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INTRODUCTION: AN ATHEORETICAL FIELD?

Mediation, defined here as a social process in which a third party helps people in conflict understand their situation and decide for themselves what, if anything, to do about it, has a long history and roots in many cultures.[1] Mediation began to develop as a distinct social institution in the U.S. during

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1. For various perspectives on the history of mediation, see Sarah R. Cole, et al., MEDIATION LAW, POLICY & PRACTICE §§ 5:1-5:4 (2d ed. 2001); Jay Folberg & Alison Taylor, MEDIATION 1-17 (1984); Kimberlee K. Kovach, MEDIATION PRINCIPLES AND PRACTICE 18-21 (1994); Robert A. Baruch Bush, *Dispute Resolution – The Domestic Arena: A Survey of Methods, Applications and Critical Issues, in* BEYOND CONFRONTATION: LEARNING CONFLICT RESOLUTION IN THE POST-COLD WAR ERA, 9-37 (John A. Vasquez et al., eds., 1995); Dorothy J. Della Noce, *Mediation Theory and Policy: The Legacy of the Pound Conference*, 17 OHIO ST. J. ON DISP. RES. 545 (2002); *see generally*, R. ABEL, THE POLITICS OF INFORMAL JUSTICE, (1982) (describing the history and current trends in the "informal justice" arena).

the 20th century,[2] with the earliest organized use of mediation in the labor relations arena. This was followed by various efforts to introduce mediation to the courts and in civil rights disputes,[3] as well as efforts to use community mediation to further agendas of legal and social reform.[4]

In recent decades mediation has entered many arenas of American life. Public agencies and private corporations offer both in-house mediation programs and outside referrals in order to handle intra-organizational disputes. Court-connected mediation programs are increasing, as courts look to mediation to control their dockets and increase the public's satisfaction with the judicial system.[5] The National Association for Community Mediation reports that it now has over 250 member centers. Mediation is being featured more frequently on television, in movies, on radio programs, and in the print media, as a constructive way to handle disputes. Within days of the tragic violence at Columbine High School in Colorado, mediation entered the national dialogue over school violence when the President of the United States held a televised meeting with high school students in Virginia to discuss the virtues of peer mediation for handling school conflict. At the same time, legislation, regulations, and court rules regarding mediation are proliferating as policymakers try to foster the use of mediation and increase public confidence in the process.[6]

The impressive growth in the *use* of mediation in the U.S. stands in marked contrast to the slower growth in the *explanation and understanding* of mediation practice.[7] The mediation field has been criticized by more than one scholar for its lack of an articulated theoretical framework — a coherent explanation of "the when and why" of mediator intervention.[8] Without such ex-

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2. *See* Bush, *supra* note 1; Della Noce, *supra* note 1.

3. *See* Cole et al., *supra* note 1; Bush, *supra* note 1; Della Noce, *supra* note 1.

4. Sally Engle Merry and Neal Milner, *Introduction*, *in* THE POSSIBILITY OF POPULAR JUSTICE 3, at 10-15 (Sally Engle Merry & Neal Milner, eds., 1993).

5. Della Noce, *supra* note 1, *citing* EDWARD J. BERGMAN & JOHN G. BICKERMAN COURT-ANNEXED MEDIATION: CRITICAL PERSPECTIVES ON SELECTED STATE AND FEDERAL PROGRAMS (1998) (detailing a variety of ADR programs in state and federal courts); and Kovach, *supra* note 1, at 21-23. *See also*, Deborah R. Hensler, *In Search of "Good Mediation": Rhetoric, Practice and Empiricism*, *in* HANDBOOK OF JUSTICE RESEARCH IN LAW 231-268 (Joseph Sanders & V. Lee Hamilton, eds., 2001).

6. *See generally* Cole et al., *supra* note 1, for an extensive compilation of legislation, regulations and rules regarding mediation.

7. Della Noce, *supra* note 1.

8. *See, e.g.*, J. A. Scimecca, *Theory and alternative dispute resolution: A contradiction in terms? in* CONFLICT RESOLUTION THEORY AND PRACTICE: INTEGRATION AND APPLICATION 217 (D.J.D. Sandole & H. van der Merwe eds.,1993); *see also* Deborah M. Kolb & Kenneth Kressel, *The realities of making talk work*, *in* WHEN TALK WORKS: PROFILES OF MEDIATORS 459-493 (Deborah M. Kolb & Associates eds., 1994).

planation, practitioners lack grounded guidance for their interventions, and the mediation process is open to many criticisms.[9]

In this article we examine developments in explaining and understanding "the when and why" of mediation practice — from the "lay theories" that have informed much of the field, to Bush and Folger's articulation of three distinct and coherent ideologically based theoretical frameworks: the problem-solving framework, the harmony framework, and the transformative framework.[10] We then trace the development of the transformative framework since its articulation in 1994, and share the insights we have gained along the way regarding the impact of increasing theoretical clarity and differentiation in the mediation field. We conclude with a discussion of the implications of ideologically based theoretical distinctions for mediation practice and policy, and recommendations for a fresh, theoretically informed, approach to policy initiatives.

"LAY THEORIES" IN MEDIATION

While scholars may criticize the mediation field for its lack of articulated, scholarly mediation theory, this should not be confused with a complete absence of theoretical grounding in the mediation field. If "theory" is understood as "the when and why" of intervention,[11] it is apparent that mediators must have a theory underlying their practices, no matter how naïve or obscured.[12] While mediators may indeed draw upon articulated, scholarly theo-

9. One notable and recurrent criticism is that mediators who are not informed and reflective about the goals and values underlying their practices unwittingly employ mediation as a subtle mechanism of social control that advances dominant social interests and maintains existing power-based and oppressive social structures and social relations. *See, e.g.,* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994); Sara Cobb, *The Domestication of Violence in Mediation*, LAW & SOC'Y REV. 397-440 (1997); Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 LAW & SOC. INQUIRY, 35-62 (1991); JOHN M. CONLEY & WILLIAM M. O'BARR, JUST WORDS: LAW, LANGUAGE, AND POWER 39-59 (1998); Richard Delgado, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 6 WIS. L. REV. 1359-1404 (1985); Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 YALE L.J. 1545-1610 (1991); Scimecca, *supra* note 7.

10. Bush & Folger, *supra* note 9, at 236-259. According to Bush and Folger's analysis, the problem-solving framework is based in Individualist ideology, the harmony framework is based in Organic ideology, and the transformative framework is based in Relational ideology.

11. Scimecca, *supra* note 8, at 217.

12. Empirical analysis of the discourse of mediators as they conducted their sessions, and

ries to construct their explanatory and interpretive frameworks for "the when and why" of practice,[13] they are not limited to such theoretical frameworks. In fact, even if not drawing upon articulated scholarly frameworks for mediation practice, mediators can and do actively construct their own theoretical frameworks to give meaning and order to their work.[14] This is because mediators, like all other social actors, are "lay theorists" — people with their own vocabularies, frames of meaning, interpretive schemes and resources, and explanations for their social worlds and activities.[15] As mediators interact with the parties during the course of the mediation process, they constantly draw upon their preferred theoretical frameworks — whatever the source — to interpret the unfolding interactions and to make choices about when and how to intervene based upon their interpretations.[16] In turn, those choices reflect the mediators' goals for intervention, embedded in their own fundamentally ideological explanations of the social world and social activities.[17]

As mediation practice has developed, largely in the absence of articulated, scholarly, theoretical frameworks explaining mediation as a distinct social process,[18] practicing mediators have tended to construct and express their own "lay" theoretical frameworks by relying upon: (1) "mythology," (2) "imported" theories, and (3) skills and techniques that were presumed to be theory-free.

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as they explained their in-session practices during interviews, has illustrated that mediators either drew upon articulated scholarly theoretical frameworks for mediation practice or constructed their own theoretical frameworks in order to explain their practices, and that they drew upon those same frameworks as they engaged in practice. DOROTHY J. DELLA NOCE, IDEOLOGICALLY BASED PATTERNS IN THE DISCOURSE OF MEDIATORS: A COMPARISON OF PROBLEM-SOLVING AND TRANSFORMATIVE PRACTICE 148-331 (2002).

13. *See, e.g.*, the analysis of how mediators drew upon the transformative framework articulated by Bush & Folger, *supra* note 9, both as they conducted their mediation sessions and as they later explained what they were doing in their sessions and why. Della Noce, *supra* note 12, at 148-97, 251-304.

