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# BEYOND THE TOOLBOX: VALUES-BASED MODELS OF MEDIATION PRACTICE

Robert A. Baruch Bush\*

## I. INTRODUCTION: THE “TOOLBOX” METAPHOR

In the 1990's, in a series of articles, mediation researcher Christopher Honeyman put forth the idea that there was a common set of core practices or skills that could be used as the basis for measuring competent performance in mediators.<sup>1</sup> Honeyman's work elaborated two main premises: first, that there is a “common core” of behaviors involved in the work of effective mediators; and second, that these behaviors are the means to an end that comprises the ultimate goal of mediation—achievement of an agreement that settles the parties' dispute. In Honeyman's work, it is clear that the meaning of “effectiveness” is success in attaining a settlement. Each of the elements he finds common to the work of the mediators he studied—investigation, empathy, persuasion, invention and distraction—is described in terms of their usefulness in promoting settlement, which is taken for granted as the goal of their work.<sup>2</sup> At the time of Honeyman's work, this conception of the goal of mediation—and the resulting view of how the process is most effectively conducted—was essentially unchallenged. That is, there was only one “model” of mediation known or imagined, and it was a model focused on the production of agreements.<sup>3</sup> Although differences in “styles” of practice had been identified and

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<sup>1</sup> See e.g., Christopher Honeyman, *Five Elements of Mediation*, 4 NEGOT. J. 149 (Apr. 1988) [hereinafter Honeyman, *Five Elements*]; Christopher Honeyman, *On Evaluating Mediators*, 6 NEGOT. J. 23 (Jan. 1990); Christopher Honeyman, *The Common Core of Mediation*, 8 MEDIATION Q. 73 (1990).

<sup>2</sup> Honeyman, *Five Elements*, *supra* note 1, at 153–55.

<sup>3</sup> See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION*, 55–68 (1994).

studied by researchers, all of these were regarded as stylistic variations on the common theme of how best to produce settlements.<sup>4</sup>

Honeyman's work led to the effort by several major ADR organizations to design a performance test based on that common core of mediation skills—the Test Design Project (TDP).<sup>5</sup> Honeyman's approach implied that mediators should all be familiar with the same basic “toolbox” of mediator methods. However, criticisms soon surfaced of the prototype test produced by the TDP,<sup>6</sup> with the result that its designers modified it to produce two “versions” aimed at incorporating the skills used in different approaches to the process, that is, different models of practice.<sup>7</sup> Subsequently, other mediator performance tests were proposed and used, some of them reflecting the “single toolbox” premise, but others geared to performance criteria for alternative models.<sup>8</sup>

From that time on, the idea slowly gained currency that there were different *models* of mediation in use, employing significantly different practices for different purposes.<sup>9</sup> That is, competent mediators were not simply selecting particular tools from a common toolbox. Rather, they were in effect using different “toolboxes” that contained different tools suited to the overall model of practice they were using—which differed from other models. This idea was expressed not only in articles about mediation but also in major mediation texts, and today it is found throughout the literature on mediation for both practitioners and academics.<sup>10</sup> Those

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<sup>4</sup> See DEBORAH M. KOLB, *THE MEDIATORS*, 2345 (1983); Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 *LAW & POL'Y* 7, 19–25 (1986); BUSH & FOLGER, *supra* note 3, at 59–63.

<sup>5</sup> Test Design Project, *Interim Guidelines for Selecting Mediators*, 7–10 (1993), *Reprinted in* Christopher Honeyman, *A Consensus on Mediators' Qualifications*, 9 *NEGOT. J.* 295–298 (1993).

<sup>6</sup> See, e.g., Richard A. Salem, *The “Interim Guidelines” Need a Broader Perspective*, 9 *NEGOT. J.* 309 (1993); Craig A. McEwen, *Competence and Quality*, 9 *NEGOT. J.* 317 (1993); Carrie Menkel-Meadow, *Measuring Both the Art and Science of Mediation*, 9 *NEGOT. J.* 321 (1993); Robert A. Baruch Bush, *Mixed Messages in the “Interim Guidelines”*, 9 *NEGOT. J.* 341 (1993).

<sup>7</sup> TEST DESIGN PROJECT, *PERFORMANCE-BASED ASSESSMENT: A METHODOLOGY, FOR USE IN SELECTING, TRAINING AND EVALUATING MEDIATORS*, 7–21 (1995).

<sup>8</sup> See Robert A. Baruch Bush, *One Size Does Not Fit All: A Pluralistic Approach to Mediator Performance Testing and Quality Assurance*, 19 *OHIO STATE J. ON DISP. RESOL.* 965, 986–99 (2004).

<sup>9</sup> *Id.* at 981–84.

<sup>10</sup> See e.g., JAMES J. ALFINI ET AL., *MEDIATION THEORY AND PRACTICE*, 109–96 (3d ed. 2013) (recognizing several models, which Alfini calls “orientations”); Grace E. D' Alo, *Accountability In Special Education Mediation: Many a Slip 'Twixt Vision and Practice?*, 8 *HARV. NEGOT. L. REV.* 201, 205–06 (2003) (“[M]ediation literature and practitioners commonly refer to three mediation models.”). See also Robert A. Baruch Bush, *Staying in Orbit, or Breaking Free:*

models include, among others: facilitative, transformative, and restorative justice (restorative) mediation.<sup>11</sup> Any careful study of these models of mediation shows that they differ from one another in many important ways that affect their users. Responsible mediation practice, use and regulation all demand recognition of the reality of the different models, and the differences among them.<sup>12</sup>

However, even though each of these models has been used and studied for many years, there is still a good deal of unclarity in the field about their differences, and their relative strengths and limitations, even among the practitioners who subscribe to a given model. Often questions are raised regarding whether the models can be combined, and if not, why that is so. Also, the transformative model, while many have understood and recognized its value, has remained confusing to others. Even the name of that model has engendered confusion—for example what exactly do transformative mediators aim to transform, and why does doing so matter to them? This Article is aimed at increasing clarity about the differences among the three models of mediation mentioned

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*the Relationship of Mediation to the Courts Over Four Decades*, 84 N.D. L. REV. 705, text accompanying notes 107-12 (2008) (identifying several distinct models).

<sup>11</sup> The models recognized by most authorities are the facilitative, transformative, and evaluative models. See *supra* note 10 and accompanying text. This Article focuses on the first two of these, plus the restorative model. The evaluative model is omitted because in the terms of this Article, it is in effect a strongly adversarial version of the facilitative model. See Dorothy J. Della Noce, *Evaluative Mediation: In Search of Practice Competencies*, 27 CONFLICT RES. Q. 193 (2009). Some commentators argue that the evaluative model is not really mediation at all. See Kimberlee K. Kovach & Lela P. Love, “Evaluative” Mediation is an Oxymoron, 14 ALTS. TO HIGH COSTS LITIG. 31 (1996); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. STATE U. L. REV. 937 (1997). See also *infra* text accompanying notes 22–35. On the other hand, the restorative model is included in this Article because of its widespread and growing usage in the United States and elsewhere, and its unique purpose and practices. See *infra* text accompanying notes 50–63; see also Russ Immerigeon and Kathleen Daly, *Restorative Justice: Origins, Practices, Contexts, and Challenges*, ICCA J. ON CMTY. CORR. 13 (1997); see generally MARK UMBREIT ET AL., *FACING VIOLENCE: THE PATH OF RESTORATIVE JUSTICE AND DIALOGUE* (2003). According to Umbreit and his colleagues, there are more than 300 restorative mediation (“victim offender”) programs in the U.S. and at least 1100 abroad. *Id.* at 11–12. Other models have emerged in recent years with some mediators following each, including narrative mediation, understanding-based mediation, and insight mediation. See ALFINI, *supra* note 10, at 115–17 and accompanying text. While these models could also be analyzed with the approach used here, doing so is beyond the scope of this Article, and each of these models has strong similarities to one of the three models analyzed here, so separate analysis would likely be repetitive.

<sup>12</sup> See Bush, *supra* note 8; Robert A. Baruch Bush, *A Pluralistic Approach to Mediation Ethics: Delivering on Mediation’s Different Promises*, 34 OHIO STATE J. ON DISP. RESOL. 459 (2019); Dorothy J. Della Noce et al., *Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy*, 3 PEPP. DISP. RESOL. L. J. 39, 53–61 (2002). See also *infra* notes 96–107 and accompanying text.

above, and at answering the questions that persist about combining the models and about the aim and value of the transformative model in particular. To accomplish this aim, the Article will offer a comparison of the three models on several levels, including an illustration of why each one might be chosen to address a specific conflict situation.

This comparison will show that mediators are indeed following distinct models of practice that are significantly different from each other, and that each one is itself internally coherent and integrated. In other words, within each model, the mediator's purpose, practices, and premises are all consistent and congruent; and when comparing each model to the others, these three levels are not only different but incompatible. Yet confusion persists because, although these models and their differences are recognized in the literature and identifiable in practice, many mediators and policy-makers do not clearly acknowledge them; even more, they are often discounted and ignored.<sup>13</sup> What is the reason for this persistent situation and confusion? To offer a preliminary answer to this question, scholars Dorothy Della Noce and Joseph Folger show in their work<sup>14</sup> that many mediators adopt and promote a "mythology" of mediation in which Honeyman's original conception of a "general toolbox" is a core construct,<sup>15</sup> and the two scholars argue that this mythology holds more sway than the kind of values- and research-based theories on which "models" of mediation are

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<sup>13</sup> See Della Noce et al., *supra* note 12, at 59 ("...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"); Dorothy J. Della Noce, *Communicating Quality Assurance: A Case Study of Mediator Profiles on A Court Roster*, 84 N. D. L. REV. 817, 817-18 (2008) ("The findings of this study suggest . . . that the differences in practice are not being taken seriously by the court or by mediators"); Joseph Folger, *Harmony And Transformative Mediation Practice: Sustaining Ideological Differences In Purpose And Practice*, 84 N. D. L. REV. 859 (2008) ("The field must overcome its reluctance to acknowledge and explore core differences among the major frameworks of mediation practice.").

<sup>14</sup> See Della Noce et al., *supra* note 12; Folger, *supra* note 13; Della Noce, *supra* note 13. The notes here and below in Part VII quote liberally from these sources because the work of Della Noce and Folger supports the text so clearly and powerfully.

<sup>15</sup> See e.g., David Hoffman, *Using Tools in a Toolbox*, MEDIATE (July 2, 2009), <https://www.mediate.com/david-hoffman-using-tools-in-a-toolbox-video/> [<https://perma.cc/DDE6-EQKX>] (employing the metaphor of using mediation techniques as one would use tools from a toolbox); Tracey-Leigh Wessels, *A Mediator's Toolchest*, TRACEY-LEIGH WESSELS, <https://www.traceyleighwessels.com/a-mediators-toolchest/> [<https://perma.cc/Q5XF-GBED>] ("The most powerful set of tools in a Mediator's tool chest is that of asking questions. Knowing how to use these tools, when to use these tools, and in what format these tools can be used is critical for not only breaking impasse but also for getting parties to the place of better understanding themselves, the nature of the conflict, as well as where the other party may be coming from.").

based.<sup>16</sup> They point to several reasons why this is the case. One reason is that the toolbox myth frees mediators from the need to explain what they do – to themselves or to any supervisory authority. Any tool from the toolbox can be justified by the demands of a particular situation and the individual judgment of the mediator. By contrast, practicing within a clear and coherent model means operating within constraints in which some practices are normative and others are not, and coherent justifications can be demanded for what a mediator does and does not do. The desire to practice without having to give such non-idiosyncratic justifications can be one strong motive to deny the reality of coherent models.<sup>17</sup>

At a deeper level, the mythology affirms and announces (for mediators and their potential clients) that mediation is a “value-neutral” practice, which does not reflect any underlying values or beliefs. It is just a practical, technical set of methods to help people settle conflicts and move on, no more value-based than car repair or plumbing.<sup>18</sup> In this vein, the author of this Article was once confronted by a critic whose advice about how to promote mediation was to “forget about models and values” and just offer practical techniques to mediation users, “like a car repairman.” This Article will show that such a “value-free” posture is just that – a posture, a pretense. The “how” of practice, the skills used, do not and cannot stand alone. Skills only make sense in terms of the goal being sought, what the mediator is trying to achieve; and seeking that goal must rest on some view of why it matters to the client. In

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<sup>16</sup> See Della Noce et al., *supra* note 12, at 43–44 (citing DEBORAH M. KOLB & KENNETH KRESSEL, WHEN TALK WORKS: PROFILES OF MEDIATORS 459 (1994)). (“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’. . . .As Kolb and Kressel noted, the research does not support these mythical explanations of mediation practice. . . .Yet the mythology persists. . . . It is apparently preferable to mediators, and even to some mediation experts, to protect the mythical frame and disregard contrary research findings. . . .”).

<sup>17</sup> See Della Noce et al., *supra* note 12, at 57. (“[T]he existence of distinct theoretical frameworks . . . ask [mediators] to justify why the particular *kind* of influence they embrace is appropriate and “good.”. . . [O]ne 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 value-based nature of differences among mediators, and the implications of those differences for practice and policy.”) The author of this Article has argued that recognizing different models of mediation is critical to creating sound policies on mediator ethics, pointing to work on negotiation ethics that recognizes the same need in that related field. See generally Bush, *supra* note 12, at 520–35.

<sup>18</sup> Della Noce et al., *supra* note 12, at 45–46 pointing to “an overemphasis on skills and techniques in the field of mediation . . . .The ‘how to’ emphasis frames mediation practice as a simple matter of skills application, uncomplicated by deeper theoretical considerations.”

other words, *how* I practice depends on *what* I'm trying to achieve, which is determined by *why* I believe that achievement has value to my client. For a professional, skills matter only when they are employed in the service of some valued end. Simply put, there is no value-free practice.

