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RESPONSE TO CONDLIN'S CRITIQUE OF TRANSFORMATIVE MEDIATION

*Robert A. Baruch Bush and Joseph P. Folger**

We welcome thoughtful critical analysis of the transformative framework because we believe such comments further substantive discussion and debate. Some prior critiques of the framework have been beneficial in helping to clearly map the ideological divide in the ADR field—a divide that separates very different approaches to conflict intervention. Cogent and honestly substantiated critiques of the transformative approach have strengthened the discourse about conflict intervention practice by building stronger arguments on all sides of the debate over the various goals and expectations for mediation.¹

Unfortunately, the recent article by Robert Condlin in this Journal² advances none of these useful goals, for two main reasons. First, the tone and style of a scholarly piece—and communication in general—matter greatly to its substantive impact. We and many other colleagues have devoted our professional lives over the past two decades to the serious development of this work. To treat these efforts with such disdain and mockery in a public context, as Condlin does, is deeply disrespectful and injurious.³ We believe people can legitimately disagree but still be connected as respectful and respected human beings.

Second, this critique effectively seeks to marginalize others' views rather than have measured dialogue and debate about them. The critique as a whole is built on a selective and self-serving literature review, outright misrepresentation of the underlying theory that supports transformative practice, and spurious arguments

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¹ See, e.g., Neal Milner, *Mediation and Political Theory: A Critique of Bush and Folger*, 21 L. & SOC'L INQUIRY 737, 750 (1996); Michael Williams, *Can't I Get No Satisfaction? Thoughts on The Promise of Mediation*, 15 MEDIATION Q. 143, 145, 149 (1997); Jeffrey R. Seul, *How Transformative Is Transformative Mediation?: A Constructive-Developmental Assessment*, 15 OHIO ST. J. ON DISP. RESOL. 135 (1999).

² Robert Condlin, *The Curious Case of Transformative Dispute Resolution: An Unfortunate Marriage of Intransigence, Exclusivity, and Hype*, 14 CARDOZO J. CONFLICT RESOL. 621 (2013).

³ See *infra*, note 9 and accompanying text, discussing this disdainful treatment in detail.

about the empirical research on transformative mediation.⁴ For us to respond in a comprehensive way would require a complete reiteration of the transformative mediation literature, because Condlin misrepresents a large portion of that work and ignores parts that are inconsistent with his personal views.⁵ Therefore, a full response is simply not warranted.

However, we do want to comment on what appears to be the motivation for this critique of transformative mediation.⁶ Condlin's recent career as a critic of ADR has targeted the work of many leading contributors to the ADR literature, including the primary authorities on integrative bargaining, social science and negotiation, and feminist theory.⁷ And, in each case, his critique

⁴ See *infra* notes 19–27 and accompanying text for some specific examples.

⁵ Genuinely interested readers can examine that work and decide for themselves the strengths or weaknesses of Condlin's charges. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 242–48, 255–56 (1994) [hereinafter, *Promise 1*]; ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 59–62, 250–56 (2ND ED. 2005) [hereinafter, *Promise 2*]. Apart from these two core works, which are consistently misrepresented in Condlin's critique, the most readily available source of reliable information on the transformative framework is a recent edited volume, *TRANSFORMATIVE MEDIATION: A SOURCEBOOK* (2010) [hereinafter *SOURCEBOOK*], which contains two dozen chapters on the theory, practice and applications of transformative conflict intervention. Many other materials are cited in the Sourcebook's well-footnoted chapters, including dozens of articles published in major journals. Finally, a downloadable annotated bibliography on the transformative framework can be found online, on the website of the Institute for the Study of Conflict Transformation, available at <http://www.transformativemediation.org/resources/bibliography-of-resources> [last visited on June 24, 2013]. Regarding Condlin's views on conflict resolution processes and their underlying premises, see *infra* notes 10–13 and accompanying text.

