

# HIDING IN PLAIN SIGHT: MEDIATION, CLIENT-CENTERED PRACTICE, AND THE VALUE OF HUMAN AGENCY

**Robert A. Baruch Bush\* and Peter Miller\*\***

## INTRODUCTION: THE INVISIBILITY OF AGENCY

From the earliest years of the “modern” mediation field, the principle of party self-determination was seen and stated as the foundation of the mediation process.<sup>1</sup> Indeed, this core principle of party self-determination was seen as the distinguishing feature of mediation, by comparison to other third-party processes like arbitration or adjudication, in which a third party was the authoritative decision maker.<sup>2</sup> Only in mediation could disputing parties have the help of a third party who would help them make their own decisions, rather than making decisions for them. Even in mediator ethical codes, the principle of party self-determination was enshrined as a guiding principle from very early on.<sup>3</sup>

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\***Robert A. Baruch Bush, J.D.**, is one of the co-creators of the transformative model of mediation, and one of its best known exponents. Together with Joseph P. Folger, he co-authored *The Promise of Mediation* (1994, 2d ed. 2005), the book that introduced the transformative model. Bush is the Rains Distinguished Professor of Law at the Maurice A. Deane School of Law at Hofstra University, where he teaches courses on mediation, ADR and other subjects. He has practiced, taught and written about mediation for nearly thirty years. Bush is also Co-Founder and Former President of the Institute for the Study of Conflict Transformation.

\*\***Peter F. Miller** is a highly experienced transformative mediator in private practice in the New York metropolitan area. He mediates primarily in the family and workplace arenas, as well as business and community mediation cases. He has worked for the United States Postal Service’s REDRESS™ Program and for other government agencies with workplace mediation programs. He is an Adjunct Professor of Mediation at the Maurice A. Deane School of Law at Hofstra University.

<sup>1</sup> See, e.g., Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization*, 6 HARV. NEGOT. L. REV. 1, 15-21 (2001); Anne Milne & Jay Folberg, *The Theory and Practice of Divorce Mediation: An Overview*, in DIVORCE MEDIATION: THEORY AND PRACTICE (Jay Folberg & Anne Milne eds., 1998).

<sup>2</sup> See Robert A. Baruch Bush, *Efficiency and Protection or Empowerment and Recognition: The Mediator’s Role and Ethical Standards in Mediation*, 41 FLA L. REV. 253, 262-63, 270-73 (1989); Welsh, *supra* note 1, at 15-18.

<sup>3</sup> See, e.g., ABA STANDARDS OF PRACTICE FOR LAWYER MEDIATORS IN FAMILY DISPUTES, STANDARD I.C., III.C. (1984), 18 FAM. L. Q. 363, 363-65 (1984). See also Welsh, *supra* note 1, at 34-52 (analyzing the principle of self-determination in the mediator ethics rules of the Florida state mediation system, adopted in 1992).

Nevertheless, despite its supposedly central role, the value of self-determination has always faced competition from other values in the world of mediation,<sup>4</sup> and it has often fared badly in that competition. First, and most obvious, the pressure to achieve settlements – especially when mediation was linked to the courts – has often diluted the commitment to the principle of self-determination. Many research studies have documented the way in which mediators exert pressure on parties – sometimes coming close to coercion – to settle their case, and few argue that this is rare or even uncommon.<sup>5</sup>

But beyond the goal of settlement, other values have also led mediation, and mediators, away from the supposedly foundational commitment to party self-determination. Another example is found in the areas of practice in which fostering inter-party understanding, and even reconciliation, is seen as a major goal. Once such arena is in restorative justice and victim-offender mediation, where a primary goal of the process is to promote understanding and empathy between the parties, and thereby heal or restore the relationship or community that was

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<sup>4</sup> Besides the value of reconciliation mentioned in the text, perhaps the most persistent competitor has been the value of justice, or protection of vulnerable parties. One classic example is the “debate” in 1981 between Joseph Stulberg, a leading mediator and trainer, and Lawrence Susskind, a prominent environmental and public policy mediator, about the mediator’s “accountability” for the fairness of settlements. In effect, the tension was between the value of self-determination and the value of justice or protection, and there was substantial disagreement about which value was superior. Susskind argued that in mediating cases involving interests of parties not at the table – like many environmental conflicts – mediators had an obligation to ensure fairness to unrepresented interests, and that they should block resolutions that lacked such fairness, even if that would attenuate self-determination for the parties at the table. Stulberg argued that mediators could not do so, because of their need for neutrality – and should not do so, because of the value of party self-determination. See Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VERMONT L. REV. 85 (1981); Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VERMONT L. REV. 1 (1981).

<sup>5</sup> Welsh, *supra* note 1; Deborah M. Kolb and Kenneth Kressel, *Conclusion: The Realities of Making Talk Work*, in WHEN TALK WORKS: PROFILES OF MEDIATORS 459, 468-70 (1994). See Leonard L. Riskin and Nancy A. Welsh, *Is That All There Is?: The “Problem” in Court-Oriented Mediation*, 15 GEORGE MASON L.REV. 863, 870-71 & nn.38-40 (2008); Bobbi McAdoo and Nancy A. Welsh, *Look Before You Leap and Keep On Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEVADA L.REV. 399, 405-08 (2004/2005); Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J.CONFLICT.RES. 117 (2004); JONATHAN G. SHAILOR, EMPOWERMENT IN DISPUTE MEDIATION: A CRITICAL ANALYSIS OF COMMUNICATION 48 (1994) [reporting based on findings of detailed case studies of three mediations that, for two out of the three mediators studied, “everything the mediators do is geared toward ... the procurement of mediation’s product – an agreement,” and noting that mediators created their own meaning of a “good agreement.”]; Stacy Burns, *The Name of the Game is Movement: Concession Seeking in Judicial Mediation of Large Money Damages Cases*, 15 MEDIATION Q. 359, 360-63 (1998) [describing various strategies that mediators use to pressure for settlements].

damaged by the original offense.<sup>6</sup> There is ample evidence that practitioners in these areas use directive practices with the aim of promoting understanding and empathy, and evoking forgiveness and reconciliation. The same is true of both practice and theory in the area of divorce and family mediation, where mediators seek mutual understanding between the parties, if not reconciliation.<sup>7</sup> In all these areas, many theorists and practitioners consider it appropriate to engage in practices that may limit party self-determination, in order to promote greater understanding, empathy, and improved relationships. In sum, from the early days of the mediation field, other values have worked to “lure” mediators away from their ostensible prior commitment to party self-determination.

The introduction in 1994 of a new “model” of practice called “transformative mediation” was in part a response to this trend in the field to subordinate the originally supreme value of party self-determination to other goals like those just described. Indeed, the book that introduced the model, *The Promise of Mediation*,<sup>8</sup> was read by many – and fairly so – as a critique of the common practices used by mediators at that time, arguing that those directive practices were inconsistent and even contradictory to the unique values that had been espoused for mediation.<sup>9</sup> *Promise* went on to call for a return to the primacy of party self-determination, and suggested an approach to practice that would embody that value.

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<sup>6</sup> See John Paul Lederach & Ron Kraybill, *The Paradox of Popular Justice: A Practitioner’s View*, in THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES 357, 358-63, 369-70 (Sally Engle Merry & Neal Milner eds., 1993); MARK S. UMBREIT, MEDIATING INTERPERSONAL CONFLICTS: A PATHWAY TO PEACE 137 (1995); Jennifer Michelle Cunha, Comment, *Family Group Conferences: Healing the Wounds of Juvenile Property Crime in New Zealand and the United States*, 13 EMORY INT’L L. REV. 283, 292-93 (1999).

<sup>7</sup> See, e.g., Milne and Folberg, *supra* note 1, at 7-9 (Jay Folberg & Anne Milne eds., 1988); Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL’Y 7, 20-25 (1986). And this value plays a prominent role in several emerging new theories of mediation, including “insight mediation”<sup>7</sup> and “understanding-based mediation.”

<sup>8</sup> ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994) [hereafter, *Promise*].

<sup>9</sup> See, e.g., James B. Boskey, *Book Review: The Promise of Mediation*, The Alternative Newsletter, Mar. 1995.

However, it could be argued – and was, by some – that the model sketched out in the book was just as directive, in its way, as the practices it criticized.<sup>10</sup> The first Part of this Article examines why that happened, and why it took many years to correct and to identify practices that genuinely further party self-determination. Tracing that history is the best foundation for understanding why party self-determination – party agency – is the real heart of the transformative mediation model, and why those who follow the model are committed to it. Practiced properly, transformative mediation can be a powerful vehicle for supporting party agency; and as discussed in the second Part of this Article, the ultimate justification for transformative mediation is the profound importance of human agency.

The immediate impetus for writing this Article is that, even today, talented students and practitioners of transformative mediation still underemphasize the importance of client “empowerment” – the opportunity for clients to recapture the sense of agency that conflict has compromised.<sup>11</sup> That is, those learning and using the skills of a client-centered process like transformative mediation tend to overlook and ignore the achievement of client empowerment, compared to other goals, whether involving outcome or process. Why does the achievement of client empowerment go unseen in this way, even when its value has been explained and emphasized in readings, written work, training, and otherwise? Addressing this “invisibility” of client empowerment is a major challenge for those who ascribe importance to the impact mediation can have on restoring clients’ sense of agency in the wake of conflict. That is one purpose of this Article

However, the effort to meet that challenge makes sense only if one accepts the premise that client agency – and human agency in general – is a core value whose preservation and

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<sup>10</sup> One observed, “Bush has long been uncomfortable with mediators who take a directive stance in the mediation process, but by focusing on transformation he proposes an approach that is at least equally controlling.” *Id.*

<sup>11</sup> ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT 60-61 (2d ed. 2005) [hereafter *Promise 2*].

furtherance should stand at the center of any client assistance process. That premise lies at the heart of transformative mediation theory and practice, and other related processes.<sup>12</sup> What justifies that premise? What is it that explains the value placed by transformative mediation adherents (and others) on this phenomenon of human agency per se? Answering that question, primarily but not only in the context of mediators' work, is a second major aim of this Article.

To achieve these aims, this Article will begin, in Part One, by retracing the path that originally brought the authors and many others to study and practice mediation, and how that path changed its course several times over the past thirty years, in conjunction with changed perceptions of the importance of client agency. Part One will show first that the practice of mediation, even by those theoretically committed to the principle of self-determination, diluted that principle by placing less importance on client agency than on other values, especially the value of empathy and relationship. Second, it will show how practitioners of transformative mediation, through a process of reflection and self-critique, recognized their departure from the principle of self-determination and took steps to correct their actual practices in ways that did place primary value on client agency.

Part Two of the Article will explain the meaning of agency, as a basis for mediation and other social processes, as the self-aware and reflective assertion by an individual of the intentional choice to make decisions affecting their life circumstances. So agency and self-determination are related if not identical. It will be argued that the phenomenon of agency is at the core of human identity and consciousness; that is, the assertion of agency is an essential and

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<sup>12</sup> Regarding transformative mediation, see BUSH & FOLGER, *supra* note 11, at 59-62, 250-56; Robert A. Baruch Bush, *Mediation Skills and Client-Centered Lawyering: A New View of the Partnership*, 19 CLINICAL L. REV. 429, 450-51 (2012-2013). Regarding other processes, see, e.g., Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 12 ARIZ. L. REV. 501, 512-17 (1990) (discussing lawyering); Spencer Rand, *Teaching Law Students to Practice Social Justice: An Interdisciplinary Search for Help through Social Work's Empowerment Approach*, 13 CLIN. L. REV. 459, 485 (2006) (discussing social work); CARL R. ROGERS, *CLIENT-CENTERED THERAPY: ITS CURRENT PRACTICE, IMPLICATIONS AND THEORY* (1951) (discussing psychology); Dinerstein, *supra*, at 517-34, 538-44, 548-551 (discussing several other fields).

existential meaning of being human, regardless of whether it achieves some other specific impact in the external world. Part Three of the Article will show that, although the value of client agency and client-centered practice is largely disfavored in the dominant practices of mediation and other “helping” professions,<sup>13</sup> that value does find strong recognition among many in the society, as reflected in popular culture, and as voiced by the clients of transformative mediators.

The Article concludes that the stakes of raising awareness of the importance of agency, in mediation and other social processes, are very great – implicating the character of our civic culture and the viability of our democratic society; therefore, it is important that, in any process such as mediation where a client-centered approach is possible, that approach should be favored and promoted – since it will recognize and enact the central value of human agency.