A full account of the reasons for recognizing that there are different models of mediation in use, and understanding both the models themselves and the field's resistance to taking them seriously, is offered in Part VII below after discussing each of the models mentioned above as described in the literature of the field. To illustrate how each model differs from the others and would have significantly different impacts on clients, the Article uses a hypothetical workplace conflict involving claims of mismanagement, favoritism, retaliation, and discrimination—although the analysis would be similar with cases from other contexts. The hypothetical case is described below, after which each of the three models is discussed in connection with the case. First, a word is in order about the concept of models of practice in general.

## II. WHAT MAKES A “MODEL” OF PRACTICE?

Mediation literature and training often advises mediators to “choose the best tool from your toolbox” to use at a given point in a session. However, this advice raises the question: “best” for what purpose? A carpenter has a toolbox with many different tools, but they cannot choose the right tool without knowing the purpose for which it will be used. In fact, although there is some overlap, different kinds of woodworkers have different toolboxes, containing quite different tools: if the purpose is homebuilding, the toolbox contains power saws, levels and nail guns; if a carpenter is making fine furniture the toolbox has chisels, planes and scrapers; if the purpose is to make a violin or cello, the toolbox includes calipers, gouges and wood bending tools.<sup>19</sup> Similar examples abound for different practitioners—doctors, physical therapists, teachers, and so on. It makes no sense to speak of taking “tools from a toolbox” without knowing the purpose for which they will be used. The

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<sup>19</sup> See *Making the Violin*, <http://www.makingtheviolin.com/Tools> [<https://perma.cc/WL2J-XRBP>]; Michael Pekovich, *12 Tools Every Furniture Maker Needs*, FINE WOODWORKING (Nov. 2010) <https://www.finewoodworking.com/project-guides/hand-tools/12-tools-every-furniture-maker-needs> [<https://perma.cc/58S9-UAC4>]; *Carpentry Tools*, MY CARPENTRY <https://www.mycarpentry.com/carpentry-tools.html> [<https://perma.cc/SZ5V-RK9Q>].

analogy points to the realization that different models of mediation use different methods to achieve different goals.

In fact, whether they acknowledge it or not, most mediators function at three distinct core levels that are connected to one another and integral to the mediator's "doing" of mediation. In other words, approaches to mediation can be distinguished at these three levels: *practices*, *purpose*, and *premises*. The three are clearly connected, but they can and should each be understood and described separately. The practice level describes the important methods and skills used by mediators trained and competent in a particular approach or model. The purpose level identifies the primary goal or purpose of the mediator as understood in this model, which provides the reason and justification for the practices: they are used because they are necessary or helpful to achieve this goal. The premises level articulates the beliefs or assumptions that underlie the mediator's identification of the specified goal as the one that clients value and seek to achieve.<sup>20</sup>

To illustrate these three levels more concretely, with brief reference to the first of the models discussed below, the facilitative model:<sup>21</sup> Some of the key practices of this model are controlling the flow of information by using prescribed ground rules and pointed questioning, organizing the discussion of issues by agenda setting, and generating movement toward agreement by methods such as devil's advocacy with each party. The goal that justifies and explains the use of these practices is the achievement of an agreement on disputed issues. The premises that underlie this understanding of the goal of mediation include, among others, the belief that the parties suffer from a variety of cognitive and emotional deficits that make reaching agreements by themselves very unlikely. Such beliefs explain why the mediator thinks that parties want and need their help to reach an agreement, and that purpose in turn explains why the mediator uses various methods of control in their practice. In other words, the logic of any model is that its premises define its purpose, which in turn drives its practices. Or, as stated above, *how* I practice is driven by *what* goal I'm seeking, which is defined and justified by *why* I think that goal matters to my client. The coherent integration of these three levels is what constitutes a model of practice as discussed in this Article.

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<sup>20</sup> See Della Noce et al., *supra* note 12, at 45–48. Della Noce shows how premises, which involve ideology or belief systems, underlie mediators' goals and practice, although practitioners and even scholars tend to ignore this level of the process.

<sup>21</sup> See *infra* text accompanying notes 22–35.



The following sections discuss how purpose, practices and premises are understood in the three models of mediation in common use as identified above—the facilitative model, the transformative model, and the restorative model. To be clear about the impacts of using each model, the following case example is integrated with the discussion of each model.

### III. THE GREENVILLE COMMUNITY CENTER CASE

*Maria Serra was the Director of Greenville Community Services Center, a nonprofit social services agency providing assistance to low-income residents of Greenville, New Mexico. The Center's clients were primarily BIPOC individuals, mostly Latino, and Maria herself was a Chicana (Mexican American). Trained as a social worker, she rose to become Director of the agency, and in the next several years she grew the Center into one of the leading community agencies in the state. She obtained several major grants to support the Center's work, and she launched a community outreach campaign that brought in many new clients. Under her leadership, the Center became an important voice for the community's low-income residents on issues such as policing and housing needs, as well as others. In her own eyes, Maria felt that she had "put the Center on the map."*

*However, Maria's knew that her administrative and management skills were not the greatest; so after a year or so as Director, she hired a close friend (Julie) from outside the agency as Assistant Director and, at the same time, promoted another close friend within the agency (Rick) to the position of Case Manager. As Assistant Director, Julie handled budgeting and financial reporting, purchasing, payroll, personnel, etc.; and as Case Manager, Rick assigned cases and monitored all the casework done for clients. Maria felt that Julie and Rick were great at these jobs, while she concentrated on handling the Center's external relations with funders, other agencies, the community, and government officials.*

*Not long after these two hiring decisions, trouble started. When Maria hired Julie as Assistant Director, she took that position away from Terry, who was the longest-term employee of the Center and who had handled center administration for several years. Maria made Terry the Project Director of a special adult literacy project – a small drop in salary but a large drop in power and prestige. Terry was very upset but held his anger back while he "built a record" against Maria and her two friends Julie and Rick. He talked to other coworkers who were disaffected by the*

changes, especially Janet, who was the best caseworker in the Center and felt that she, not Rick, should have gotten the Case Manager job. Janet was best friends with Len, the bookkeeper, who knew all the financial business of the Center.

Terry found out from Len and Janet that Julie's current budget failed to fully account for a large portion of the grant funds the Center had received. Unless the discrepancy was cleared up in the next few months, Len said, it would show up in the Center's annual report to funders, and there was a good chance that they would demand the return of \$200,000 in unspent funds and revoke commitments for future funding. Janet also told Terry that one of the caseworkers (Cindy) had missed several client visits, because of which a child had been neglected by a parent and injured, and a child abuse investigation was initiated in which the Center could be exposed to liability. Terry and Janet agreed that it was Rick's fault for failing to monitor the caseworker. They also agreed that Maria had done nothing about these mistakes because she was covering up for "her friends." Terry confronted Maria with these charges and demanded that she do something.

Instead, Maria charged Terry with insubordination, and demoted him to an ordinary caseworker position. Fuming at her decision, Terry contacted the President of the Center's Board, told him about the failings of Rick and Julie, and charged Maria with covering things up and with retaliating against him.

The Board's President, Tom Reynolds, convened the Board and interviewed Terry, Janet, Len, and Cindy. They decided the matter was indeed serious, involving credible allegations of mismanagement that might have stark consequences for the Center. The Board therefore asked Maria to give them a written report on these charges and to appear before them to answer questions. Maria postponed filing the report three times, and when it was finally filed it provided only a vague explanation of the budgetary discrepancy and the casework supervision failure and made no mention of the cover-up/retaliation charge.

Then Maria failed to appear twice for her scheduled meeting with the Board. She did appear on the third date but refused to answer specific questions. Instead, she insisted that, according to her contract, she had full authority for all the decisions made and no duty to account for her actions to the Board except in her annual report, which was not due for several months. She accused the Board of trying to micromanage the Center's affairs, which it had no right to do, and of questioning her integrity. Finally, she suggested that this entire matter might well be racially motivated, since the complaining staff members (Terry and Janet) and most of the Board (including Tom Reynolds) were white, while she

and her two top staffers (Julie and Rick) were all Latino. She stormed out of the meeting, threatening to quit and take her top staffers with her. Her last comment was that, if the Board did not back off, she would quit and file a race discrimination lawsuit against the Center.

During all this, the Center's work has been badly disrupted. The staff split into factions, tension is high, and client services are suffering. Preparation of financial reports to funders has been put on hold, since Julie and Len aren't even speaking – but the reports are due shortly. While the conflict has not yet become known outside the Center, things have gotten even worse following Maria's confrontation with the Board, and no one knows what might happen next.

Like all the Center's Board members, Tom Reynolds is a dedicated community servant who is proud of his service on the Board and who cares deeply about the Center's work and its value to Greenville's less fortunate citizens. He and all the Board members were badly stung by Maria's accusations of racism. Clearly, she was upset and emotional, but if she really has those suspicions about them, it not only hurts at a personal level, it also raises questions about whether and how they can all work together in the future. Reynolds hopes the situation can be handled in a way that makes this possible – but that also brings Maria's management practices into line, without delay.

Maria's contract with the Center includes a mediation clause providing that "all disputes arising out of the employment relationship governed by this contract shall be addressed first by mediation, before any other action is taken." Reynolds asks the Board's lawyer to find a good mediator to handle this situation. The lawyer has learned at CLE programs that some experts believe different mediators use different "models" of mediation. But colleagues have said that all mediators use similar methods, and that the main thing is to find one who has a good record of achieving settlement agreements.

To find a "good mediator," the lawyer first needs to know which of these views is valid: Are there different "models" of mediation being used by different mediators, or is there one basic approach in which different mediators have different success rates?

#### IV. FACILITATIVE MEDIATION: PURPOSE, PRACTICES, PREMISES – AND IMPACTS

As discussed above in Part II, the answer to the lawyer's question depends upon whether there are indeed differences in the practices, purpose and premises underlying supposedly different "models" of practice. One main thesis of this Article is that there are indeed such differences, and they will be explained in both this and the following Parts of the Article. Each Part will also include an analysis of how the model under consideration might "fit" as a choice for the Center in the Greenville situation.

Before proceeding, the author of this Article notes two important caveats regarding the analysis that follows. First, the description in this Article of each of the three models is necessarily a summary of key elements, especially as to practices and premises. At the same time, the descriptions given here are not arbitrary projections, they are all drawn from published research and scholarship, and citations are included to fuller treatments of each model in that literature. Second, as will become clear from the analyses of applications to the Greenville scenario, a case can be made for using *each* of these models, depending on how the Greenville facts are interpreted. In other words, the aim of this Article is *not* to show that one model is unequivocally best, either in this situation or any other. Rather, it is to show that the impacts of using each model would be different, and possibly preferable, depending on how the facts are understood and how the goals are prioritized.<sup>22</sup> The comparison starts with the facilitative model, since it is the one in widest use today.

##### A. Purpose

The facilitative model is probably what most people imagine mediation to be when they first hear about the process. In this model, the goal of a mediator is to have the parties reach an agreement on the matters in dispute.<sup>23</sup> As discussed below, it is assumed

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<sup>22</sup> See *infra* Parts IV.D, V.D, and VI.D.

<sup>23</sup> See *e.g.*, Della Noce, *supra* note 14, at 786, 797–99. Della Noce's study is one of the only empirical investigations that identifies which model of mediation is most frequently followed by mediators. The model's focus on the goal of agreement was central to Honeyman's early research on mediator practices, see *supra* note 1, which elaborated two main premises: first, that there is a "common core" of behaviors involved in the work of effective mediators; and second,

by the mediator that this is what the parties are seeking when they come to mediation. There is some variation within the model about the “quality” of the agreement sought. In the view of some, the aim is simply to reach any agreement that the parties themselves find subjectively acceptable; for others, the aim is seen as reaching an agreement that is not only acceptable to the parties, but also meets some objective standard of fairness, optimality, or other marker of quality.<sup>24</sup> For all, reaching an agreement of some sort is the purpose of mediation and the definition of success.

### B. *Practices*

Because there is variation within the facilitative model regarding the view of mediation’s goal, there are also variations in the practices used, although there is a great deal of commonality. In effect, we can speak of two versions of facilitative mediation—the positional version and the problem-solving version.<sup>25</sup> To describe

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that these behaviors are the means to an end that comprises the ultimate goal of mediation – achievement of an agreement that settles the parties’ dispute. Each of the elements he finds “common” to the work of the mediators he studied is described in terms of its usefulness in promoting settlement, which is taken for granted as the goal of their work. *See e.g.*, Honeyman, *Five Elements*, *supra* note 1 at 153–55.

<sup>24</sup> *See* Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 90–96 (1981); Leonard L. Riskin, *Mediation Training Guide (2004)*, DISP. RESOL. AND LAWS. 362, 365–74 (4th ed. 2009). For Stulberg, the only standard for an agreement is that it be mutually acceptable to the parties. For Riskin, the standard is that it be acceptable, that it satisfies the parties’ underlying needs, and that it be fair to the parties and affected outsiders.