⁶ Another reason for our responding to Condlin's article are the questions being raised by those who quickly turned away from the article and were puzzled and disturbed by its extreme rhetoric. See *infra* note 9, for examples of this rhetoric. Colleagues have asked about Condlin's motive for writing this piece (and, frankly, the Journal's role in publishing it in this form). They are particularly puzzled by the derisive, mocking tone that runs through the essay. They ask, why would someone use this tone in a scholarly critique of a model of conflict intervention practice? Graduate students have told us directly that they started reading the article and after four or five pages, they simply stopped. The inaccuracies, excessive negativity, and derisive tone of the essay made them question both the credibility of the content and the author's motives for writing it. Our response here suggests what those motives may be.

⁷ See Robert Condlin, *Bargaining Without Law*, 56 *NEW YORK LAW SCHOOL L. REV.* 281 (2012) [hereinafter, *Bargaining*]; _____, *Legal Bargaining Theory's New "Prospecting" Agenda: It May Be Social Science, But Is It News?*, 10 *PEPPERDINE DISP. RESOL. L. J.*, 215 (2010) [hereinafter, *Prospecting*]; _____, *Bargaining with a Hugger: The Weaknesses and Limits of a Communitarian Conception of Legal Dispute Bargaining, or Why We Can't All Just Get Along*, 9 *CARDOZO J. CONFLICT RESOL.* 301 (2008) [hereinafter, *Hugger*]; _____, *Every Day and in Every Way, We are All Becoming Meta and Meta: Or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)* [hereinafter, *Meta*], 23 *OHIO STATE J. ON DISP. RESOL.* 231 (2008).

appears designed to make his chosen subject appear not merely wrong, but also foolish.⁸ The aim of his work seems to be marginalization, not measured deliberation and debate. This approach pervades all of Condlin's articles on ADR, and his critique of transformative mediation in this Journal's previous issue (Volume 14, Issue 3) takes it to a new level. Throughout the article, he employs a litany of sarcastic rhetoric to suggest that the theorists and practitioners of this model of mediation are naïve fools or worse—"carnival barkers" with "utopian fantasies," to use his words.⁹

⁸ See, e.g., Condlin, *Prospecting*, *supra* note 7, at 265 ["The point seems to be that bargainers should be ambitious, pursue ambitions diligently, and exploit ignorance and inexperience when they have the chance. This will not come as a shock to most lawyers. One might conclude, paraphrasing Horace, that 'the mountain has labored mightily and brought forth a mouse'. . . . None of these lessons are controversial or counterintuitive. . . . It is like telling an adult to look both ways before crossing the street."]; Condlin, *Hugger*, *supra* note 7, at 3-5 [Communitarian bargainers create a kind of dispute-settlement Nirvana (or Eden) where self-interest is not naked, force is not brutish, entitlement claims are not legalistic, and everyone acts in the spirit and to the limits of her or his social potential. This is a wonderfully inspiring story, full of nobility and grandeur, and it would be a source of great comfort in an unfriendly and fractious world if it were true. But sadly, the assumptions communitarian bargaining theory makes about legal disputing are . . . based on a vision of humans before the fall."]; Condlin, *Meta*, *supra* note 7, at 239 [Professor Menkel-Meadow's article . . . is the Bible of communitarian bargaining and its Ninety-Five Theses as well.], 250 ["In . . . communitarian normative argument . . . a catchy story with a clever and non-obvious outcome is used to show how a seemingly intractable bargaining problem was made to give way in the face of imaginative, communal thinking. . . . Collectively, these stories make up a set of bargaining parables that offer folksy accounts of practical bargaining wisdom. Like fairy tales, the stories all have morals intended to produce epiphanies rather than skeptical reflection, and also like fairy tales, they suffer when examined closely."]. Other examples of similar tone are found in all these articles.