14. See, for example, the analysis of how mediators constructed problem-solving frameworks by drawing on the language, metaphors and practices of problem-solving itself, as well as the complementary "imported" theories of negotiation and systems therapy, both as they conducted their mediation sessions and as they later explained what they were doing in their sessions and why. Della Noce, *supra* note 12, at 148-250. *See also*, notes 23-27, *infra*, and accompanying text.

15. *See* ANTHONY GIDDENS, CENTRAL PROBLEMS IN SOCIAL THEORY: ACTION, STRUCTURE AND CONTRADICTION IN SOCIAL ANALYSIS (1979); ANTHONY GIDDENS, THE CONSTITUTION OF SOCIETY (1984); ANTHONY GIDDENS, NEW RULES OF SOCIOLOGICAL METHOD (2d ed. 1993).

16. *See* Della Noce, *supra* note 12 (providing an empirical illustration and analysis).

17. *See* Bush & Folger, *supra* note 9, at 236-59. *See also* Della Noce, *supra* note 12 for an empirical discourse study illustrating the links between mediators' goals, practices and ideologies.

18. *See* Della Noce, *supra* note 1, at 552-555.

Mythology

In a study of twelve prominent mediators, Kolb and Kressel identified the "mythology" of mediation:

> The mythic world of mediation is one in which one practitioner of the art is pretty much like another in regard to motives and orientation to the role. In the mythic world, mediators are impartial neutrals who have no authority and no wish to impose their views on the disputing parties. Also, the process is entirely voluntary and noncoercive . . . [19]

As Kolb and Kressel noted, the research does not support these mythical explanations of mediation practice. In fact, a substantial body of research has provided evidence that mediators do not share common motives and orientations, are not "neutral" in any absolute sense, and in fact actively influence what the parties can and cannot do in a mediation session in various ways, often coercively.[20]

Yet the mythology persists. For example, it is difficult to find a practitioner-oriented text or training manual in the mediation field that references

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19. Kolb & Kressel, *supra* note 8, at 459-60; *see also* Susan Silbey, *Mediation Mythology*, 9 NEGOTIATION JOURNAL, 349-53 (1993).

20. Kolb & Kressel, *supra* note 8, at 460; *see also* Bush & Folger, *supra* note 9. For examples of research studies that have demonstrated various markers and dimensions of mediator influence, *see*, J.J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?* 19 FLA. ST. U. L. REV. 47-75 (1991); Sydney E. Bernard, et al., *The Neutral Mediator: Value Dilemmas in Divorce Mediation, 4* MEDIATION Q., 61-73 (1984); Stacy Burns, The Name of the Game is Movement: Concession Seeking in Judicial Mediation of Large Money Damage Cases, 15 MEDIATION Q., 359-67 (1998); Cobb, *supra* note 9; Cobb & Rifkin, *supra* note 9; Della Noce, *supra* note 12; Robert Dingwall, *Empowerment or Enforcement? Some Questions About Power and Control in Divorce Mediation, in* DIVORCE MEDIATON AND THE LEGAL PROCESS 150-67 (Robert Dingwall & J. Eekelaar eds., 1988); WILLIAM DONOHUE, COMMUNICATION, MARITAL DISPUTE AND DIVORCE MEDIATION (1991); Joseph P. Folger & Sydney E.Bernard, *Divorce mediation: When Mediators Challenge the Divorcing Parties*, 10 MEDIATION Q. 5 (1985); Angela Garcia, *Dispute Resolution Without Disputing: How the Interactional Organization of Mediation Hearings Minimizes Argument*, 56 AM. SOC. REV. 818-835 (1991); Angela Garcia, *The Problematics of Representation in Community Mediation: Implications for Mediation Practice*, 22 J. SOC. & SOC. WELFARE 23 (1995); David Greatbatch & Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 LAW & SOC'Y REV. 613 (1989); David Greatbatch & Robert Dingwall, *The Interactive Construction of Interventions by Divorce Mediators, in* NEW DIRECTIONS IN MEDIATION: COMMUNICATION RESEARCH AND PERSPECTIVES, 84-109 (Joseph P. Folger & T.S. Jones eds., 1994); J. Rifkin, et al., *Toward a New Discourse for Mediation: A Critique of Neutrality*, 9 Mediation Q. 151-64 (1991); Karen Tracy & Anna Spradlin, *Talking Like a Mediator, in* NEW DIRECTIONS IN MEDIATION: COMMUNICATION RESEARCH AND PERSPECTIVES 110-32 (Joseph P. Folger & T.S. Jones eds., 1994).

or attempts to explain the above body of research in any significant way. Where any part of this research is referenced, typically it is simply dismissed as evidence of "bad practice," that is, practice that does not live up to the mythology.[21] It is apparently preferable to mediators, and even to some mediation experts, to protect the mythical frame and disregard contrary research findings, than to accept the research findings and risk being left without a frame of any kind. The myths are functional. Mythology fills the void created by the absence of articulated theory by providing at least some sort of "intellectual and emotional scaffolding" for mediators.[22]

"Imported" theories

Another response to the absence of articulated mediation theory has been the marked tendency in the mediation field to "import" theories from other domains: primarily negotiation theory,[23] but also various therapeutic theories[24] and even various theories from the physical sciences.[25] Imported theories are useful because they, too, provide a certain amount of much-needed grounding for the practitioner. However, because none of these theories were developed expressly to explain third party interventions in conflict, the theories became somewhat distorted when imported and adapted to the goals of third party in-

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21. *See, e.g.*, Michael Williams, *Can't I Get No Satisfaction? Thoughts on The Promise of Mediation*, 15 MEDIATION Q. 143 (1997).

22. Kolb & Kressel, *supra* note 8, at 489.

23. It is quite common for scholars and practitioners in the mediation field to draw upon negotiation theory as an explanation for the mediation process and grounding for the mediator's work. For examples of mediation literature that imports negotiation theory, *see* JOHN M. HAYNES, THE FUNDAMENTALS OF FAMILY MEDIATION (1994); ROY J. LEWICKI, ET AL., ESSENTIALS OF NEGOTIATION 204-08 (1997); CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 8, 55-77 (2d. ed. 1996); KARL A. SLAIKEU, WHEN PUSH COMES TO SHOVE: A PRACTICAL GUIDE TO MEDIATING DISPUTES 5 (1996). For an empirical study demonstrating how practitioners draw on negotiation theory as they engage in their practices and as they describe and explain them, see Della Noce, *supra* note 12.

24. When used as grounding for mediation practice, therapeutic theories are typically blended with negotiation theory. For an example from the mediation literature, see, e.g., HOWARD H. IRVING & MICHAEL BENJAMIN, FAMILY MEDIATION: CONTEMPORARY ISSUES (1995). For an example from an empirical study, see Della Noce, *supra* note 12. For perspectives on the potential value as well as the dangers of importing practices and premises from systems therapy into mediation, compare Marian Roberts, *Systems or Selves? Some Ethical Issues in Family Mediation*, 10 MEDIATION Q. 3-19 (1992) with John M. Haynes, *Mediation and Therapy: An Alternative View*, 10 MEDIATION Q. 21-34 (1992),.