## PART ONE: SELF DETERMINATION –THE JOURNEY AWAY AND BACK

### A. The Promise of Mediation: Moving from Agency to Empathy.

The authors of this article met roughly three decades ago at one of the many “community mediation centers” that serve parties in conflict in the New York area. One of them was presenting a training program at that center, and the other was a coach in that program. In one of the simulated cases used to demonstrate the mediator’s methods, a slow-witted worker had been attacked and humiliated as a “bozo” by his impatient boss. The mediator, in a private “caucus”, pressed the boss to consider how hard the worker was trying to do his job, despite his limited capability, and to imagine the harsh effect the name-calling had on the worker’s self-respect. The method was explained as a way of evoking understanding or empathy from the employer, which could obviously help promote a settlement of the case. But the response to this demonstration, from both the coach and the trainees, was that this practice of offering a

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<sup>13</sup> See, e.g., Robert A. Baruch Bush: *Staying in Orbit or Breaking Free: The Relationship of Mediation to the Courts over Four Decades*, 84 N. D. L. REV. 707, 739-42 (2008) (discussing and citing research on the prevalence of directive practice in mediation); Dinerstein, *supra* note 12, *passim* (discussing directive practice in lawyering and other professions). See also *supra* text accompanying note 5.

sympathetic explanation of one party to the other had value independent of the effect on settlement. That was the value of the experience of empathy per se, as an expression of human connection despite the presence of great differences.<sup>14</sup> For almost everyone present, realizing the power of mediation to evoke this kind of human connection explained why they were attracted to learn and practice this process – their desire to be the instruments of increasing understanding and empathy in situations where enmity was the starting point.

For the authors of this Article, this impulse to help parties move from enmity to empathy was a core motivation for their becoming mediators – and for adopting what came to be called the transformative model of practice, where the goal was not only settlement but also a “transformation” of the parties’ attitudes toward each other.<sup>15</sup> That model of practice was introduced to the field in a book that influenced many mediators who resonated with this view of the goal and value of mediation – *The Promise of Mediation*.<sup>16</sup> That book named two goals as central to the mediation process, both of which went beyond the goal of settlement per se – empowerment and recognition. The first focused on how the process could help clients reassess their sense of agency, the second on how they could activate their sense of empathy, both of which are often damaged by the experience of negative conflict.<sup>17</sup> And while both were presented as core goals of this approach to mediation, in both the book itself and the training and practice that grew out of the book, the recognition goal soon emerged in practice as the driving value behind the kinds of practices suggested for “transformative mediators”. How that happened can be illustrated by reference to the book itself, and developments following its publication.

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<sup>14</sup> See Dorothy J. Della Noce, *Seeing Theory in Practice: An Analysis of Empathy in Mediation*, 15 NEG.J. 271 (1999) (explaining the relation of empathy to mediation practice).

<sup>15</sup> See *Promise 2*, *supra* note 11, at 51-62; Bush, *supra* note 2, at 266-73.

<sup>16</sup> *Promise*, *supra* note 8.

<sup>17</sup> See *Promise 2*, *supra* note 11, at 54-62.

Empowerment and recognition are the terms used in transformative mediation theory that correspond to the values of agency and empathy, and in this Article this correspondence should always be borne in mind when these terms are used. In the first published work on transformative mediation, there were inherent contradictions in the treatment of empowerment and recognition. Thus, in the article that first articulated the empowerment concept in 1989, it stated that the “empowerment-and-recognition” conception of the mediator’s role requires a “pushy mediator,” who will not be passive but will push the parties to make informed and deliberate decisions and to reexamine negative views of each other.<sup>18</sup> Looking back, this obviously involves a contradiction. The kind of pushiness being called for would in itself undermine party self-determination in many cases – by insisting that “the parties consider and understand fully the consequences of either outcome, before they decide for or against agreement,” and by pushing “for each party to hear and understand the other’s position … [and] express a measure of recognition of the other party’s situation.”<sup>19</sup>

When *Promise* was published five years later, it clarified that a “successful mediation,” is one in which, “the parties *have been helped* to make informed, deliberate and free choices about how to proceed at every decision point” and “helped to give recognition whenever it was their decision to do so.”<sup>20</sup> This emphasis on “helping” rather than “pushing” the parties to make informed choices and to extend (or refuse) recognition is much more consistent with the primary value of party self-determination that underlies the transformative model.<sup>21</sup> So is the clear statement that “the definition of empowerment per se reminds the mediator that even a ‘poor outcome’ produced by the party’s own process of reflection and choice strengthens the self more

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<sup>18</sup> See Bush, *supra* note 2, at 277-83.

<sup>19</sup> *Id.* at 279-81. Still, such inconsistency might be expected at such an early stage in the emergence of a new conception. The account given here of the history of the transformative model draws in part from Robert A Baruch Bush, *Taking Self-Determination Seriously*, in J.P. Folger et al., eds., TRANSFORMATIVE MEDIATION: A SOURCEBOOK 51 (Institute for the Study of Conflict Transformation, 2010).

<sup>20</sup> *Promise*, *supra* note 8, at 95.

<sup>21</sup> See Bush, *supra* note 2, at 270-73.

than a ‘good outcome’ induced by the mediator’s directiveness or imposition.”<sup>22</sup> It appeared that the initial contradiction between “pushiness” and empowerment was resolved in favor of empowerment.

However, *Promise also* describes the patterns of transformative mediation practice as “encouraging deliberation and choice making” and “encouraging perspective taking.”<sup>23</sup> These two patterns could, depending on how they are carried out, involve the kind of “pushiness” that was advocated five years earlier. In fact, in the case study used in *Promise* to illustrate transformative practice, the mediator’s practices do just that. In the Landlord-Tenant case of *Promise*, the session began with a fairly standard “opening statement” in which the mediator set ground rules, which he later enforced. Later in the session, the mediator “stepped in and said that, if neither party objected, *he wanted* to speak to each privately.”<sup>24</sup> In these instances and many others in the session, the mediator’s interventions preempted party choices. Of course, the choices preempted were choices about process, not outcome. But the practices of the mediator in the case study could certainly be called “pushy” rather than supportive of party empowerment.

Beyond these process issues, the directiveness of the mediator was evident in his effort to “support” inter-party recognition. The transformative mediator in *Promise* focused on interventions in which he would “reinterpret, translate, and reframe parties’ statements” and “ask parties to consider the significance of such reformulations.”<sup>25</sup> For example, in caucus with the tenant, the mediator asked how her once-friendly relationship with the landlord had soured, and she answered that the landlord had pressed her hard for the rent even though she had obviously been in the midst of some personal problems. After sympathizing, the mediator asked her

*whether she thought it was possible that the reason [the landlord pressed by] continuing to call her was not that he didn’t trust her but that since it was wintertime, [the landlord] felt pressed*

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<sup>22</sup> *Promise*, *supra* note 8, at 88.

<sup>23</sup> *Id.* at 100-01.

<sup>24</sup> *Id.* at 151 (emphasis added).

<sup>25</sup> *Id.* at 101.

*himself to find out about the rent, because his bills were higher, so he couldn't be as flexible as he might have wanted to be.<sup>26</sup>*

In short, for the sake of trying to evoke recognition, this mediator was “pushing” the tenant quite a bit to consider things that she hadn’t thought of – and probably wouldn’t have – without the mediator’s suggestions. He was in effect telling her that she *should* entertain reconsiderations like these. He was employing a measure of directiveness for the sake of producing a recognition shift. In *Promise*, this is offered as a good example of how transformative practice tries to support recognition shifts. The same kind of intervention is repeated several times with each party.<sup>27</sup>

Thus, despite a clear theoretical commitment to the value of party self-determination and empowerment (client agency), the examples offered in *Promise* as transformative interventions actually involved a significant degree of mediator directiveness. And the strongest motive for this directiveness seems to have been the goal of “evoking recognition.”<sup>28</sup> To put it differently, as between empowerment and recognition, *recognition* emerged as the higher value in actual practice, so that evoking recognition would justify directive interventions, even though they may have diluted party self-determination or empowerment. Thus, while the stated theory claimed that empowerment had to be the foundation for recognition, the practices used by mediators trying to follow this “new model” – including the authors of this Article -- displayed a willingness to move away from empowerment in order to evoke recognition.<sup>29</sup> The clear question is: Why did the goal of recognition/empathy seemingly displace the goal of

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 163-78.

<sup>28</sup> *Id.* at 160.

<sup>29</sup> None of this escaped early critics of transformative mediation, whose criticisms seen in retrospect may be fairer than they seemed at the time. One observed, “Bush has long been uncomfortable with mediators who take a directive stance in the mediation process, but by focusing on transformation he proposes an approach that is at least equally controlling.” Boskey, *supra* note 9. This critic may have rightly sensed that it was the recognition value that was operating in *Promise* as the heart of transformation, and as thus justifying directive interventions. If this kind of critique arose from a serious reading of the illustrative interventions just described, it can be understood as a justified challenge to an inconsistency between the “rhetoric and reality,” theory and practice, of transformative mediation as presented in *Promise*.

empowerment/agency, in the practice of transformative mediation as originally enacted – especially since the theory behind that practice put these goals in precisely the opposite order?

### B. Placing the Emphasis on Recognition.

Answering this question involves looking at the larger context of the mediation field and its history prior to the advent of transformative mediation, as briefly described in the Introduction above. As noted there, despite its supposedly central role, the value of self-determination has always faced competition from other values in the world of mediation.<sup>30</sup> Also discussed above, one particular value that has long competed with self-determination for the minds and hearts of mediators, and worked to “lure” them away from their ostensible prior commitment to party self-determination, is the value of relationship or reconciliation.

This context helps to answer the question posed above: Why did early enactments of transformative practice display a directiveness that is inconsistent with party empowerment? The answer is that the lure of other values was difficult to identify and resist, even as transformative practice was being articulated on different grounds. In particular, for early transformative mediators the alluring competitor was the value of promoting understanding, empathy or relationship – in the terms of transformative theory, the value of recognition. And the lure of this value worked to overpower the supposedly more basic value of empowerment. As described earlier, the mediator in the Landlord-Tenant case employed directive practices, and did so out of a concern for promoting recognition,<sup>31</sup> and so did many others who followed his example.

Indeed, for many mediators, the great “successes” were the cases where the parties came to a new understanding of each other.<sup>32</sup> Promoting understanding, empathy and connection

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<sup>30</sup> See *supra* text accompanying notes 4-7.

<sup>31</sup> See *supra* text accompanying notes 23-28.

<sup>32</sup> Indeed, when training was first offered in transformative mediation, the first exercise was usually one called “success stories,” in which the participants – usually experienced mediators trained in other methods – were asked to

between people separated by conflict – what could be more significant? It is thus understandable that transformative mediation practitioners, including the model’s originators, were initially drawn into focusing on recognition and giving less attention to empowerment, despite the fact that this contradicted the basic theory itself. And as the transformative model grew in popularity, a major reason for this growth was that people were very interested in the recognition shift. The appeal of the transformative model was the possibility that, through using it, parties’ attitudes towards each other would change for the better. Mediation would “get” parties to change the way they saw each other, so their relationships and lives would improve – in families, in communities, in the workplace.<sup>33</sup> It seems that it was natural for both the suppliers and the consumers of transformative mediation to implicitly take the view that the recognition shift was the main point, precisely because the recognition value is so alluring. So if recognition tended to displace empowerment in the value hierarchy of transformative practice, one reason was the great allure of the recognition value. Another reason was the unobtrusiveness of the empowerment value itself.

### C. Failing to Notice Empowerment.

Even the best transformative mediation students, when explaining why using their transformative skills has value, often refer to recognition rather than empowerment. For example, in a recent course, one simulated mediation in the course involved a Muslim worker

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reflect on their past cases, identify for themselves their real “successes,” and then say what aspect of the case made it such a “success” in their eyes. The most frequent answer, expressed in various ways, was the moment in these cases where “the light went on” for the parties and they “saw each other differently.” See, e.g., Paul Charbonneau, *How Practical is Theory?*, in DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK 37, 46-47 (Joseph P. Folger & Robert A. Baruch Bush, eds., 2001) [hereafter, DESIGNING MEDIATION].. This exercise was very useful to draw mediators’ attention to the value they themselves saw in such “recognition,” and to then interest them into the study of how to practice mediation in ways that pursue this goal rather than the goal of agreement.

