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HARMONY AND TRANSFORMATIVE MEDIATION PRACTICE: SUSTAINING IDEOLOGICAL DIFFERENCES IN PURPOSE AND PRACTICE

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I. INTRODUCTION

As the alternative dispute resolution field matures, there is an increasing recognition that not all mediation practice is the same.¹ Despite an initial tendency to assume that mediation practice was monolithic, an important line of empirical research that focused on mediators' actual intervention practices demonstrated the wide range of approaches that mediators adopt in their work.² As a result, it is now widely acknowledged that mediators have different practice goals, they conduct interventions in very different ways, and they define success in very different terms. The growing diversity of mediation practice across the various sectors in which mediation is employed has resulted in obvious "growing pains" for a relatively young field. The emerging differences in practice have triggered considerable controversy and substantial debate about the ethics of practice, mediator competency, and the most appropriate ways to assess the value

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1. See, e.g., Robert A. Baruch Bush, *One Size Does Not Fit All: A Pluralistic Approach to Mediator Performance Testing and Quality Assurance*, 19 OHIO ST. J. ON DISP. RESOL. 965, 965-1004 (2004) (asserting that different approaches to practice require different quality assurance standards); Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71, 75 (1998) (commenting on alternative styles of mediation in the field); Leonard Riskin, *Understanding Mediator Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 24-32 (1996) (positing that there are important stylistic differences in practice).

2. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 55-77 (1994) (asserting that differences in approaches to practice are rooted in different ideological premises); Joseph P. Folger, *Mediation Research: Studying Transformative Effects*, 18 HOFSTRA LAB. & EMP. L.J. 385, 388-91 (2001) (indicating that early mediation research focused heavily on outcomes of the process and ignored what mediators did in their practice, contributing to a lack of awareness in the field about the diversity of practice).

and impact of mediation in court programs and other settings.³ Although many of these controversies remain unsettled as the field comes to grips with the fact that mediation is not monolithic, the very emergence and exploration of these issues suggest that the alternative dispute resolution field is maturing in important ways.⁴

The controversies in the field and the professional discussion about them has led to healthy and productive scrutiny of the underlying premises on which various approaches to practice rest and has deepened the professional dialogue about what mediation can and should accomplish. With the publication in 1994 of the first edition of Bush and Folger's *The Promise of Mediation*, the discussion of how various mediation practices differ shifted significantly.⁵ The dialogue in the field, within both academic and practitioner arenas, turned its focus away from an emphasis on differences in mediator styles—dispositional and communication tendencies that mediators tend to display as they practice their craft—to a deeper discussion of differences in core purposes that give rise to different intervention practices. Bush and Folger offered an explicit ideological critique of how mediators conduct their work and with what purposes.⁶ They argued that different approaches to mediation practice are linked to different ideological premises—different core assumptions about the nature of conflict and foundational expectations about what mediation can and should deliver. They posited that ideological premises shape the underlying purpose that mediators implicitly or explicitly hold in conducting their work and that

3. See, e.g., Dorothy J. Della Noce, *The Beaten Path to Mediator Quality Assurance: The Emerging Narrative of Consensus and Its Institutional Functions*, 19 OHIO ST. J. ON DISP. RESOL. 937, 937-64 (2004) (critiquing the common assumption that all standards of assessing quality practice must be the same); Carrie Menkel Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOTIATION J. 217, 217-42 (1995) (attempting to critique mediation practice that is outside the mainstream ideological frameworks); Bush, *supra* note 1, *passim* (documenting differences in the language of various performance standards and the implications for alternative forms of practice).

4. This professional maturation in the mediation field in some ways parallels the evolution of practice in the counseling field in which practice evolved from psychodynamic approach to a range of cognitive, behavioral, and systems approaches to intervention. See, e.g., Don D. Jackson, *The Study of the Family*, in *THE INTERACTIONAL VIEW* 2, 2 (Watzlawick & Weakland eds., 1977) (describing a shift in therapy away from a traditional focus on the individual and towards a focus on systems dynamics and interactional patterns among those in family relationships); see also IVAN BOSZORMENYI-NAGY & BARBARA R. KRASNER, *BETWEEN GIVE AND TAKE: A CLINICAL GUIDE TO CONTEXTUAL THERAPY* ix-xiii (1986) (expanding practice to include cross-generational context); MAURICE FRIEDMAN, *THE HEALING DIALOGUE IN PSYCHOTHERAPY* *passim* (1985) (describing the efficacy of the psychodynamic process).

5. BUSH & FOLGER, *supra* note 2, at 15-32.

6. See *id.* at XII-XIII (pointing to the explicit ideological character of the argument advanced in the book, and anticipating that this book will launch substantial debate and discussion).

these premises not only shape mediators' interventions but define the perceived value and impact of the mediation process itself.

Bush and Folger suggested that the diversity of mediation practice is best understood by recognizing that there are three prominent ideologically driven frameworks of practice in the alternative dispute resolution field. Specifically, they suggested that the problem-solving framework, the harmony framework, and the transformative framework capture the main ideological thrusts in the field.⁷ Each of these frameworks assumes a particular orientation to conflict and to the third party's goals in dealing with it. Each framework reflects the underlying values and assumptions of a recognizable ideology or worldview. Bush and Folger suggest that the problem-solving framework is grounded in individualistic ideology, the harmony framework is rooted in organic ideology, and the transformative framework is based in relational ideology. These ideologies are value-laden and they shape mediators' professional and personal orientations to conflict and conflict management. They are not mere descriptions of stylistic differences or how mediators respond to the immediate demands of specific intervention situations.⁸ Rather, the three ideological frameworks clarify the value-laden choices practitioners make about the goals of practice and the outcomes they are attempting to achieve. They undergird what mediators believe conflict is and how mediators think it is best to manage conflict productively. In this sense, the ideological frameworks reveal the deepest levels of differences that exist among the major forms of mediation practice in the alternative dispute resolution field.⁹

The differences between the problem solving and the transformative frameworks have been widely discussed and analyzed.¹⁰ This is because

7. *Id.* at 229-59.

8. Dorothy Della Noce, Robert A. Baruch Bush & Joseph P. Folger, *Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy*, 3 PEPP. DISP. RESOL. L.J. 39, 48 (2002).