25. *See, e.g.*, Robert A. Benjamin, *The Physics of Mediation: Reflections of Scientific Theory in Professional Mediation Practice*, 8 MEDIATION Q. 91-113 (1990) (drawing upon quantum mechanics and chaos theory).

tervention.[26] For example, interest-based negotiation theory provides one useful explanation of two-party bargaining that parties directly engaged in a negotiation can choose to draw upon (or not) in order to understand the behavior of the other party and to strategize their own behavior. But when imported into the mediation process and applied prescriptively by a third party, the fundamental character of interest-based negotiation is changed: the third party imposes the framework on both parties, structures their interactions accordingly, assumes the power to determine what the parties' hidden interests are and when they have been uncovered, and becomes as invested in the production of a "win-win" solution as the parties themselves are presumed to be.[27]

"Theory-free" skills and techniques

Finally, the lack of scholarly mediation theory has produced an overemphasis on skills and techniques in the field of mediation, or what Scimecca calls "blind faith in the *how* of the processes . . . "[28] The "how to" emphasis frames mediation practice as a simple matter of skills application, uncomplicated by deeper theoretical considerations.[29] As a consequence, mediator development is framed as a matter of technical "training" and skills acquisition rather than education. "How to" workshops and publications, devoid of articulated theoretical grounding, proliferate. In these workshops and publications, experts typically focus on *how* to intervene and avoid the deeper ques-

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26. At the same time, Della Noce has argued elsewhere that importing theoretical frameworks from other disciplines has distorted the mediation process —detracting from its character as a distinct social process and institution, and instrumentalizing it in service of the goals and values of such processes as adjudication, litigation, negotiation, and therapy. Della Noce, *supra* note 1, at 547-551. For empirical evidence and analysis of the impact of importing the goals and values of adjudication and litigation as rationales for the mediation process, see JOSEPH P. FOLGER, ET AL., A BENCHMARKING STUDY OF FAMILY, CIVIL AND CITIZEN DISPUTE MEDIATION PROGRAMS IN FLORIDA (2001). A concise presentation of certain analytical insights from that study is published in this volume: Dorothy J. Della Noce, et al., *Assimilative, Autonomous, or Synergistic Visions: How Mediation Programs in Florida Address the Dilemma of Court Connection*, 3 PEPP. DISP. RES. L.J. (forthcoming 2003).

27. Bush & Folger, *supra* note 9, at 71; *see also* Dorothy J. Della Noce, *Seeing Theory in Practice: An Analysis of Empathy in Mediation*, 15 NEGOTIATION J. 271-301 (1999).

28. Scimecca, *supra* note 8, at 217 (emphasis added).

29. *Id.*

tions of *when* and *why*. Skills, "tricks" and "tools" are emphasized, while goals and underlying values are either obscured or simply presumed.

This "how to" viewpoint is quite popular in the mediation field, and remarkably far-reaching. For example, the popular explanation for observed differences in mediators' practices — that mediators are assumed to be working toward the same goals, but with individual "style" variations in how they apply their specific skills[30] — is based on the "how to" view. Similarly, numerous mediator competency-testing initiatives are also based on this view, as evidenced by the focus on evaluation of the "how," that is, the observed performance of specific skills according to various checklists that are assumed to be theory-free.[31] These initiatives generally fail to consider the relationship of mediator goals and values to the observed performance, or the likelihood that there could be very different goals and values among mediators that could shape competent performance in fundamentally different ways.[32]

Reliance upon mythology, importing theories from other disciplines, and an emphasis on skills and techniques that are presumed to be theory-free, all represent related responses by mediators to the relative lack of meaningful articulated theories of mediation. Each provides mediators with a foundation on

30. *See, e.g.*, Jeffrey Krivis & Bobby McAdoo, A Style Index for Mediators, *available at*http://www.mediate.com/articles/krivis2.cfm. *Reprinted from* ALTERNATIVES, CPR Institute for Dispute Resolution (December 1997); *see also, e.g.*, Nina Meierding, *We Are All Evaluative Mediators*, 10 FAMILY MEDIATION NEWS, at 10 (Winter 2002).

31. As Della Noce observed: "Historically, attempts to define mediator competencies have organized around three dimensions (1) decontextualized lists of performance-based skills, (2) consensus around a common core of skills enacted by all mediators, despite their perceived or professed differences, and (3) competencies based on what mediators say they do rather than empirical analysis of what they actually do . . . To date, these attempts have failed to produce universally accepted standards or a valid and reliable competency test." Della Noce, *supra* note 12, at 335. For illustration, see Judith Filner, *The Voluntary Mediator Certification Project: A Discussion*, CONFERENCE PROGRAM & PROCEEDINGS BOOK, Academy of Family Mediators (1999); Christopher Honeyman, *The Common Core of Mediation*, 8 Mediation Q. 73-82 (1990); Christopher Honeyman, *A Consensus on Mediators' Qualifications*, 9 NEGOTIATION J. 295-308 (1993); Mediator Skills Project, AN INTERIM REPORT OF THE MEDIATOR SKILLS PROJECT: ASSESSING AND SUPPORTING EFFECTIVE MEDIATION (Submitted to the State Justice Institute and the William and Flora Hewlett Foundation, 1998); Linda C. Neilson & Peggy English, *The Role of Interest-Based Facilitation in Designing Accreditation Standards: The Canadian Experience,* 18 Mediation Q. 221-48 (2001); Test Design Project, INTERIM GUIDELINES FOR SELECTING MEDIATORS (Washington, DC: National Institute for Dispute Resolution 1993); *but see*, Test Design Project, PERFORMANCE-BASED ASSESSMENT: A METHODOLOGY, FOR USE IN SELECTING, TRAINING AND EVALUATING MEDIATORS (Washington, DC: National Institute for Dispute Resolution, 1995) (indicating that checklists of skills for performance-based testing might have to be varied to suit the needs of individual mediation programs).

32. Robert A. Baruch Bush, *Mixed Messages in the Interim Guidelines,* 9 NEGOTIATION. J. 341 (1993).

which to construct their own lay theories of their work. In some instances, the three responses may even be entwined with each other, since none essentially contradicts the others. But separately or together, they provide an insecure foundation for mediators. They fail to encourage a serious examination of the reality that mediator practices can and do influence the parties' conflict, the questions of what kinds of influence are appropriate and why, the nature of differences in mediators' motives and orientations, and how different underlying ideologies shape mediators' goals, and therefore, their influence on the conflict, in very different ways.

TOWARD CLARIFICATION: CONFLICT THEORY

In *The Promise of Mediation*, Bush and Folger[33] tried to move beyond lay theories, grounding their analysis of mediation practice in clearly articulated theoretical models of both conflict in general and mediation in particular. Building on the body of research findings regarding mediators' practices noted above, their own experiences as mediators, and their insights as legal and communication scholars respectively, they acknowledged the inevitability of some kind of mediator influence on the parties' interactions and the outcome of the mediation.[34] They did not reject the mounting body of empirical research that defied the mythology of mediation practice, but sought a framework in which it could be explained.[35] The challenge was to identify the social forces and interpretive frameworks underlying the exercise of mediator influence, and determine how those forces and frameworks might shape mediator influence in different ways, with different social consequences. This led to the insight that mediator influence on the parties' conflict took different forms and had different social consequences depending upon the mediator's underlying ideology and how that ideology shaped the mediator's goals and practices.[36] Building on this insight, Bush and Folger clarified that three mod-

33. Bush & Folger, *supra* note 9.

34. Bush & Folger, *supra* note 9, at 75-77.

35. *Id.* at 75-77, 104-108.

36. Bush & Folger, *supra* note 9, at 236-59. "Ideologies" are the socially constructed, socially shared, meaning systems that members of social groups use to view, organize, interpret and judge their surrounding world. *See generally*, J.M. BALKIN, CULTURAL SOFTWARE: A THEORY OF IDEOLOGY (1998); TERRY EAGLETON, IDEOLOGY: AN INTRODUCTION (1991); JOHN B. THOMPSON, IDEOLOGY AND MODERN CULTURE (1990); TEUN A. VAN DIJK, IDEOLOGY: A MULTIDISCIPLINARY STUDY (1998). Functionally, "ideologies allow people, as group members, to organize the multi-

els of practice shared the mediation field: *problem-solving, harmony*, and *transformative*.[37] Each model of mediation practice assumes a particular view of the nature of conflict, which in turn is built upon and reflects the underlying values and assumptions of a particular ideology.[38] Bush and Folger also argued that a mediator's preferred framework for practice was less a matter of situational strategy or personal style than it was a matter of his or her fundamental ideology.[39] The two most prevalent models, problem-solving and transformative, are outlined in the sections that follow.[40]

The Problem-Solving Model

Bush and Folger argued that the *problem-solving* model of mediation was based upon an essentially psychological / economic view of human conflict.[41] According to this model, conflict represents a problem in solving the

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tude of social beliefs about what is the case, good or bad, right or wrong, *for them,* and to act accordingly" *Id.* at 8, (emphasis in the original). Thus, ideologies always imply a preferred moral order.