⁹ For specific examples of his use of sarcasm and even ridicule in his attack on transformative mediation, including the terms quoted in the text, see Condlin, *supra* note 2, at 629 ["The wishful and grandiose nature of these claims might make them seem somewhat Panglossian, reminiscent of the arguments for Soviet and Chinese five year plans, designed societies, perfectible humans, and other *utopian fantasies*" (emphasis added)]; fn. 28 ["'Strength' is a recurring theme in B&F's description of TDR. It is as if they wanted to neutralize an anticipated objection to the Theory (that TDR behavior will look weak to an experienced negotiator) by appropriating the terminology of the objection and claiming it as their own. This is a familiar rhetorical stratagem. Contemporary examples include Fox News calling itself 'fair and balanced,' or the Communist Party of the Soviet Union calling its official newspaper Truth (Pravda)."]; fn. 110 ["The 'Pontius Pilate' philosophy at the heart of the concept of Empowerment is illustrated nicely by a transformative mediation joke. Question: 'How many [TDR] mediators does it take to change a light bulb? . . . [A]nswer: None.' Even this does not capture the full force of TDR's non-interventionist commitment. The punch line should read: 'None. Light bulbs change themselves.'"]; fn. 129 ["TDR proponents are not above airbrushing . . . imperfections out of their mediation stories. . . . Janet Malcolm is the most prominent proponent of this questionable empirical reporting practice, having been found to have deliberately altered the content of statements attributed to Jeffrey Masson in a NEW YORKER magazine article to make the statement say what Malcolm thought they should."]; 661 ["The parties' discussion of the "deep" issue in

Our aim here is to suggest what we think is the reason for this polarizing, exaggerated critique. We believe it lies in Condlin's intense opposition to—and scorn for—the *values and beliefs* that he sees underlying the transformative theory (and, to a lesser degree, the other work he has criticized in the past). He believes firmly that the adversarial process—including adversarial negotiation and adversarial litigation—is the best way to address conflict effectively.¹⁰ To him, “communitarian” and “transformative” processes

dispute [in the case presented in *Promise 2*, *supra* note 5]—whether the . . . objection to the purple color was racist—is little more than a Sixties set piece of the sort Tom Wolfe mocked in his depiction of the San Francisco OEO office in *RADICAL CHIC & MAU-MAUING THE FLAK CATCHERS.*”]; 664 [“Notwithstanding its detours, impasses, asides, and dead ends, the mediation [case presented in *Promise 2*] played out pretty much the way TDR proponents say it should have, right up to the predictable happy ending. For all of B&F’s efforts at verisimilitude, the story looks like all of their other stories, just a lot longer, and with a lot more drama. Think of it as a mediation opera without the music.”]; fn. 235 [“When I describe the movement as evangelical, I have in mind the revivalist-rhetorical properties of evangelism and not its doctrinal ones. Like Chautauqua preachers, TDR proponents speak in loud, certain terms, admit no qualification or questioning, reject non-conforming views out of hand, and proselytize with the *enthusiasm of a carnival barker* (emphasis added)]; 678 [“One might think over-exaggerating the benefits of a dispute resolution theory was no longer possible after the publication of *Getting to Yes*. That book raised the hoopla standard so high it seemed it would not be equaled within twenty-one years of a life-in-being in 1981, but *Getting to Yes* brought sophisticated scholarship in low-visibility fields to the attention of a wider audience, and its authors’ adjectival excesses were forgiven for that reason. Sadly, TDR has no such saving grace.”]; 679 [“The Theory is popular within certain circles, to be sure, but this popularity, like that of the T-Group in the 1960s and 1970s, seems based more on the allure of a simple, one-size-fits-all, psychological template for personal learning and growth, and the opportunity to participate in an evangelical, intellectualist movement of the moment, than it does on the discovery of a definitive new account of disputing. It is a popularity based on optimism, fashion, and hope more than on critical judgment, and popularity of this sort tends to be ephemeral. . . . Somewhere, the ghosts of Santayana and Marx must be chuckling.”] Other examples abound, but those quoted here are enough to give the flavor of Condlin’s approach to “scholarly critique.”