9. Ideological discourse analysis provides the broadest foundation for considering the relationship between practice and underlying ideological premises. See, e.g., TEUN A. VAN DIJK, *IDEOLOGY: A MULTIDISCIPLINARY APPROACH passim* (1998) (providing an overview of this perspective); MICHAEL BILLIG ET AL., *IDEOLOGICAL DILEMMAS passim* (1988) (providing case examples of ideological discourse analysis).

10. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT passim* (2005) [hereinafter *PROMISE OF MEDIATION*]; Joseph P. Folger & Robert A. Baruch Bush, *Ideology, Orientations to Conflict and Mediation Discourse*, in *NEW DIRECTIONS IN MEDIATION: COMMUNICATION RESEARCH AND PERSPECTIVES* 3, 3-25 (Joseph P. Folger & Tricia S. Jones eds., 1994); Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 *MEDIATION Q.* 263, 263-78 (1996) [hereinafter *Folger & Bush* (1996)] (characterizing the core practice commitments of a transformative mediation); BUSH & FOLGER, *supra* note 2, at 3-25; Della Noce, Bush & Folger, *supra* note 8, at 47-60 (summarizing implications of adopting transformative commitments).

the problem-solving framework has been the most widely known and practiced approach to mediation. It is the approach most often adopted across various types of disputes in court-based programs.¹¹ In developing and clarifying the transformative framework as an alternative to this prevailing approach to practice, Bush, Folger and their colleagues focused on how the transformative approach to practice differs from the problem solving approach and clarified the differences between these two frameworks, at both the level of ideological premises and intervention practices.

In contrast, far less emphasis has been placed on the differences between the harmony and transformative approaches to practice.¹² The distinctions between these two frameworks are less well understood in the field at large. As a result, the two approaches are often mistakenly assumed to serve the same conflict intervention goals and to rely on the same core skills and interventions. Although harmony practice is less familiar (especially in western cultures) than problem-solving mediation, many forms of conflict intervention practice across various dispute sectors are anchored in core elements of the harmony framework and its underlying ideological orientation. For instance, many restorative justice programs are closely aligned with the core values of the harmony framework.¹³ The failure to distinguish clearly between the harmony and transformative frameworks is detrimental to the development of mediation practice in general and to an understanding of transformative practice in particular. Recognizing the sources of this confusion is important in allowing theorists and researchers to develop and assess each model and in supporting practitioners as they decide which approach to practice they want to adopt.

The objective of this article is to articulate and clarify the key differences between the harmony and transformative frameworks of mediation practice and to argue for the importance of maintaining an awareness of these core differences in both theory and practice.¹⁴ The first two parts

11. See KENNETH KRESSEL, DEAN G. PRUITT ET AL., *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION* *passim* (1989) (discussing the range of court contexts in which problem-solving practice was employed in the first fifteen years of the alternative dispute resolution movement).

12. See Diane Le Resche, *Comparison of the American Mediation Process with a Korean-American Harmony Restoration Process*, 9 *MEDIATION Q.* 323, 323-39 (1992) (demonstrating one of the few explicit contrasts in practice).

13. See, e.g., MARK S. UMBREIT ET AL., *FACING VIOLENCE: THE PATH OF RESTORATIVE JUSTICE AND DIALOGUE* *passim* (2003) (discussing various restorative justice programs); MARK S. UMBREIT & JEAN GREENWOOD, *GUIDELINES FOR VICTIM-SENSITIVE VICTIM-OFFENDER MEDIATION: RESTORATIVE JUSTICE THROUGH DIALOGUE* *passim* (2000) (analyzing restorative justice programs).

14. Although this analysis generally focuses on the role of mediators, both of these ideological frameworks apply to the enactment of any third party role that addresses conflicts or disputes, including group facilitators, team building experts, ombudspersons, etc. The full range of these

discuss how the harmony and transformative frameworks differ along three dimensions: (a) the ideological premises that shape the goals and expectations for conflict intervention; (b) the nature of and expectations for the third party role within each approach to intervention; and (c) the specific intervention practices that are central to third party work in each of the frameworks. Part III section focuses on why the differences between the two frameworks are often overlooked or misunderstood in the mediation field. It clarifies the sources of confusion and discusses the impact the misunderstandings have had on the development of transformative mediation practice. The final part of the article argues for the importance of sustaining a clear distinction between these two ideological approaches to conflict intervention. It contends that the differences matter at both a conceptual and applied level for the preservation of sustainable practice within each framework.

II. THE HARMONY FRAMEWORK OF MEDIATION PRACTICE

To clarify the core differences between the harmony and transformative frameworks of practice, it is important to examine the core ideological premises of each framework and to illustrate how these core premises give rise to different intervention practices and different enactments of the mediator's role. The ideological premises shape what the framework values about mediation practice and establishes the core purpose that underlies the third party role. The harmony and transformative frameworks differ in their foundational views of what conflict is, of what productive conflict can achieve, and of what parties should do as they address conflicts.¹⁵

A. IDEOLOGICAL PREMISES

In the harmony framework, conflict is viewed as a disruption of a valued and vital social order that sustains and defines a larger community or group in which a conflict occurs.¹⁶ Social order is the basis for stability

conflict intervention roles fall more generally under the label "third party intervener." The term "mediator" will be used here to refer to a wide range of third party roles that are labeled differently by different theorists and practitioners.

15. See VAN DIJK, *supra* note 9, at 140-44 (discussing the group-basis of shared ideological assumptions). Although ideological orientations are never purely established within any given group or community, a range of practices and communicative patterns come to define a core ideological orientation that can be identified and described. These behaviors tend to predominate in the overall ideology adopted by a group.

16. See HUGH F. HALVERSTADT, *MANAGING CHURCH CONFLICTS* 1-13 (1991) (pointing to the importance of maintaining wholeness in church communities); RON SUSEK, *FIRESTORM: PREVENTING AND OVERCOMING CHURCH CONFLICTS* 72-73 (1999) (noting the importance of community in many church settings); HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 27 (2002) (noting how communities are disrupted by normative violations); Philmer

within the group, organization, or community in which parties' conflicts emerge. It supports the group's underlying values and norms and is constituted by patterns of behavior and personal choices that are expected and valued by the group as a whole.¹⁷ When conflict occurs among individuals or subgroups within a larger community or social institution, it is viewed as a potential disruption or challenge to the norms, behavioral expectations, or social positions people hold. Conflict inherently threatens the network of relationships that constitute the larger community because it raises the specter that parties may not be able to work through their differences to a point where their relationship or their relationship with the group as a whole remains intact. The possibility that a relationship will end or the connection to the larger group will terminate is inherently threatening to the strength and stability of the community at large. For this reason, the emergence of conflict is viewed negatively. It is seen as a potential threat to social stability and the preservation of community.