37. Bush & Folger, *supra* note 9, at 236-259.

38. While some may suggest that there is a much wider variety of practice in the field than three models can capture, many of the other "models" put forth can actually be explained as variations on one of these fundamental theoretical frameworks. For example, "therapeutic" mediation as described in HOWARD H. IRVING & M. BENJAMIN, FAMILY MEDIATION: CONTEMPORARY ISSUES (1995), "facilitative" and "evaluative" mediation as described in Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARVARD NEGOT. L. REV. 7, 7-51 (1996), and "integrative" mediation as described in KARL A. SLAIKEU, WHEN PUSH COMES TO SHOVE: A PRACTICAL GUIDE TO MEDIATING DISPUTES (1996), can all be understood as variations on the problem-solving model. They share the common goal of producing a settlement agreement in order to resolve conflict, based on common ideological assumptions about human nature and the nature of conflict. All import negotiation theory in some way. Differences appear primarily at the level of mediator procedures and techniques. Therefore, these approaches should not be mistaken for unique theoretical frameworks. On the other hand, this is not to say that there are not, or will not be at some point, additional theoretical frameworks and models of practice beyond those articulated by Bush & Folger.

39. Bush & Folger, *supra* note 9.

40. The harmony model, based in Organic ideology, is not widely relied upon in contemporary Western society. Bush & Folger, *supra* note 9, at 241. For examples of the harmony model in the mediation literature, see P. Bluehouse & J.W. Zion, *Hozhooji Naat'aanii: The Navajo Justice and Harmony Ceremony*, 10 MEDIATION Q. 327-37 (1993), and D. LaResche, *Comparison of the American Mediation Process with a Korean-American Harmony Restoration Process*, 9 MEDIATION Q. 323-39 (1992).

41. For works by other scholars who have noted and explored the psychological / economic basis of a problem-solving approach to conflict in general, and to mediation practice in particular, see Sara Cobb, *Einsteinian Practice and Newtonian Discourse: Ethical Crisis in Mediation*, 7 NEGOTIATION J. 87-102 (1991); Cobb, *supra* note 9; Cobb & Rifkin, *supra* note 9; Della Noce, *supra* note 27.

parties' incompatible needs and interests.[42] Because a problem solved is a conflict resolved, the model presumes that a solution —typically represented by a tangible settlement agreement — is "what the parties want."[43] Therefore, the mediator's goal is to generate an agreement that solves tangible problems on fair and realistic terms, and good mediator practice is a matter of issue identification, option creation, and effective persuasion to "close the deal." In this model there is heavy reliance on mediator initiative and direction, because both are useful in generating settlement.[44] The problem-solving framework is based on and reflects an *individualist* ideology, in which human beings are assumed to be autonomous, self-contained, atomistic individuals, each motivated by the pursuit of satisfaction of his or her own separate self-interests.[45] The problem-solving model, while seldom going by that precise name, and seldom acknowledging or exposing its ideological roots, is the dominant model in the mediation field.[46] The predominance of this model also explains, in part, the persistence of the lay theories that have emerged in the mediation field — all partake of the same individualist ideology, and psychological / economic view of conflict, underlying the problem-solving model.[47]

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42. Bush & Folger, *supra* note 9, at 55-75.

43. *Id. See also* Della Noce, *supra* note 12, at 148-186, for an analysis of the importance to mediators of this concept of "what the parties want." She observed that mediators used this concept to address the fundamental dilemma of their own agency in mediation. That is, they "untroubled" the nature and extent of their own influence in a mediation session by aligning their influence with "what the parties want." Specifically, she found through her interviews with mediators that problem-solving mediators described a solution to the problem as "what the parties want."

44. Bush & Folger, *supra* note 9, at 55-75.

45. Bush & Folger, *supra* note 9; Joseph P. Folger & Robert A. Baruch Bush, *Ideology, Orientations to Conflict, and Mediation Discourse*, *in* NEW DIRECTIONS IN MEDIATION: COMMUNICATION RESEARCH AND PERSPECTIVES (Joseph P. Folger & T. S. Jones eds., 1994); *see also* Della Noce, *supra* note 27; Della Noce, *supra* note 12, at 60-65.

46. Bush & Folger, *supra* note 9, at 69. For empirical evidence of the dominance of the problem-solving model, drawn from the discourse of mediators, see Della Noce, *supra* note 12.

47. The various lay theories discussed above are all compatible with, and can be used to further, the problem-solving mediator's goal of producing a settlement agreement based on assumptions of individual self-interest. They are actually naïve expressions of the dominant problem-solving theoretical framework of the field. But the lay theories have an obfuscating dimension. They obscure the nature, extent and underlying value-base of mediator influence, whereas an articulated theoretical framework exposes these features and thereby opens them to critical reflection, dialogue and informed choice.

The Transformative Model

In contrast to problem-solving, Bush and Folger articulated the *transformative* model of mediation.[48] This model takes an essentially social / communicative view of human conflict.[49] According to this model, a conflict represents first and foremost a crisis in some human interaction — an interactional crisis with a somewhat common and predictable character.[50] Specifically, the occurrence of conflict tends to destabilize the parties' experience of both self and other, so that the parties interact in ways that are both more vulnerable and more self-absorbed than they did before the conflict.[51] Further, these negative dynamics often feed into each other on all sides as the parties interact, in a vicious circle that intensifies each party's sense of weakness and self-absorption.[52] As a result, the interaction between the parties quickly degenerates and assumes a mutually destructive, alienating, and dehumanizing character.[53] For most people, according to transformative theory, being caught in this kind of destructive interaction is the most significant negative impact of conflict.[54]

However, the transformative model posits that, despite conflict's potentially destructive impacts on interaction, people have the capacity to change the quality of their interactions to reflect relative personal strength or self-

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48. Bush & Folger, *supra* note 9; Folger & Bush, *supra* note 45; Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 MEDIATION Q. 263, 263-278 (1996).

49. The roots of this view of conflict can be found in the postmodern and social constructionist literature of the social sciences, particularly in the discipline of communication science. *See, e.g.*, ALLEN D. GRIMSHAW, CONFLICT TALK (1990); and Christina Kakava, *Discourse and Conflict*, *in* THE HANDBOOK OF DISCOURSE ANALYSIS 650-70 (D. Schiffrin, et al., eds., 2001). Scholars who have noted that this social/communicative view of conflict fosters significantly different visions of the nature of conflict processes than does the psychological/economic view, and therefore significantly different approaches to conflict resolution and intervention, include: Cobb, *supra* note 36; Cobb & Rifkin, *supra* note 9; Linda L. Putnam, *Challenging the Assumptions of Traditional Approaches to Negotiation*, Negotiation J. 337-46 (October 1994). *See also* Barbara Gray, *The Gender-Based Foundations of Negotiation Theory*, *in* RESEARCH ON NEGOTIATIONS IN ORGANIZATIONS 4, 3-36 (1994), and Deborah M. Kolb & Linda L. Putnam, *Through the Looking Glass: Negotiation Theory Refracted Through the Lens of Gender*, *in* WORKPLACE DISPUTE RESOLUTION: DIRECTIONS FOR THE TWENTY-FIRST CENTURY 231-47 (Sandra E. Gleason, ed., 1997), who reached a similar conclusion through a feminist-informed analysis.

50. Bush & Folger, *supra* note 9; Robert A. Baruch Bush & Sally Ganong Pope, *Changing the Quality of Conflict Interactions: The Principles and Practice of Transformative Mediation*, 3 PEPP. DISP. RES. L.J. (forthcoming 2003).