<sup>33</sup> This was part of what interested corporate agencies like the United States Postal Service in using transformative mediation for workplace conflict. See Cynthia J. Hallberlin, *Transforming Workplace Culture: Lessons Learned from Swimming Upstream*, 18 HOFSTRA LAB. & EMP. L.J. 375, 378 (2001) (“I knew almost any type of mediation could result in settlements, but the Postal Service wanted more....I needed more than ‘deals’. I was looking for improved relationships.”).

and a white supervisor, and in the mediation the worker became very clear that the supervisor had no interest in understanding her isolation in the workplace. The student's self-assessment of the case was that the mediation was unsuccessful because "it failed to achieve increased understanding between the parties". Another case involved two neighbors, a mother with young noisy children and a veteran counseling ex-convicts in his apartment. The student's reflection afterwards was that, although the mother became very clear that the veteran's counseling sessions were a threat to her family, the mediation did not succeed because she "failed to change her perspective" about those sessions. In these and other examples, students assessed their own work as unsuccessful because one or both parties did not make "recognition shifts" – even though one or both gained clarity and confidence about their situation and position. Essentially, although the mediations often showed increased party empowerment, they were seen as lacking because the parties did not make recognition shifts. Whereas, in cases where parties did become more understanding of each other during the session, the students saw these as successful mediations – but without mentioning that the parties also became clearer, more confident, and stronger in the mediation. In short, recognition got the students' attention, while empowerment got little or none, even though it was just as significant in the mediations. In effect, empowerment shifts simply went unnoticed.

So it is not just that empowerment got overshadowed by recognition; it was simply overlooked in itself. One reason for this is that empowerment shifts go unnoticed because they are harder to identify. This point can be explained by reference to the discourse studies concept of conversational "markers."<sup>34</sup> Markers are forms of expression, verbal or nonverbal, that signify a development in conversation that is considered important for some reason. As used here, "markers" are expressions in conflict conversation that are signs of a party shift from

<sup>34</sup> See Dorothy J. Della Noce, *Ideologically Based Patterns in the Discourse of Mediators: A Comparison of Problem Solving and Transformative Practice*, Ann Arbor, Michigan: UMI Dissertation Services, 2002 (unpublished) (on file with author).

weakness to strength, or from alienation to connection.<sup>35</sup> Though conflict conversation usually contains both kinds of expressions, the markers of empowerment shifts are typically less obvious than those of recognition shifts. Apologies, statements of changed perspective, even changes in tone of voice and manner of address, are all markers of recognition shifts. These markers are all quite noticeable in a mediated conversation – not only because of the high value placed on recognition, but also because expressions of recognition usually involve a sharp contrast with the tone and substance of the conversation preceding them. Moreover, these expressions are themselves, most often, noticeably positive. It is not just that the negative of hostility or suspicion is lessened; rather, the positive of acceptance or understanding appears quite visibly.

So these markers stand out, attract our attention, and seem central to mediation “successes.”

The markers of empowerment shifts, by contrast, tend to be less dramatic. When a party’s statements become less confused and rambling, more focused and articulate, this often comes as a relief to a mediator or observer. But it does not necessarily stand out as a dramatic change – although it is definitely a marker of an empowerment shift. Similarly, when a party’s expressions become less hesitant and more confident, or less agitated and more measured, such changes are markers of empowerment shifts. But these also may attract less attention, both because they are often quite subtle and also because they are noticed as the absence or removal of a negative – less confusion, less agitation, less hesitancy – rather than the occurrence of a positive. The positive appearance of clarity, calm and confidence may simply be subsumed in the dissipation of the negative; and when this happens, the marker of an empowerment shift is missed. These reasons help explain why empowerment itself, despite its foundational importance in transformative theory, tended to be overlooked and underemphasized in transformative practice.

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<sup>35</sup> See, e.g., Janet K. Moen et al., *Identifying Opportunities for Empowerment and Recognition*, in DESIGNING MEDIATION, *supra* note 32, at 112; Promise 2, *supra* note 11, at 167-69, 180-84.

In our most recent mediation class, the students' difficulty in seeing empowerment shifts motivated us to offer them a “typology” of such transitions. Thus, we labelled different *types* of empowerment shifts and asked the students to identify points in their mediations where one or both parties:

- stood up for him/herself (*advocacy*)
- acknowledged his/her own problem (*awareness*)
- used an argument to persuade the other party (*persuasiveness*)
- realized his/her responsibility for the conflict (*responsibility*)
- became very clear about the problem/situation (*clarity*)
- suggested a solution/course of action (*problem-solving*)
- demanded self-protective measures (*self-protection*)
- used eloquent or powerful language (*self-expression*)
- engaged in “thinking it through” (*deliberation*)
- came to a strong decision (*decision-making*)

This typology definitely helped the students to notice the parties' empowerment shifts, but the need for such a typology is further evidence that these shifts are not easy to notice by comparison to the recognition shifts that students saw so readily.

#### D. Moving Back to Empowerment: Re-focusing the Model on Party Agency

As described above, despite a strong theoretical commitment to party self-determination, the early practitioners of the model – including this Article’s authors -- often focused more on recognition as the primary value, and tended to employ directive interventions in order to further that value. The path to transformative practice led away from a focus of client empowerment and agency. However, a new period soon began in the development of transformative mediation practice, with the work of talented mediators who undertook to put their practice more in keeping with the theory articulated in *Promise*, especially as to client empowerment. Prominent among these was Sally Pope, an experienced family and commercial mediator. After reading *Promise of Mediation*, Pope resonated with the transformative model and began to experiment with using it. In that process, she began to question many of the practices she’d learned earlier in her career

and to look for different practices more consistent with the transformative model.<sup>36</sup> What she found were practices that went away from being directive and beyond the focus on recognition and empathy – instead moving toward a stronger focus on party agency. As close colleagues of Pope, the authors of this Article were impressed and influenced by her move toward greater client empowerment.

Pope's earliest moves in this direction involved the opening of her mediation sessions, which she'd always conducted using a standard opening statement describing the process, setting groundrules, establishing confidentiality, informing parties about caucusing, and so on. Gradually, she realized that every one of these elements in her opening was “supplanting” party decision-making, so she began to “throw open” the opening – inviting the parties into an “opening conversation” in which they themselves decided about groundrules, confidentiality, goals and reasons for using mediation.<sup>37</sup> For Pope and others, this “rethinking” of how to begin a session was the beginning of an ongoing exploration of the concrete meaning of transformative practice.<sup>38</sup> Most significant for this chapter, much of this exploration focused directly on practices that supported party empowerment shifts and increased party agency. This new generation of work began to realign the development of transformative practice with the premise

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<sup>36</sup> Pope had started her mediation career practicing the conventional, “facilitative” approach to the process. See Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996). According to one authoritative view of the facilitative model, the mediator in that model acts as facilitator or manager of the parties’ negotiation or problem-solving process. She/he establishes groundrules, facilitates information exchange, defines issues and structures an agenda, and tries to generate movement toward agreement by various means – such as encouraging parties to focus on interests rather than positions, emphasizing areas of agreement, discouraging discussions of past incidents and limiting expressions of intense negative emotions.

<sup>37</sup> See Sally Ganong Pope, *Inviting Fortuitous Events in Mediation: The Role of Empowerment and Recognition*, 13 MEDIATION Q. 287 (1996).

<sup>38</sup> See, e.g., James A. Antes et al., *Is a Stage Model of Mediation Necessary*, 16 MEDIATION Q. 287 (1999); Susan Beale & Judith A. Saul, *Examining Assumptions: Training Mediators for Transformative Practice*, in DESIGNING MEDIATION, *supra* note 32, at 1, 12-15. Erling O. Jorgensen et al., *Microfocus in Mediation: The What and How of Transformative Opportunities*, in DESIGNING MEDIATION, *supra* note 32, at 133.

of the model that empowerment shifts, and party agency, were primary and foundational in transformative mediation.<sup>39</sup>

Pope was also involved in a major initiative to train mediators in the transformative model, one part of which involved producing a video to demonstrate transformative practices in a simulated workplace conflict.<sup>40</sup> The authors of this Article partnered with Pope in the making of this video. By the time the video was made, Pope and others had developed considerable expertise using transformative interventions, and the practices shown on the video clearly demonstrated what it meant for a mediator to take seriously the principle of supporting and not supplanting party decision-making, and thus supporting increased party agency. The video was used for training beginning in 1998, and the impact on audiences was electric. They saw for the first time a set of practices that consistently supported party choices and agency at every decision point in a mediation session, and they saw how the impact of those practices was to facilitate empowerment shifts for both parties to the mediation. For some the picture was inspiring, and for some it was shocking; but for all the training participants, the centrality of empowerment and client agency in transformative mediation was made very clear.

This picture of “second generation” practice was crystallized and disseminated still further when two new publications emerged. The first was another video, *The Purple House Mediation*, featuring one of the authors of this Article as the mediator of an interracial housing conflict, and presenting another concrete picture of practice in which empowerment shifts are clearly seen as the foundation for conflict transformation.<sup>41</sup> The second publication was a completely revised edition of *Promise of Mediation (Promise 2)*, which clarified the relative place of empowerment and recognition shifts in conflict transformation and included the *Purple*

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<sup>39</sup> See *supra* text accompanying notes 20-22.

<sup>40</sup> DVD: SARAH AND BERNARD, R.A. Bush & S.G. Pope eds. (U.S. Postal Service, 1997).

<sup>41</sup> DVD: THE PURPLE HOUSE CONVERSATIONS, R.A. Bush & S.G. Pope eds. (Institute for the Study of Conflict Transformation, 2001).

*House Mediation* in transcript form as a case study.<sup>42</sup> Like the response to Pope's original video, the response to the *Purple House* video was powerful and diverse. Some could not understand why the mediator in the case does not do more to bridge the misunderstanding between the parties and promote recognition.<sup>43</sup> Others understood that the reason for this is that the mediator works first and foremost to consistently promote party *empowerment shifts and agency*, and that it is on the foundation of these *primary* shifts that recognition shifts can – and *do*, in *Purple House* – subsequently take place. In the words of *Promise 2*:

*The mediator's primary goals are (1) to support empowerment shifts, by supporting – but never supplanting – each party's deliberation and decision making, at every point in the session where choices arise (regarding either process or outcome) and (2) to support recognition shifts, by encouraging and supporting – but never forcing – each party's freely chosen efforts to achieve new understandings of the other's perspective.*<sup>44</sup>

The explanation made it clear that the empowerment shift, the exercise of party agency, is the condition on which all else in conflict transformation, including the recognition shift, depends.<sup>45</sup>

Thus the picture of transformative practice became clearer over the years – and more consistent with its underlying theory. And the early missteps, whether due to the allure of the recognition value (increasing empathy) or the unobtrusiveness of the empowerment value (increasing agency), were slowly corrected in training and in practice – including for the authors of this Article. The result is not only a theory, but a form of practice, in which empowerment comes first, in terms of its conceptual value and its practical importance. The picture of

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<sup>42</sup> *Promise 2*, *supra* note 11, at 131-214.

<sup>43</sup> See, e.g., Ran Kuttner, *Striving to Fulfill the Promise: The Purple House Conversations and the Practice of Transformative Mediation*, 22 NEGOT. J. 331, 340-45 (2006).

<sup>44</sup> *Promise 2*, *supra* note 11, at 66 (emphasis added).

<sup>45</sup> Comparison to the Landlord-Tenant case of *Promise* is instructive. There are certainly places in *Purple House* where the mediator could “suggest reinterpretations” to each party of the other’s current statements or past conduct, asking them to imagine more favorable motives for each other’s behavior. This was the key example given earlier to illustrate how the Landlord-Tenant mediator, to use the language of *Promise*, tries to “evoke recognition.” By contrast, there were no interventions of this kind by the mediator in *Purple House* – precisely because, to use the language of this newer picture, such suggested reinterpretations would risk both “supplanting party deliberation” and “forcing recognition.” That is, mediator reinterpretations would undermine rather than support empowerment shifts, as well as the genuine recognition shifts that might be built on them. Instead, the mediator was careful to “reflect” and “amplify” the conversation in ways that always supported the parties agency in making their own choices – including the choice of whether, when and how to extend recognition to each other.

transformative mediation today is a picture that acknowledges and maintains the centrality of party self-determination and agency, not only in theory but in mediation practice.