<sup>25</sup> While Stulberg and Riskin do not use these terms about mediation, Riskin does recognize and use these labels for the two approaches to negotiation on which these versions of facilitative mediation are based. *See* Stulberg, *supra* note 24, at 178–86. Regarding the different versions these two scholars present of the facilitative model; Stulberg presents an approach in which the mediator assists in what is largely a positional or “adversarial” bargaining process of mutual concessions between the parties. *See* JOSEPH B. STULBERG & LELA P. LOVE, *THE MIDDLE VOICE* 53–131 (3d ed. 2019). Riskin, by contrast, portrays the mediator as assisting parties in a “problem solving” process based largely on identifying and working with their complementary needs and interests. *See* Riskin, *supra* note 24, at 365–74. Stulberg’s approach has evolved somewhat over the years since his classic “Theory and Practice” article cited *supra* note 24. For example, he now includes the “needs/interests” construct in his analysis. *See* JOSEPH B. STULBERG & LELA P. LOVE, *THE MIDDLE VOICE* 53–131 (3d ed. 2019). But his approach nevertheless follows the same basic steps and strategies outlined in the earlier article. Indeed, the essence of his approach, and its difference from Riskin’s, is captured by the acronym Stulberg now uses to summarize the mediator’s activities through the process, “BADGER.” While the activities described are similar, the acronym connotes a process in which the mediator “badgers” and pushes the parties into an agreement. *See* JOSEPH B. STULBERG & LELA P. LOVE, *THE MIDDLE VOICE* 50 (3d ed. 2019). (The steps denoted by the acronym are: begin, accumulate information, decide

first the practices common to both versions, in both, the mediator leads the parties through a sequence of stages: opening the session and setting ground rules, gathering information, defining issues, generating options, generating movement, and achieving agreement and closure.<sup>26</sup> The labeling of these stages differs according to different authorities, but the commonalities are clear, as to both the goal and the means to achieve it. There is also some commonality as to the “best practices” or strategies for mediators to use in moving through these stages and securing an agreement. Some of the mediator *practices common to both* versions include: maintaining firm mediator control over the process throughout all the stages; using ground rules and turn-taking to control the flow of information; asking questions to elicit basic information about the matters in dispute; focusing discussion on future commitments and not past events and grievances; limiting strong emotional expression; focusing discussion on material rather than intangible matters; reframing parties’ comments to soften harsh language and sharp disagreements; and using separate meetings (caucuses) to work with each party alone to generate movement and explore solutions.<sup>27</sup>

However, the two versions of facilitative mediation each follows some *practices different* from the other. In the positional version, questions are used to identify the differences between the parties on the facts and negotiating positions, and to probe the parties for additional facts and for their willingness to make concessions and change positions. Caucuses are used to “play devil’s advocate” with each party by highlighting the weaknesses of their case and the strengths of the other party. They are also used to float hypothetical deals based on possible reciprocal concessions, without requiring commitments by either side until it appears that

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on the agenda, generate movement, elect separate meetings, reach closure.) By contrast, Riskin, although he moves through similar stages and activities, frames them as inviting and leading the parties into a mutual problem-solving discussion. This is the difference to which the text refers in the two “variations” of the facilitative model, although there is some overlap between them.

<sup>26</sup> See e.g., ALFINI, *supra* note 10, at 103–05, 109–37.

<sup>27</sup> See Robert A. Baruch Bush, *Mediation Skills and Client-Centered Lawyering: A New View of The Partnership*, 19 CLINICAL L. REV. 429, 436–39 (2012). Bush contrasts these practices with the very different ones of the transformative model. For example, he contrasts the centrality of direct questioning of the parties in the facilitative model, with the practice of “reflection” in the transformative model, which almost completely avoids asking direct questions. See *infra* text accompanying notes 50–63. However, there is some anecdotal evidence that facilitative mediators have begun to shift their practice toward greater use of reflection and less use of direct questioning. See conversation with Mediator Peter F. Miller, on file with the author of this Article.

a deal can be reached.<sup>28</sup> In effect, the mediator acts as a surrogate negotiator for each side with the other. In the problem-solving version, questions are used to probe for the “needs or interests” underlying the parties’ stated positions, so that the mediator can reframe those positions into interests in further problem-solving discussions. Caucuses are then used to lead the parties in exploring their complementary interests to reveal possible mutual-gains solutions.<sup>29</sup> In effect, the mediator acts as an expert problem solver for both sides.

All the practices described above, including those common to both versions and those unique to each, are adopted because they all make it more likely—and in fact are necessary—to reach the agreement that is the goal of the process. In other words, the mediator’s purpose drives their practice. Indeed, if these practices were to be criticized as being too controlling or directive in a process supposedly based on self-determination, the likely response would be that the goal of agreement simply cannot be achieved without using them.<sup>30</sup>

### C. *Premises*

This last point, regarding the necessity of the mediator’s practices of control, relates directly to the final “level” of the model, its underlying premises or beliefs. The most important of these beliefs concern the human beings who are the parties to the process and the clients of the mediator, especially the assumptions the model makes about the motivations and capacities of those parties. The facilitative model posits, probably based on insights from economic theory and psychology, that human beings are primarily interested in satisfying their self-defined needs and interests, but ironically they are deficient and flawed in their capacity for rational decision making about those interests and in their capacity for empathetic consideration of others.<sup>31</sup> Therefore, when facing another party in

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<sup>28</sup> See e.g., Stulberg, *supra* note 24, at 97–106.

<sup>29</sup> See e.g., Riskin, *supra* note 24, at 368–74.

<sup>30</sup> See Bush, *supra* note 8. Bush analyzes multiple mediator performance tests and shows that most include measures that focus on one or the other of the two versions of facilitative mediation discussed in the text. That is, mediators are most often evaluated in terms of their skills in one of the two versions of facilitative mediation.

<sup>31</sup> The premises or beliefs underlying the facilitative model are rarely if ever articulated in the literature of that model itself. See Della Noce et al., *supra* note 12, at 56–58, where the authors note and offer explanations for this lack of attention to premises or ideology in the

conflict, parties negotiating on their own are likely to make decisions and take actions that harm both themselves and each other. To avoid those harms, the assistance of a mediator is essential, and that mediator must use practices of control that prevent the likely harm to self and others.

The bases for this view of party “deficits” in rationality and empathy, although they were presumed without explanation for many years, were explicated in the literature on “strategic and cognitive biases” in negotiation that emerged beginning in the 1990s.<sup>32</sup> In that literature, it was shown how the “game-playing” or strategy inherent in the negotiation process usually places barriers in the way of rational decision-making, so that even supposedly rational actors tend to make decisions that do not serve their own interests.<sup>33</sup> It was also shown that the supposed rationality of the human thinking process is distorted by inherent, hard-wired biases in human cognition, which limit the capacity to think clearly and understand both one’s own interests and the other party’s motivations and interests.<sup>34</sup> Many of these biases lead each side to be

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mediation literature. However, the premises of the facilitative model can be inferred from the literature on the negotiation process that serves as the basis for facilitative mediation. That literature does articulate beliefs like those stated in the text. See, Robert A. Baruch Bush, “What Do We Need a Mediator For?": Mediation’s “Value-Added” for Negotiators, 12 OHIO STATE J. ON DISP. RESOL. 1, 6–21 (1996).

<sup>32</sup> *Id.*; see also *infra* notes 33–34.

<sup>33</sup> See DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 29–40 (NY: Free Press, 1986). Lax and Sebenius, in their discussion of the problem of strategic behavior, articulate how the tension between the opportunities to claim value and to create it leads to rational but ironically self-defeating strategic behavior. Dealing with this “negotiator’s dilemma” is the task of the negotiator, but it is quite a difficult one, and the failure to “manage” the dilemma effectively often results in sub-optimal bargains, if not impasse. Lax and Sebenius base their work on earlier work on strategic bargaining and game theory by Schelling and Raiffa. See THOMAS C. SHELLING, *THE STRATEGY OF CONFLICT* (1960); HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982); see RICHARD E. WALTON & ROBERT B. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS* (McGraw Hill, 1965).

<sup>34</sup> See MARGARET A. NEALE & MAX H. BRAZEMAN, *COGNITION AND RATIONALITY IN NEGOTIATION* 41–43 (Free Press, 1991). Neale and Bazerman point to the work of Kahneman and Tversky as the seminal work on “cognitive heuristics.” See e.g., Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263 (1979); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *SCIENCE* 453 (1981). As Neale and Bazerman put it, “Kahneman and Tversky . . . provided critical information about specific, systematic biases that influence judgment; they also suggest that decision makers rely on simplifying strategies, called cognitive heuristics, to make decisions, [whose] use can sometimes lead to severe decision errors.” Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *SCI.* 43 (1981). Some of the major work translating the insights on cognitive biases to the negotiation context has been done by Neale, Bazerman, Ross, Tversky and colleagues working with them. See, e.g., Margaret



confused about its own interests and suspicious of the other side's motives, even when there are no actual grounds for suspicion. The effect of these cognitive biases is to blind parties to advantageous agreements, no matter what negotiation approach they take.

Given this "deficit" view of the human capacities for rationality and empathy, it makes sense to believe that without third-party interventions that reduce strategic and cognitive barriers, parties in conflict will fail to reach agreements even where that is everyone's goal and where agreements are actually attainable. In short, the model's underlying premises about parties' deficient cognitive and empathetic capacities explain why facilitative mediators need to use the controlling practices described in the preceding section. Facilitative practices have the effect of overcoming those deficiencies and the barriers they create, thereby achieving agreements that would otherwise not occur, which is exactly the help the parties want from a mediator.<sup>35</sup>

#### D. *Impacts in the Greenville Case*

Based on the foregoing examination of the three levels of the facilitative model, it is possible to suggest what might be the impacts of using that model—i.e., retaining a mediator who follows it—in the Greenville Center case.

One of the key facts in this case is that, absent a speedy resolution of the parties' differences, the financial reports required by funders will reveal major discrepancies and put continued funding in jeopardy. But given the parties' suspicions of one another's motives—by Maria, and by the complaining staff members—it is hard to see how the parties on their own will reach any agreement that will put the Center's operations back on track in a timely way. In addition, lapses in supervision of the work being done with clients

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A. Neale & Max H. Bazerman, *The Effects of Framing and Negotiator Overconfidence on Bargaining Behavior and Outcomes*, 28 *ACAD. MGMT. J.* 34 (1985); Max H. Bazerman & Margaret A. Neale, *The Role of Fairness Considerations and Relationships in a Judgmental Perspective of Negotiation*, in *BARRIERS TO CONFLICT RESOL.* (Kenneth J. Arrow et al. eds., 1995); Lee Ross & Constance Stillinger, *Barriers to Conflict Resolution*, 1 *NEGOT. J.* 389 (1991); Lee Ross & A. Ward, *Psychological Barriers to Dispute Resolution*, 27 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 255 (1995); DANIEL KAHNEMAN & AMOS TVERSKY, *CONFLICT RESOLUTION: A COGNITIVE PERSPECTIVE*, *BARRIERS TO CONFLICT RESOL.* 44 (1995). My colleague Peter Miller suggests that another barrier to resolution is that the experience of conflict is itself like an intoxicant that induces irrationality and blocks agreements despite self-interest.

<sup>35</sup> See Bush, *supra* note 31, at 12–14; *infra* Table One.

threaten to expose the Center to legal action; but once again the mutual suspicion and hostility of Maria and senior staff make agreement about improvements in supervision unlikely. Therefore, the firm hand of a facilitative mediator driving the parties toward agreement seems needed to overcome the mutual suspicions and other barriers to settlement that exist.

At the same time, Maria is a key factor in the Center's success, and her perception of racism seems to threaten both her continued cooperation in the Center's work and its reputation in the outside world. Strong settlement pressure from a mediator could cause Maria to resist and react, perhaps even "going public", so that facilitative practices might be counterproductive.

On the other hand, the facts could be read to indicate that, while Maria has been important to the Center, her view of her importance may be subjective and inflated, while the errors made in finances and supervision are objective and serious. If the facts are read this way, the devil's advocacy skill of a facilitative mediator could succeed in deflating Maria's resistance to the Board and make agreement more likely. And even if Maria "goes public," the good work of the Center over many years could well be enough to overcome the bad publicity of sudden charges of racism.

This analysis supports the choice of a mediator using the facilitative model, whose practices should be able to achieve the goal of agreement and its positive effects, despite the current acrimony. One final point, though, is that facilitative practices are unlikely to reduce or eliminate that acrimony itself, so that the ongoing working relationships, within the Center and between Maria and the Board, may not improve—or may even worsen in the long run. Whether that is a risk worth accepting, given the other positive impacts of facilitative mediation, is a key question for Tom Reynolds and the Board.

## V. RESTORATIVE MEDIATION: PURPOSE, PRACTICES, PREMISES – AND IMPACTS

The restorative justice model of mediation (herein "restorative mediation") is another model of practice which, although not usually compared to the facilitative model, is very widely used today, especially in certain conflict arenas. In terms of numbers of cases mediated, it is probably second only to facilitative mediation. It has a unique background, with origins in two very different cul-

tures—non-western indigenous communities, specifically in Australia and New Zealand, and religious communities in North America, specifically in the Mennonite and similar traditions.<sup>36</sup> Despite these two seemingly very different sources, both rooted in traditional communities of different kinds, the restorative model has gained acceptance in secular contexts in modern western countries, especially in conflicts involving juvenile criminal cases and conflicts in schools, but also in family and community disputes and even commercial cases.<sup>37</sup> Its purpose and premises are quite different from the facilitative model, but its practices bear some similarities to that model. Those practices, as discussed below, are used both in cases of interpersonal conflict between two parties, and in cases with multiple parties within or between different groups.<sup>38</sup>

### A. Purpose

In the restorative model, the primary goal of the process is to repair a breach in some relationship, interpersonal or intracomunal, that has occurred in the course of a conflict between individuals or members of a community. The aim is not simply to achieve an agreement about future behavior, or about addressing past disagreements; rather, the aim is to achieve the full reconciliation of the parties to the conflict, and to restore their relationship to its prior state of friendship and unity. It may be that agreements are made, but the real aim is full reconciliation between the parties, healing of the harm done, and restoration of their prior relationship. A secondary goal, considered a prerequisite for reconciliation, is acceptance of shared responsibility by all parties for whatever has occurred to create the breach in the relationship or community.<sup>39</sup>

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<sup>36</sup> See Immerigeon and Daly, *supra* note 11, at 13; Jennifer Michelle Cunha, *Family Group Conferences: Healing the Wounds of Juvenile Property Crime in New Zealand & The United States*, 13 EMORY INT'L L. REV. 283, 292–93, 326 (1999); Jharna Chatterjee & Liz Elliott, *Restorative Policing in Canada: The Royal Canadian Mounted Police, Community Justice Forums, and the Youth Criminal Justice Act*, 4 POLICE PRAC. & RSCH. 347, 348–50 (2003).