51. Bush & Folger, *supra* note 9; Bush & Pope, *supra* note 50.

52. *Id.*

53. *Id.*

54. *Id.*

confidence (the empowerment shift) and relative openness or responsiveness to the other (the recognition shift).[55] Moreover, as these positive dynamics feed into each other, the interaction can regenerate and assume a constructive, connecting, and humanizing character.[56] The model assumes that the transformation of the interaction itself is what matters most to parties in conflict — even more than settlement on favorable terms.[57] Therefore, the model defines the mediator's goal as helping the parties to identify opportunities for empowerment and recognition shifts as they arise in the parties' conversation, to choose whether and how to act upon these opportunities, and thus to change their interaction from destructive to constructive.[58] In transformative mediation, success is measured not by settlement *per se* but by party shifts toward personal strength, interpersonal responsiveness and constructive interaction.[59] Effective practice is focused on supporting empowerment and recognition shifts, by allowing and encouraging party deliberation and decision-making, and inter-party perspective-taking, in various ways. The transformative framework is based on and reflects *relational* ideology, in which human beings are assumed to be fundamentally social — formed in and through their relations with other human beings, essentially connected to others, and motivated by a desire for both personal autonomy and constructive social interaction.[60]

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55. *Id.*

56. *Id.*

57. Bush & Folger, *supra* note 9; Bush & Pope, *supra* note 50.

58. *Id.*

59. Bush & Folger, *supra* note 9, at 94-95. Settlement is certainly possible in this model, and is not discouraged. The distinction is that settlement is not the *mediator's* goal, but rather one of the many choices that might open to the parties as an incidental benefit of improved interaction. If mediators do their job, parties are likely to make positive changes in their interactions with each other and, as a result, find acceptable terms of resolution for themselves where such terms genuinely exist. But the possibility is also left open that parties may voluntarily choose, and be satisfied, to leave the mediation with new insights on their choices and new interpersonal understandings but no agreement, or even to take the conflict to a different forum such as litigation. Settlement remains a distinct possibility —one choice available to the parties depending upon how their own goals and insights develop through the mediation conversation —but it is no longer the single outcome privileged by the mediator or the mediator's single measure of a successful mediation. Bush & Folger, *supra* note 9, at 106-108, 273-279; *see also,* Dorothy J. Della Noce et al., *Myths and Misconceptions about the Transformative Orientation, in* DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK (Joseph P. Folger & Robert A. Baruch Bush, eds., 2001) 50-60.

60. *See* Bush & Folger, *supra* note 9, at 236-59; Folger & Bush, *supra* note 45; and Della Noce, *supra* note 12, at 60-65 for literature reviews and analysis of the ideological roots of the transformative model.

Developments in transformative theory

The articulation of these different theoretical frameworks and the distinctions between them generated significant interest among scholars and practitioners.[61] Practitioners who resonated with transformative theory, in particular, sought greater clarification about the realities and implications of this framework for their practices. Several major theory-building initiatives followed.

Bush and Folger began the Training Design Consultation (TDC) Project in 1996 with joint funding from The Surdna Foundation and The William and Flora Hewlett Foundation, and the collaboration of 41 scholars and practitioners from the U.S. and Canada. The goal of this project was to support the development of new training resources for the field based on transformative theory. By the time of its completion in 1998, the TDC had supported the development of twenty-four pilot training projects, a wealth of new training materials, exercises and models, and new insights on the transformative model.[62]

Another initiative gathered momentum in 1997. One of the participants in the TDC, Cynthia Hallberlin (then Alternative Dispute Resolution Counsel for the United States Postal Service (USPS)), was responsible for the development of an Equal Employment Opportunity (EEO) mediation program for the USPS, the largest civilian employer in the U.S. She recognized the importance of aligning institutional goals and values with the goals and values of a specific theoretical framework for mediation, and selected the transformative framework because of the USPS interest in improving the quality of workplace conflict interaction.[63] This was the first time a mediation program was built on a specific, articulated theoretical framework from the ground up. Training programs and materials, trainer development programs, research pro-

61. *See* Della Noce, *supra* note 12, at 65-73, for a review of the literature that has developed in response to Bush & Folger's analysis of theoretical frameworks for the mediation field. *See also* DOROTHY J. DELLA NOCE, TRANSFORMATIVE MEDIATION: AN ANNOTATED BIBLIOGRAPHY OF INSTITUTE RESOURCES (Institute for the Study of Conflict Transformation at Hofstra Univ. School of Law, 2001).

62. Many of the insights, materials, and exercises from the TDC were eventually described in DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK (Joseph P. Folger & Robert A. Baruch Bush eds., 2001).

63. *See generally*, Lisa B. Bingham & Lisa M. Napoli, *Employment Dispute Resolution and Workplace Culture: Introduction to the REDRESS™ Program and Its Implementation*, *in* MEDIATION AT WORK: THE REPORT OF THE NATIONAL REDRESS™ EVALUATION PROJECT OF THE UNITED STATES POSTAL SERVICE 18-33 (The Indiana Conflict Resolution Institute 2001); Robert A. Baruch Bush, *Handling Workplace Conflict: Why Transformative Mediation?* 18 HOFSTRA LAB. & EMP. L.J. 367 (2001); Cynthia Hallberlin, *Transforming Workplace Culture Through Mediation: Lessons Learned From Swimming Upstream*, 18 HOFSTRA LAB. & EMP. L.J. 375-83 (2001).

tocols, and mediator evaluations were all created specifically to support the goals and values of the framework. Research on the mediation program has shown it to be successful on many different dimensions.[64]

Bush and Folger began a third initiative in 1998, again with joint funding from The William and Flora Hewlett Foundation and The Surdna Foundation. The goal of this Practice Enrichment Initiative (PEI) was to further develop and disseminate the transformative framework for those who were drawn to it, and to preserve a genuine opportunity for practitioners to engage in this form of practice. The PEI had three key dimensions: developing pictures of transformative practice via videos and transcripts, developing research methods to assess the progress of mediators building their competency in the transformative framework, and developing methods of analyzing mediation policy to determine underlying assumptions and their effects on practice. The PEI concluded in 2000, and resulted in two university-sponsored symposia; new video, training, research, assessment and policy resources; and numerous publications representing a solid body of literature supporting and clarifying the transformative framework.[65] The work of the PEI, coupled with the earlier work described here, ultimately led to the establishment of the Institute for the Study of Conflict Transformation, affiliated with Hofstra University Law School. The Institute functions as a "think tank," devoted to advancing the understanding of transformative mediation through research, policy analysis and consulting, and the development of resources for practitioners and program administrators.[66]

THE IMPACT OF PROMOTING THEORETICAL CLARITY

The three initiatives described above illustrate the process of articulation and further development of one particular theoretical framework for the mediation field. These initiatives have had significant substantive impact on the

64. *See, e.g.*, Symposium, 18 Hofstra Lab. & Emp. L.J. (2001); MEDIATION AT WORK: THE REPORT OF THE NATIONAL REDRESS™ EVALUATION PROJECT OF THE UNITED STATES POSTAL SERVICE (The Indiana Conflict Resolution Institute 2001).

65. Robert A. Baruch Bush & Joseph P. Folger, *The Practice Enrichment Initiative 1998-2000 Final Report.* Submitted to The William and Flora Hewlett Foundation and The Surdna Foundation (2001). *See also* Della Noce, *supra* note 61, for annotated references to publications produced as a result of the PEI.

66. Information about the Institute, its mission, history, and current projects, can be found at http:\\www.transformativemediation.org.

field themselves, particularly among those who are drawn to, and wish to, practice from the transformative framework. At the same time, we observed that the very process of pursuing theoretical clarity by engaging in these initiatives has had an impact of its own, which also deserves to be articulated. Specifically, we have noted that: (1) pursuing theoretical clarity requires that value-based distinctions between models be highlighted; (2) there is substantial incentive for mediators to deny value-based theoretical distinctions; and (3) theoretical distinctions have policy implications.

Developing theoretical clarity means highlighting differences

In 1994, when Bush and Folger tried to clarify the values, goals and practices of transformative mediation, they did so by also highlighting where, how and why these differed from those of problem-solving mediation.[67] Further elaborations of the theoretical framework of transformative mediation have also employed comparisons for the sake of clarity, with respect to the structure of the transformative mediation process,[68] the meaning of empathy in each framework,[69] approaches to training,[70] approaches to opening the mediation session,[71] and approaches to assessing mediator competency.[72]

Such comparative clarifications are immensely helpful to scholars and practitioners. An important part of clarifying any theoretical framework is clarifying not just what it *is* but also what it is *not*.[73] At the same time, how-

67. Bush & Folger, *supra* note 9.

68. *See* James R. Antes, et al., *Is a Stage Model of Mediation Necessary*? 16 MEDIATION Q. 287 (1999); Dorothy J. Della Noce, *Mediation As a Transformative Process: Insights on Structure and Movement, in* DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK 71-84 (Joseph P. Folger & Robert A. Baruch Bush eds., 2001).

69. Della Noce, *supra* note 27; Dorothy J. Della Noce, *Recognition in Theory, Practice and Training, in* DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK 96-111 (Joseph P. Folger & Robert A. Baruch Bush eds., 2001).

70. DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANFORMATIVE FRAMEWORK (Joseph P. Folger & Robert A. Baruch Bush eds. 2001).