And yet this raises the question stated at the outset, which has increasingly troubled the authors of this Article: Why do students and practitioners of this model, even now, assess success and failure based primarily on whether the parties showed empathy and gave each other recognition, rather than whether the parties acted with increased agency and gained empowerment in the process? That is the focus of the remainder of this Article.

## PART TWO: MEDIATION AND HUMAN AGENCY

### A. The Problem: The Invisibility of Agency.

As noted earlier, even the most talented students and mediators regularly assess their mediations as successful or not based on whether the parties made “recognition shifts” – that is, whether they expressed greater understanding and empathy for each other. Where those kinds of shifts occur, transformative mediators feel gratified. Where they do not, the mediators often see the session as frustrating and ultimately unsuccessful.<sup>46</sup> This identification of success with the achievement of increased inter-party understanding misses the importance of client “empowerment” – the extent to which clients and parties are offered, and then take, the opportunity the process affords to recapture the sense of agency and self-determination that conflict has compromised. Understanding this “invisibility” of client agency/empowerment, and addressing it, is a major challenge to those who ascribe importance to the positive effect mediation can have on restoring clients’ full sense of agency in the wake of conflict. This challenge has led the authors to realize their own deep commitment to the value of human agency. They have also realized that they cannot explain their commitment to the core principles

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<sup>46</sup> See *supra* text accompanying notes 11-12.

of party self-determination and empowerment in mediation without delving into and explaining their own larger commitment to the value of human agency.

Reflecting on the source of this commitment, the authors confronted each other with a question: If mediators “get” the practices of transformative mediation and perform them with real skill, *why does it matter to us* whether they recognize that what they are doing is increasing party agency, and that this is its real value? Searching for an answer led both of us to realize that our own real interest goes beyond the subject of mediation per se. What makes mediation important as a social process is that it is, or can be, a very good vehicle for increasing human agency. In other words, *human agency* is the truly important subject, and mediation puts a spotlight on that subject. Our real interest, and our real sense of what’s important to notice and support, is the value of agency itself.

### B. Defining and Understanding Human Agency.

In a course or training on transformative mediation, it is barely possible to mention, much less to explore deeply, the phenomenon of *human agency* and its enormous value, to individuals and to society as a whole. Yet, without understanding this value, advocating for transformative mediation – or any party-centered practice – will likely not succeed in changing the character of the field. This connection between transformative mediation and larger societal structures and processes was noted in the Foreword to *Promise of Mediation* twenty-five years ago.<sup>47</sup> Since then, most of the effort has been on explaining the process itself and teaching its specific client-centered practices.<sup>48</sup> But those practices will continue to gain only limited traction unless the case is made for their larger societal impacts. This may explain why, in many professions, client-centered practice is a minority approach, while expert-driven modes of practice

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<sup>47</sup> See Jeffrey Z. Rubin, *Foreword*, in *Promise*, *supra* note 8, at xi-xiii.

<sup>48</sup> See, e.g., *Promise 2*, *supra* note 11, at 131-214; Robert A. Baruch Bush and Sally Ganong Pope, *Transformative Mediation: Changing the Quality of Family Conflict Interaction*, in JAY FOLBERG, ANNE L. MILNE & PETER SALEM, *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES AND APPLICATIONS* 53.

dominate.<sup>49</sup> Client-centered practices are undervalued because the gains in human agency that they foster are undervalued, in comparison to other goals. Therefore, at this juncture, what is needed is to focus directly on the larger societal implications of client-centered practices, which relate to the place our society affords or denies, and the value it ascribes or denies, to the phenomenon of human agency. That is the aim of this part of the Article, although some examples will be drawn later from the realm of transformative mediation.<sup>50</sup>

Human agency is a concept that has been the focus of much study and discussion in multiple fields, including philosophy, psychology, sociology and others.<sup>51</sup> In those fields, the concept has been defined and explained in multiple ways, and it is beyond the scope of this Article to examine or even summarize that multi-disciplinary discussion. Instead, for purposes of this Article, a working definition of agency will be posited, drawn from sources in the fields mentioned above, as follows: *Agency is the self-aware and reflective assertion by an individual of the intentional choice to make decisions affecting their life circumstances.* In this sense, agency and the concept of self-determination are related if not identical. Also, in this definition, agency is not absolute; that is, individuals' agency is usually limited by their environment and surrounding social structures.<sup>52</sup> Nevertheless, they can still exercise a measure of agency within those limits.

Working with this definition, the premise of this Article, supported by much of the literature on agency, is that agency is a core element of human identity, and that human well-being requires the assertion of agency for its fulfillment.<sup>53</sup> That is, agency is not simply a socially

<sup>49</sup> See, e.g., Bush, *supra* note 13, at 739-42 (discussing and citing research on the prevalence of directive practice in mediation); Dinerstein, *supra* note 12, *passim* (contrasting directive practices in traditional lawyering, counseling and other professions, with client-centered practices in those professions).

<sup>50</sup> See *infra* text accompanying notes 78-79.

<sup>51</sup> See Julia Lerch, et al., *The Rise of Individual Agency in Conceptions of Society*, 32 INT'L SOCIOLOGY 38, 38-40 (2017).

<sup>52</sup> See Albert Bandura, *Social Cognitive Theory: An Agentic Perspective*, 2 ASIAN J. SOCIAL PSYCH. 21, 23-24 (1999) (adopting a similar definition of agency and a similar view of its relation to social structure).

<sup>53</sup> See *Promise* 2, *supra* note 11, at 59-62 (citing literature from multiple fields), 250-56.

constructed concept, it is an inherent feature of human consciousness or identity; so that the restriction of agency violates the sense of self that human beings carry, and the support of agency enables the fulfillment of that sense of self.<sup>54</sup> In the words of Joseph Stulberg, a mediation scholar whose work regularly integrates philosophical concepts, “[A] person’s capacity to engage in the process of making such decisions, and to have her choices respected, is essential to her being; one cannot be a person without making such decisions and assuming responsibility for their outcome.”<sup>55</sup> In other words, agency is essential to human personhood, whether in mediation or in general. Moreover, according to celebrated psychologist Albert Bandura, an individual’s belief that s/he possesses agency is a necessary condition for her sense of self-efficacy, which is in turn a prime contributor to her overall well-being and success in life.<sup>56</sup> This view is consistent with cross-cultural research from all over the world which documents that autonomy and the ability to make choices that affect one’s life is a prime determinant of human wellbeing.<sup>57</sup> It is also consistent with sociological research documenting that people consistently prefer social processes that afford them high levels of participation and decision-making.<sup>58</sup> In all this work, human agency is “proven” to be central to human identity.

### C. What Agency Facilitates: A Comparison

In fact, however, human agency is not a phenomenon that can be proven, even with the support of multidisciplinary sources. Even if studies show that human

<sup>54</sup> See *id.* Obviously, this view of agency accepts the notion that human beings do indeed exist as individuals, although within a social context, and that they are not solely the consequences or by-products of larger structures, whether economic, political or otherwise. See Lerch et al., *supra* note 51.

<sup>55</sup> Joseph B. Stulberg, *Mediation and Justice: What Standards Govern?*, 6 CARDozo J. CONFLICT RESOL. 213, 230 (2005).

<sup>56</sup> Bandura, *supra* note 52, at 28-32.

<sup>57</sup> See, e.g., B. Ann Bettencourt and Kennon M. Sheldon, *Social Roles as Mechanisms for Psychological Needs Satisfaction*, 81 J. PERSONALITY AND SOC’L PSYCH 1131 (2001).

<sup>58</sup> See, e.g., E. ALLEN LIND & THOMAS TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988).

wellbeing, happiness, efficacy, etc., all require agency, this could be an effect or perception created by social structures themselves. Even if research “proves” that agency increases resilience and strength and diminishes “fragility” and dependency,<sup>59</sup> all this can be ascribed to the effect of culture or social forces. Indeed, opposed to the view that agency matters are those arguing that individual choice is itself a construction, an illusion, and that human beings and their choices are ultimately products of social forces, environment, brain wiring, and other factors unrelated to individual agency.<sup>60</sup>

In fact, then, **there is no way of proving empirically that agency is an essential element of human nature and consciousness.** Rather, **asserting the core value of agency is itself a choice, a belief, an assertion about how things are or should be.** If this is so, how can one make a convincing case for the importance of valuing agency to anyone who doesn’t already hold this belief? One suggestion is through a mental exercise in comparison – through envisioning a world without agency and a world with agency, and comparing the character of the two, as in the following discussion.

If agency is dismissed as simply a social construction or convention, then nothing else in the realm of human conduct is really meaningful.<sup>61</sup> What difference does it make if empathy is expressed, or generosity, or courage – or selfishness and cowardice? All are the products of deterministic forces, so what is the significance of these forms of human conduct? If there is agency, and choice, everything else has the potential for value and significance. Without agency, there is no significance and no responsibility –

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<sup>59</sup> See Greg Lukianoff and Jonathan Haidt, *The Three Great Untruths that are Harming Young Americans*, HELEO.COM (Oct. 23, 2018) [available at <https://heleo.com/three-great-untruths-harming-young-americans/19321/?platform=hootsuite>]; GREG LUKIANOFF & JONATHAN HAIDT, THE CODDLING OF THE AMERICAN MIND 19-32 (2018).

<sup>60</sup> See Bandura, *supra* note 52, at 21-23. (Describing this non-agentic view of human beings: “People are merely repositories for past stimulus inputs and and conduits for external stimulation, but they can add nothing to their performance. They undergo actions rather than construct, select and regulate them.... [S]tripped of consciousness and agentic capability of decision and action, people are mere automatons undergoing actions devoid of any conscious regulation, phenomenological life or personal identity.”)

<sup>61</sup> See *id.*

good and evil acts can be attributed to larger forces, and the individuals performing the acts deserve neither credit nor blame.

Said differently, without the belief in agency, all action is the result of compulsion, external or internal. If external, it is the result of outside forces; if internal, it is the result of irrational impulses or preferences. Either way, there is no significance or meaning in terms of individual intention or purpose. So to envision a world without agency is to envision a meaningless, chaotic place, devoid of intention, purpose and meaning. Whereas, with a belief in agency, everything becomes meaningful and significant – and real. Empathy, generosity, etc. are all real phenomena, because they are intended and meant, and that is so because there is an agent behind them choosing and enacting them, asserting them into the world. The same is true for evil acts. So there can be accountability and responsibility. There can be admiration and there can also be condemnation. All of this is possible when human agency is present and operating. None of it is possible when it is not.

In sum, without agency, no human action is real, all action is an artifact – like forced recognition in mediation.<sup>62</sup> Given all the above, one can argue that even if agency is not a provable element of human identity, it makes sense to act as though it is – because this choice to see agency as real will ultimately construct a more decent, humane, livable world. This hypothetical comparison should help explain why agency – or the belief in it – does and should matter deeply.

#### D. What Agency Itself Represents.

However, the above argument supports the value of agency by reference to the effects that its presence or absence produces. That is, it argues for the importance of agency as

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<sup>62</sup> See *supra* text accompanying notes 25-31.

*instrumental* to the achievement of other, more fundamental values: *human wellbeing*, *happiness*, *efficacy*, *empathy*, etc. It does not argue or show that human agency has an *essential value*, in itself and without reference to its valued effects. To understand the depth of commitment to agency required in client-centered practices, the *essential* value of agency must be understood and recognized. Otherwise, if client-centered practices fail to achieve the other valued effects, then agency must be restricted in the pursuit of those other effects. This is the argument that explains the move away from client self-determination described in Part One of this Article, and well-documented in mediation and other fields.<sup>63</sup> Those who make this move believe that to achieve recognition/empathy, or justice, or even settlement, client agency can and sometimes must be abandoned.<sup>64</sup> However, the authors believe and argue the reverse -- that even if supporting client agency *fails* to produce these results, the clients' exercise of agency has *essential value* and takes priority in practice.

Our belief is that when a human being acts with agency, that action itself has an essential value – whether it is described as being part of human identify or in some other way. That value is captured, in one sense, by the terms first used above to define agency – “the *assertion* by an individual of the *intentional* choice to make a decision or take an action”. The term *assertion* implies that agency involves a *positive* action, from within the individual him/herself, to bring some internal intention into the world. That action, by definition, is taken freely; it is not a *reaction* to some external pressure or force, even if external factors may come into consideration in the decision.<sup>65</sup>

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<sup>63</sup> See *supra* text accompanying notes 14-33.