¹⁰ See, e.g., Condlin, *Hugger*, *supra* note 7, at 70–81 [praising what Condlin presents as a (lengthy) example of successful adversarial negotiating strategy (in the context of a simulated pre-trial conference): “The parties’ final agreement was pretty one-sided. By almost any standard Paine did much better than Drillco. . . . In short, through a combination of substantive cleverness and a persistent, forceful yet flexible demeanor, they managed to be confident without being arrogant, articulate without being glib and aggressive without being belligerent. They made it seem as though their case did not depend upon rhetorical tricks and as though they were motivated by a commitment to client interests more than a desire to win. . . . They were deceptive, competitive, concerned almost exclusively with Paine’s interests, and intent on coming away from the conference with as much as they could get rather than finding a mutually beneficial middle-ground solution. They were willing to exploit all of the leverage available to them. . . . Beneath their outward appearance of reasoned elaboration lay an unvarnished desire to win. . . . The Paine lawyers’ decision to bargain in this way is easy to understand. If it is possible to win more than an adversary, without compromising one’s integrity, abusing others, corrupting legal institutions, or making the world a more hostile place—and the Paine lawyers’ behavior is evidence that it is—then it is only rational to try to do this, even if the behavior involved is not saintly (i.e., selfless). One is usually better off with more rather than less of something valued,

are not simply foolish, but dangerous.¹¹ This commitment to adversarial methods rests, in turn, on the values and vision he holds. He rejects (and mocks) the relational vision of human capacity and motivation—the view that human beings have inherent capacity and desire for both agency and empathy, and therefore flourish in processes like transformative mediation that support these capacities.¹² He believes instead in the individualistic view that human beings in conflict are motivated by self-interest and self-satisfaction without any deep sense of social connection or empathy, and that they usually require strong outside direction to do what is best for them because they lack the capacity for self-determination.¹³ In

everything else being equal; that someone felt otherwise would be the breaking news . . . the Paine lawyers' behavior is a case study in the process of bargaining competitively without appearing to do so, and without offending."]; n. 219 ["The Paine lawyers' behavior presents a more realistic picture of adversarial bargaining and shows how being substantively aggressive can be socially acceptable without leaving any of the bad aftertaste communitarians decry."]; 86 ["To be taken seriously . . . bargaining theory must make room for and incorporate the sort of adversarial maneuvering the Paine lawyers used so effectively in the Drillco pre-trial conference. It must explain how deception, argument and self-interested trading fit within a complete theory of bargaining behavior. . . . All bargaining . . . is a lying game to some extent, and one in which adversarial behavior plays an inevitable role. To pretend otherwise is to deny reality, actual and imagined."]. See also Condlin, *Bargaining*, *supra* note 7, at 285 ["To be 'skillful, energetic, uncritical, and obedient instruments' of their clients' selfish ends is the essence of legal representation for many lawyers, and this view is embodied in the traditional, adversarial approach to legal dispute bargaining."].

¹¹ See *supra* notes 8 & 9, and accompanying text. The examples given there should suffice to demonstrate the point made in the text here. It is characteristic of the weakness of Condlin's critique that he does not distinguish between the problem-solving and transformative theories of mediation, referring to both as "communitarian." See, e.g., Condlin, *Bargaining*, *supra* note 7, at 282–83. In fact, the two are quite distinct in both theory and practice. See *Promise 1*, *supra* note 5, at 55–77; Robert A. Baruch Bush, *Mediation Skills and Client-Centered Lawyering: a New View of the Partnership*, 19 CLINICAL L.REV. 429, 433–46 (2013).

¹² Regarding the relational vision and its connection to transformative mediation, see *Promise 1*, *supra* note 5, at 255–56; *Promise 2*, *supra* note 5, at 59–62, 250–56.