71. *See* Sally G. Pope, *Beginning the Mediation: Party Participation Promotes Empowerment and Recognition, in* DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK 85-95 (Joseph P. Folger & Robert A. Baruch Bush eds., 2001).

72. *See* James R. Antes & J.A. Saul, *Evaluating Mediation Practice From a Transformative Perspective*, 18 MEDIATION Q. 313 (2001).

73. Hence, comparative analysis is an important feature of various bodies of empirical research, such as grounded theory research, institutional discourse analysis, analysis of gender and discourse, and ideological discourse analysis. *See*, e.g., Barney G. Glaser & Anselm L. Strauss, THE DISCOVERY OF GROUNDED THEORY (1967) (discussing the need for comparison in grounded theory research); TALK AT WORK: INTERACTION IN INSTITUTIONAL SETTINGS (Paul Drew & John Heritage, eds., 1992) (discussing the value of comparison for institutional discourse analysis);

ever, these comparative clarifications at the theoretical and ideological level moved the mediation field to an unfamiliar place — a place where value-based distinctions among mediators' practices demanded to be acknowledged, discussed and accommodated.[74] It is worth noting, in this context, that what the lay theories in the field accomplish is an obscuring and minimizing of such important distinctions; each serves to perpetuate and reinforce the false image of a unitary or monolithic field of practice. The articulation and clarification of the transformative framework posed a particular challenge for the mediation field, because accepting the distinctions on which it is based required the field to acknowledge that differences among mediators' practices are a matter of deeply-held values and assumptions.[75] It also forced practitioners to grapple with the associated practical and policy implications.

GENDER AND DISCOURSE (Ruth Wodak, ed., 1997) (addressing the need for empirical comparison of language differences in order to draw any conclusions about what is unique to one gender or the other); van Dijk, *supra* note 32 (addressing the value of empirical comparison for ideological discourse analysis); Della Noce, *supra* note 12 (addressing the value of empirical comparison for ideological discourse analysis). Comparative analysis yields insights that might not be apparent otherwise, because it supports the identification of unique features distinguishing the bodies of data being compared. For example, Della Noce was able to identify particular similarities and differences in the discourse of problem-solving and transformative mediators by comparing the discourse of the mediators within and across groups, both as they engaged in mediation practice and as they engaged in interviews explaining their practices. Della Noce, *supra* note 12.

74. Noting differences among mediators' approaches to practice was not new to the mediation field. Historically, distinctions have been found between mediators' approaches in one empirical study after another. See, e.g., Alfini, *supra* note 20 (identifying "trashers," "bashers," and "hashers"); Sydney E. Bernard, et al., *The Neutral Mediator: Value Dilemmas in Divorce Mediation*, 4 MEDIATION Q. 61 (1984) (identifying neutralists and interventionists); D.M. KOLB, THE MEDIATORS (1983) (identifying orchestrators and dealmakers); Kolb & Kressel, *supra* note 8 (identifying settlement oriented and communication oriented mediators); K. Kressel, et al., *The Settlement-Orientation vs. the Problem-Solving Style in Custody Mediation*, 50 JOURNAL OF SOC. ISSUES 67 (1994); Leonard L. Riskin, *Two Concepts of Mediation in the FmHA's Farmer-Lender Mediation Program*, 45 ADMIN. L. REV. 21 (1993) (identifying "broad" and "narrow" mediation); S.S. Silbey & S. Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y 7 (1986) (identifying bargaining style and therapeutic style). Riskin's identification of evaluative and facilitative approaches to practice, while not empirically grounded, also appears to have gained currency in the field. *See* Riskin, *supra* note 33. However, what was new —and unfamiliar to the field —in Bush & Folger's analysis was tying practice differences to theories of practice embedded in value-laden ideological meaning systems, and the attendant argument that mediators' preferred approaches were more a matter of deeply held values and assumptions than a matter of any strategic selection process contingent on party and case characteristics. Bush & Folger, *supra* note 9.

75. Bush & Folger, *supra* note 9.

Hence, a response we have encountered frequently in the mediation field is that practitioners accept that differences among themselves exist at the level of "style" of practice, but deny that these differences exist at the level of theory, values or ideology. At first we were puzzled by the impulse seen in some mediators and scholars to deny that fundamental value-based differences in theoretical frameworks for mediation practice were of any consequence or even that they existed.[76] However, as we have continued to engage with the field around these and other issues, we have gained some insight on why this is so.

There is substantial incentive to deny value-based theoretical distinctions

The articulation of social theories is not simply an academic exercise that takes place in a social vacuum. Theories, as explanations of social phenomena, are embedded in distinct perspectives — fundamental beliefs and assumptions about the nature of human beings and the nature of social interaction.[77] Perspectives are ultimately tied to values, ideology, and a preferred moral order. Typically, the values and ideology that underlie various social theories remain obscured, so that the theory has the appearance of being neutral and objective "science."[78]

However, as various scholars pursued development of the transformative framework, they articulated the ideology and moral vision on which it was based, as well as how that ideology and moral vision differed from those un-

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76. While this impulse sometimes surfaced in the literature (see, e.g., Benjamin, *supra* note 25; Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions,Ideologies, Paradigms and Practices.* NEGOTIATION J. 217 (July 1995); Williams, *supra* note 21), it also came to our attention at times in various educational programs where we simply sought to clarify differences between frameworks, and made it very clear that we were not trying to convince anyone to adopt our preferred framework. The impulse to deny theoretical and ideological distinctions has taken several different forms (although we have also seen some people take the rather inconsistent approach of arguing two or three at the same time): (1) an outright denial of such differences no matter what the evidence to the contrary, (2) an extreme exaggeration of difference to the degree that one can claim that what he or she practices is "traditional" or "normal" mediation and therefore the transformative framework is so different that it cannot possibly be considered mediation at all, or (3) the unsupported assertion that the two forms of practice are inherently compatible and therefore can be integrated. The effect is the same: to leave mediators with the familiar and comfortable assumption that mediation is a unitary practice at the level of theory, ideology and values. This assumption has no foundation in any empirical study, yet it persists.

77. *See* Della Noce, *supra* note 12, at 77-87 for a review of relevant literature on this point.

78. Joseph P. Folger, Mediation Research: Studying Transformative Effects. 18 HOFSTRA LAB. & EMP. L.J. 385 (2001).

derlying problem-solving practice.[79] They emphasized, as Bush and Folger did in 1994, how particular approaches to mediation are based on different visions of human nature and "good" human interaction, and how the nature and extent of the mediator's influence varied with the different visions.[80] Each renewed comparison further threatened the lay theories that had been the scaffolding of the field. The mythology of absolute mediator neutrality and unitary practice could not be sustained; even imported theories were revealed to be value-based; and mediation practice could no longer be reduced to a simple matter of skills acquisition and application.

As these comparisons established the existence of distinct theoretical frameworks based on distinct underlying values, it became apparent that mediators not only have influence on the conflict interaction and outcome, but they also have meaningful *choices* about the nature and extent of their influence. Further, those choices are embedded in, reflect, and reproduce each mediator's fundamental social values and preferred moral order. This pushed mediators beyond the already-difficult point of acknowledging the inevitability of their own influence on the parties' conflict; it also asked them to justify why the particular *kind* of influence they embrace is appropriate and "good." As a result, social agendas for mediation that might once have been obscured were exposed. At the most obvious level, then, one incentive to deny value-based theoretical distinctions is that mediators may thereby remain in the comfort zone of their lay theories, and avoid grappling with such thorny issues as the inevitability of their own influence on the conflict, the value-based nature of that influence, the value-based nature of differences among mediators, and the implications of those differences for practice and policy.

At another level, it appears that some mediators are motivated to deny difference at the theoretical level because acknowledging the value-based na-

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79. *See*, e.g., Antes & Saul, *supra* note 72; Susan Beal & Judith A. Saul, *Examining Assumptions: Training Mediators for Transformative Practice*, *in* DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK 9-19 (Joseph P. Folger & Robert A. Baruch Bush eds., 2001); Paul Charbonneau, *How Practical is Theory*? *in* DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK 37-49 (Joseph P. Folger & Robert A. Baruch Bush eds., 2001); Della Noce, *supra* note 27; Sally G. Pope & Robert A. Baruch Bush, *Understanding Conflict and Human Capacity: The Role of Premises in Mediation Training*, *in* DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK 61-67 (Joseph P. Folger & Robert A. Baruch Bush eds., 2001).