<sup>37</sup> See e.g., Cunha, *supra* note 36, at 285–88; Chatterjee and Elliott, *supra* note 36, at 350–55; TREVOR FRONIUS ET AL., RESTORATIVE JUSTICE IN US SCHOOLS: A RESEARCH REVIEW 1-13 (2016); Lauren Abramson and David B. Moore, *Promoting Positive Peace One Block at A Time: Lessons from Innovative Community Conferencing Programs*, MOVING TOWARD A JUST PEACE 189, 190–91 (2014).

<sup>38</sup> See e.g., *id.* at 197–200.

<sup>39</sup> See Cunha, *supra* note 50, at 293–96. Cunha notes the strong influence of the work of John Braithwaite, who emphasizes the aim of “reintegration” of offenders in the community, which

## B. Practices

Restorative mediation practices are found in various forms, although there are common elements in all the forms. Sometimes the practices are applied to traditional one-to-one interpersonal mediations, and this is usually called “victim-offender” mediation. In other contexts, the practices are used in “group conferencing,” in which multiple individuals participate in a discussion of the conflict, all of whom are connected to the matter in some way, either as direct parties, allies, or members of a surrounding community.<sup>40</sup> Whatever the form of the engagement, certain practices are commonly followed by the intervener (mediator or facilitator). Some of these practices resemble those of the facilitative model, but most are unique to this second model.

In general, as in the facilitative model, there are set “stages” in restorative mediation sessions and the mediator is in firm control throughout all of them.<sup>41</sup> Almost always, and uniquely in restorative mediation, the mediator meets with each party separately

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requires reconciliation after admission of responsibility and forgiveness. *Id.* at 293–96 citing JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989). Mark Umbreit, a leading practitioner, researcher and advocate of the restorative model, agrees that Braithwaite’s concept of reintegration is central, and that “accountability, healing, and closure” are the aims of the model. See Mark S. Umbreit, *Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment*, 1 WEST. CRIMINOLOGY REV. (1998). Mediation scholar Joseph Folger identifies reconciliation as the central purpose of restorative mediation and associates it with what he calls “harmony ideology.” See Folger, *supra* note 14, at 827–30. He argues that this ideology, and the model of intervention it supports, are found in contexts other than schools and juvenile crime, such as church groups and religious communities.

<sup>40</sup> See Immarigeon and Daly, *supra* note 11, at 2–6. See also Abramson and Moore, *supra* note 37, at 190–91 (“Th[e] emerging Conferencing movement was . . . part of the broader international ‘restorative justice’ movement, which began [with Victim-Offender-Mediation programs] in Canada and the US in the early and mid-1970s. . . . By the mid-1990s, Conferencing was routinely described as a ‘restorative justice process’. . . . However, the archetypal restorative scene involves reconciliation between two individuals, one of whom has harmed the other. In contrast, the archetypal Conferencing scene is a group seated in a circle, reaching collective agreement. Furthermore, Conferencing shares values and practices with several other social movements. One such movement, with origins in North American (and other) indigenous traditions, promotes the use of “circles”. . . . [B]ecause of convergence between the Conferencing and Circles movements, [conferencing programs spread from] Australia to Canada in 1996.”).

<sup>41</sup> See Cunha, *supra* note 36, at 301–09. The practices described in the text below are common among most restorative mediation practitioners, including “group conferencing” programs. Commentators say that the larger restorative justice “movement” originated with these third-party processes, although that movement as a whole goes beyond them. See e.g., Immarigeon and Daly, *supra* note 11. However, that broader movement is beyond the scope of this Article. The subject here is the mediation model that first defined the practice of a restorative approach and the common practices followed in this model. See also *supra* text accompanying note 22, regarding the limits of the descriptions of practices and premises presented in this Article.

before the joint meeting—unlike the usual practice of meeting separately or caucusing during the session. In that preparatory meeting, the mediator previews for the party what will happen in the joint session and informs them of what they will be expected to do to, in order to accomplish the reconciliation that is sought.<sup>42</sup>

In the joint session,<sup>43</sup> the party who is seen as the “victim” is first prompted by the mediator to give his/her account of what happened to them in the conflict, and especially to describe the emotional impact of victimization (although statements of physical impacts are also welcomed). The mediator intervenes with questions to make sure that the victim’s account is complete and vivid, checking to see that the other party appreciates the victim’s experience. Following the victim’s “impact statement,” the “offender” is directed to respond with their account of the situation, but that account must also include their admission or confession of responsibility for what happened, and an apology to the victim, which is again often prompted by the mediator’s questions so that it seems complete and authentic. The victim is then offered the chance to question the offender, but s/he is also encouraged to also accept some degree of responsibility for the events and, ultimately, to express his/her forgiveness to the offender. Once all this has happened, all are prompted by the mediator to recognize and describe their positive feelings about reconciliation. Finally, the session is moved by the mediator into a new, problem-solving stage aimed at developing a concrete behavioral plan for how to avoid future conflicts between the parties—which is again directed and led by the mediator. Where the process includes multiple parties in “circle” format, all the previous elements are found, but in addition the mediator focuses on each participant in turn, and prompts statements of shared responsibility, reconciliation, and future commitments from all of them. At all stages, even when discussion becomes highly emotional, the mediator discourages participants from leaving before the confession/forgiveness/reconciliation process is complete.

Clearly, some of these practices mirror those of the facilitative model, in terms of the mediator’s control and direction of the pro-

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<sup>42</sup> Cunha, *supra* note 36, at 301–04. The regular practice of meeting separately with each party before a joint meeting is a notable difference with the practices of the other models discussed in this Article.

<sup>43</sup> *Id.* at 301–09; Folger, *supra* note 14, at 835–40; Abramson and Moore, *supra* note 37, at 191–94. The practices mentioned in the text, regarding the conduct of the joint meeting, are reported by all the cited authors as standard practices in the restorative model.

cess and probing of the parties with questions, as well as the mediator's efforts to prevent anyone from ending the session before the process is "complete." The mediator's directiveness is even greater in this model,<sup>44</sup> controlling who speaks and when, and prompting specific responses from all the parties at specific times. In those responses, the mediator not only allows but encourages and even pushes for strong emotional expression, on both sides, in clear contrast to the facilitative model. Additionally, the element of pushing for admissions of shared responsibility is unique here.

### C. Premises

As with the other two models, the basis for the restorative model's view of the purpose and proper practices of mediation stems from the premises that underlie the model, particularly the beliefs it reflects about the nature, motivations and capacities of human beings who participate in the process. By contrast to other models, which give significant place to the view of human beings as separate individuals seeking their own ends, the restorative model presumes that in essence people experience themselves as interconnected parts of a social entity or organic whole, and they are motivated by a need and desire for belonging and acceptance, and the need to have their place in that organic whole.<sup>45</sup> Conflict sepa-

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<sup>44</sup> This aspect of restorative mediation is emphasized in David Williamson's plays, based on mediations the playwright observed in Australia, in which the facilitator is extremely controlling and directive, even manipulative (as for example in "*A Conversation*", which depicts a session in which the families of a murder victim and the murderer meet), as he seeks to have each of the multiple parties accept a share of responsibility for the events that occurred. See DAVID WILLIAMSON, *JACK MANNING TRILOGY: FACE TO FACE/A CONVERSATION/CHARITABLE INTENT* (2002); David B. Moore, *WILLIAMSON'S JACK MANNING TRILOGY: A STUDY GUIDE* (2003).

<sup>45</sup> See Folger, *supra* note 14, at 827–30; Cunha, *supra* note 36, at 292–98, 303–09, 337–40; HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* 189 (1990) ("New tissue must grow to fill the space where the old was torn away. The proper conditions and nutrients must be present to allow the new to grow. There must be safety and cleanliness and time. Sometimes there is a scar, and sometimes there is impairment. But when it is healed we can move and function and grow. And through our experience of wounding and healing, we can have some understanding of the conditions which brought about . . . that healing. [Then] we can work to change the former and to offer the latter to others who are wounded."). See also Peter Adler et al., *The Ideologies of Mediation: The Movement's Own Story*, 10 *LAW & POL'Y* 317, 323–24 (1988) ("In [Mennonite Conciliation Service's] self-description 'peace' is a key term. Peace stands in opposition to alienation, which keeps people isolated, estranged or in a state of otherness. In dramatic terms, the MCS might be described like this. The scene is the changing world of the religious community. The act is one of conciliation-bringing together, making friends, making peace. The agents in this drama are trained mediators and mediator teachers, the Mennonite congregation and people in society at large. The agency through which this occurs is dialogue,

rates them from the whole and from each other, and motivates a drive to heal the breach, restore the whole, and regain their place within it. That whole may be an important relationship, like a friendship or family, or a larger community like a school or neighborhood or affinity group, or even a business organization. Whatever the context, the premise is that the lost sense of connection is devastating to everyone and to the whole. At the same time, while this is not explicitly stated, the restorative model rests on the implicit premise that despite their desire for belonging, human beings have deficits in their capacities for connection and empathy.<sup>46</sup> The resulting breaches in relationship and community are therefore hard to avoid and difficult to heal, and people need and want interveners to help them repair those rifts when they inevitably occur.

The challenge of overcoming parties' deficits in empathy requires restorative mediators to be especially forceful and even intrusive, using parties' feelings of guilt, remorse, shame and regret to elicit admissions of responsibility, apologies, and expressions of forgiveness.<sup>47</sup> Indeed, one of the primary authorities on restorative mediation describes the process as one involving "reintegrative shaming," in which the offenders are first shamed for their behavior and then, after accepting responsibility are forgiven and welcomed back into the community or relationship.<sup>48</sup> The language used in the model, as noted, openly alludes to moral concepts of shame, confession, and forgiveness, which is understandable in a model based on traditional and religious cultures, both non-western and western.<sup>49</sup> Restorative premises thus have a character

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that is, "respecting differences"; listening; practicing respect, openness and love; and protecting the other's integrity, and using and teaching mediation. The purpose is unity, understanding. . . and spiritual peace.").

<sup>46</sup> See ZEHR, *supra* note 45; Adler et al., *supra* note 45.

<sup>47</sup> Cunha, *supra* note 36, at 304–07.

<sup>48</sup> *Id.* at 293–96. The "shaming" construct is seen as problematic by some, because of its potential for inflicting new harm. See Joseph Robinson and Jennifer Hudson, *Restorative Justice: A Typology and Critical Appraisal*, 23 WILLAMETTE J. OF INT'L L. & DISP. RESOL. 335, 339–348 (2016). But all agree that some sort of measures for promoting accountability, especially that of the offender but ultimately including all sides, are essential.

<sup>49</sup> Cunha, *supra* note 36, at 339, cites language that references explicitly moral and religious concepts such as "distinctions between the immoral act and the immoral agent," "hate the sin but not the sinner," suggesting the emphasis on alienation from and reconnection to the organic whole in Christian thought. For an example of the restorative model in a traditional non-western context, see E. Victoria Shook and Leonard Ke'ala Kwan, Ho'oponopono: Straightening Family Relationships in Hawaii, CONFLICT RESOL.: CROSS-CULTURAL PERSPS. 213 (Kevin Avruch et al., eds., 1998). Shook and Kwan's account exemplifies all the elements of the restorative model discussed in the text—as to purpose, practices and premises.

quite different from those underlying the other models, and they explain and justify the powerfully controlling mediator practices described above. If the restorative mediator were to be challenged about his/her exercise of these practices, s/he would respond that reconciliation cannot be achieved without them. As in the other models, the underlying premises explain and justify the practices followed and the goal to be achieved.

#### D. *Impacts in the Greenville Case*

Based on the facts given, it is possible to see the Greenville Community Center as a community in itself. Its leadership, staff, and Board are all devoted to a common mission, one that all members of the Center see as serving an important social good for clients who need and deserve their help. Moreover, like many nonprofit agencies, their work probably gives them a sense of community and belonging as they strive to fulfill their mission. Therefore, the conflicts that have arisen at the Center can be seen as rifts in an important organic enterprise, tearing apart vital social connections. In that view, the ruptures between the staff members, Maria, and even the Board, exemplify exactly the kind of breach of a community fabric that the restorative model is intended to address.

If a restorative mediator can bring all the parties together, in a fashion similar to a restorative justice “circle,” the mediator/facilitator can use his/her skills to press each party to acknowledge its role in causing the breakdown of the community. While Maria might strongly resist the controlling hand of a restorative mediator pressing for reconciliation, her sense of loyalty to the entity she helped create and nurture could draw her into the process of admitting responsibility and expressing regret or confession, thus generating a cycle of reconciliation—particularly if the Board, through Tom Reynolds, is the first one pressed to acknowledge his own role, whether in failing to notice the problems himself or in taking too harsh and adversarial steps toward Maria. Once the process of admission and forgiveness is begun with Maria and Tom, the mediator can focus on each of the staff members and their roles in escalating the conflict, encouraging each one to step up and accept some responsibility for the overall damage done to the fabric of the Center community. It is very possible that this restorative process can replace mutual suspicion and anger with trust and a restored



sense of common purpose. That would make it possible to quickly deal with the financial and supervision crises, and it would lay the foundation for improved management and continued partnership of all in the common enterprise of the Center.