¹³ Regarding his view of human motivation, see Condlin, *Hugger*, *supra* note 7, at 83 ["Perhaps in an Hegelian spirit world, or one of Platonic forms, there would be no inclination to prefer one's own projects over others' . . . but bargaining does not operate . . . in a spirit world. The desire to do as well as possible for oneself is as much a feature of legal bargaining as it is of social life generally and as such, it is a feature that any viable theory of bargaining must recognize and take into account."]; 6–7 ["[L]awyers understand something about real-life bargaining that communitarians do not. . . . [A]n exclusively, relentlessly, or unqualifiedly communitarian approach to bargaining is another name for eleemosynary behavior and lawyers usually want to make deals rather than gifts.]; & fn. 246 ["[Communitarian theorists] operate on an unsophisticated, if not naive, psychology that sees self-interested competition over scarce and valuable resources as an optional feature of social and political life. They should read more Madison. Richard Nisbett's insightful book on the 'geography of thought' shows how an individualistic and competitive view of bargaining has its greatest explanatory power for American (or Western) bargaining practice. . . . Nisbett shows how an individualistic focus . . . is a characteristic of Western culture"]. Regarding his view of human capacity for self determination, see Condlin,

short, Condlin's critique is at base an *ideological* one aimed at the *underlying beliefs and premises* of the transformative approach to conflict, and this explains its intensity. But instead of presenting this critique seriously and directly, he uses clever sarcasm in an effort to trivialize the approach and make it look foolish.

We certainly understand that Condlin may disagree with relational beliefs about human nature, motivation, and capacity—beliefs that are the foundation of practice within the transformative framework. However, his disagreement is not proof that his views are right and that the transformative model is wrong. Nevertheless, his aggressive approach to the subject does suggest that he perceives the relational view to be not only wrong, but also fundamentally challenging to his individualistic vision of conflict and human nature. Condlin is certainly not the only scholar to question the viability of the relational vision and processes based on it.¹⁴ However, the productive way of posing such questions is through measured intellectual engagement and not hyperbole or mockery.

Stripped of the rhetorical flourishes, Condlin's real charge (against both us and the other ADR scholars he has criticized) is that our foundational premises—regarding inherent human capacity and motivation for agency and empathy—are overly idealistic and impractical.¹⁵ Our response, in brief, is that the relational premises about human nature are indeed highly idealistic and optimistic. However, this is not to say that these optimistic premises have no basis in reality; in fact, there is good evidence to support them.¹⁶ Furthermore, these premises are by no means impractical.

supra note 2, at 641–43, criticizing a mediator (in a case presented in *Promise 1*, *supra* note 5) because he did not “protect the parties against themselves” and “force them” to do what was in their best interests [“. . . to permit them to jettison a workable alternative . . . without considering what would happen if they did not agree to it, or without forcing them to consider whether their buyers’ remorse was warranted, is hard to understand. . . To let the parties dismiss this option . . . simply for the sake of empowering them, seems irresponsible. . . The parties almost certainly would have honored the alternative agreement—even if nudged into it—if later it became clear that it was their best option in a less than perfect world. Anything else would have been irrational. . . . When parties give in to pique, resentment, spite, or some other emotion of the moment . . . it is reasonable for them to expect a mediator to protect them against themselves. . . . Empowerment should be seen as a means to an end, not an end in itself; useful when it helps parties make good decisions, but destructive when it causes them to shoot themselves in the foot.”]

¹⁴ See, e.g., Seoul, *supra* note 1.

¹⁵ See *supra* notes 8, 9, & 13, for quotes from his various critiques showing that this is his central charge against the ADR scholars he criticizes.

¹⁶ There is evidence to support an optimistic view of the human capacity and desire for both agency and empathy. Regarding empathy, see, e.g., ALFIE KOHN, *THE BRIGHTER SIDE OF*

This is the heart of a constructionist approach to social institutions, which holds that the view we take of the world affects and constructs the world itself, negatively or positively, either limiting it or improving it.¹⁷ Optimistic views can be profoundly practical because they can motivate and facilitate positive change. This is true of the ideas behind all of the approaches that Condlin calls “communitarian” (although there are differences among these approaches that he ignores).¹⁸ They envision alternative ways of conducting conflict because they recognize positive potentials of human capacity and motivation that he ignores or denies. This difference of vision is a genuine and legitimate disagreement on which there can be substantive exchange. We welcome this kind of exchange. However, we choose not to respond in depth or comprehensively to a critique that conceals its essentially ideological argument behind a screen of exaggerated and sarcastic rhetoric.