80. Bush & Folger, *supra* note 9.

ture of their own practice invites practical consequences they are not willing to accept. For example, the USPS REDRESS™ mediation program we described above specified that its mediators were to use the transformative framework.[81] To borrow the rhetoric of the field, transformative mediation was what the client wanted.[82] To this end, the USPS provided training in the framework at no charge to mediators, and asked mediators to decide at the end of training whether they were willing and able to work within this framework. Needless to say, many mediators sought the compensated work that this program provided, both as mediators and as trainers. Yet at the same time, some refused to learn or use the transformative framework. Some tried to talk the client out of its preferred model. Some tried to obtain the work while chafing against the specified form of practice. These mediators clearly had the option of declaring that they preferred another form of practice and declining work for the USPS — but to do so had undesirable economic and other practical consequences for them.

Finally, we have come to realize that the clarification of value-based theoretical distinctions in the field is fundamentally threatening because, ironically enough, the field of mediation does not yet have the capacity to deal constructively with difference. If some mediators examine their own fundamental beliefs and assumptions about practice, and in doing so, identify with a sub-community of practitioners that could be called an "us," in distinction to another sub-community that could be called a "them," the process of drawing this distinction is considered inherently provocative. This reflects the dominant problem-solving theoretical framework of the field: "us" and "them" must have competing self-interests, and conflict will exist as long as those interests are not mutually satisfied through finding common ground, compromising, and reaching a "win-win" agreement.[83] There is not yet a field-wide discourse that accommodates and nurtures meaningful difference; on the contrary, the dominant discourse of the field operates on many levels to obscure, marginalize or even eliminate important differences. This has become most obvious to us in the realm of mediation policy, a subject we take up in the next section.

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81. *See* notes 63-64, *supra*, and accompanying text.

82. *See* note 43, *supra*, and accompanying text.

83. *Cf.* Bush & Folger, *supra* note 9, for a description of markers of the predominant problem-solving framework.

Theoretical distinctions have policy implications

Mediation policy is constantly shaping, and being shaped by, mediation practice. Typical policy topics in the mediation field include who can practice mediation, how to determine mediator competency, how the process should and should not be conducted, who is capable of participating in mediation as a client, the ethical obligations of the mediator, grounds for termination of the mediation process, whether the mediator should have reporting obligations to various agencies, whether mediation is the practice of law, and whether mediation should be confidential.[84] Policy statements regarding these and other topics can be found in legislation, regulations, court rules, standardized forms, training standards, and codes of ethics, to name but a few places.[85]

Typically, policy statements simply address "mediation" in the generic, as if it is a unitary process. To some extent this is understandable, as a great deal of mediation policy was developed prior to the clarification and differentiation of underlying theoretical frameworks. Nonetheless, differences in the theory and practice of mediation are generally being ignored or minimized by policy-makers to this day, and policy-makers continue to try to craft policies that treat mediation generically. However, efforts to craft theory-free, value-free policy (or to interpret and enforce existing policies in a theory-free, value-free way) are futile. The underlying theory and values will emerge, because every policy that defines or limits mediation in any way is built on a particular value-based vision of what mediation is and should be, and by its very existence reproduces that vision. Through policy analysis, participation in various policy-making initiatives, and our encounters with mediators in the field, we have come across much direct evidence supporting this argument. We provide just two examples here to illustrate our point.

In the first example, two mediators from two different states who were quite skilled in the transformative approach, and who trained other mediators in the transformative approach for the USPS, were evaluated for competency in unrelated programs in their respective states on the basis of supposedly "neutral" and "generic" checklists of "skills." Both were found "incompetent" in their mediation skills. An examination of the checklists themselves showed that the skills that "counted" were neither neutral nor generic, but

84. *See* Cole, et al., *supra* note 1 for extensive references to, and examples of, policy topics in the mediation field.

85. *Id.*

were based exclusively on the problem-solving framework. In other words, all the checklist demonstrated was that the transformative mediators were not conducting "competent" problem-solving practice. This was no surprise, because competence in transformative practice cannot be evaluated according to a problem-solving skills checklist: the theoretical premises, mediators' goals, and therefore mediator practices, are very different in each framework.[86] In fact, the practices of either approach do not make sense from the theoretical standpoint of the other — some of the very interventions that are considered "good practice" in one framework are considered "bad practice" in the other.[87] As a matter of policy, therefore, these two programs, through their checklists, made one form of practice normative.

The second example concerns the policy of one state body for certifying mediation trainers to provide training in that state. A trainer who submitted her training program, based on the transformative framework, to this body, was questioned because her program did not include "the stages of the process." While a prescribed framework of linear, sequential stages is a typical feature of problem-solving mediation, transformative mediation does not incorporate this feature.[88] This trainer's certification in that state was at risk, because the certification policy incorporated assumptions based on problem-solving practice. By implication, the ability of any trainer to provide certified training in the transformative approach to mediators in that state was likewise at risk. Yet, the state body in question never openly endorsed one form of practice over another, and the certification process was supposedly neutral, generic and theory-free. In all likelihood, the state body was unaware that the "stages" requirement was value-laden, ideologically based, and made a particular theoretical framework for practice (i.e., problem-solving) normative.

The point of these two examples is that many current mediation policies make certain types of practice normative, and others marginal, based on an unarticulated, underlying vision of "good" mediation — often without ever intending that this be so. Each policy that has this effect is significant in itself for the way it contributes to shaping the field. Many such policies have a cumulative effect. If predominantly based on a single vision of "good" mediation, they create an unspoken (and often fundamentally unexamined) norm. On the other hand, if based on a variety of unarticulated, possibly inconsis-

86. Empirical support for this point is provided by Della Noce, *supra* note 12.

87. *Id.*

88. *See* Bush & Folger, *supra* note 9, at 201-08; Antes et al., *supra* note 68; Della Noce, *supra* note 68. The idea that human interaction can and should be made to fit an organized, linear sequence, implicates a web of value-based assumptions about the nature of human interaction that are embedded in individualist ideology. *Id.* at 75-76.

tent, underlying visions, they have the additional unintended effect of creating a general state of confusion in policy affairs and impasse in policy initiatives.[89] This is especially true when we consider the tendency of some policy-making bodies to simply import, borrow, or cut-and-paste policy statements from other bodies without examining the underlying value-based vision of "good" mediation, a practice that results in internally inconsistent policy statements built on competing visions.

Advancing the Field Through Theoretical Clarity: A Proposal

Looking at the mediation field through a policy lens reveals that, in many ways, the field is in a state of paralysis. While there has been notable growth in some mediation programs, growth seems to be primarily in programs with some mandatory component. There does not appear to be corresponding growth in the voluntary, self-selected use of mediation by members of the public.[90] Many members of the public appear to be uninformed, or even confused, about what mediation is and what it has to offer.[91] Thus, with respect to mediators, it is not surprising that supply currently exceeds de-

89. For an analysis of this dynamic with respect to performance-based assessment standards for mediators, *see* Bush, *supra* note 32.

90. *See, e.g.*, Scott Bradley & Melinda Smith, *Community Mediation: Reflections On a Quarter Century of Practice*, 17 MEDIATION Q. 315 (2000); Thomas D. Cavenaugh, *A Quantitative Analysis of the Use and Avoidance of Mediation by the Cook County, Illinois Legal Community*, 14 MEDIATION Q. 353 (1997); Lester Cohen, *Mandatory mediation: A Rose By Any Other Name*, 19 MEDIATION Q. 33 (1991); Cris M. Currie, *Mediation and Medical Malpractice Disputes*, 15 MEDIATION Q. 215 (1998); Liz O'Brien, et al., *Reflections on Past Successes and Future Challenges: Three Perspectives*, 17 MEDIATION Q. 321 (2000); Rogers & McEwen, 1994, Sec. 7.03; Phelan A. Wyrick & Mark A. Costanzo, *Predictors of Client Participation in Victim-Offender Mediation*, 16 MEDIATION Q. 253 (1999).