Whether this is a realistic scenario depends on how Tom Reynolds assesses the pre-existing spirit of common purpose in the Center. If it had been strong and vital prior to the present conflicts arising, and if Tom himself is willing to be the one to begin the process of admission, responsibility and apology, this model could be a powerful way to address all aspects of the current situation and put things on a solid footing moving forward. However, the forceful methods of the restorative mediator might also drive the parties further apart. Tom Reynolds will again have to weigh this risk carefully against the possible benefits of this model.

## VI. TRANSFORMATIVE MEDIATION: PURPOSE, PRACTICES, PREMISES, IMPACTS

While the facilitative model dominated mediation practice for many years—and still does—an alternative approach emerged in the 1990s, labeled the transformative model.<sup>50</sup> This model emerged partially in response to criticism of facilitative practices, especially for the ways they limit party self-determination, and partially based on new perceptions about the value mediation holds for parties in conflict.<sup>51</sup> As it was developed over the next ten years, it became clear that the transformative model presented a very different view of the purpose, practices and premises of the mediators who adopted it, so that it could fairly be called a different “model” of practice rather than a different “style” of facilitative mediation.

### A. *Purpose*

In contrast to the facilitative model, the transformative model posits that the purpose and goal of mediation is not settlement or agreement per se, even though achieving agreement is a probable side-effect of mediation with this model. Rather, the purpose of

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<sup>50</sup> See BUSH AND FOLGER, *supra* note 3.

<sup>51</sup> *Id.* at 55–77.

the process is to directly address *the interaction between the parties* that has turned into a destructive and even demonizing one, and to change or transform that interaction back into a positive and humanizing one, even in the midst of conflict and whether or not an agreement is reached.<sup>52</sup> As part of that purpose, the mediator's goal is to help the parties regain their inherent human capacities for agency and empathy—self-determination and consideration of other—both of which have been temporarily disrupted due to the natural but negative impact of the experience of conflict per se.<sup>53</sup> It is assumed in this model, for reasons discussed below under *Premises*, that this positive change in conflict interaction matters greatly to disputing parties and is indeed what they are seeking from a mediator. It is also assumed that if positive interaction is achieved, the parties will likely reach agreement on disputed issues without the need for mediator control or pressure.<sup>54</sup>

### B. *Practices*

The fundamental principle of transformative mediation practice is that the mediator intervenes only in ways that “support and never supplant” party decision making.<sup>55</sup> This obviously stands in sharp contrast to facilitative (and restorative) practice in which the mediator firmly controls all aspects of the unfolding process, as described above. In fact, many of the practices of the transformative mediator are polar opposites of facilitative practice. For example, rather than imposing ground rules and turn-taking, transformative mediators allow the parties to decide for themselves whether to have such rules, whether to take turns speaking, when to speak, when to interrupt each other, and so forth. Strong emotional expression, including anger and distress, is allowed and supported rather than suppressed. Parties decide for themselves what issues to address, including “intangibles” like racism or sexism, and in what order to address them. In all this, the transformative media-

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<sup>52</sup> See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 49–53 (2d ed. 2005). This volume is the authoritative text on the transformative mediation model, from which much of the literature draws.

<sup>53</sup> *Id.* at 51–53, 59–62.

<sup>54</sup> *Id.* at 68–69.

<sup>55</sup> Bush, *supra* note 27, at 435. The specific kinds of support offered are described in the text below. They are also presented in greater detail in Bush, *supra* note 27, at 439–446. They are described there as “interactional support skills” by contrast to the “problem solving skills” central to the facilitative mediation model. See *id.* at 436–39.

tor follows rather than leads the parties; there are no set “stages” but rather an evolving conversation of the parties’ choosing.<sup>56</sup>

Throughout this conversation, the transformative mediator uses interventions that support rather than supplant the parties’ decision-making: s/he listens closely to the parties’ comments, but without having any agenda of his or her own based on problem identification or bargaining strategy; s/he regularly reflects a speaking party’s comments back to the speaker, but without altering or reframing them to soften or filter them in any way; when parties engage directly s/he stays or backs out of their way, privileging their talk over her own; when the parties have engaged in an extended exchange, the mediator summarizes the exchange, but without organizing it for them, and making sure to highlight their disagreements and differences, not only “common ground”; as for asking questions, s/he only asks questions that “check in” with the parties about what they want to do at a certain point in the conversation, not to probe them for more information, whether about positions or underlying interests; and the mediator accepts the parties’ decision on when to end the conversation and whether to make any agreements before doing so.<sup>57</sup>

All these practices stem directly from the purpose of helping parties regain their sense of strength and connection and thereby change their destructive interaction into a positive one. The practices seek to achieve that goal by supporting the parties’ own decision-making and choices, because this actual exercise of self-determination is what revives the parties’ inherent sense of their own competence and capacity, which in turn opens them to consideration of each other.<sup>58</sup> In effect, the various transformative prac-

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<sup>56</sup> Bush, *supra* note 27, at 435 (“In short, the essential work of the mediator is to *support* the parties’ *deliberation, communication, and decision-making*, rather than to direct them in any way. The reason for employing supportive rather than directive practices is that the aim of the process is party empowerment and interparty recognition—and thus positive interactional change—rather than resolution per se; and interactional change is most likely achieved through mediator support rather than mediator direction.”).

<sup>57</sup> *Id.* at 439–445. For concrete examples of the use of these skills in mediations, see Robert A. Baruch Bush and Joseph P. Folger, Transformative Mediation: Core Practices, TRANSFORMATIVE MEDIATION: A SOURCEBOOK—RESOURCES FOR CONFLICT INTERVENTION PRACTITIONERS AND PROGRAMS 39–44 (Joseph P. Folger et al., eds., 2010); Robert A. Baruch Bush & Sally G. Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 PEPP. DISP. RESOL. L. J. 67 (2002). For an extended case study illustrating all the skills discussed here in the text, see BUSH & FOLGER, *supra* note 52, at 131–270.

<sup>58</sup> See Bush, *supra* note 27, at 435; Bush, *supra* note 10, at 746–48 [explaining the connection between interactional change and supportive rather than directive intervention]; Della Noce et al., *supra* note 12, at 50–51.

tices described above all “amplify” the parties’ conversation at every point, making their comments clearer and more accessible both to themselves and to each other, and thereby supporting their ability to make strong and freely chosen choices—including choices to see each other differently and more positively.<sup>59</sup>

If the transformative mediator is criticized for not doing enough to control the parties’ conversation, s/he will respond that giving the parties themselves control over the process is necessary to achieve the purpose—to support empowerment and recognition shifts and thereby change the quality of the conflict interaction. In short, purpose drives practice for the transformative mediator, just as it does for the facilitative or restorative mediator. But since the purposes are very different, the practices are very different—and in many ways the opposite of each other. At the same time, it is important to recognize that using transformative practices also makes reaching agreement likely, even if that is not the mediator’s primary purpose—and an agreement reached by the parties’ uncoerced choice will almost certainly be stronger and more lasting.

### C. Premises

The logic of transformative practices and the basis of the purpose that drives them, are found once again, as in the facilitative and restorative models, in the premises and beliefs that underlie the model. And once again, the most important of those premises concern the motivations and capacities of the human beings who are the participants and clients in the process. This level of the transformative model again reveals sharp differences from the other models. Rather than viewing disputing parties as beset by permanent deficits in rationality or empathy, the transformative model posits that the parties’ very human identity is constituted by an inherent capacity and desire for both individual agency and social connection.<sup>60</sup> In fact, the most distressing aspect of conflict is that it interrupts the expression of these inherent human capacities

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<sup>59</sup> See Bush, *supra* note 27, at 439–445, 452–54. In the cited article, the author makes the case that these “interactional support skills” can be just as helpful to lawyers as they are to mediators, in supporting “client empowerment”. See also DAN SIMON & TARA WEST, SELF-DETERMINATION IN MEDIATION: THE ART AND SCIENCE OF MIRRORS AND LIGHTS (2022) (giving an account of multiple cases mediated by Simon using the transformative approach, with a commentary by West explaining the practices used and their impacts in those cases).

<sup>60</sup> BUSH & FOLGER, *supra* note 52, at 54–62; Bush, *supra* note 27, at 450–51; Della Noce et al., *supra* note 12, at 50–51.

and temporarily traps the parties in the experience of helplessness and alienation that characterizes negative and destructive conflict.<sup>61</sup> Parties very often escape the prison of negative conflict on their own, but when they cannot they seek help in doing so, because recapturing their capacity for strength and compassion, and returning to positive and humane interaction, is what parties want most of all.<sup>62</sup> In the view of the transformative model, that is the primary reason people come to mediation, and offering that help is the purpose of mediation and the logic of its practices. These premises underlying the model, like those of the facilitative model, have identifiable sources in broader fields, including social and developmental psychology, political philosophy, and feminist theory.<sup>63</sup> All these fields emphasize the centrality of agency and

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<sup>61</sup> BUSH & FOLGER, *supra* note 52, at 61–62, 49–53. See also AARON BECK, *PRISONERS OF HATE: THE COGNITIVE BASIS OF ANGER, HOSTILITY AND VIOLENCE* (2000).

<sup>62</sup> BUSH & FOLGER, *supra* note 52, at 52–65.

<sup>63</sup> See Dorothy J. Della Noce, *Seeing Theory in Practice: An Analysis of Empathy in Mediation*, 15 *NEGOT. J.* 229, 275–79 (1999); BUSH & FOLGER, *supra* note 52, at 250–56. These premises are part of what many call the “Relational Worldview”, which draws from developments in all the fields mentioned in the text. For example, in the field of *developmental psychology*, Carol Gilligan’s work identifies the tension between a “morality of rights [that emphasizes] separation” and a “morality of responsibility [that emphasizes] connection”; and she suggests that “responsiveness to self and responsiveness to others are connected rather than opposed.” See CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* 19, 61 (1982). In *political philosophy*, Michael Sandel’s critique of individualism stresses the need to integrate our separate individuality and social connection. See MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 144 (1982). Sandel’s work has inspired a school of “communitarian” political and social thought that has attracted scholars in the fields of *law, sociology and political science*, among others. See *THE ESSENTIAL COMMUNITARIAN READER* (Amitai Etzioni ed., 1998). In *feminist theory*, thinkers have drawn from both these influences, arguing that there is a “dialectical need for connectedness within freedom and for diversity within solidarity”, and that the human self is only created by processes of interacting with others. Legal sociologist Joel Handler calls this “communitarian feminism.” See Joel F. Handler, *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*, 35 *UCLA L. REV.* 999, 1041 (1988). Handler describes a common view of human nature and society that has emerged from work in fields as diverse as *law, political science, feminist theory, sociology, ethics, and communications*. The central themes of this view, which he calls “dialogism,” are the need and possibility for integrating the human experience of separateness and connection, and the centrality of social interaction in doing so in “dialogue, conversation, questioning.” *Id.* at 1070. Key to the dialogic view is the premise that human beings have both the desire and capacity for agency and empathy. In sum, a consistent set of ideas about human identity and social interaction has emerged in recent decades and found support in a very wide range of fields and disciplines. The essence of this view is that conflict interaction offers an unusually potent opportunity to actually *enhance* social interaction, as well as the human experience of both autonomy and connection in balanced relation. This view is expressed eloquently by, yet another thinker interested in the relational or dialogic worldview, who has linked transformative mediation to work on lawyers’ ethics and moral philosophy. See Robert P. Burns, *Some Ethical Issues Surrounding Mediation*, 70 *FORDHAM L. REV.* 691 (2001). As implied in

empathy to human identity and explain how their denial strikes at the very heart of peoples' sense of their own humanity. And this view of human motivation and capacity differs markedly from the views that underlie facilitative and restorative practice.

As with the facilitative model, premises establish purpose, and purpose drives and demands certain practices. If confronted with the frequent criticism that its practices lack structure and direction and make it less likely that agreement or reconciliation will be reached, the response is that these are not the goal. The goal is changing interactions from destructive to constructive, and that goal cannot be attained by any process of mediator control that suppresses expression and limits party decision making. The goal is only attainable by supporting and not supplanting party choice, and that is the justification for the various practices described above. As for protecting the parties from harming themselves and each other, the transformative mediator's premises justify his/her belief that with appropriate support, the parties will make choices of their own that provide this protection.

#### D. *Impacts in the Greenville Case*

Based on this review of the three levels of the transformative model, it is possible to analyze the likely impacts of using it in the Greenville Center situation. As noted earlier, the facts point to the need for prompt resolution of the management problems at the Center, both in the financial area and in caseworker supervision. However, the facts also indicate that there is a high level of mutual suspicion and hostility among the staff, which if not addressed will probably continue and frustrate efforts to address the immediate crisis. Obviously, this situation has created negative and destructive interaction, and that is unlikely to be changed by a mediator's top-down efforts to control and reframe the conversation. That is

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both Burns' account and the discussion above, it is part and parcel of the Relational view that human beings have not only the *desire* for both autonomy and connection, but the *capacity* for both. That is, while circumstances may provoke human responses of weakness and dependency, or responses of selfishness and isolation, all human beings retain an inherent desire and capacity to transcend the circumstantial responses and to act with both self-determined agency and other-regarding empathy. See Della Noce, *supra* note 12, at 50–51. These are the core premises underlying transformative mediation—that human beings have the inherent desire and capacity to engage in social interaction and conflict interaction constructively, not only without destroying each other, but with the ability to turn conflict itself into an opportunity to deepen and enhance interaction, personal strength, and interpersonal understanding.

particularly true given Maria's obvious personal sensitivity to outside control, as in her reaction to the Board. Forceful mediator intervention could easily cause her to "dig in" rather than cooperate. Therefore, on this analysis it seems that the best path to addressing the immediate problems constructively is to help the parties change their interaction itself toward a more positive exchange—which is the direct aim of the transformative model. Although the use of the model may not totally "transform" the parties' negative interaction right away, it could improve the situation sufficiently to allow the budget and supervision issues to be addressed and the current crisis averted.