Nevertheless, it is important to give a few examples of how Condlin's commentary on transformative mediation distorts the subject and misses the mark. The first example is his discussion of the empirical research on transformative practice.¹⁹ There has been substantial independent research conducted on the USPS

HUMAN NATURE: ALTRUISM AND EMPATHY IN DAILY LIFE (1990), at 4–5 [“There is good evidence to support the proposition that it is as ‘natural’ to help as it is to hurt, that concern for the well-being of others cannot be reduced to self-interest, that social structures predicated on human selfishness have no claim to inevitability—or even prudence.”], 230–38 [summarizing numerous studies that provide “good evidence” of human motivation and capacity for empathy and altruism]. Regarding agency, see, e.g., Alafair S. Burke, 81 N.C. L. REV. 211, 223–24, 237 (2002) [discussing the evidence that battered women, rather than being victims of “learned helplessness”, have both the motivation and capacity for self-determined rational choice among constrained alternatives – and indeed exercise their agency to make such choices in deciding to stay or leave abusive relationships]. See also Robert. D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 12 ARIZ. L. REV. 501, 517–44 (1990) [discussing the views of many experts on the lawyering process that clients, including those from less educated and advantaged groups, have the capacity for self-determined choice and agency, and will exercise that capacity if supported by the professionals who assist them]. Interestingly, Condlin references the literature cited by Dinerstein on the role of client agency, but seems to disregard it as evidence of the human capacity for self-determination. See Condlin, *supra* note 2, at 642 & n. 91. He also references the work of Carl Rogers, and recognizes his work on humanistic psychology as an antecedent to the transformative theory, but again makes no mention of the evidence of client capacity for agency found in Rogers' work. See *id.*, at 629–30 & n. 46. In short, there is indeed evidence that supports the realism and practicality of the relational vision underlying transformative theory, and Condlin simply ignores it in dismissing the vision as unrealistic and “utopian”.

¹⁷ See, e.g., Kenneth J. Gergen, *Constructionist Dialogues and the Vicissitudes of the Political*, in *THE POLITICS OF CONSTRUCTIONISM* (I. VELODY & R. WILLIAMS eds.), 1998; DANIEL CHANDLER, *SEMiotics: THE BASICS* (2007), regarding the social constructionist approach.

¹⁸ See *supra* note 11.

¹⁹ See Condlin, *supra* note 2, at 668–73.

transformative mediation program, which has been published in competitively reviewed journals by Lisa Bingham and her colleagues.²⁰ Bingham's intense focus on the effects and outcomes of the USPS program make the transformative model of practice the most researched approach to conflict intervention in the last twenty years. Her studies followed traditional, well-established, empirical methods for assessing parties' responses to and assessment of the mediation process and the mediators' interventions. The research is extensive, credible, meticulous, and highly regarded. The work was also innovative in its ability to gauge the upstream effects of parties' participation in transformative mediation. The unsubstantiated, broad-brush criticisms of her research, in this critique, are specious and demonstrate a lack of knowledge of standard empirical methodology.

A second example is Condlin's dismissal of nearly two decades of work that explains and illustrates transformative mediation practice. He belittles the "case-examples" offered in this work, implying that these examples are offered as research evidence that the approach works.²¹ In fact, the cases are presented not as research evidence, but rather as concrete illustrations of how transformative mediators practice and what kinds of effects their interventions aim for. Moreover, Condlin misses one of the central lessons of these case-examples and the overall work on the transformative approach to practice—namely, that there is a real and important difference between *mediator control of parties* and *mediator support for parties*.²² His denial that this difference exists and

²⁰ See Dorothy J. Della Noce and Hugo C.M. Prein, *The Case for Transformation: A Review of Theoretical and Empirical Support*, in SOURCEBOOK, *supra* note 5, at 93–105 [summarizing and referencing the multiple studies done by Bingham and her colleagues evaluating the use of transformative mediation in the United States Postal Service's REDRESS mediation program].