Conflict is only viewed as productive when the course it takes confirms the norms and behavioral expectations of the group and when the interpersonal relationships are stabilized, restored, or reconciled. Restoring relationships is the central goal of conflict interventions; it is the essence of what constitutes productive conflict in this orientation to practice.¹⁸ The

Bluehouse & James W. Zion, *Hozhooji Naat'aammii: The Navajo Justice and Harmony Ceremony*, 10 MEDIATION Q. 327, 328-31 (1993) (describing community norms in Native American settings); LeResche, *supra* note 12, at 326-27 (describing the Korean-American experience of community). See generally JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION *passim* (1989); SPEED LEAS & PAUL KITTLAUS, CHURCH FIGHTS *passim* (1973) (indicating the tendency for communities of faith to avoid and suppress conflict in order to circumvent disruption of the community); RESTORATIVE JUSTICE AND CIVIL SOCIETY *passim* (Heather Strang & John Braithwaite eds., 2001).

17. The harmony framework is linked to organic/collectivist visions of societies and communities. This link has been discussed previously and will not be a significant focus of this analysis. See Bush & Folger, *supra* note 2, at 239-41 (discussing the assumptions of organic ideology).

18. There are a range of views on the nature of reconciliation but all have some basis in relationship restoration. Kriesberg notes, for example, that "'reconciliation' generally refers to the process of developing a mutual conciliatory accommodation between antagonistic or formerly antagonistic persons or groups. It often refers to a relatively amicable relationship, typically established after a rupture in the relationship involving one-sided or mutual infliction of extreme injury." Louis Kriesberg, *Coexistence and the Reconciliation of Communal Conflicts*, in THE HANDBOOK OF INTERETHNIC COEXISTENCE 182, 184 (Eugene Weiner ed., 1998). Cameron suggests that reconciliation involves a re-humanization of the parties to each other as well as an acknowledgment of a troubled past so that trust can be re-established. Lynne Cameron, *Patterns of Metaphor Use in Reconciliation Talk*, 18 DISCOURSE & SOC'Y 197-222 (2007). Lederach points to the role of acknowledgment in reconciliation processes, saying that "[a]cknowledgment through hearing one another's stories validates experience and feelings and represents the first step toward restoration of the person and the relationship." JOHN PAUL LEDERACH, BUILDING PEACE: SUSTAINABLE RECONCILIATION IN DIVIDED SOCIETIES 26 (1997); see also MARC HOWARD ROSS, THE MANAGEMENT OF CONFLICT: INTERPRETATIONS AND INTERESTS IN COMPARATIVE PERSPECTIVE 64 (1993); David Bloomfield, *Reconciliation: An Introduction*, in RECONCILIATION AFTER VIOLENT CONFLICT: A HANDBOOK 10, 10-18 (David Bloomfield et al.

hallmark of successful mediation in this framework is the restoration of harmonious relationships that support the values of the community at large. This objective is central to conflict intervention practice in a range of diverse settings including: victim offender/restorative justice, communities of faith, organizations that share explicit values that guide members' behavior, families, as well as some ethnic groups and subcultures.

The goals and outcomes of conflict noted above are achieved in the harmony framework through the expectations this ideological orientation sets for parties' behavior and decision-making as conflicts are addressed.¹⁹ These expectations are aligned with the view of productive conflict summarized above and are rooted in core assumptions about what parties are capable of as they address conflicts. Because the preservation of social order is an assumed priority, the choices and decisions parties make while managing their conflicts are expected to reflect the roles they hold in their communities or institutions, as well as the values on which those communities and institutions are founded. It is assumed that responsibilities and commitments that guide people's behavior in their day-to-day personal and professional roles should significantly influence the behaviors parties enact as the conflict unfolds. These role-based commitments govern the choices parties make about how to address divisive issues and move forward in the future.

The expectations about how parties need to respond to conflict are tied to the view that individuals are embedded members of their communities—that people are inherently connected to and identify with a larger group or organization that matters to them. In this perspective, interdependence is valued over independence. An individual's membership and identity within their community remains in the forefront of the choices and options he or she considers as conflicts are addressed. Freedom of choice is possible but only within well-defined limits. Choice needs to be enacted within a framework that emphasizes community connection, responsibility, and commitment.²⁰ Parties are expected to align their decisions and outcomes of their conflicts with the norms of the community, even in the face of divisive

eds., 2003); George Pavlich, *The Force of Community*, in RESTORATIVE JUSTICE AND CIVIL SOCIETY, *supra* note 16, at 56, 56-57; Le Resche, *supra* note 12, at 327.

19. Le Resche, *supra* note 12, at 327; *see also* HALVERSTADT, *supra* note 16, at 34-43 (illustrating how a community's explicit values define expectations for appropriate conflict responses).

20. *See, e.g.*, HALVERSTADT, *supra* note 16, at 6 (indicating that conflict processes in church settings need to address parties' "differences within the framework of a larger good affecting all").

issues that call into question core values or the social positions the parties hold in the group.²¹

Additionally, because the maintenance of social relationships is a clear priority in the harmony view of conflict, there is an underlying expectation that parties need to enact certain conflict behaviors that are consistent with the ideological premises. Three types of conflict behaviors in particular characterize an orientation to conflict that is aimed primarily at relationship restoration. These conflict behaviors are: avoiding issues, saving face, and extending apologies and forgiveness.