<sup>64</sup> In fact, this argument is fallacious, because where any of these other goals are achieved by imposition and not by party choice, the gains made are illusory. That is, recognition resulting from mediator pressure is not genuine; justice resulting from mediator imposition is unlikely to be truly equitable; and settlement/agreement achieved by mediator pressure is unlikely to be complete and sustainable. Nevertheless mediators who do not value agency per se will often engage in impositional practices to “achieve” these other goals.

<sup>65</sup> See Bandura, *supra* note 52, at 22-23. On his website, Bandura summarizes his view of agency, which includes elements similar to those mentioned here in the text: “Agency refers to the human capability to influence one's functioning and the course of events by one's actions. There are four functions through which human agency is

The term *assertion* also implies that the action requires some motivating energy within the self to bring it about. That is, even where there is no external pressure that produces a reaction, there are *internal* barriers or steps to be overcome before the intention emerges into action. That is implied by the term *intention*, which means that there is a gap to be bridged between the intention itself and the intended result. Those barriers may involve unclarity about what the intention involves or requires; they may involve uncertainty about how to express the intention; they may involve doubt about one's capacity to carry out the intention.<sup>66</sup> Agency represents an *assertion of the self itself* that overcomes those barriers and breaks through from an internal, contemplated intention to an externalized, realized action or decision.<sup>67</sup>

In an earlier effort to describe the nature of agency, and in doing so establish its centrality to human identity, one of the authors wrote, “Agency involves an outward thrust of the self into the world. It occurs at the nexus of volition and action: the place where choice and the ability to exercise choice meets the capacity to act in some fashion.”<sup>68</sup> Thus agency includes both choice and intentional action, both of which are essential to human identity. Reflecting further on this observation, the authors believe that this description of agency relates to another deep truth about human beings. Individuals’ identity – *the self* – is not static and limited, but rather dynamic and

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exercised. One such function is intentionality. People form intentions that include action plans and strategies for realizing them. The second function involves temporal extension of agency through forethought. People set themselves goals and foresee likely outcomes of prospective actions to guide and motivate their efforts anticipatorily. The third agentic function is self-reactiveness. Agents are not only planners and forethinkers. They are also self-regulators. The fourth agentic function is self-reflectiveness. People are not only agents, they are self-examiners of their own functioning. Through functional self-awareness, they reflect on their personal efficacy, the soundness of their thoughts and actions, the meaning of their pursuits, and make corrective adjustments if necessary.” Albert Bandura, *Agency*, at <https://albertbandura.com/albert-bandura-agency.html>.

<sup>66</sup> See *id.* In transformative mediation theory, barriers like those mentioned in the text are the “markers” of the weakness of self that characterizes the negative conflict cycle. See BUSH & FOLGER, *supra* note 11, at 49-50.

<sup>67</sup> For this reason, agentic action is even more significant when it is a response to barriers from within or without that seem powerful enough to block or frustrate its expression. The intentional self-assertion needed to break through those barriers comes from, and calls forth, a deeper level within the self, leading to a fuller expression of the self. This is one reason why the phenomenon of individuals overcoming a sense of their own weakness and connecting to their sense of strength – such as the empowerment shift in transformative mediation – has such a powerful impact on whoever experiences or witnesses it. Specific examples of this phenomenon, and its powerful impact, are given below. See *infra* text accompanying notes 78-85.

<sup>68</sup> Peter F. Miller, “Notes on Agency”, manuscript on file with author.

venturesome.<sup>69</sup> The self seeks to develop its full identity and to find expression in the world.<sup>70</sup>

And this need of the self to develop, and to bring itself into the world, is foundational to human nature. Thus agency matters deeply because only through its exercise can the human self be constructed and expressed.<sup>71</sup>

In short, *agency is the phenomenon of the self's identifying and expressing the self*, and as such it is at the core of human identity and consciousness. The assertion of agency, in other words, is one essential meaning of being human. That is the value of agency – an essential value -- regardless of whether it achieves some other specific impact in the external world<sup>72</sup>

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<sup>69</sup> See *Promise 2*, *supra* note 11, at 251-54 (citing sources from different fields adopting the view that the self is not static but rather develops and is constructed through interaction with the world); see also Barbara Gray, *The Gender-Based Assumptions of Negotiation Theory*, 4 RESEARCH ON NEGOTIATION IN ORGANIZATIONS 3, 24-25, 27-28 (1994) (arguing that feminist perspectives show that static conceptions of the self are invalid).

<sup>70</sup> The need for expression accounts for - but is by no means restricted to - the creative impulse; and it accounts for the lonely stances artists sometimes take in support of or in defense of their work. Bob Dylan's refusal to accede to the impassioned wishes of his fan base provides an example of an artist standing by his work, even leaning back into a sea of disapproval and opprobrium. As a folk singer Bob Dylan swiftly came to be one of the very foremost voices of youth and the counter culture. He performed within the established traditions of folk music by using an acoustic guitar and without being accompanied by percussion. That changed at the Newport Festival of 1965. He came on stage with an electric guitar accompanied by rock musicians who provided a rock underpinning to his songs. This evolution into what came to be called folk/rock dismayed his audience. People saw it as to selling out to commercialism, and as a betrayal. (An apocryphal story circulated, much believed at the time, that Pete Seeger, an older icon of folk music, tried to cut Dylan's electric guitar cord during the performance.). Not deterred, Dylan persisted in his new style. Controversy dogged Dylan when he toured Europe the next year. One moment epitomizes the fan base's response to the change in Dylan's music and his defiant response to that. At a concert in England, Dylan is greeting by a cascade of boozing as he comes on stage accompanied by back-up musicians. (One concert goer, is reputed to have yelled, "Judas!"). Dylan turns to one of the band members and can be heard to say, "Play it f\*\*\*ing loud." The scene is captured in Martin Scorsese's 2005 documentary, *Bob Dylan: No Direction Home*.

<sup>71</sup> See Robert Burns, *Some Ethical Issues Surrounding Mediation*, 70 FORDHAM L.REV. 691, 709-10 (2001) (citing the philosophical view that "the self is not obvious to the self," but must be discovered or constructed.) But what is meant here by *the self*? To receive a fatal prognosis and go to pieces certainly qualifies as informing the world with one's innerness. But to fall apart in the face of adversity is not to exert agency; rather it is to lose touch with it. *The self*, as we envision and use the term, means the *intended self*: who it is we wish to be and how it is we wish to comport ourselves. So, to extend the example of the fatal prognosis, *agency* would apply to the patient's heroic efforts to regain composure after the diagnosis. And the force driving agency would be the *intended self*'s need or desire to meet adversity well.

<sup>72</sup> For a concrete example of this phenomenon, see *infra* note 87. This is not to say that agency is the *only* essential value, or the *only* essential meaning of being human. In the *Promise of Mediation* and other key writings on transformative mediation, it was argued that another essential value, and core element of human identity, is empathy or compassion – and that full human development involves an integration of agency and empathy. See *Promise 2*, *supra* note 11, at 59-62. This Article does not abandon that view. Rather, it argues that the enactment of agency alone, even if empathy does not follow, is still an essential value and core element of humanity. Because of the tendency to overlook or undervalue agency discussed in this Article, that argument is the authors' focus here. It is worth noting, however, that in any ordering of essential human values, there is a sound argument that agency is

To return to the original subject of this Article: This kind of assertion of agency is what occurs in mediation when a party makes an entirely self-determined decision – and it occurs whether or not that decision leads to settlement, justice, recognition, or any other valued end. It is an end in itself, and because that is so, supporting client agency in mediation is of central importance, and trumps any other possible goal that the process might be used to achieve. In exploring our own commitment to self-determination in mediation, this is what the authors of the Article have realized about our deeper, underlying commitment to the value of agency: it is a supreme value that is either served or disserved by mediators, depending on how fully they support client decision-making. This realization is all the more important because of another dimension related to this discussion: the institutional context surrounding the practice of mediation and other client-centered processes.

#### E. The Stakes in Choosing to Value Agency.

Another important factor that strengthens our commitment to the principle of client self-determination is the restriction of the space given for agency to function, in our current societal environment. That is, the organization of social processes, and especially the organization of professional expertise, makes the assertion of agency very difficult and almost impossible in many contexts. This obviously comes back to the specific subject of this Article, disregard for client agency in mediation. But beyond mediation, there is also a robust body of literature documenting, and criticizing, the culture of expertise that dominates many so-called “helping professions” – including law, medicine, counseling, education, and others. In all these professions, the outside expert – lawyer, doctor, therapist, educator, or mediator – traditionally assumes a place of authority that automatically shrinks the realm of client agency, and many

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primary, because as described in the previous section, other valued human impacts lose their significance if they occur without agency but as reactions to other forces.

assume that this is the proper state of affairs.<sup>73</sup> This dominant culture of expertise makes the value of agency even more important to assert and explain, because it is a “minority” value that must fight for its place in society and in peoples’ consciousness. In short, because agency is often disregarded, and the opportunity for exercising it is so limited, asserting its value becomes correspondingly more important. That is certainly part of what has driven the commitment of the authors to make their claims about the value of agency.

The larger societal consequences of professional disregard for client agency are hard to overstate. When clients are denied agency by “experts”, they come to doubt their own capacity for agency in general. A self-fulfilling prophecy then takes over. In families, workplaces, communities, and civic life generally, people flounder in the face of problems and challenges, and they fail to realize and activate their own capacity for working through those challenges. The result is a culture of reliance on outside “helpers” and experts, in which people forfeit control over their own lives.<sup>74</sup>

In a democratic society the results of that forfeiture cannot be overstated. Can we really be surprised by this moment in which our society finds itself -- in which people view decisions that affect their lives as being foisted on them by detached or malign elites, in which theories of conspiracy abound, and in which there is broad skepticism of knowledge itself? The destructive impacts of inequalities in income to both individuals and societies have been studied and

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<sup>73</sup> See, e.g., Dinerstein, *supra* note 12, at 504, 506 & notes 17-19 (regarding the weight given to professional expertise in traditional legal and medical practice), note 173 (regarding the weight given to professional expertise in traditional psychology practice), and *passim*. Dinerstein’s article is an exhaustive examination of the conceptual and practical differences between the traditional, expert-centered approach to practice, and the client-centered approach, in different fields, and at many different levels.

<sup>74</sup> An interesting example of this disregard for agency’s value has surfaced in the authors’ classes, when the subject of agency is discussed. Every year, a hypothetical deal is offered to the students: the student will surrender to the professor all decision-making power over his/her life for one year, and if the student does not agree at year’s end that their life is categorically better than if s/he had made his/her own decisions, the professor will pay a million dollars. Each year, more than half the class accepts the hypothetical deal, and surrenders their agency to the professor. Why? Because the culture of expertise has inculcated in the students the belief that the “expert” will get better results than they will on their own – and the exercise of agency in itself – even their own agency -- does not hold great enough value for them to resist the deal.

documented. But what of the unevenly suffered harms that result from deficits – and inequities – in *agency*?<sup>75</sup>

As argued in the *Promise of Mediation*, the stakes of rejecting agency in mediation are thus far greater than the impact on that field – they may ultimately contribute to a decline in the self-governing and democratic character of the society as a whole. However, it is equally true that accepting and enacting the value of agency in mediation can contribute to strengthening the society's commitment to democratic processes and institutions, and the capacity of the citizenry to make those structures work. In *Promise*, that positive impact was identified as one of the public values of transformative mediation, and that value is as important today as it was 25 years ago.<sup>76</sup> It is also just as much in need of more widespread recognition and support.