²¹ See, e.g., Condlin, *supra* note 2, at 637–45, 660–68 [criticizing two central case-examples for not providing evidence of any transformative impacts on the parties, despite the fact that the cases are clearly not presented as evidence of impact, but as illustrations of practice]. He also criticizes the case-studies presented because they are simulations, not real cases recorded and transcribed for analysis. This is ironic, since the only case he presents, in his own work, as an example of his preferred form of adversary negotiation, is a *lengthy simulation* of a pre-trial conference! And this simulated case is analyzed in depth, in multiple articles, to argue in favor of the adversary approach to negotiation. See Condlin, *Hugger supra* note 7, at 16–86; Condlin, *Prospecting, supra* note 7, at 258–61.

²² As documented in many research studies, conventional mediators often *direct and control* the process and limit party communication and decision-making. See Robert A. Baruch Bush, *Staying in Orbit or Breaking Free: The Relationship of Mediation to the Courts Over Four Decades*, 84 N. DAKOTA. L. REV. 705, 713–14, 727–32, 735–38 (2008) [summarizing research on the directiveness endemic in conventional mediation practice]. By contrast, also as documented in research, transformative mediators *follow and support* party communication and decision-mak-

his claim that it is unimportant are completely uninformed.²³ His further claim, that the “supportive” interventions of transformative mediation are the equivalent of the mediator doing nothing and just “waiting for the parties to take control,”²⁴ is a distortion of the specific transformative interventions described concretely in the case-examples and taught in intensive mediation training programs.²⁵ This claim is particularly insulting to the thousands of practitioners who have mastered the proactive, non-directive intervention skills on which transformative practice is built, and who have seen the positive impact on parties’ interaction.

Finally, the critique’s claim that we present the “relational” vision as our own original work, without acknowledging any major figures as sources, is shockingly false.²⁶ In fact, we have acknowledged since 1994 that our central construct of the balance between regard for self and regard for other, empowerment and recognition, is based on and derived from the work of Carol Gilligan,

ing. See Della Noce & Prein, *supra* note 20, at 100–105 [summarizing and citing multiple studies of transformative mediators’ practice of supporting party interaction]. Regarding Condlin’s seeming to ignore or deny this difference, see Condlin, *supra* note 2, at 639–43 & note 83 [commenting on discussion and illustration of supportive v. directive mediator interventions in *Promise 1*], 647–49 & notes 110–111 [commenting on discussion of supportive but nondirective interventions in *Promise 2*].

²³ See Bush, *supra* note 11, at 433–46 [detailing the clearly different practices of facilitative and transformative mediators, in terms of control v. support, with citations to authorities on these two different models of mediation practice]; Robert A. Baruch Bush and Joseph P. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO STATE J. ON DISP. RESOL. 1, 22–44 (2012) [analyzing the different impacts of practices of mediator control and mediator support on the goals of civility and justice as affected by mediation]. Condlin’s critique notably fails to cite either of these recent articles.

²⁴ See Condlin, *supra* note 2, at 647–649.

²⁵ See *Promise 2*, *supra* note 5, at 131–214 [case study with commentary illustrating specific proactive mediator interventions used in transformative mediation]; Robert A. Baruch Bush and Joseph P. Folger, *Transformative Mediation: Core Practices*, in SOURCEBOOK, *supra* note 5, at 31 [describing specific practices of transformative mediation, with examples]. Readers genuinely interested in an accurate portrayal of transformative mediation practices should consult these sources. Though he cites extensively to the case study noted above, Condlin omits any reference to the detailed commentary explaining the mediator’s interventions. That commentary explains many of the interventions Condlin criticizes.

²⁶ Condlin, *supra* note 2, at 626 fn. 16, 677–78 [“. . . they describe the Relational Worldview as an original conception . . . not associated with any ‘big names’”] (emphasis added). Condlin’s citation is to a sentence in *Promise 1*, *supra* note 5, at 244, that states, “Because it represents an outlook that is just emerging, the Relational worldview has no widely recognized character or ‘name’ as yet” (emphasis added). The misrepresentation of our statement is clear and shocking, particularly since we state explicitly only a few pages later that “. . . we can identify works in many different fields that not only reflect . . . this worldview but are coming together to constitute it. The account we presented earlier was based on a number of these sources, though it is our own construction,” *Promise 1*, *supra* note 5, at 255 (emphasis added), and we then cite many “relational thinkers” as the sources of our account. See *infra* note 27.