1. *Avoiding Conflict Issues*

It is common for parties within a harmony orientation to actively avoid addressing issues that they sense might be un-resolvable or deeply threatening.²² Conflicts that can bring parties to the brink of separation are often ones that need to be overlooked, redefined, or hidden. The tendency to sidestep difficult conflict issues is well documented in communities of faith where harmony values predominate. Leas and Kittlaus, for example, offered the following characterization of why avoidance is common in some church settings:

The problem is that there is a big assumption inscribed in the folklore of the church that anger, hostile feelings, conflict, and differences of opinion are signs of sickness, selfishness, and failure in the church. This assumption dictates hiding, suppressing, avoiding, and/or denying even the slightest twinge of dissatisfaction that one may have, because if he reveals it, he will disclose the fact that the church is not the strong superchurch it has been trying to make itself believe it is.²³

The tendency to avoid conflict reflects a defining characteristic of the harmony orientation. If parties can successfully ignore issues or manage to talk about them without delving into the most divisive dimensions of these issues, the relationship between the parties can be sustained. The appearance of harmony is sustained and supported, even if deeply divisive issues lay just beneath the surface of the parties' interaction. Maintaining the appearance of strong relationships is seen as more acceptable than

21. In addition to aligning decisions and outcomes with the norms of a community, Susek suggests that parties' expression of emotions in conflict need to be aligned with broader community expectations as well. See SUSEK, *supra* note 16, at 215 (discussing how emotions can be realigned with one's faith after the emergence of difficult conflict).

22. Le Resche, *supra* note 12, at 326; see also ROSS, *supra* note 18, at 54-56 (discussing avoidance behavior in Native American culture).

23. LEAS & KITTLAUS, *supra* note 16, at 48.

acknowledging that a relationship is precarious or that someone may be close to withdrawing their membership from the larger group. As Leas and Kittlaus note in their characterization of avoidance in church settings, “most ministers perceive reconciliation as leading to a peaceful church which is distinguished by the absence of conflict. What is really going on in this situation is the repression of conflict for the sake of peace.”²⁴

2. *Saving Face*

Those who are aligned with harmony values encourage parties in conflict to rely on face-saving to restore relationships. Face-saving is widely recognized as a form of interpersonal behavior that contributes to the restoration of relationships.²⁵ When an image someone holds of him or herself is rejected or disconfirmed by someone else (i.e., the person’s face is threatened), the relationship between the parties is strained and unstable. If, however, the party is allowed to save face—have an image of himself or herself confirmed, accepted, or restored by others—then the relationship becomes more stable and satisfying. If, for example, a party in a conflict conveys to others that he or she sees him or herself as a generous person and the other party conveys that they do not see him or her that way, the person’s face is unsupported and the relationship between the two parties is undermined to some degree.²⁶ From a face-saving perspective, the relationship is not fully restored until the responding party supports, through communication, the magnanimous image the person holds of himself. Although some relationships can survive the loss of face, true harmony depends heavily on interaction that assumes and conveys mutual face support. When face threats persist, they tend to escalate conflicts because issues

24. *Id.* at 74. See generally HIDDEN CONFLICT IN ORGANIZATIONS *passim* (Deborah M. Kolb & Jean M. Bartunek eds., 1992) (discussing conflict suppression in organizational settings); DEAN TJOSVOLD, THE CONFLICT POSITIVE ORGANIZATION 118-20 (1991) (delineating the various reasons members of organizations often avoid conflict); see also Anne Donnellon & Deborah M. Kolb, *Constructive for Whom? The Fate of Diversity Disputes in Organizations*, in USING CONFLICT IN ORGANIZATIONS 161, 161-76 (Carsten De Dreu & Evert Van De Vliert eds., 1997); Stephen W. Littlejohn, *Moral Conflict in Organizations*, in CONFLICT AND ORGANIZATIONS: COMMUNICATIVE PROCESSES 101, 101-25 (Anne Maydan Nicotera ed., 1995).

25. See WILLIAM A. DONOHUE & ROBERT KOLT, MANAGING INTERPERSONAL CONFLICT 48-66 (1992) (analyzing causes of conflict escalation); JOSEPH P. FOLGER, MARSHALL SCOTT POOLE & RANDALL K. STUTMAN, WORKING THROUGH CONFLICT: STRATEGIES FOR RELATIONSHIPS, GROUPS AND ORGANIZATIONS 145 (2005) (discussing the relationship between face saving and conflict escalation); Erving Goffman, *On Facework: An Analysis of Ritual Elements in Social Interaction*, 18 PSYCHIATRY 213, 213-31 (1955) (providing a seminal analysis of face-saving).

26. See FOLGER, POOLE & STUTMAN, *supra* note 25, at 145 (discussing face messages as the means to convey how someone wants to be seen by others). The extent to which the relationship is strained depends upon how important the image of self is to the person who is seeking face support.

related to identity—how parties see themselves—are rarely negotiable.²⁷ Face-saving is important in preventing and mitigating the escalation of identity conflicts.

3. *Offering Apologies and Forgiveness*

The third and perhaps most characteristic set of behaviors that are aligned with harmony values are acts of apology and forgiveness.²⁸ When the behavior of one party is perceived or interpreted by someone else as harmful, disrespectful, or in some way offensive, the relationship established between the parties is jeopardized. From a harmony perspective, it is assumed that the parties cannot fully restore their relationship unless the offended party receives an apology from the offender and the offended party forgives the other person for the behavior. Although the substantive issues that arise in a conflict might be settled without apologies and forgiveness, the relationship between the parties remains precarious unless the aggrieved party pardons and transcends resentment toward the offender.²⁹ The extension of forgiveness is often referred to as a “healing” process in the harmony framework.³⁰ Forgiveness is seen as providing both psychological and interpersonal healing.³¹ Forgiveness allows someone to let go of the resentment they harbor towards someone who has offended them. Forgiveness is also seen as an interpersonal healing process because it allows parties to remove an obstacle that threatens their ongoing relationship. It supports the possibility that the relationship can transcend the transgression. Forgiveness is the route parties need to walk to heal relationships that are threatened by perceived wrongdoings. Without it, there is no way back to true harmony.

Offers of apology and forgiveness also support the parties’ alignment with the core values of the community at large. Offenses are seen not just as offenses against another person but as challenges to the expectations of the community as a whole. Apologies, therefore, often carry an implicit or explicit acknowledgment that the norms or expectations of the community

27. *Id.* at 148-54, 161-66.

28. See DONALD W. SHRIVER, AN ETHIC FOR ENEMIES, FORGIVENESS IN POLITICS *passim* (1995) (discussing the role of forgiveness in political settings); Gary W. Hawk, *Transcending Transgression: Forgiveness and Reconciliation*, in INTERPERSONAL CONFLICT 293, 293-317 (William W. Wilmot & Joyce L. Hocker eds., 2001) (offering a model of cognitive and interactive forgiveness processes); John McDonald & David B. Moore, *Community Conferencing as a Special Case of Conflict Transformation*, in RESTORATIVE JUSTICE AND CIVIL SOCIETY, *supra* note 16, at 134-35 (discussing restorative processes in community conferencing).