Beyond the need to address the immediate problems, it is clear from the facts that the entire atmosphere of the Center, including both intra-staff relations and relations between Maria and the Board, has taken on a toxic character that makes long-term cooperation and effective operation unlikely going forward. And Maria's threat to leave and expose "racism" at the Center may indeed be a cause for concern if her own view of her importance is shared by others in the community. Moreover, the facts suggest that all those involved, including Maria, the staff and the Board, have been propelled by the conflict into an experience of weakness and selfishness that makes calm deliberation and openness to each other very difficult. Given all this, direct attention to improving the parties' interaction seems critical for the long-term, and the best (if not the only) way to do this is by supporting and not supplanting their own choices and communication. This is possible using the transformative model, and if the effort succeeds then work at the Center will become viable and productive, even if specific agreements about Maria's managerial authority and limits are not immediately achieved.

Using the transformative model makes sense on this analysis, because it offers the real prospect of interactional improvement in some degree, which is a prerequisite for addressing *both* the short-term crisis and the long-term viability of the Center's operations. And even if the model does not succeed in moving toward more positive interaction, the situation will be no worse than already exists; because, as shown in the analysis above, more forceful directive interventions by a mediator following a different model will most likely be ineffectual in producing either short-term solutions or long-term change in the agency. On this analysis, the transformative model could be a good choice here. True, there is some risk of exacerbating the conflict without improving the interaction,

since the parties can and will express themselves fully and freely without any “reframing” or filtering by the mediator. Ultimately, Tom Reynolds will have to weigh that risk against the likely benefits of the transformative approach as discussed above – including both a positive change in interaction and a likely agreement produced by improved interaction.

## VII. SIDE-BY-SIDE COMPARISON: IMPLICATIONS FOR PRACTICE AND POLICY

The analysis of Parts IV-VI above makes possible the side-by-side comparison of the three models of mediation, which is presented in **Table One** below. That comparison, based on features recognized in the literature and identifiable in mediators’ actual practices, shows the clear and striking differences between the models. However, many mediators and policymakers do not clearly acknowledge these differences—even more, the concept of models is itself discounted and ignored.<sup>64</sup> What is the reason for the insistence that good practice is a matter of using a common toolbox rather than following coherent and distinct models? Even more important, what would be the positive impact, on practice and policy, of recognizing rather than ignoring the important differences between these models?

### A. *Reasons for Resistance*

As to the first question, Part I of this Article introduced an answer.<sup>65</sup> As discussed there, many mediators adopt a “mythology” of mediation in which the “mediator toolbox” is a core construct and is given more credence than the values—and research—based theories underlying the different models of mediation.<sup>66</sup> The

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<sup>64</sup> See Della Noce et al., *supra* note 12, at 59 (“...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.”); Della Noce, *supra* note 13, at 817–18 (“The findings of this study suggest . . . that the differences in practice are not being taken seriously by the court or by mediators.”); Folger, *supra* note 13, at 859 (“The field must overcome its reluctance to acknowledge and explore core differences among the major frameworks of mediation practice.”).

<sup>65</sup> See *supra* notes 13–18 and accompanying text.

<sup>66</sup> See Della Noce et al., *supra* note 12, at 43–44 (citing Deborah M. Kolb & Kenneth Kresel, *supra* note 16 (“...[T]he mythology persists. . . . It is apparently preferable to mediators,



toolbox myth allows mediators freedom from the need to explain what they do in coherent terms. Any intervention can be justified by the mediator's subjective judgment as to "what works" in the circumstances presented. By contrast, the direct comparison summarized in **Table One** shows that each model has essential features and limits that demand coherent justifications for what mediators do and don't do in practice. The desire to practice without such justifications can be a strong motive to deny the reality of coherent models.<sup>67</sup>

At a deeper level, also mentioned above, the mythology affirms that mediation is a "value-neutral" practice, which does not reflect any underlying ideology or beliefs. It is just a practical, technical set of methods to help people settle conflicts and move on.<sup>68</sup> **Table One's** side-by-side comparison, reaching all the way down to the premises or values underlying each model, shows that such a "value-free" posture is just that—a posture, a pretense. In fact, mediators are for the most part following one model or another, and in doing so they are expressing one set of ideological premises or another whether or not they consciously realize this.<sup>69</sup>

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and even to some mediation experts, to protect the mythical frame and disregard contrary research findings. . .").

<sup>67</sup> See Della Noce et al., *supra* note 12, at 57–58. Della Noce offers as an example the response of mediators recruited by the U.S. Postal Service for their workplace mediation program, many of whom resisted the program's demand that they justify their practices by reference to the transformative mediation model.

<sup>68</sup> Della Noce et al., *supra* note 12, at 45–46 (" . . . [M]ediator 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. . . 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.").

<sup>69</sup> Of course, mediators do vary their individual practices in some respects (stylistically) from the common features presented in **TABLE ONE**. But for the most part, their practices fall recognizably within the outlines of one or another of the models. In addition, when mediators transition from one model to another, as happens increasingly today, they may for a time retain some elements of their "old" model while they are orienting to their "new" one. This is not the same as intentionally offering a "combined" model. As to the presence and impact of values underlying practice, see Folger, *supra* note 13, at 855–56 (discussing the premises underlying the transformative and restorative models) ("The differences between these two frameworks need to be clearly articulated and sustained in order to support mediators in making choices about how they want to conduct their practice. Choosing between different approaches to practice cannot be guided simply by a mediator's desire to master the intervention skills associated with each framework. Because [different] frameworks are rooted in fundamentally different ideological premises, the core values of an adopted approach to practice need to resonate, to some degree, with a mediators' personal ideology—their views of human nature, conflict, and the role of social institutions in addressing conflicts. . . Skills that mediators learn in training . . . are easily overridden by their personal value orientation in the throes of actual intervention work.").

TABLE ONE:

**FACILITATIVE**

**Practices:**

- Manage/control/drive the process
- Structure issues/agenda for settlement
- Focus on future, avoid discussing past
- Limit/discourage emotional expression
- Ask probing questions to gain information and reveal interests
- Exclude intangibles
- Reframe expression to soften
- Reframe positions to interests for problem-solving
- Summarize to stress common ground
- Act as devil’s advocate to each party/seek what-if deals
- Limit party decision-making to final outcome/terms

**Purpose/Goal:**

Achieve agreement that settles the conflict on terms mutually acceptable to the parties *[and fair to the parties, and to affected outsiders]*.

**Premises/Beliefs:**

1. Human Nature: My clients are separate individuals with desire for satisfaction in their own terms, but with inherent limitations of cognition/ rationality and empathy that block achieving satisfaction.

2. Experience of Conflict: Conflict frustrates satisfaction; it is volatile, explosive and harmful; but it is inevitable because social interaction is necessary to satisfy desires/needs.

3. What Clients Value from Mediator: M solves problem of frustrated satisfaction of needs that is obstructed by others’ needs and own cognitive deficits; M *facilitates* deals and *protects* against individuals harming self or others due to limits on rationality and empathy.

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**TRANSFORMATIVE**

**Practices:**

- Allow the parties to control/ drive the process
- Follow the parties in whatever issues they raise
- Allow/support emotional expression
- Include intangibles if the parties wish to discuss them
- Reflect expression without softening
- Summarize to sharpen/highlight difference
- Privilege party decision-making on all matters—content and process: “Support and never supplant” party decision-making/ perspective-taking

**Purpose/Goal:**

Support parties in changing their conflict interaction from negative/destructive to positive/ constructive; help them recapture strength and understanding (with agreement a likely by-product).

**Premises/Beliefs:**

1. Human Nature: My clients are both individual and social by nature, with both inherent desire and inherent capacity for agency/ autonomy and empathy/ connection.

2. Experience of Conflict: Conflict temporarily disconnects capacities for autonomy and connection, but presents chance for reasserting those capacities, so it is not necessarily destructive but a potentially constructive opportunity for personal and social growth.

3. What Clients Value from Mediator: M helps them achieve positive conflict interaction and transformation, by supporting their inherent capacities for strength and compassion, agency and connection.

**RESTORATIVE**

**Practices:**

- Push parties to talk about incident and impacts (push expression/emotion)
- Prevent anyone from withdrawing; compel listening by all
- Shift focus from person to person, make sure to include all
- Determine who speaks when
- Seek admission of responsibility (confession) from each party
- Suggest/push forgiveness by all
- Use “momentum” of group (centripetal force) to get admissions/forgiveness
- Intervene periodically to shift/ maintain focus on each party
- Direct problem-solving at end for agreement

**Purpose/Goal:**

Promote shared responsibility, but also promote understanding/ reconciliation, to repair breach in relationship or community, and move individuals from isolation/ alienation to connection/unity.

**Premises/Beliefs:**

1. Human Nature: My clients are essentially parts of a social entity/ organism, with desire for belonging, but limited capacity for connection and empathy, and tendency to become alienated/ vengeful.

2. Experience of Conflict: Conflict ruptures the social fabric, resulting in separation and loss of belonging, threat to the organic whole, and barrier to relationship.

3. What Clients Value from Mediator: M restores broken social connection, achieves reconciliation and belonging, ends hate/isolation/guilt.

concludes, “There is no ideology-free zone of mediation practice.” *Id.* at 859. The ideological differences that Folger and Della Noce emphasize are what this Article describes as the “Premises” level of each of the three models discussed herein – the why behind the what and the how of practice.

The failure to acknowledge this reality may represent a *tendency to avoid reflecting* on the values underlying one's practice; or it may represent the *desire to avoid revealing* those values even though the mediator is aware of them. If non-reflectiveness is the case, that might be acceptable for auto repair shops; but mediation purports to be a profession, and a professional cannot remain unaware of the values underlying his/her practice. On the other hand, if the preference for the toolbox concept over models reflects the desire to "be all things to all clients," that is an example of non-transparency. In other words, recognizing models of practice, and identifying with one, limits the number of clients one can claim to serve. Claiming to use a general toolbox expands the potential client base, so the toolbox claim may simply be a form of strategic marketing.<sup>70</sup> There is research that strongly supports the existence of both phenomena—non-reflectiveness and non-transparency on the part of mediators.<sup>71</sup>

### B. *Implications: The Practice of "Combining" Models*

The continued use of the "toolbox" concept, by ignoring the reality of the different models, almost certainly contributes to confusion about differences between those models. That, in turn, contributes to the seemingly widespread practice of mediators claiming to use a "combination" of two or more models. In her research on mediators serving on a court roster, Della Noce found

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<sup>70</sup> See David Hoffman, *supra* note 15 (discussing the metaphor of using mediation techniques as one would tools from a toolbox, and suggesting that the wider range of tools one has, and the more skilled one becomes with these tools, the wider range of people can be served and more success the mediator can achieve). See also Della Noce et al., *supra* note 12, at 58. She notes that, "[T]he USPS [workplace] mediation program . . . specified that its mediators were to use the transformative framework. 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. [Many] mediators sought the compensated work that this program provided. . . . 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 were implicitly saying that their "toolbox" could achieve what the client wanted without using the "model," and they were saying this because they wanted the positive economic benefits of the USPS while continuing their "toolbox" practice.

<sup>71</sup> See Della Noce, *supra* note 14. The non-reflectiveness discussed here, and its impacts, might be ameliorated by what some call "reflective practice". See e.g., MICHAEL D. LANG, *THE GUIDE TO REFLECTIVE PRACTICE IN CONFLICT RESOLUTION* (2019). However, the impact of this method is beyond the scope of the present Article.

that many mediators make that claim.<sup>72</sup> However, it is a claim that ignores the reality of the several models and their differences, and a claim that is belied by the actual practices of mediators who make this claim.<sup>73</sup> **Table One**'s side-by-side comparison makes clear that each model is different from the others at all three levels—practices, purpose, and premises—and in each model all the levels fit together and reinforce each other. This means that if a mediator following one model uses a “tool” or practice from a different model, that tool will likely disrupt and short-circuit the entire process.<sup>74</sup> This would be like putting a foreign component

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<sup>72</sup> See Della Noce, *supra* note 13, at 785–86. Nearly 70% of the 127 mediators studied in Della Noce's research claimed to “combine” two or more models of mediation in their practice, using various rationales for doing so. *Id.* at 818–19. (“[In the court studied], the mediators themselves resist the court's effort to make [model] differences a factor in mediator selection. They actively elide differences in practice. They claim to be able to enact multiple forms of practice, blend practices, or shift from one form of practice to the other, at will. These claims are highly suspect, a fact the mediators seem to observe when they take pains to account for their choices in their narratives. These claims also lack empirical support. . . . Moreover, even if one argues that [choice of model] is contingent on case or other characteristics, there is no persuasive evidence in the empirical research regarding which [model] is most appropriate for which contingencies. The mediators in this study reflected the vagaries of their own idiosyncratic contingency approaches when they tried to explain what contingencies were relevant, and the answer appeared to be, whatever the mediators deemed relevant. . . . There is . . . a pressing need, for empirical research with respect to mediators' claims that they can blend and shift [models]. . . . Until there is a credible body of research on this topic, mediators' claims in this regard must be considered part of the mythology in the mediation field. . . [and] the claims must be seen as a strategic way for mediators to enhance their marketability.”)