### PART THREE: RECOGNIZING AND SUPPORTING THE VALUE OF AGENCY

#### A. Lights at the End of the Tunnel: Portraits of Agency in Transformative Mediation.

At the same time as agency is restricted and disfavored by many current social and professional structures, the value of agency has found powerful expression and support in client-centered practices in some professions – including transformative mediation. Despite the serious challenges discussed in this Article, cases reported by transformative mediators confirm how

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<sup>75</sup> The literature on client-centered lawyering raises this question explicitly and implicitly, in stressing the special importance of client agency for poor, disadvantaged and disempowered clients. See, e.g., GERALD LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VIEW OF PROGRESSIVE LAW PRACTICE (1992); DOUGLAS ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 168-69 (1974) (stating that client-centered lawyering is intended to "promote the dignity of citizens as clients..., make the client a doer, responsible for his choices [and] increase the chances for [the] client achieving a measure of control over [his] own life...."); Elizabeth Newman, *Bridging the Justice Gap: Building Community by Responding to Individual Need*, 17 CLIN. L. REV. 615, 627-31 (2011) (arguing that "[i]f the lawyering process is to be an effective tool for social justice, the means cannot be inconsistent with the ultimate goals," and suggesting that the client should be treated as "a vital partner from the very outset," and supporting "the conception of the lawyer as coach and the client as capable partner."); Rand, *supra* note 12, at 485 (citing the social workers' ethical code provision that "People empower themselves and our job is to assist them", and arguing that social justice lawyering must be based on the same principle).

<sup>76</sup> See *Promise* 2, *supra* note 11, at 80-83.

parties value and seize the opportunity the process gives them to assert their own agency in the face of disempowering situations.

Transformative theory recognizes the corrosive impact that conflict has on people's capacity to exert agency. In the midst of conflict, parties become less clear in their thinking, less able to articulate their thoughts, less able to process and make decisions, and less confident of their own efficacy. Transformative theory also recognizes that this state of weakness is existentially discomfiting to disputants, to such a degree that, if properly supported in mediation, they will make every effort to recapture those essential attributes of agency, even as they contend with one another.<sup>77</sup> The following vignettes, drawn from actual mediation cases, use the voices of parties to demonstrate that people in conflict place great importance on the need to sustain or regain their agency in transformative mediation.<sup>78</sup>

*1. Something Worth Praying For.* Some years ago, one of the authors mediated a dispute between two managers in a business. For many years they worked closely, each with the same level of institutional authority and status. Then one of them was promoted, and the other became subordinate because he now reported directly to his former equal. The new arrangement so toxified their professional relationship that the subordinate manager filed a discrimination complaint against his new boss. The company they worked for has an internal process with which to handle complaints of discrimination. People filing complaints may opt for mediation as a potential means of resolving their issues. Mediation is mandatory for managers named in complaints.

In this case, there was a third manager present in the mediation that resulted from the subordinate's decision to mediate the matter. Both the boss and the subordinate had requested his presence. In introducing himself and describing his role in the mediation,

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<sup>77</sup> See *id.*, at 49-53.

<sup>78</sup> It is important to note that, in each of the mediation vignettes in this section, and each of the film scenes in the following section, the story shows the essential and independent value of agency, without any further effect needing to occur. See *infra* note 87 for further discussion of the significance of this point.

this manager said, “I’m not here to help one of these guys right a wrong. They are both nice guys and I am here in support of both of them.” The mediation that ensued was satisfactory to both boss and subordinate. In its aftermath, probably because of the presence of the third manager, the three engaged in a conversation of the sort that mediators seldom are privileged to hear. Disputants rarely articulate the feelings and thoughts they had experienced as they anticipated their approaching mediation. Here each of the two disputants did precisely that. Each related that they had gone to church after work the day before the mediation. Each had prayed. Each asked for the ability to be *firm and clear* in mediation the following morning. In sum, rather than focus on a desired outcome, each disputant asked that he not lose the capacity to act with agency, in a situation that each clearly saw as an imminent challenge that would require him to draw on reserves in order to surmount.

Little commentary is required here. Clearly conflict can be formidable and daunting because the experience of conflict challenges one’s human capacities. Clearly the ability to meet the adversity of conflict with one’s capacities at their best is something that matters to people. And clearly retaining or regaining those capacities is hard. In moments of great challenge, people do not pray for the inconsequential. What mattered to the parties here was their agency. That is what they prayed for, and this mediation allowed and helped them to maintain it.

2. The Value of Voice: One of the authors had a partner for many years with whom he mediated issues of divorce and other family matters. This case is drawn from that experience.

On a particular day the author’s partner, Sarah, found herself in our locality’s Supreme Court. She was there representing an association of mediators whose practices include divorce and sundry disputes that occur within families. The association had placed mediators at the Court’s disposal that day in response to a joint initiative by the court system and various mediation groups called Mediation Appreciation Day. Mediation Appreciation Day is an annual one day event which attempts to demonstrate the capabilities of mediation to court personnel, principally judges and to litigators as well who happen to be in Court that day. The case the judge selected for mediation was a divorce case that was set to go to trial that afternoon. The judge literally threw the case’s bundled paperwork to Sarah, and ordered the spouses to “Go with the mediator and try to work this out.” (A room had been set aside for mediation.) Those readers familiar with divorce will understand just how remote was the possibility of the spouses “working out” their issues. Few divorce actions get on court calendars; only a fraction of those cases actually go to trial. So this husband and wife were among a small cohort of spouses whose issues had proved intractable in negotiation, whether conducted directly or through attorneys, or in mediation. Adding to the unlikelihood of resolution was the utter absence of choice by the spouses regarding the selection of mediation as a means of potential resolution.

Since Sarah is a transformative mediator, she gave the spouses the option of just sitting for a length of time rather than attempting to mediate their differences. After a short discussion the spouses opted for mediation, in effect saying, “As long as we have to be here, we might as well try.” And so, they opened a discussion of their issues. Their conversation was notable for its contentiousness and acrimony. Each spouse staked out ground and held it, often in spirited fashion. Neither moved an inch. In the words of another client of one of the authors, who is unrelated to this story, “They agreed to disagree about everything. They resolved nothing.” After an hour or so of sustained disagreement the spouses decided to suspend the mediation and return their case to the Court so as not to delay their trial.

The wife happened to see Sarah an hour or so later as Sarah was leaving the Courthouse. The wife crossed the wide corridor that separated them and proffered her hand. When Sarah gave the wife her hand, the wife said, “I want to thank you. I found my voice.”

To be without a voice is crippling to the sense of agency.<sup>79</sup> The self is imprisoned and therefore incomplete. And finding one’s voice is powerful and restorative. These spouses were contending over the distribution of their marital assets. For the authors, this story raises the question, “What is worth more, gaining a greater share of assets, or gaining one’s voice, one’s agency?” For the wife here, the answer was clear. Parties value their agency, and they value a process that supports it. They find that in transformative mediation.

3. Doing Something. A young man, in his early to mid-20s, had agreed to participate in mediation at the request of the young woman of comparable age. Both the young man and young woman are deaf. Mediation had been suggested to the young woman by a staff member of a social agency - both the young people were long standing clients - which offers an array of services to the deaf community. The local community mediation center which had offered to host the young people’s mediation provided an interpreter, fluent in American Sign Language. One of the authors of this Article was the mediator.

When the mediator invited the two young people to open their conversation, it was the young woman who chose to speak. She unfolded a lengthy narrative, the theme of which was the history and status of their relationship. She spoke at length of the value she placed on having been in emotional partnership with the young man. How his support and simply being with him had permitted her new insights into the motives that had

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<sup>79</sup> See *infra* notes 84-85 and accompanying text.

governed the poor decisions she had made in the past. And how his support and being connected with him had equipped her with a deeper knowledge of herself, so that she had at last been able to take steps to stabilize her life, which had to that point been chaotic and disjointed. In continuing, the young woman spoke of the discomfort the young man's uncommunicativeness had caused her in their past, and was especially causing her now. Even when things were going well between them, she said, his failure to communicate his feelings about her had caused her pain. He had never told her he loved her, had never said that he valued being in connection with her. Now, she was hearing from others in the community that the young man had told them that she and he "were no longer an item." She wanted him to know that, while still loving him, she could accept the end of their relationship if he told her that he wanted to end it. Painful as the ending would be, what was more hurtful was not knowing. And the awareness that he had been voluble *about her* with others, while remaining silent with her, was both hurtful and degrading.

Although the theme of the relationship occupied most of her narrative there were two other topics the young woman touched on. She was about to enroll in an in-patient course of therapy and counseling in order to address a persistent drug problem. The course of treatment was to run for six weeks. She had a court date immediately after its conclusion. She was to appear as a respondent in a custody action by the father of her young daughter - - clearly she envisioned Court as an ordeal through which she had to pass. Would the young man support and accompany her, whether as mate or merely in the capacity of a friend? And there was the matter of her car. The young man had borrowed it and while driving had gotten into an accident. He had reimbursed her for the initial estimate of \$3,000.00, but it turned out that the actual cost of repairs had been \$6,000.00. Would he make up for the shortfall?

The young man had been attentive and connected by his gaze to the young woman throughout all she had said. But during this lengthy time he had remained silent. At several points when the young woman had paused in her narrative, the author/mediator had asked the young man whether there were things he wished to raise, or did he prefer to just listen? The young man always answered, "I'll just listen." At one point, the young man asked if we could take a break so he could exit the building in order to smoke a cigarette. The young woman opted to join him. When they returned some 20 minutes later, there was a markedly different quality in the young man's bearing and affect, manifest even before he spoke. He seemed at once lighter, yet more solid and present, and possessed of greater vitality. When he did speak, he told the author, "We worked it out."

A few minutes later the young woman and young man responded to the author's question "Have you had a complete conversation or is there anything else you want to say." She spoke aloud for the first time in the session; directing her gaze to the young man, she said, "It feels like we did a lot today." The young man answered her, also aloud, by saying, without a trace of theatricality or even emphasis, "Yeah, for the first time in my life." He then shifted his gaze to the author and said, "I like mediation."

Here the authors invite the reader to pause for a moment. If you can, imagine yourself, perhaps because of disability, perhaps not, as never having acquired the certain knowledge that you have

the capacity to undertake doing things, and doing them well. In fact, if you can, imagine yourself as never having had the experience of having truly done something. Now picture yourself as having moved yourself, through the act and experience *of doing*, to a clear knowledge that you do indeed possess those powers – you have agency. Think of the difference that self-knowledge might make as you conduct your life going forward. You too might then find mediation an affirmation, as this couple did. In fact, this episode was salutary for the author/mediator as well, because it struck a resonant chord of memory. It was precisely the sort of dynamic change in clients, exhibited here by the young man -- sometimes expressed physically, sometimes in words -- that had drawn the author's attention years before. Those changes strongly suggested that there were benefits to clients inherent in the process of *doing mediation* that were of value and were independent of outcomes. It was the cumulative effect of those earlier, increasingly pressing observations that had led the author to explore transformative practice, and ultimately to adopt it, in order to support human agency in mediation.

4. Saying No. The following episode taught one of the authors a lesson about choice that may also have contributed to his transition to the transformative mode of practice. The mediation had been referred from Family Court. The petitioner - the father in a dispute over visitation - was a man in his late thirties or early forties. The respondent - the mother of the two girls who were the subjects of the petition - was a woman a few years his junior, in her mid to late thirties.

Shortly after fathering the two children, the man had entered into a marriage with another woman, and had two other children with her. During the life of the marriage, the father, had been fiscally dutiful in a consistent way in supporting his two older children. Yet during this time he had expressed no interest in reviving a relationship with them. Indeed, he had gone a number of years without any sort of contact with these children, now about eight and nine years old. Recently the father's marriage had ended in divorce. With the end of the marriage there came a change in the father. He had become passionately interested in connecting with his two older children. Some months before, he had reached out to their mother and asked if he could come to her home to become reacquainted with their children. The mother had welcomed this surprising initiative

because the two children, although they had scant memory of their father, frequently asked about him. She understood that her two girls badly missed the presence of a father. The father's initial visit had gone well all around. So had all the subsequent visits. The two girls and their father were clearly developing a connection that, from the mother's perspective, enriched the well-being of her children. By the time the parents were in Court, the father had been visiting the children in their home for some months.

The parents' differences arose over whether the children could have overnight visits in their father's home. The father insisted on their being able to do so. The mother objected. Later, in negotiation, the mother had somewhat modified the position she had initially adopted. She stipulated that, if things continued to go well, they could revisit the question of overnight visits in six months or so. The father had continued to insist on immediate overnights. As do many fathers, he regarded the discretion the mother was attempting to exert as diminishing his status and prerogative as co-parent.

Now they were in mediation. The author had initiated a separate meeting with the mother. The stance she had adopted regarding visitation seemed to the author/mediator to be untenable in a legal sense, and he had wanted to explore that with her. Here the mother became expansive. She explained why she had adopted and committed to her stance. She said, "I understand how important his connection with my children is to them and I don't want to interfere with it. But right after each of the children were born, the father (she used his name) urged me to give them to his sister to raise. His sister lives in the Dominican Republic. We (meaning the United States) have no treaty with them about unlawful flight, so if he ever does get them to the D.R. They will never see me again."