29. ZEHR, *supra* note 16, at 45; Hawk, *supra* note 28, at 296.

30. See SUSEK, *supra* note 16, at 223; ZEHR, *supra* note 16, at 53.

31. Hawk, *supra* note 28, at 298-312.

have been violated. An admission of wrongdoing conveys a party's intent to align with the behavioral expectations that the community values. Offers of forgiveness, in turn, acknowledge this intent and support the offender's effort to realign with the broader norms of the community.

B. VISION OF THE MEDIATOR'S ROLE

The role of a mediator within a harmony orientation to conflict follows from the core premises and expected conflict behaviors described above.³² Because the outcomes of conflict need to be aligned with the core values of the community, the mediator usually is assumed to have some degree of personal familiarity with these values. The parties trust that the mediator both knows and/or personally represents the values that underlie the social stability of the group or community because these values are assumed to have an influence on the direction the conflict is expected to take.³³ In some settings, this means that the mediator him or herself is a member of the disputing parties' community. For example, he or she may be an advisory member of the parties' community such as a personal minister, rabbi, or local government official. In other instances, the mediator may be from the parties' wider community, but not be a member of the parties' immediate group. For example, he or she might be a minister, priest or rabbi who holds the same faith as the parties but comes from a different geographical region of the community.³⁴ In the latter case, the interveners are often external consultants who are brought in as specialists to help with a conflict. They are still seen as capable of enacting an advisory role to the parties because of their personal familiarity with community expectations.

Third parties in restorative justice processes are somewhat different in that they do not usually hold established advisory roles in the parties' community.³⁵ They do not cast themselves as the voice of the community, although they are seen as members of the community who care, in a general sense, about the maintenance of community norms.³⁶ Instead, third parties design victim-offender processes to include members of the community who are not directly involved in the parties' conflict but can speak to the

32. See ZEHR, *supra* note 16, at 8-9 (contrasting mediation with restorative justice processes). Zehr explicitly argues that the term "mediation" is inappropriate for restorative justice processes because the participating parties are not on a "level moral playing field" and that victims object to being referred to as "disputants." *Id.* Zehr notes that the terms "conferencing" and "dialogue" are more suitable labels and that these terms are more commonly used when referring to restorative justice processes. *Id.*

33. SUSEK, *supra* note 16, at 169, 173.

34. LEAS & KITTLAUS, *supra* note 16, at 76; Le Resche, *supra* note 12, at 330.

35. ZEHR, *supra* note 16, at 26-27.

36. *Id.* at 27-28.

issues from the community's point of view.³⁷ The participation of these members is important in restorative justice processes because they play a key role in reminding parties of their relationship to the larger group. Their presence and contributions encourage parties to recognize that their accountability is not just to each other, but to the community as a whole. Reconciliation is not just with the offended party, but with the larger community. Meeting this expectation makes possible and supports offenders' sense that they can be reintegrated into the community by participating in good faith in the victim-offender process. The third party intervener takes on the responsibility of insuring that the conflict intervention process is linked to the community by including representative members who speak for community values.

The relationship that the mediator has with the parties' immediate community is important in harmony-based interventions because, in settings other than restorative justice, there is often an expectation that the mediator should know the disputants personally. This is considered helpful or necessary because the mediator then understands the immediate context of the dispute, and he or she has some familiarity with the parties, the history of their relationship and their issues. This knowledge enables the mediator to better interpret and guide the direction of the conflict. It facilitates the application of community values to the current "case." In addition, when mediators are members of the parties' immediate community and know the parties it is easier for them to demonstrate that they have a direct investment in how the dispute between the parties evolves. Their relationship with the parties and their familiarity with the dispute establishes an expectation that the conflict the parties are addressing is not just their conflict, but is owned by and is threaded through the larger community. In this sense, the mediator is a party in the conflict in that he or she represents the larger community in the parties' unfolding dispute.

The mediator's personal presence, conveyed through his or her communication with the parties during the intervention, is important in achieving the goals of harmony interventions.³⁸ The mediator's style tends to reflect and embody the kind of communication that the group as a whole values. That is, the mediator's behavior models the approach to conflict—

37. *Id.* at 24-28.

38. UMBREIT & GREENWOOD, *supra* note 13, at 7. Umbreit and Greenwood indicate that in restorative justice processes, "[t]he mediator's presence plays an important role in facilitating an open dialogue in which the parties are actively engaged and doing most of the talking. This 'presence' is established through the mediator's verbal and non-verbal communication, tone of voice, straightforwardness, expression of empathy, and genuine concern for each party." *Id.*; see also Le Resche, *supra* note 12, at 330-31 (providing an example of Korean-American interventions).

and the respect for relationships—that is embedded in the underlying values of this orientation to conflict. Because of the emphasis on preserving relationships, the mediator often relies upon a consciously chosen communication style that clearly reflects the third party's elevated role in the community and his or her desire to nourish parties' relationships. The mediator's style conveys an advisory, "elder" role, which embodies a range of verbal and non-verbal characteristics including: relying on non-threatening or offensive verbal expressions, speaking with reflective and calm intonations, offering protective advice, conveying deep respect toward parties, reminding parties of the larger community of which they are members, and being comfortable with periods of silence and reflection. The mediator also conveys a deep sense of optimism that explicitly supports the potential for continuation of the parties' relationship.³⁹

In this framework of conflict intervention practice, mediators' personal presence is often more important than their training in specific conflict intervention skills. Mediators frequently conduct their conflict intervention work without having a professional background in conflict theory or training in any model of mediation, although many individuals have professional backgrounds in related areas such as social work, pastoral care, or education. The third party role is often an extension of the general advisory role that the third party already enacts in the parties' community or organization. Training in specialized conflict intervention skills is less essential when the enactment of the third party role parallels the advisory role that the third party normally plays in their community or institution.⁴⁰ The third party's credibility and influence comes from the role they have outside of the conflict intervention context as well as from the personal communication style they adopt as they conduct a conflict intervention process.