<sup>73</sup> Research suggests, for example, that mediators claiming to combine facilitative and transformative mediation are usually using largely if not entirely facilitative practices. *See id.* It bears repeating here that the specifics of the models as described in Parts IV–VI and summarized in Table One necessarily comprise a summary of key elements, especially as to practices and premises. At the same time, the descriptions given here are not arbitrary projections; they are all drawn from published research and scholarship, and citations are included above to fuller treatments of each model in that literature.

<sup>74</sup> Folger, *supra* note 13, at 854–55 (Illustrating the incompatibility of models, Folger analyzes the impact of trying to “combine” the transformative and restorative models: “The unique contributions of either approach to practice are easily undermined if the differences that exist between them are not maintained in practice. The central purpose of each approach is essentially incompatible with the other—working toward the achievement of one purpose negates the attainment of the other. . . . If, for example, a particular community establishes mediation to help preserve its values and to maintain relationships among its members when conflicts arise, then only mediation practices that are aligned with the [restorative] model can clearly and consistently support this goal. If someone works within a transformative framework in this setting, there is no assurance that shared values will be preserved or that relationships will be restored. The emphasis in the transformative framework on party empowerment opposes any effort by the mediator to bring the parties toward reconciliation. . . . Transformative mediators support the expression of differences and resistance to community-held values if parties want to challenge the existing harmony of the group. . . . A mediator's support for the expression of core differences with community values would be seen as inappropriate, dangerous, or even unethical if a

into a precisely designed and engineered machine—given its precise construction, the machine is likely to explode because of the foreign part. The analogy points to both the internal coherence of each mediation model and the incompatibility of practices from different models. As a result, it is difficult, if not impossible, to combine two models in practice even if mediators claim that they are doing so.<sup>75</sup> Such claims should be met with great skepticism.

**Table One** makes it easy to suggest examples: If the practice of supporting strong emotional expression, from restorative mediation, is employed in facilitative mediation, it will disrupt the process and make agreement unattainable. If the practice of sharply limiting emotion, from facilitative mediation, is brought into restorative mediation, it will prevent reconciliation. Or, if the forced communication of restorative mediation is introduced into transformative mediation, it will effectively supplant party choice and empowerment shifts, and thereby block the transformation of the interaction. And if these different tools or practices are simply picked from a general “toolbox” and put together without coherence, little value of any kind is likely to be produced. Simply put, because of their very different practices, *combining* the different models in any specific case is not practically feasible, and when mediators claim to do so it is likely that their actual practice, as a whole, follows only one of the models. Furthermore, when mediators say that they can and will employ *whichever* of the models the client prefers, this is another very dubious claim: Given the very different and indeed opposite practices required by each model, it is extremely unlikely that the same mediator can be competent in all of them.<sup>76</sup>

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mediator was expected to align their practice objectives with the goals of a harmony intervention. Conversely, [a] focus on achieving party reconciliation and the restoration of relationships is inherently inconsistent with transformative practice because the transformative approach fully supports party choice and self-determination. [Restorative] interventions limit the full range of possible party-driven outcomes in the effort to attain their core goals. Containing conflict interaction, avoiding issues that threaten relationships, and encouraging parties to heal transgressions are all practices that restrict party voice and self-determination. In the transformative framework, these containment and reconciliation practices would be considered inappropriate or unethical, because they are inconsistent with the essential purpose of mediation practice as defined by its premises. Blending the core practices of these approaches is not possible without undermining the goals of both frameworks.”)

<sup>75</sup> See e.g., David A. Hoffman, *Confessions of a Problem-Solving Mediator*, 23 SOC'Y OF PROS. IN DISP. RESOL. NEWS 1 (1999) (discussing the possibility of combining the facilitative and transformative models).

<sup>76</sup> See *supra* note 74, and accompanying text. Folger details very clearly the incompatibility of the transformative and restorative models, but the same difficulties would be faced in combining any of the models discussed in this Article. And when a mediator represents that s/he can

Thus, **Table One**, summarizing the discussion of Parts IV-VI, shows plainly that there is no workable *general* mediator “tool-box,” and a mediator who claims to be using one is either using a grab-bag with no coherence, or s/he is following a specific model of practice but is either not realizing it or not admitting it. A very important corollary is that when choosing a mediator (and hence model of mediation), users should be wary of any mediator who explicitly makes one of the following claims: (1) s/he is a *generalist* who does “whatever works”, an idea debunked throughout this Article; (2) s/he will use a “*combination*” of two or more models, or else use *whichever* model the client wants, both of which assertions make no sense given the incompatible and contradictory practices of the different models.<sup>77</sup> The mediator who makes these kinds of claims is either unaware of his/her own practice and skills limitations, or else intentionally concealing them to gain more business. Either way these claims strongly suggest that users should avoid the practitioner who makes them.

As shown throughout, at the base of each of the models is its own distinct purpose and values. There is no value-free mediation—or any other professional practice for that matter. To recognize the existence of models of mediation is thus to acknowledge that *all* mediation practice is purpose or value driven.<sup>78</sup> Mediators make choices about how they practice based on deeply held values and beliefs about their clients, and the different models reflect dif-

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nevertheless use different models in *different* cases—a claim this Author has heard from many mediators—this claim ignores the fact that, as noted in the text, the skills involved are so different that a single mediator is very unlikely to be proficient in all of them. Therefore, offering to use whichever model the client prefers is a promise the mediator most likely cannot fulfill in practice. See *supra* Table One. Instead, a mediator who wants to offer different models to her clients can do so best by helping the clients consider all the models and choose one, and if that model is different from the one used by the mediator, referring that client to a mediator who follows that other model. See *infra* notes 101–02 and accompanying text.

<sup>77</sup> See *supra* note 74; see *supra* note 76; see also *supra* Table One. However, it is entirely possible and even likely, that some mediators’ practices will include elements, for example, of both the facilitative and transformative models, because they are making a *transition* from one model to the other. In that transition period, their practice will seem to combine the two models, but in fact their intent is to move from one to the other. There is anecdotal evidence that this is quite common among those who began as facilitative mediators but became attracted to the transformative model. See “Notes from Conversation with Peter F. Miller”, on file with Author. However, mediators in this kind of transition are unlikely to claim they are using a combined model.

<sup>78</sup> See Della Noce et al., *supra* note 12, at 59 (“[E]fforts to craft theory-free, value-free policy (or to interpret and enforce existing policies in a theory-free, value-free way) are futile.”); Folger, *supra* note 13, at 859 (“No approach to practice can be developed or used without invoking some core purpose and without relying on a set of ideological premises. There is no ideology-free zone of mediation practice.”).

ferent beliefs or premises. Disclosing those choices is essential to ethical practice of any model, as this author and others have discussed elsewhere.<sup>79</sup>

### C. *Implications: Clarifying Key Differences Between the Models*

Another important implication of the side-by-side comparison of models in **Table One** is the light it sheds on the unique value of each one, as illustrated by the analysis of the Greenville case in relation to each model. In particular, this comparison should reduce the confusion that persists about the *transformative* model. In presentations on transformative mediation, questions are often raised about whether it really differs from other models, and if so, what the actual differences are. In fact, several key differences are evident from the side-by-side comparison in **Table One** that summarizes the descriptions of each model in Parts IV-VI.

First, unlike the other models, the *purpose* of the mediator in the transformative model is not to achieve “resolution” of any kind, whether it is the resolution of tangible issues through specific terms of agreement, or the resolution of a damaged relationship through a reconciliation. (Indeed, at one conference, a participant observed that the model was not really about conflict resolution at all—a comment that helped inspire the distinct term conflict *transformation*.) Rather, the mediator’s purpose is to support a change in the way the parties experience and behave toward themselves and each other, resulting in a change in the *quality of their interaction* from negative and destructive to positive and constructive. This aim can be achieved whether or not the conflict is resolved through an agreement or a restored relationship. Interaction can become positive and constructive, even though conflict and disagreement continue, and even when parties decide to end a relationship altogether. And such interactional change is the definition of success in this model, as described in **Table One**.<sup>80</sup> Many features of transformative practice flow from this different purpose, as discussed shortly.

Another confusion about the model is the meaning of the term “*transformative*” itself, which has puzzled many mediators. Admit-

<sup>79</sup> See Bush, *supra* note 12; Waldman, *infra* note 100.

<sup>80</sup> This also clarifies why the model claims a “*relational*” character—meaning the simple interpersonal exchange involved in interaction—without being aimed at *relationship* repair. See *supra* note 63 and accompanying text.

tedly, some of that confusion was invited by the language of the first book on the model, which referred to “changing people.”<sup>81</sup> In fact, the term simply refers to the *change in interaction* that is the aim of the model, and transformation is one term for change. But why adopt that seemingly dramatic term? The explanation is suggested in the description of the *goal* of the model in **Table One**: the change from “negative and destructive to positive and constructive interaction.” That is a dramatic change—as described by one of the creators of the model: “The parties walk in looking small and mean, shrunken into themselves and shooting daggers with their eyes. . . . and they walk out looking big and generous with arms open.”<sup>82</sup> And, as elaborated in training materials on the model, the seemingly small “shifts” involved in the overall interactional change are also quite dramatic. In the change from negative to positive interaction, parties experience themselves changing: from “weak and selfish” to “strong and responsive;” from “helpless and hateful” to “competent and caring;” from “impotence to agency;” from “reactive to deliberate;” from “reacting to responding.”<sup>83</sup> Changes like these in the parties’ experiences of themselves and each other are indeed dramatic, almost like the change from darkness to light. In short, the choice of the term “transformative” may seem dramatic but it is also the most effective way to describe the meaningful and impactful changes that parties make in their interaction through this model of mediation.

A further, and particularly important, difference between transformative mediation and the other models is clarified by the side-by-side comparison in **Table One**. That is the central place of *party self-determination* in the model. In the other two models (and still others), the mediator’s interventions can and often do intrude on or supplant the parties’ self-determined choices, and this is seen as acceptable because it is necessary to secure an agreement, achieve reconciliation, or attain some other goal. Because those goals are seen as more important, party self-determination can be limited or sacrificed, despite a formal commitment to the principle.<sup>84</sup> By contrast, in transformative mediation the mediator

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<sup>81</sup> BUSH & FOLGER, *supra* note 3, at 81.

<sup>82</sup> S. Cal. Mediation Ass’n, *Webinar: Transformative Approach to Conflict and Mediation: Three Dimensions with Professor Robert A. Baruch Bush*, YOUTUBE (Sept. 6, 2022), <https://www.youtube.com/watch?v=gwruSLWJLs4> [<https://perma.cc/6RUQ-S5LZ>].

<sup>83</sup> See S. Cal. Mediation Ass’n, *supra* note 82 (Webinar Materials on file with Author).

<sup>84</sup> Robert A. Baruch Bush & Peter F. Miller, *Hiding in Plain Sight: Mediation, Client-Centered Practice, and the Value of Human Agency*, 35 OHIO STATE J. ON DISP. RESOL. 591, 615–19 (2020) [<https://perma.cc/GB5Q-QNKB>].



can *never* justify supplanting the parties' own decision-making, because interactional change is the ultimate goal, and that goal cannot be achieved *except through* parties exercising self-determination. The reason is that only by exercising their capacity for decision-making do parties reconnect with their inherent strength of self, and only then can they reconnect with their capacity for openness to one another.<sup>85</sup> Those steps describe the cycle of interactional change, and party self-determination is what *initiates* the whole process. In fact, overriding party choices and supplanting self-determination will return parties to their state of weakness and thus stop or even reverse the positive conflict cycle.<sup>86</sup> Therefore, as **Table One** indicates, transformative mediators *privilege* party decision-making above all, unlike the other models that give higher priority to different goals.<sup>87</sup>

This powerful commitment to party self-determination manifests in other unique features of transformative practice: making no effort to structure the parties' discussion; reflecting but not reframing/softening party comments; neither limiting nor pushing emotional expression; and in general allowing complete party control, of both the process and content of the session.<sup>88</sup> This core commitment also debunks the erroneous view that transformative mediators discourage negotiation on tangible issues and avoid the use of separate meetings or "caucus"—both of which the mediator will support when the parties decide to do them. In fact, the only time that transformative mediators will *not* follow the parties is when they ask that the mediator make some decision for them.<sup>89</sup>

Finally, the side-by-side comparison of models shows that transformative practice is founded on *premises and beliefs* that differ greatly from those of the other models. While both other models assume that there are inherent and serious *deficits* in humans' capacity for both agency and empathy, the transformative model is based on the contrary view that these capacities are inherent *assets* of human beings which, even if weakened by conflict, will resurface with a mediator's skilled support. Indeed, these unique transformative premises are the ultimate reasons for the model's unique

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<sup>85</sup> See S. Cal. Mediation Ass'n, *supra* note 82 [at timecode 33:00-36:00]; see also *supra* note 58 and accompanying text.

<sup>86</sup> See S. Cal. Mediation Ass'n, *supra* note 82.

<sup>87</sup> See Bush & Miller, *supra* note 84, at 619.

<sup>88</sup> See *supra* Table One.

<sup>89</sup> In this respect transformative practice is in full accord with accepted ethical principles, since making decisions for the parties would violate the first principle of most mediation codes. See e.g., Bush, *supra* note 12.

practices, which manifest the belief that when parties' human capacities are supported and not supplanted, they can be trusted to harm neither themselves nor one another. At this level, the side-by-side view of the models reveals a sharp difference, in terms of the transformative model's highly positive view of human nature. This may indeed be the most important of the unique dimensions of the model, as well as the most controversial.

Thus, the comparison of models presented in this Article, summarized side by side in **Table One**, not only highlights important differences between the models, but also clarifies confusion about key elements of the transformative model that are often misunderstood.