Michael Sandel, and others.²⁷ We have made no claim to originality in the arena of relational theory. Instead, we have always welcomed the opportunity to acknowledge this body of work. The cross-disciplinary contributions of relational scholars strengthened the foundation of the transformative model and helped to explain its alternative vision of conflict and conflict intervention. Anyone who had read even the first edition of *The Promise of Mediation* knew that this claim was false.

Our main point is this: This critique of the transformative approach to conflict intervention is simply the latest in Condlin's series of critiques of ADR generally, all of which are ideologically driven. But we suggest that the particularly extreme and unfounded attack made in this recent article stems from the fact that the transformative model is becoming intricately sewn into the fabric of the mediation field,²⁸ and that it has placed values front and center in a way that others in the field have not—values to which the author of this critique is vehemently opposed.²⁹ In sum, this critique is driven by ideology; but regrettably, instead of openly discussing the ideological dimension, Condlin resorts to mockery, a recognized tactic used to marginalize disfavored ideologies without genuine substantive engagement.³⁰

We certainly understand that not everyone in the mediation field subscribes to the values and practices of the transformative framework; however, we are confident that professionals in the field will think through their responses to this model and decide—

²⁷ See *Promise 1*, *supra* note 5, at 255–56; *Promise 2*, *supra* note 5, at 59–60, 250–58 [both works describing the roots of the relational vision in the work of Gilligan, Sandel, and many other thinkers in different fields].

²⁸ There are many objective signs that, over the past fifteen years, the transformative model has garnered an established place in the ADR field and is likely to continue to flourish, including: (1) the translation of *The Promise of Mediation* into seven languages, its use as the core text in graduate programs in conflict and dispute resolution, and its record as a best seller in the ADR field; (2) the success of numerous national and international conferences devoted to transformative practice in the US and abroad; (3) the inclusion of descriptions of transformative mediation in many law school ADR casebooks, and in major mediation texts; and (4) the organizational, financial and interpersonal success of the US Postal Service REDRESS mediation program, as well as many programs in mediation centers that rely upon the transformative model for addressing their cases. This momentum could be the real answer to the questions asked about the tone of Condlin's critique. As one writer has said, "Ridicule is a public confession of fear." Attributed to Vanna Bonta, American novelist, b. 1958, author of *FLIGHT*.

²⁹ Dr. Jeffrey Rubin, editor of the first edition of *Promise of Mediation*, predicted that "The fact that Bush and Folger are so frankly ideological and value driven" will disturb many readers. His prediction has been borne out, with Condlin's critique the latest and most extreme example. See Jeffrey Z. Rubin, *Foreword*, in *Promise 1*, *supra* note 5, at xii.

³⁰ See TEUN A. VAN DIJK, *IDEOLOGY: A MULTIDISCIPLINARY APPROACH* (1998).

on substantive grounds—whether and why it is, or is not, for them. Either way, it has become part of the lasting discourse of conflict intervention work and scholarship.³¹ We believe that future discourse about the transformative model—and about other important developments in the field—can and should be conducted in a manner that involves civil, substantive contributions on all sides, even when the differences involve deeply held beliefs.

³¹ Accepting the accomplishments and appeal of the transformative model of practice is very difficult—perhaps threatening—for one who insists that disputes be addressed in the adversarial mode that some experts on legal advocacy promote and provide. *See supra* note 10. Actually, despite Condlin's charge that the transformative framework is "exclusivist," our work acknowledges that the legal process is a useful and sometimes necessary means to address conflict (as is the conventional, problem-solving model of mediation). *See Promise 2, supra* note 5, at 260–66. We also suggest that transformative skills can be highly useful to lawyers engaged in traditional legal advocacy, and we discuss how those skills can be used in the lawyering process. *See Bush, supra* note 11, at 452–84.