C. INTERVENTION PRACTICES

Although there is no one standardized process that third parties adopt across harmony-based settings, there are several characteristic mediator practices and intervention strategies that have been identified. These practices are clearly aligned with the goals and expectations of harmony interventions. Five sets of mediators' behaviors are identified and briefly discussed here: relying on separate party meetings; actively establishing a

39. LEAS & KITTLAUS, *supra* note 16, at 68.

40. *Id.* Mediators who are steeped in a different practice orientation (e.g., facilitative problem-solving) and try to intervene in communities where a harmony orientation prevails have identified difficult challenges that they face in conducting this type of work. *See generally id.* (describing the requirements for systematic and comprehensive intervention in a church conflict).

conciliatory climate; advising the direction and nature of the conflict; containing parties' conflict interaction; and encouraging face-saving, apologies, and forgiveness. All of these intervention practices are aligned with the underlying ideological premises of a harmony orientation to conflict.

1. *Holding Initial Individual Meetings*

In harmony approaches to conflict intervention, the mediator often meets with the parties separately, sometimes for several sessions.⁴¹ Separate meetings serve important functions in a harmony intervention process. For mediators, these individual sessions provide detailed background on each party, parties' perspectives on the issues, as well as the history of the conflict. Obtaining this background is important because it allows a mediator to develop an independent sense of how the conflict (and its outcomes) can be aligned with the values and norms of the community as a whole. Separate meetings also allow the mediator to establish rapport with the parties. This rapport becomes a basis for the mediator's influence during the intervention and is rooted in the parties' acknowledgment of mediator's legitimate role in their community. It also contributes to the parties' acceptance of an advisory stance that the mediator adopts in working with their conflict.

For the disputing parties, the initial separate meetings with the mediator establish their expectations about the goals of mediation, the nature of the process, and their participation in the intervention. Parties gain a sense from the mediator about how the conversations should unfold when the parties meet together. In addition, the mediator may set specific restrictions on the type of comments that the parties can make or delimit the topics that they can discuss. The mediator may establish these restrictions without asking the parties whether they agree with them or whether they feel they should follow them. By setting these restrictions, the mediator sets a strong expectation that the process needs to head in a specific direction and that these restrictions are essential to getting there.

2. *Establishing a Conciliatory Climate*

In both the initial separate meetings and in joint sessions, the mediator works to establish a climate that promotes conciliation and peaceful co-

41. See, e.g., UMBREIT ET AL., *supra* note 13, at 78-79, 104-08 (discussing the functions of preparation meetings in restorative justice processes, including the use of questionnaires parties complete that are used as a basis for discussing expectations for possible joint meetings between victims and offenders); UMBREIT & GREENWOOD, *supra* note 13, at 3 (suggesting preparation meetings for victims and offenders to improve sessions).

existence. This climate conveys a sense that any difficulty or issue the parties face can be overcome and that the relationship between the parties is more important than any issue that divides them. In part, this climate is established by the verbal and nonverbal style of the mediator, as described above. It is also created by explicit practices—communicative moves and interventions—that the mediator enacts. For example, in communities of faith it is common for the intervener to start a mediation session with prayer, a reading from scripture, or some inspirational statement that encourages the parties to reflect upon their core personal values, their common humanity, and the values of the community.⁴² In non-religious contexts, a similar climate can be established by offering opening comments that convey the mediator's confidence in the parties' ability to reach a point of shared understanding and mutual respect.⁴³ It can also be created by explicitly acknowledging the importance of preserving the relationship between the parties, whatever the issues that currently divide them.

3. *Advising the Parties*

Because there are clear expectations for where conflicts need to head, mediators in harmony interventions play an acknowledged advisory role in addressing parties' conflicts.⁴⁴ Mediators' work rests on a mandate that stems from the core relationship they have with the parties and the recognized place they hold in the parties' community. The mediator interprets and reacts to the issues and the parties' various points of view. This focus is not for the purpose of imposing justice or to construct a problem-solving solution to substantive issues, but rather to create a vision for the future that the parties can readily adopt—a vision that is acceptable because it is so clearly and closely tied to the core values of the community. When mediators propose solutions or outcomes to particular issues, they are often ones that follow existing precedents and norms within the community.

The mediator's degree of influence over the outcomes and direction of the parties' conflict varies depending upon the mediator's personal style and the dispositions of the parties. Influence over parties' views of their

42. *E.g.*, HALVERSTADT, *supra* note 16, at 126 (suggesting that parties need to think “theologically as Christians about the meanings of conflict, the church humanness, love, and grace in participants’ experiences. The emotional climate that works best is one of sharing rather than disputing participants’ own faith understandings and commitments in conflicts”); *see also* Emmanuel LoWilla, *Intrafaith and Interfaith Dialogue in Southern Sudan*, in RELIGIOUS CONTRIBUTIONS TO PEACEMAKING: WHEN RELIGION BRINGS PEACE, NOT WAR 25, 26 (David Smock ed., 2006) [hereinafter RELIGIOUS CONTRIBUTIONS] (describing the role of religious practices in a peace building conference).

43. Le Resche, *supra* note 12, at 333.

44. *Id.* at 331; LEAS & KITTLAUS, *supra* note 16, at 74.

issues and the acceptability of outcomes can be achieved through a reframing process that alters parties' perceptions of what they have said or how they are considering each other's perspectives. In the harmony approach to practice, reframing practices are tied to the underlying values that the third party intends to preserve.⁴⁵ Halverstadt, for example, suggests that "a reframing process achieves change by affirming what parties perceive and believe while changing how parties interpret what they perceive and believe."⁴⁶ He links the purpose of reframing to explicit Christian values that the mediator needs to uphold during an intervention:

Reframing focuses more on moving people through the present into a future than on rejecting the present because of the past. In Christian terms, reframing is rooted more in a consciousness of the goodness of our creation, than a consciousness of our sinfulness With reframing, one experiences oneself more as a worthy child rather than a broken work of God While finite parties cannot create or change circumstances as if they were God, they can choose to interpret the meanings of circumstances from God's revealing perspectives.⁴⁷

In the harmony approach to practice, mediators enact direct and indirect influence strategies, including reframing strategies, to move parties to a conciliatory position and to align conflict behavior with shared values.⁴⁸ This type of influence is crucial to successful outcomes in harmony approaches to conflict intervention.

4. *Containing Conflict Interaction*

Mediators working within a harmony framework accept the responsibility of mitigating the inherent disruption that conflict carries. Conflict interaction needs to be contained because of its threat to the stability of parties' relationships and its potential to disrupt the community as a whole. As a result, third parties who manage conflict rely on a range of strategies

45. HALVERSTADT, *supra* note 16, at 100.

46. *Id.*

47. *Id.* at 101.