#### D. *Implications: Clarifying How to Choose Between Models*

How does knowledge of the differences in the models have practical value for mediation consumers, individual or institutional? To be clear, the analysis of this Article is *not* meant to suggest that one of the three models is "better" than the others in absolute terms, or to "rank" them in any preferred order. However, the analysis does offer a method for choosing among the models in specific cases—a critical need for mediation users. The method is implicit in the discussion above regarding the impacts of using each model in the Greenville case. That discussion suggests two principles for choosing among the models, and both principles show that the diversity of mediation models is in fact a great virtue for users of the process.

The first principle is that no single model can satisfy the needs of all mediation users in all cases. The specific capacities of each model, given its different practices and their impacts, make that model useful in some situations, to some users—and counterproductive to other users, in the same or other situations, as shown by analysis of the Greenville case. Therefore, the existence and recognition of different models of practice, far from being a problem, is a great advantage in the mediation field. Diversity is a virtue to be embraced, not an obstacle to be overcome—so long as the differences are acknowledged and properly understood.

This same principle applies to policies that would institutionalize mediation in some specific context—for example in family or workplace conflicts. Proposals for improving conflict resolution practices often recommend incorporating the use of mediation, but

without specifying which model, or else mentioning two models together, implying that they are functionally the same.<sup>90</sup> But this kind of policy ignores the real differences between mediation models, as do programs that allow for “combination” of models.<sup>91</sup> The analysis here shows that, precisely because of the diversity of models and practices, mediation can be employed by different clients/users for different purposes. But the models cannot be coherently combined, nor a single model chosen, to be all things to all users.<sup>92</sup> Just as individual clients need to choose a mediator, policymakers and institutions need to choose a model and not treat mediation generically.<sup>93</sup>

The second principle is that any choice of any model depends heavily on how the user, individual or institutional, understands the facts of the situation and how they prioritize the most important aims to achieve. For example, in the above analyses of the Greenville case, the discussion of the facilitative model concluded that *if* speedy resolution of the finance and supervision crises is most im-

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<sup>90</sup> See e.g., Pauline H. Tesler, *Can This Relationship Be Saved? The Legal Profession and Families in Transition*, 55 FAM. CT. REV. 38, 46 (2017) (suggesting the use of either facilitative or transformative mediation in family conflict, without seeming to differentiate between the models).

<sup>91</sup> See e.g., Della Noce, *supra* note 13 (reporting on a court-connected mediation program using mediators who “combined” three different models of mediation in their practice).

<sup>92</sup> Similarly, when mediation is joined to other processes, there needs to be a compatibility of the mediation model with the practices and premises of the other process. This is not always clearly recognized when such joining of processes is proposed. Rather, the proponents may treat mediation as a generic practice, a “general toolbox”. If this is done, the client-centered practices of transformative mediation, for example, might be undermined by a more directive model of practice with which it is joined, or vice versa. Only if the differences between mediation models are acknowledged and understood can joinder of different processes be successful and productive.

<sup>93</sup> See Folger, *supra* note 13, at 856–57. (“If directors of courts, . . . agencies, or community centers do not have an accurate understanding of the differences between [the restorative and transformative] frameworks of practice, the goals they set for their programs may not be met and attempts to document success will be thwarted. . . . [V]ictim-offender programs, for example, might want . . . a conflict intervention process that aims at establishing conciliatory relationships between offenders and victims, relationships that are built on offenders’ apologetic posture and victims’ receptivity to admissions of guilt for offensive behavior. These expectations would not necessarily be met if a transformative approach to practice were implemented in such a program. Parties could construct this kind of relationship if they chose to do so, but there would be no effort made by transformative mediators to [sic]ensure that reconciliation was achieved. Alternatively, a director of a victim-offender program might want to establish a program in which both parties are free to say whatever they want to say to each other . . . during the mediation process. In this vision, party empowerment for both victim and offender may be the overriding objective. In this case, the program director would not want the intervener to promote or steer the process towards reconciliation. . . . [and] transformative practice would meet the desired expectations of the program and its vision of success.”).

portant to Tom Reynolds, and *if* Maria's view of her personal importance to the Center is overblown, then using this model could be the best choice. In similar fashion, the discussion of the restorative model concluded that *if* the Center is properly seen by Tom Reynolds as having been a strong community before the conflict, and *if* reversing the unraveling of that community is most important, then using this model could be the best choice. And the discussion of the transformative model concluded that *if* the main distress experienced by the parties at the Greenville Center is their lost sense of their own competence and connection with each other, and *if* reclaiming and reasserting those capacities is most important to them (and a prerequisite for any other aim), then using this model could be the best choice. In sum, in the discussion of each model, the choice of that model depended on how the user or client understood the facts of the situation and what they saw as the most important goal in addressing it. A similar analysis would apply if the choice of mediation were made as part of a policy for addressing employment discrimination or family conflicts generally, for example by a court system or other institutional user.<sup>94</sup>

Extrapolating from the discussion in the Greenville case in Parts IV-VI, it should be clear that, even in similar situations, not all users will view the facts in the same way, nor hold the same goal priorities. Therefore, there is a place and a need for different models of mediation practice. Not all clients are the same, not all cases are the same, and different needs cannot be met by any single model. There is no one "best" model for all clients and cases. One the other hand, given how the user understands the situation and prioritizes the values at stake, one model will almost always be preferable to the others. And to provide the widest range and the greatest likelihood that users will find value in using mediation, dif-

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<sup>94</sup> This was the analysis of the U.S. Postal Service when they chose to adopt the transformative mediation model to address employee charges of discrimination. See Robert A. Baruch Bush, *Handling Workplace Conflict: Why Transformative Mediation?*, 18 HOFSTRA LAB. & EMP. L. J. 367, 367-73 (2001) (discussing the rationale for using transformative mediation in the U.S. Postal Service); Cynthia J. Hallberlin, *Transforming Workplace Culture Through Mediation: Lessons Learned from Swimming Upstream*, 18 HOFSTRA LAB. & EMP. L. J. 375, 375-83 (2001) (addressing the rationale and implementation of the transformative model); Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in the USPS REDRESS Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L. J. 399, 399-427 (2001) (discussing the transformative model as adopted by the Postal Service). It is worth noting that, just as this analysis of the match between mediation model and case goals is essential, the same kind of process-choice matching is generally called for when attorneys advise clients on ADR processes generally. See Robert A. Baruch Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893 (1984).

ferent models should be available using different practices to reach different goals.<sup>95</sup>

## VIII. CONCLUSION: COMMON TOOLBOX OR DIFFERENT MODELS?

### A. Why *the Answer Matters*

To return to one of the questions with which this Article began: Does it make sense to regard mediation as a unitary process, a single “toolbox” containing different tools that can be used in various circumstances? Or does it make more sense to regard mediation as a process that includes several distinct “models” that are different from one another in highly significant ways—as different as the work of the homebuilder, furniture maker and violin maker mentioned in the Introduction—with each model having a “toolbox” of its own different from the others? Before summarizing how this Article answers the question, *consider why the answer matters*. If mediation represents a “common toolbox” as researchers claimed thirty years ago, then the articulation of different “models” is confusing and unnecessary.<sup>96</sup> Users of mediation can simply interview practitioners and ask for their “track record,” and on that basis try to assess whether that mediator will be a good choice.<sup>97</sup> Regulators can try to assess mediator competency or compliance with standards, although under the toolbox approach any intervention can be justified if “it works”—and there is no objective definition of what works other than production of a settlement. As a result, settlement rates become the only measure of both competency and ethics.<sup>98</sup> In fact, research suggests that this is

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<sup>95</sup> This is the conclusion of Bush and Folger in their classic text on the transformative model. That is, they do not argue for the use of that model for all cases, but for the consideration of the transformative model, on equal terms with other models, depending on the parties’ goals. See BUSH & FOLGER, *supra* note 52, at 259–66.

<sup>96</sup> See Honeyman, *Five Elements*, *supra* note 1; Bush, *supra* note 8.

<sup>97</sup> Alternatively, as some have suggested, users can simply review a list or menu of practices/tools and tell the mediator which ones they want used in their case. See *e.g.*, Hoffman, *supra* note 75.

<sup>98</sup> See *e.g.*, Della Noce, *supra* note 13, at 797–99. See also Bush, *supra* note 12. Are a doctor’s practices justified solely by whether the patient recovers or survives, regardless of what measures were taken to achieve this outcome? But for some patients, quality of life matters as much as survival *per se*. Or are a lawyer’s practices justified simply by the size of a recovery, again regardless of the measures used. But for some clients the amount gained means little, absent a

precisely the situation at present, because many mediators and institutional users regard “models” only as matters of theory which can be disregarded in practice.<sup>99</sup>

On the other hand, if there *are* defined and different models of practice—each with its own purpose, practices, and premises—then individuals can ask a mediator what model they follow, and thereby more clearly assess whether that mediator will provide the kind of help they are looking for, and they can also hold the mediator accountable for doing so.<sup>100</sup> Furthermore, policymakers and institutions can decide what approach to mediation will meet the goals of their program, require mediators to use that approach, and measure their performance in terms of those goals. Regulators can establish standards appropriate to the models being used and hold mediators to those standards. And mediators themselves can avoid the quandary of using a confused amalgam of methods, with no clear principles to guide them or justify what they do. Therefore, since the different models discussed in this Article are indeed being followed in actual practice, whether consciously or not, recognizing them and understanding their differences offers clients, policymakers, regulators and mediators a way of ensuring that the process they are using serves the purposes that they value and intend. So acknowledging and understanding different models of practice matters greatly to the quality of mediation’s impacts on individuals and on society in general.<sup>101</sup>

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sincere apology for the harm done and a guarantee that the same harm won’t occur to anyone else. Nevertheless, according to some research, in practice, settlement is the only measure of success for most mediators. See Della Noce, *supra* note 13, at 797–99.

<sup>99</sup> Della Noce, *supra* note 13, at 808, 817–19. Della Noce reports that, “[M]ediators took pains to explain their claims of competency in more than one [model], but their explanations actually served to elide the differences between [models]. The importance of [model] as a distinguishing concept for mediators was thereby minimized by the mediators . . . . The public could learn nothing about [models] per se from these narratives. What the public could learn, or what was communicated by the mediators, was that the differences are relatively trivial. . . .” See *id.* at 808. See also Della Noce et al., *supra* note 12, at 53–59; Folger, *supra* note 13, at 859.

<sup>100</sup> See Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L. J. 703, 768 (1997) (“The effort to construct a code [of ethics] suitable for all manners of mediation fails because it does not recognize the divergent, and often competing, dictates which issue from each model. Mediation is not a ‘one-size-fits all’ process; it cannot be guided by a ‘one-size-fits all’ code. . . . [This argues] for the construction of internally consistent codes, tailored to fit each of the mediation models.”) Bush makes a similar argument for a “pluralistic approach” to mediator ethics codes, to account for the different models of practice. See also Bush, *supra* note 12, at 523–34.

<sup>101</sup> See Della Noce et al., *supra* note 12, at 53–65; Folger, *supra* note 13 at 854–59. See also *supra*, notes 65–80 and accompanying text; see *supra* note 16 and accompanying text.

B. *Models with Diversity and Coherence*

Practically speaking, coherent and clearly defined models are essential for users of mediation to know “up front” what service a mediator is promising them—which is not possible with the “mediator’s toolbox” approach that some advocated in the past<sup>102</sup> and that persists today.<sup>103</sup> The variability of practice in that environment makes it very hard to inform clients about what to expect from a mediator. It also makes it hard for regulators to know what standards to impose on practitioners. By contrast, different but coherent models like those discussed in this Article meet the needs of clients and regulators: Mediators can announce and explain to clients what model they follow—and also offer clear information about what models other mediators follow.<sup>104</sup> Clients can then make informed choices about which approach meets their needs, and both clients and supervisory authorities can ensure that mediators perform according to their promises.<sup>105</sup> There will still be variations in individual mediators’ “styles” within each model. But that kind of stylistic difference is not the same as “toolbox” practice with no consistency or coherence.

The analysis offered by this Article shows that mediation practice is truly diverse, not only as a matter of individual mediator style, but in different coherent and value-based models of practice. Furthermore, diversity is a real benefit to users of the mediation process, since the different models allow the process to serve a wide range of needs and circumstances and do so with competent and ethical practice. Ignoring, dismissing, or concealing the differences of the models of mediation is a mistake, whether by practitioners or policymakers.<sup>106</sup> The general toolbox metaphor is neither needed nor helpful; nor are idiosyncratic combinations of models by mediators or institutional providers. Rather, the genuine reality of diverse but coherent models of practice should be accepted—and celebrated—so that mediation can provide the greatest value to its potential users, individual and institutional. To

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<sup>102</sup> See Honeyman, *supra* note 1.

<sup>103</sup> See e.g., Hoffman, *supra* note 15; Wessels, *supra* note 15.

<sup>104</sup> See *supra* Table One (a chart like that in Table One, that provides information about the different practices, purpose and premises of all the models that can be offered to all clients, with additional explanation offered if requested).

<sup>105</sup> BUSH, *supra* note 12, at 464–66, 531–35 (this kind of pluralistic framework for mediation is discussed in detail, in relation to mediator ethics codes, in, using a specific case example to illustrate how it would work in practice).

<sup>106</sup> See *supra* note 65; see *supra* note 80.

borrow a phrase from today's general discourse, diversity brings strength; giving recognition and support to diverse, purpose-driven models of practice will strengthen the entire field of mediation.<sup>107</sup>

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<sup>107</sup> See BUSH & FOLGER, *supra* note 52, at 259–66.