She concluded, "I've met with a lawyer. I know I am going to lose the case, because of the father's legal rights. But if my children are going to lose their mother, it will happen because someone else permitted it to happen, (referring to the Court), not because I failed to protect them. I will not participate in that." There was such dignity and calm, such clarity and purpose in what she said, that it stopped cold any incipient desire by the author to ask her for any reconsideration or moderation of the stance she had taken and held.

As we have suggested earlier in positing *choice* as a requisite for meaningful action, our participation only has value when we have the option of *not* participating; and our yeses only have meaning when we have the power to say no. Sometimes *the self* needs to hold itself in opposition, even with the knowledge that it is powerless to alter an outcome. Doing so is an eloquent expression of agency, and that was the heart of what happened in this mediation and the others reported on above.

### B. Lights at the End of the Tunnel: The Value of Agency in Popular Culture.

In teaching our courses on mediation, the authors have found that even when students notice the empowerment shifts that clients make, they underestimate the value these experiences have to clients – because the students find it hard to believe that agency really matters so much to people. In order to overcome this skepticism, we have increasingly turned to popular culture, narrative history, and realms unrelated to mediation. We have used stories from these realms as a vehicle to illustrate the importance of agency in peoples' lives.

Unlike the actual world which unfolds willy-nilly, events in drama and film are structured by the dramatist's need to stir his or her audience. In drama and film, events and characters responses to events are purposely sequenced so as to inspire emotion in viewers. Drama and film achieve those sorts of impacts because dramatists and directors have the power to create the world – that is, they can structure what the viewer sees and when s/he sees it in ways that support the development of unified and powerful themes.

*Human agency* is one such dramatically powerful and compelling theme, and for that reason it is repeatedly the subject of popular films. It is always heroically depicted: a protagonist is confronted by a challenge or series of challenges, he or she struggles with fear, or doubt or the inability to move forward as they wish to or need to, then he or she connects with internal resources, and ultimately emerges from the struggle with new strength. Incidentally, that heroic progression from weakness to strength mirrors that of conflict participants as they move through mediation.

The authors believe that *agency* -- its loss or potential loss, and then its assertion -- has the power to deeply move audiences again and again, precisely because it is an essential part of our nature. In support of that belief, the authors present here a few short synopses of films in which protagonists who face challenges, nevertheless find and assert agency and in doing so,

become stronger and gain the audience's admiration.<sup>80</sup> Recounting these stories here, together with comments on how we see agency demonstrated in them, will reinforce our exposition of the value of agency in earlier sections of the article – and suggest how skepticism about that value can be overcome.

1. A Rash Action, or a Deliberate Choice: The 2004 film “*Crash*” depicts a series of confrontations faced by a group of unrelated characters in a tense urban environment.<sup>81</sup> One of the characters is an urbane, African-American film director, Cameron Thayer, married to an attractive and demanding woman, also African-American.

The couple is driving home from an award celebration, in evening clothes, in a brand new black SUV, when they are pulled over by police. There is no reason for the stop, but the senior officer is a racist who uses the occasion to taunt Cameron and sexually fondle his wife, before letting them go “with a warning.” Cameron submits to this abuse rather than suffer arrest and jail, but his wife is enraged at his cowardice in not standing up to the cop, and she berates him mercilessly when they get home. The following day, on the set of his film, Cameron is criticized by his white producer because one of the actors has not used a “black” accent in a scene, and although Cameron objects that he knows what black people talk like, the producer forces him to re-do the scene. Through all this, Cameron is diminished, disrespected, and even degraded publicly. Finally, driving home from the studio, he is the victim of an attempted carjacking by two teen-aged black kids, one with a gun. As they struggle for control of the gun and the car, a patrolling police car notices them; Cameron wrests the gun from the teen and tries to drive away, but the police catch up and block his escape. They order him with a bullhorn to exit the car with his hands up, while the teen hides from view on the floor of the front seat.

Cameron sits for several moments thinking, while the bullhorn blasts its orders. Then he deliberately tucks the gun into his belt under his sweater and steps out of the car cursing and yelling at the police, all the while using an exaggerated “black” street-talk accent. Eventually, finding he has no record, the police allow him to leave, and he drives away. Stopping some distance away, he hands the gun back to the teen – who has hidden from view the entire time – and says to the teen, without a street accent and in a firm, calm voice: “You disrespect me; you disrespect yourself.” And he drives off, leaving the teen standing on the street in wonder at what has happened.

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<sup>80</sup> See *supra* note 67.

<sup>81</sup> The scene described can be viewed at <https://www.youtube.com/watch?v=IQ6RSu8dhPU>.

This scene can be viewed in different ways, as was likely the intention of the director. But the most compelling interpretation is that Cameron, having been subjected to several, successive withering assaults on his self-respect – from the cop, his own wife, his producer, and now the teen – firmly decides that he will not continue his submissive attitude, but will take affirmative control of the situation in the best way he can manage. So he removes the gun from the teen’s reach, and then steps out and dramatically confronts the police, hoping they will focus on him and overlook the teen – and hoping that he can successfully end the confrontation that he has intentionally begun. He does all this, and then leaves the teen with a powerful challenge – stop disrespecting others and yourself. On this interpretation of the scene, the character of Cameron asserts his agency in a most powerful way, despite the risks involved and the constraints of his situation. The scene, one of the most gripping in a film full of dramatic scenes, affects the audience profoundly precisely because it presents a striking example of the assertion of human agency in the most challenging circumstances – and where this assertion derives its value from the act itself, rather than from any other impact it might have. A human being expresses his agency, and audiences understand the value embodied in this act.

2. A Choice to Change. Even in lighthearted films, human agency is found at the heart of the story and at its critical moments. The film “*Little Miss Sunshine*” portrays a largely dysfunctional family on a quixotic trip to help the 10-year old daughter, Olive, enter a pre-teen beauty pageant to improve her self-image.<sup>82</sup> The family includes teenaged older brother Dwayne, a self-styled intellectual who has sworn not to talk, since his opinion is that no one in his family is worth talking to. Dwayne’s dream is to enlist in the Airforce when he’s 18, and become a jet pilot, and he can hardly wait.

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<sup>82</sup> The scene described can be viewed (in two parts) at <https://www.youtube.com/watch?v=zcLlq4Lml7A> and [https://www.youtube.com/watch?v=GJT\\_pAYaWB8](https://www.youtube.com/watch?v=GJT_pAYaWB8).

The whole family is driving in their old VW van on the way to the beauty pageant, and Olive is testing Dwayne on math problems and other items on the Airforce admission test. She shows him a test to determine visual acuity, but he fails to see the letters embedded in the colored images on the page. She and his uncle declare together, “Dwayne, you’re color-blind!” At this, Dwayne totally loses self-control, begins screaming and pounding on the windows and sides of the van trying to get out, and the family has to stop and let him out. His uncle explains to the shocked family that his colorblindness disqualifies Dwayne from ever being a jet pilot! Meanwhile, Dwayne jumps out and runs down the embankment at the side of the road, screaming and cursing, and sits in a field at the bottom, shaking and sobbing. He rejects approaches from his mother, uncle and father, waving them off or ignoring them, and they are stymied. Then little sister Olive climbs down the hill, approaches him silently, sits down next to him, and puts her head on his shoulder. A few minutes pass, and then Dwayne speaks to her, and simply says, “OK, let’s go.” They get up and he carries her up the hill, apologizes to his family, and they all get in the van and continue the trip, with Dwayne now engaging in normal communication with everyone.

Audiences are universally affected by this portrayal of Dwayne’s sudden emotional disintegration and then, his equally sudden shift to calmness and “normalcy”. However his shift, though sudden, is not reactive or automatic. It is clear that his time sitting at the bottom of the hill, after the screaming and cursing, has been spent in thought and deliberation; and he has realized that his jet-pilot dream is over. He sees that there is no point to sitting in the field and delaying his family’s journey, and instead he must swallow hard and go on with the trip, and with life. Dwayne’s decisions to get up, climb the hill with Olive, and re-join the family, enact self-determined choices about how to confront the unexpected and drastic alteration of his life prospects. His character displays an essential quality of agency that operates in all circumstances, and which is central to his identity. So lost aspirations do not fundamentally disable him from asserting himself, making choices, and moving forward. Witnessing this act of agency is what makes audiences find this scene so powerful and affecting. They recognize the value of human agency that it portrays.

3. A Redemption through Agency. In an important sense, the assertion of agency is always redemptive – redeeming the self from the internal and external constraints that block its expression in the world. In “*The Shawshank Redemption*”, a film about a middle-class

accountant wrongly convicted of murdering his wife<sup>83</sup>, agency is redemptive in the simple factual sense, when it leads Andy Dufresne from degradation in prison, to gradually reclaiming his capacity for decision and action, and ultimately to his freedom.

Thrown from a respected professional post into a situation of forced labor as a prisoner in a maximum security prison, Andy is working under harsh physical conditions and witnessing the brutality of the guards who supervise the work. One sweltering summer day he and his fellow inmates are covering the roof of a prison building with hot tar, while guards watch and taunt them. Andy overhears the head guard talking to the others angrily about property he inherited which, after the state takes a big “cut” in fees and taxes, will leave him with a pittance. After a few minutes listening, Andy drops his broom and walks straight over to the guards. His fellow inmates are shocked, as are guards, who instantly confront him with guns drawn. The head guard grabs Andy and pulls him to the edge of the roof, threatening to throw him off for coming too close to the guards. However, Andy remains calm and manages to say, “I can help you get all that money.” The head guard pulls Andy back from the edge, and Andy says, “Do you trust your wife?” The guard almost explodes at him, but Andy explains, with the guard’s hand on his throat, that if he trusts her he can make the inheritance a gift to her and they will keep it all. The next day, after a check with the IRS proves that Andy’s advice is true, the guard asks Andy what he wants in payment for the advice. Still tarring the roof in the heat with his fellows, Andy responds, “Cold beer for all of us,” and amazingly, the guards bring the beer for the inmates. From that moment in the film, with the guard’s recommendation, Andy advances little by little to become the accountant for the Warden, who uses his skills to embezzle funds from the state. Eventually Andy uses the trust he develops with the Head Guard and the Warden to escape – leaving evidence behind of the Warden’s illegal activities.

The scene described here is the dramatic turning point of this film, not because of the grave threat to Andy’s life from the guard, but because of the powerful impact of Andy’s deliberate decision to risk his life to gain the head guard’s confidence by using his expert knowledge, which was rendered useless in prison until now. In the moments before Andy rises to approach the guards, we see him noticing and listening to their conversation, thinking it over, and then deciding to act. From his situation as a helpless prisoner, Andy asserts himself to reclaim his self-respect and his place as a knowledgeable professional, and to use them strategically to gain a reward for his fellow prisoners and a long-term relationship with the Head guard that leads to his “redemption”. Until this point in the film, Andy has been the hapless

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<sup>83</sup> The scene described can be viewed at <https://www.youtube.com/watch?v=cMuam1MObtI>.

victim of circumstance – his wife’s murder, a prosecutor’s failure to consider exculpatory evidence, and the prison system’s brutal character. Despite all this, Andy’s agency remains intact, and it resurfaces at this point in the film – and continues to lead him through the remainder of the film to navigate his way out of the prison and to freedom. Audiences appreciate and admire Andy for this assertion of human agency, and enjoy the triumph over circumstance and helplessness that it entails. The phenomenon of human agency is the real “star” of this film.

4. A Powerless King. *The King’s Speech* is a dramatized account of the struggles of the young man whom circumstance forced to ascend to the throne as George VI.<sup>84</sup> Unlike his assured and socially facile older brother, Edward VIII, George VI had been from childhood introverted, shy, socially awkward, and badly incapacitated by what amounted to paralytic stuttering. The film begins at a moment in which the possibility of Edward’s abdication has become increasingly imminent.