48. See TJOSVOLD, *supra* note 24, at 146-50 (describing methods for building shared visions in workplace setting). In non-church contexts, disputing parties' issues and perspectives can be aligned with other values and premises that are not related to the values associated with faith communities but are relevant to the setting in which the dispute has emerged. For example, in organizational contexts parties' perspectives and points of view can be shaped or reframed so that they are consistent with central business values such as effective team performance, economic efficiency, customer service, etc. See generally Raymond A. Friedman, *The Culture of Mediation: Private Understandings in the Context of Public Conflict*, in HIDDEN CONFLICT IN ORGANIZATIONS, *supra* note 24, at 143, 143-64.

that support conflict containment. Halverstadt, for example, describes a rationale for employing conflict constraining or preventing strategies in the management of church disputes:

What is being rejected and constrained is the destructive behavior of principals, not the principals themselves. What is being protected from destruction is the inherent goodness of both principals and bystanders.

Erecting barriers against dirty fight behaviors provides a way for all parties to explore fair fight alternatives. A preventing strategy provides guilty wrongdoers the opportunity to repent and shame-based wrongdoers the chance to begin to heal as well. A preventing strategy opens the way for God's grace to be claimed by responsible parties who choose to accept it.⁴⁹

Containment strategies allow mediators to actively manage the topics parties discuss and the issues that need to be decided. Mediators' assessment of and intuition about what should *not* be discussed is critical in preventing the potentially destructive effects of conflict. In this approach to practice, what does not get discussed is as important as what does. Because of the mediator's advisory stance, the parties are encouraged to follow an agenda that the intervener sets for discussion. This agenda-setting function can be done explicitly or it can be accomplished through subtle redirection of discussion topics and reframing of parties' statements as the conflict interaction unfolds.⁵⁰ Agenda setting is a primary tool used to contain issues and prevent the escalation of parties' conflict interaction.

5. *Encouraging Face Saving, Apologies, and Forgiveness*

The importance of saving face, extending apologies, and granting forgiveness in the harmony framework has been noted above.⁵¹ The mediator's role in a harmony intervention is to encourage and support parties' willingness to engage in these behaviors because they help to insure that any threats to the continuation of the parties' relationship are mitigated. In some communities, the importance of apologizing and offering forgiveness

49. HALVERSTADT, *supra* note 16, at 104-08. Halverstadt discusses a wide range of conflict constraining strategies that are recommended for use in the management of church conflicts. *See id.* at 104-48.

50. *See* David Greatbatch & Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 LAW & SOC'Y REV. 613, 613-41 (1989) (documenting how mediators subtly shift agendas by dropping issues identified by parties).

51. *See generally* RELIGIOUS CONTRIBUTIONS, *supra* note 42, at 36 (discussing the role of apologies and forgiveness in ethno-political peacemaking interventions); Le Resche, *supra* note 12, *passim*.

is openly discussed by the mediator. This is particularly likely if these behaviors are explicitly identified in documents or reference material that capture the shared values of the community. In other cases, these behaviors can be encouraged by a range of mediator interventions, including: telling a party that offering an apology might be helpful, asking a party whether they can say anything that might make the other party feel better, letting parties know that they will be rewarded if they offer an apology for some offense, discussing the value of forgiveness for the person who could offer forgiveness, discouraging or reframing comments that are potentially offensive, asking someone to explain why they are offended, and advising someone on how they can best phrase an apology or express forgiveness.

III. THE TRANSFORMATIVE FRAMEWORK OF MEDIATION PRACTICE

A. IDEOLOGICAL PREMISES

Transformative mediation is based on an alternative ideological perspective of how productive conflict evolves.⁵² In the transformative framework, conflict is viewed as a crisis in human interaction. Because of the difficulties parties face as they try to reconcile differences or deal with any issues that divide them, parties' conflict interaction is often difficult and debilitating. That is, the experience of conflict often challenges parties' efforts to interact with each other productively or constructively. This is because the experience of conflict tends to disable parties in two specific ways.⁵³

First, engaging in difficult conflict tends to create a loss of personal strength and clarity. Conflict tends to lessen parties' ability to accurately understand and assess their situations, think clearly about their own views,

52. See Robert A. Baruch Bush & Sally Ganong Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 PEPP. DISP. RESOL. L.J. 67, 67-96 (2002) (articulating the constructive and destructive spirals of conflict based upon a relational vision); Dorothy J. Della Noce, *From Practice to Theory: A Brief Retrospective on the Transformative Mediation Model*, 19 OHIO ST. J. ON DISP. RESOL. 925, 925-35 (2004) (describing the history of the core concepts in the model); BUSH & FOLGER, *supra* note 2, at 81-112 (defining the core concepts of empowerment and recognition and providing an overview of the transformative process); PROMISE OF MEDIATION, *supra* note 10, at 131-214 (offering a detailed case study of mediation practice that is aligned with transformative objectives); Folger & Bush (1996), *supra* note 10, at 266-76 (listing the ten key hallmarks that capture the essence of transformative practice). See generally DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK *passim* (Joseph P. Folger & Robert A. Baruch Bush eds., 2001) [hereinafter DESIGNING MEDIATION] (providing detailed discussions of how the core principles of a transformative view of conflict emerge during parties' mediated conflict).

53. PROMISE OF MEDIATION, *supra* note 10, at 54-59.

and deliberate confidently about their choices and options. As a result, parties are often uncertain, indecisive, confused, and disorganized as they engage each other about the issues that divide them. Second, conflict tends to lessen parties' ability for perspective-taking and social connection. Parties become myopic and self-absorbed. They are less able to see beyond their own perspectives and views, and less willing to understand or consider the perspectives of other parties. As a result, parties often respond defensively. The parties may become unresponsive and act with limited understanding and insufficient awareness of the other's situation or perspective. Parties' self-absorption leads them to make decisions without considering important information, integrating critical considerations, or moving beyond their initial instincts. When parties try to address conflicts in these two debilitating states of weakness and self-absorption, conflict interaction tends to escalate and become unproductive or destructive. This negative interaction prevents the parties from understanding themselves and each other and, as a result, often undermines sound decision-making. Parties make choices that are rooted in a reactive, unreflective posture rather than a reflective, deliberate one.