91. WASH., DC: NAT'L INST. FOR DISP. RES., NATIONAL SURVEY FINDINGS ON: PUBLIC OPINION TOWARDS DISPUTE RESOLUTION (1992). There is, however, at least a question as to whether an uninformed or underinformed public is at the root of the relative lack of growth in the voluntary use of mediation by the public. For at least 25 years, mediation has been increasingly available through court programs, community programs and private mediators. Hundreds of mediators claim to have mediated hundreds of cases, some mediators claim to have mediated thousands of cases, and a certain base number of annual cases is often required of certified mediators and mediators who seek certain professional credentials. Each mediated case encompasses at least two clients. Mediation has been the subject of news reports in the print and electronic media. There is therefore every reason to believe that many members of the public have been exposed to mediation in some way. This raises the question, then, whether the lack of voluntary use by the public is a matter of what the public doesn't know, or a matter of what it *does* know.

mand. Mediation has yet to develop into a legitimate profession as many have hoped it would. There is no established career track for mediators. Full-time paid employment for mediators remains relatively scarce.

While various policy initiatives could alleviate some of the confusion and educate the public about mediation and what it has to offer, their potential in this regard has not been realized. For example, mediator quality assurance efforts are sometimes justified as vehicles for informing and protecting the public. Yet, these efforts often stall out, as mediators struggle over whose approach to mediation is "right." Because standards that do eventually emerge are built on consensus and compromise, they tend to be equivocal, internally inconsistent, and therefore of limited informational value.[92] All of these circumstances may well be attributable to the lack of theoretical clarity in the field — a great deal of debate surrounds the definition of mediation (let alone "good" or effective mediation), and yet in policy matters the field is still trying to define itself, its goals, its values and its accomplishments in a unitary way.

We maintain that pursuing theoretical clarity — pursuing further elaboration of value-based theoretical distinctions through thoughtful and constructive comparisons — is critical to the continued growth of the field. It opens as-yet unexplored possibilities for field development. We suggest that it is especially important for theoretical distinctions to be taken into account by policy-makers.

We use the term "policy-makers" broadly, to encompass such traditional policy-makers as legislators and regulators as well as those not typically considered policy-makers, such as program administrators, professional associations, task forces, committees, and educators and trainers. What all of these people and entities share is the power to shape mediation practice and the mediation field by creating practice norms, whether explicit or implicit, based on their underlying vision of conflict and the goal of mediation. While the potential impact of such norms on the mediation field is obvious, the impact also ripples beyond the mediation field. Because mediation policy is built on underlying, value-based visions of conflict and shapes mediation practice accordingly, policy norms effect wider social consequences by shaping the mediation experience for actual *and* potential users of mediation services.[93] Decisions with such far-reaching impacts should be made with full reflection on the potential social consequences. Thus, the question is not *whether* theoretical clarity should inform the policy-making process, but *how*.

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92. *See* Bush, *supra* note 32.
93. *See generally* Folger, et al., *supra* note 26.

We suggest that one critical step in every policy-making initiative is to consider whether the purpose of the initiative is to make a certain approach to practice normative and constrain others, or whether it is to create space in which a variety of practices can thrive. Either goal is well served by clearly articulating theoretical frameworks and distinctions, although for different reasons.

There are situations in which a conscious choice of a particular framework of practice is warranted. Typically, this would be a situation in which particular social goals are desired as a matter of policy, and the chosen framework for practice clearly supports the desired goals. The USPS REDRESS™ program is a case in point.[94] And, as the USPS experience demonstrates, if there are policy reasons to endorse a particular framework it is better practice to state this endorsement explicitly than to leave it unspoken. The explicit endorsement provides important information about the desired policy goals to program users and administrators, the mediation community, and others who will be affected by or need to interpret the policy. It protects the integrity of evaluation research. It also clarifies who is and who is not intended to be affected by the policy. For example, if a policy-maker adopts transformative mediation for a given program, and establishes ethical or training standards for the mediators in that program, explicit adoption of a single model clarifies that no global claims about the ethical or training standards for all mediators are being made. This would preserve the ability of mediators who favor another approach to practice their preferred framework in other settings. It would also afford further protection for mediators outside the program by discouraging other policy-makers from cutting-and-pasting policy statements from this program into programs based on incompatible goals and values.

But there are also situations in which there is no need for policy-makers to endorse a particular approach, and they would better serve their goals by taking as inclusive a stance as possible. An example of such a situation would be a field-wide initiative directed at informing the field and the public broadly on a particular topic (such as the many possible approaches to "effective" mediator training), to the end that no particular form of practice is endorsed on a global scale but local policy-makers and consumers are assisted in making informed choices about how to proceed in their own jurisdictions.

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94. *See* notes 63-64, *supra*, and accompanying text.

In this case, theoretical clarity and distinctions actually serve the goals of diversity and inclusivity.

This may seem counter-intuitive, as comparisons and distinctions seem by their very nature to exclude, but the differences among mediation practices are so fundamental that they very well may require different policy positions for different practices.[95] It is only with clear articulation of these different policy positions that space is created for the different practices to thrive together; without it, any given form of practice might be marginalized or excluded by unstated assumptions that privilege another form of practice. Here, too, explicitness is most beneficial. It is better practice to identify the different theoretical frameworks actually considered and the policy positions appropriate for each, than to leave the impression that "all" orientations to mediation have been considered and are within the scope of the policy. Explicit reference to the theoretical frameworks considered by the policy-makers leaves room for the development of new theoretical frameworks in the future, unconstrained by pre-existing policy statements that clearly did not foresee the new development or intend to limit it. This is an important benefit in a field still young in terms of theoretical development, as well as for those who fear that the future development of the field will be foreclosed by today's policy pronouncements.

Of course, crafting policy to achieve either of the goals stated above presumes policy-makers have a fundamental understanding of theoretical frameworks for mediation as well as their practice and policy consequences. Therefore, it is crucial that policy-makers be conversant at the theoretical level. Every policy discussion should include a discussion of what "mediation" is, what theories of practice inform the policy initiative, whether particular theories are being (or should be) privileged by the policy initiative, what assumptions underlie those theories, and how those assumptions will shape practice and wider social consequences.

Answers to many perplexing policy questions could be fruitfully addressed in new ways given the framework we propose. For example, mediator quality assurance is one of the most hotly debated topics in the field.[96] We suggest that this is because many field-wide initiatives continue to rely on lay theories, and also attempt to construct unitary quality assurance standards as if mediation were a unitary field. Debates erupt, and initiatives stall out when various mediators or groups of mediators do not see their approach to practice properly represented or included in the proposed standards. Consensus-

95. *See* Della Noce, *supra* note 12, at 333-341.

96. *See, e.g.*, C. MORRIS & A. PIRIE, QUALIFICATIONS FOR DISPUTE RESOLUTION: PERSPECTIVES ON THE DEBATE (1994).

seeking becomes the only way to move forward, yet the standards that emerge from a consensus-based process are internally inconsistent.[97] The pattern repeats itself again and again. Why not change the entire quality control conversation? First, abandon the misguided (and apparently failed) quest for unitary standards. Second, determine the goal of the quality control initiative in question. Is it to promote a particular social consequence by encouraging the use of one specific theoretical framework and providing the public quality assurance regarding those specific mediators? Or is it to inform the field and the public more generally about available options? Then, either prepare standards narrowly and explicitly tailored to accomplish quality control for one theoretical framework, or educate the field and the public by offering a menu of different sets of standards specifically tailored for the different theoretical frameworks explicitly considered. Such an approach could also be a model for policy-making in the mediation field generally, beyond matters of quality assurance.

CONCLUSION

In this article we have provided an overview of the progress toward theoretical development in the field of mediation and our insights on why that has sometimes been a difficult journey. Theoretical development challenges the field to come to terms with fundamental differences in mediators' practices at a meaningful level, and to come to terms with what it means to embrace different values, goals and practices within one field. Historically, the mediation field has lacked an openly value-based discourse that accommodates and nurtures such fundamental differences. The theoretical frameworks discussed here can contribute to just such a discourse. The field can move to an understanding of mediation as a value-based practice rooted in different theoretical frameworks for understanding conflict. In an openly value-based dialogue, the field can constructively address differences in practice and policy, rather than minimizing, obscuring or trying to eliminate those differences in the hope of preserving the illusion of uniformity. This dialogue would offer unique and untapped promise for advances in any number of policy initiatives. We believe that whether the field opens itself to this kind of dialogue will shape the future and the continued viability of the field.

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97. *See* Bush, *supra* note 32.