George (who by all accounts had always shunned the glare of public life) is confronted by the daunting possibility of being thrust into the role of Head of State. And that role has become especially demanding because tensions in Europe have been escalating, and the possibility of war is looming large. In sum, a young man who had always eschewed the focus that fame confers, and the demands that such focus requires, and who cannot speak with normal fluency, knows that, despite his fears, he must reconfigure himself because he might have to become a very public leader in a moment that is critical to the life of the nation. He simply has to master the ability to speak. For help George turns to Lionel Logue, an Australian speech therapist. (Logue, a commoner, and Australian to boot, is considered an unsuitable source of support by much of George’s circle.) In the world constructed by directors, the protagonist’s passage from weak to strong begins with a moment, dramatically highlighted, in which the protagonist hits bottom. In this film, such a pivotal moment takes place after an extended period in which Logue’s efforts and George’s efforts to make a dent in his difficulty have been without result. The stuttering is as bad as ever; it seems to be immovable. Now Logue, lounging on a seat George usually occupies, imitates and mocks George’s failed attempts to express even a few words, so disabling is his stuttering at that moment. Both desperate and furious, George transcends decorum and yells. And in yelling, he manages to overcome his stuttering and express a short, but fluent sentence: “*I have a voice!*” Logue sits up and says, in a quiet and affirming voice, “Yes, you do.” The moment is very moving. Someone with all the status and power society can confer, yet who has been, in a very real sense, powerless, in a moment of rage and desperation, has demanded recognition of his humanness: the self

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<sup>84</sup> The scene described can be viewed at <https://www.youtube.com/watch?v=f7131IkiSCg>

has demanded expression and emerged. George's struggles are not over. But something vital has changed, and it is from this moment that he gains command of his voice. The film ends, when as King, he gives a wartime address to the nation by radio right after Britain's declaration of war.<sup>85</sup>

The pivotal moment when George gains his voice is very moving to audiences, and understandably so. Despite all the status and power society can confer, he has been, in a very real sense, rendered powerless; and then, in a moment of rage and desperation, the self has demanded expression and emerged. In the world constructed by directors, the protagonist's passage from weak to strong begins with a moment in which he or she hits bottom and then strives upwards, and that realization of agency holds great value for audiences.<sup>86</sup> The same

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<sup>85</sup> A close analogue to these events is the heroic struggle of Winston Churchill, perhaps the 20th Century's most accomplished orator, as depicted in the recent (2017) cinematic version of his memoir, *The Darkest Hour*. The immense pressures resulting from Britain's military defeat in France and the increasing isolation in which Churchill finds himself, as he advocates for continuing the fight rather than seeking an accommodation with Germany, cause a contraction of both confidence and ability. At one point he woefully murmurs, "No one believes in me." At about that time, this supremely gifted speaker descends into inchoate, incomprehensible babble as he attempts to dictate a letter. Later, although nothing in his political situation nor Britain's military status has changed, two moments help him to regain his footing. He becomes clear and decisive about pursuing the course he had determined to follow. He then rallies Parliament and the nation by delivering his famous "*We shall fight*" speech, possibly the greatest war speech ever made outside of Shakespeare's Henry V.

<sup>86</sup> History too provides dramatic vignettes which demonstrate the power that agency's presence can exert on observers. One such moment occurred during the American Revolutionary War. In the summer of 1777 the British tried to sever New England from the greater mass of Colonies and in doing so end the War. To accomplish this, General Bourgogne and his Army of 10,000 troops invaded from Canada and moved south in order to meet General Howe and his Army which were to move up from the City of New York. For much of the journey Bourgogne was able to move with relative ease by navigating Lake Champlain. But at Lake's end, in order to continue south he was forced to traverse a swampy wilderness. His Army emerged from the inhospitable terrain exhausted and badly in need of horses, having lost many to the swamp.

Bourgogne received word that Bennington, Vermont, 20 or 30 miles to his east, was lightly defended and had horses, other draft animals and ample provisions, all of which he desperately needed if he was to continue south to take Albany. With an eye to replenishing his stock, he dispatched a force of 700 troops, composed principally of Hessians. They were to march to Bennington, and seize the Colonists' livestock and provisions. But as Bourgogne had moved south, Vermonters had appealed for help, and by this time Bennington was defended by a force of 1,500 militia from New Hampshire and Massachusetts. Before the 700 could reach Bennington they were intercepted by the American militia. In the ensuing battle they were surrounded and then overwhelmed by the larger American force. As they were marched into captivity, the two Armies had a rare opportunity to observe one another, not across a field of battle, but at close hand.

There was something about the Americans that struck one of the British officers. It couldn't have been their physical appearance; their clothing was not uniform and it was ragged. It must have been something in the way they held themselves, in their demeanor. Perhaps it was in the manner of their speech. But whatever its precise nature and origins, there was evident in the American troops a quality of self-possession and assurance that to this officer was both impressive and novel; commoners in Europe simply did not carry themselves in this fashion. In a letter home to his wife this officer was moved to write, "I have met the New Man," meaning "There is a state to which people can attain that I had not seen 'til this day." That state, in a word, was agency.

movement occurs, with the same striking value, in actual transformative mediation sessions, as the examples in the previous section show.

#### IV. CONCLUSION: RESTORING THE PLACE OF AGENCY IN MEDIATION

The earlier account of transformative mediation's development, buttressed by the examples just presented about the value of asserting and strengthening agency, should explain why we often find ourselves disappointed with talented students and practitioners of transformative mediation. When these students/mediators identify *empowerment shifts* in the mediations they conducted and participated in, they do so *only* when empowerment served as a harbinger of other changes, such as *recognition*, reconciliation or agreement. Certainly, they are not inaccurate in identifying empowerment as an essential forerunner of these other changes.

Due to the debilitating impacts of conflict, reconnecting with one's efficacy is almost always a necessary prelude to the sorts of more visible changes of recognition that are easily grasped and valued. Flailing about in a state of unclarity and indecisiveness, and experiencing oneself as ineffectual, pretty much precludes the possibility of reassessing the actions, motives and character of a conflict counterpart, whom one has typically demonized. One must find one's footing before those sorts of experiential and perceptual changes can occur in the interpersonal realm. We do not dispute any of this.

However, where we differ from our students and from many in the mediation field, in both our focus and our understanding of success, is that we believe *empowerment shifts have stand-alone value* – because they enact *agency*. We believe that when parties are able to reconnect with their capabilities, to stand up for themselves, to do so in thoughtful, articulate, decisive and resolute ways, something good and valuable and essential has occurred, *even should*

*nothing else follow.*<sup>87</sup> In other words, the enactment of agency in itself has profound and essential value – and it can be witnessed in mediation over and over again. We remain hopeful

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<sup>87</sup> There is one change in the way disputants regard their conflict counterparts that always attends the recapture of agency – but it is really part of empowerment, not a separate effect of recognition or empathy. That change in perception is related to the ways in which disputants tend to demonize one another. Beyond ascribing malign motives to one another, the weakened capacities of conflict participants cause them to endow one another with heightened powers to destabilize, overwhelm, thwart, or vanquish in some fashion. Thus, as a party regains efficacy and experiences themselves as stronger, the capacity of their conflict opponent to affect them negatively is diminished in commensurate measure. When the full range of change that is available in mediation is realized, disputants come to see one another more positively. Often they choose to extend compassion and empathy to one another. Those changes, termed *recognition shifts*, involve seeing one's counterpart as somehow *better*. The change we are describing here involves seeing one's counterpart as *smaller in their ability to inflict harm*. In that sense, they become in one's eyes, not better, but more manageable.

Describing a particular simulated mediation will demonstrate the correspondence between the increase of capacity in a disputant and the decrease of the perceived powers of their counterpart. The mediation, titled, *The Purple House*, was conducted by one of the authors. It appears in transcript form in *Promise 2*. See *Promise 2*, *supra* note 11, at 133 ff. There are three parties in the mediation, a home owner, Elizabeth and her daughter Bernice, and a second home owner, Julie, who is also a representative of the Home Owners Association which governs the development in which they all live. The parts were played by professional actors, who were given a fact pattern, but not a script to follow. Thus, there was no predetermined direction the parties would move in, nor was there a predetermined outcome. Elizabeth and Bernice are African American. Julie is of European descent. Their dispute arises from the purple color with which Elizabeth and Bernice have painted their home: Julie and other home owners have adopted the stance that the color selection violates the rules governing the range of discretion available to home owners; Elizabeth and Bernice, with the support of others, maintain that the rules do not place boundaries on color selection. To illustrate our point, we will focus only on Elizabeth. Elizabeth has been unsettled and agitated in her demeanor and her speech from the outset. At one point in her interaction with Julie, her agitation intensifies as she addresses Julie, “You know Julie, ever since we have moved into the community you’ve been on a personal vendetta. Is it because we are the only blacks on your block? . . . It is a racist, we are the only family you are attacking! There is nothing. You are the racist! You are the one!” Beyond being angry, Elizabeth is distraught as she articulates and holds up what for her is the core of the dispute, and what she believes to be Julie’s actual motivation. She flails in her movements. Her thoughts are scattered, and her speech fragmented. She is volatile and without command of herself. And she depicts Julie (and clearly experiences her) as monstrous in her impact on Elizabeth’s life.

Elizabeth and Julie continue to interact (with interventions by the mediator) for some time. During this period, Elizabeth demonstrates small, incremental shifts in her capacity for clarity of thought and in her ability to be articulate. Her demeanor becomes solid and centered. She becomes calm. Then she says to Julie, “I’m really hard pressed to accept any decision by your committee. . . It becomes a matter of control that at this point in my life that I am simply unwilling to deal with. I mean no animosity, I mean no disrespect. But we’ve gone as far as we can go.” Elizabeth’s thinking has become cogent and clear, and her speech both rich and measured. In this moment, she is a superb advocate; she has stood up for herself with calm, forceful dignity. And clearly, Julie has been correspondingly reduced in her ability to overwhelm Elizabeth. She has become, to Elizabeth, manageable.

In actuality, the mediation continued on for some 40 minutes beyond this point. During those 40 minutes Elizabeth affirmed that she saw Julie as a racist, so there is confirmation that after this moment of calm, forceful advocacy, Elizabeth’s experience of Julie’s character and motives is unchanged. She does not see Julie as “better”. This mediation could very well have ended at the point of Elizabeth’s speech to Julie. Indeed mediations often end at similar junctures. The sort of “visible changes” involving recognition or agreement that students hold as the standard of success have not taken place. Yet, Elizabeth has made strides. She has named the essential wrong as she sees it; she is clear as to where she stands and where she will not go; she has gathered herself in such a way as to both oppose the wrong effectively and to convey that opposition to Julie with dignity and quiet force. The self has entered the world to inform it, and if need be, to meet adversity well. Agency has been enacted, and its value is clear – even if nothing else followed.

that mediation students and practitioners will come to fully appreciate this. Indeed, furthering that goal has been our purpose in writing this Article.

In conclusion, the above discussion has made the case for several propositions:

*First*, the practice of mediation, even by those theoretically committed to the principle of self-determination, diluted that principle by placing less importance on client agency than on other values, especially the value of empathy and relationship.

*Second*, practitioners of transformative mediation, through a process of reflection and self-critique, recognized their departure from the principle of self-determination and took steps to correct their actual practices in ways that did place primary value on client agency.

*Third*, the meaning of agency, as a basis for mediation and other social processes, is the self-aware and reflective assertion by an individual of the intentional choice to make decisions affecting their life circumstances – so agency and self-determination are related if not identical. Moreover, the phenomenon of agency is at the core of human identity and consciousness; that is, the assertion of agency is an essential meaning of being human, regardless of whether it achieves some other specific impact in the external world.

*Fourth*, although the value of client agency and client-centered practice is largely disfavored in the dominant practices of mediation and many other “helping” professions – nevertheless that value does find strong recognition among many in the society, as reflected in popular culture, and as voiced by the clients of transformative mediators reported in this Article.

*Finally*, the stakes of raising awareness of the importance of agency, in mediation and other social processes, are very great – implicating the character of our civic culture and the viability of our democratic society.

Together, these propositions show how important it is that, in any process such as mediation where a client-centered approach is possible, that approach should be favored and

promoted – since it will recognize and enact the central value of client agency. Transformative mediation is such a client-centered approach to mediation. It has gained a following and grown slowly but steadily in the 25 years since its first introduction. However, given the societal stakes, it is important to accelerate the acceptance of this model, and to draw more practitioners toward following it – for the sake of clients in mediation, and for the sake of our larger social and political environment. The time has come for the transformative model to receive more recognition and greater practical emphasis, both in mediation and beyond, since it will bring the value of human agency out of hiding and into the full light of societal recognition.