In the transformative perspective, productive conflict occurs when the *quality* of the parties' conflict interaction shifts.⁵⁴ This shift occurs when parties move, to some degree, from states of weakness and self-absorption to states of greater empowerment (confidence and strength) and recognition (openness and engagement).⁵⁵ Thus, in this ideological orientation to conflict, the term "transformation" refers to the transformation of the parties' destructive conflict interaction. Transformation, in this sense, occurs when parties change how they engage each other in conflict—how they communicate with each other, negotiate and discuss issues, and how they deliberate about the decisions they face. Transformation, in this sense, is not about the achievement of any particular outcome or decision but about the quality of interaction, which comes to constitute those outcomes or choices. The core assumption is that parties are able to make their best decisions and create the outcomes they want once the quality of their conflict interaction shifts. These shifts occur when parties move to some extent toward greater empowerment and recognition.

Because the quality of parties' interaction is of primary importance in this orientation to conflict, certain behaviors in conflict are viewed as

54. *Id.* at 65.

55. See BUSH & FOLGER, *supra* note 2, at 242-59 (discussing the relationship between this framework and the human experience); Della Noce, Bush, & Folger, *supra* note 8, at 50-51 (analyzing the transformation from self-absorption to openness). The transformative framework is linked to a broader relational vision of human experience.

consistent with and supportive of productive interaction. These behaviors include a wide range of communicative acts that reflect parties' movement toward greater empowerment and recognition as conflict unfolds and develops.⁵⁶ Empowerment is often conveyed, for example, by acts that suggest parties are becoming calmer, clearer, more confident, more focused, or more able to make choices in a deliberate and reflective way. It is also conveyed when parties become more decisive about their goals, options, skills, resources, and their decision-making. Parties often convey enhanced strength when they gain their voice in the conflict, make decisions with greater deliberation and reflection, are noticeably at ease with their choices, or are less reactive and more intentional about their responses, moves, and decisions. All empowerment shifts in some way stem from parties' inherent capacity for greater control and agency as they face their conflict situation.

Similarly, recognition is conveyed by behaviors that suggest parties are more attentive to each other, more open to hearing and considering alternative perspectives, more able to distinguish areas of agreement and disagreement, more substantively engaged with exploring differences, or more perceptive of the other parties' situation. Parties often convey this movement toward greater recognition when they reveal new understandings, question their own views in new ways, integrate new perspectives or substantive points into their own views, reflect upon and consider the value or merits of another's perspective, or argue cogently against another's position on divisive issues. All recognition shifts in some way reveal parties' inherent capacity to extend themselves beyond their own worldview—to connect in some way to the perspectives of others. Recognition does not, however, mean that the parties necessarily achieve reconciliation of their relationship or reach agreement about substantive issues that divide them. Supporting recognition is central to transformative practice, wherever it leads the parties in their understandings of each other or their decisions about issues.⁵⁷

All of the empowerment and recognition behaviors identified above can be expressed and observed, both verbally and nonverbally, as a conflict unfolds. When these behaviors do occur they come to constitute changes in

56. See Janet Kelly Moen et al., *Identifying Opportunities for Empowerment and Recognition in Mediation*, in DESIGNING MEDIATION, *supra* note 52, at 112, 112-32 (illustrating specific empowerment and recognition shifts in conflict interaction); PROMISE OF MEDIATION, *supra* note 10, at 131-214 (discussing the *Purple House* mediation case in detail).

57. See discussion *infra* pages 850-52 and accompanying notes (discussing misunderstandings in the core purpose of the two frameworks regarding changing the quality of interaction vs. reconciling relationships).

the quality of the parties' interaction. They indicate that the conflict interaction is built increasingly on the parties' strength of self and openness to each other. These behavioral shifts are taken, in this orientation to conflict, as makers of productive changes in conflict. The hallmark of successful mediation in this ideological framework is the qualitative transformation of the parties' interaction, as reflected in greater intra-party empowerment and inter-party recognition.

B. VISION OF THE MEDIATOR'S ROLE

The role of a mediator within a transformative orientation to conflict flows from the vision of conflict outlined above.⁵⁸ Transformative mediators pro-actively support shifts in the parties' interaction based on possible movement towards greater empowerment and recognition. The mediator's role is facilitative and non-directive, focusing on the moment-to-moment unfolding conflict interaction, and offering support for its transformation. Mediators follow and support the conflict interaction in which the parties are engaged, to help increase parties' understanding of their own views and the views of the other party, as well as assist them in making decisions based on these achieved understandings. With this support, the mediator assists parties in shaping their own outcomes. They support parties in identifying possible settlement terms or agreements, understanding and accepting insoluble disagreements, reconciling strained relationships, or deciding to end an existing relationship. The goal is for parties to create their own outcomes based on clearer and more confident understandings of themselves, each other, and the nature of the issues that divide them. The mediator's goal is not to shape or influence any particular substantive or relationship outcome in the dispute. Instead, by supporting constructive changes in the quality of the parties' interaction, mediators support the parties in making the clearest and most confident choices about any aspect of their conflict.

In transformative practice, the mediator need not, and usually does not, have any pre-existing or community-based relationship with the parties. The mediator is not usually a recognized member of the parties' community and does not represent or embody any set of values that the parties are assumed to share, or that a community wants to protect. In this orientation, there is no assumption that the parties have common values that need to be preserved for the good of the community at large. Instead, the mediator is perceived as an advocate for the ability of parties to gain their own voice

58. PROMISE OF MEDIATION, *supra* note 10, at 66-72.

and act with clarity and deep reflection. He or she is supportive of all parties simultaneously in their efforts to make the best choices they can make based on the greatest understanding of themselves and each other.

The mediator's presence is molded by the facilitative role that he or she plays during the intervention. More specifically, the mediator's presence is characterized by an ability to stand with the parties as they engage in difficult conflict. Mediators are able to be "in the room" with escalating conflict and do not contain parties' conflict interaction by encouraging parties to avoid conflict, save face, offer forgiveness, or move to common ground. Instead, the mediator is comfortable allowing the parties to explore the dimensions of difficult and divisive issues however they want to address them, even if this means that the parties question or end their relationship, fail to reach an agreement, or decide to escalate their conflict by pursuing it through an adversarial process outside of the mediation.

This also means that transformative mediators are comfortable with parties' expression of strong emotions and potentially offensive or challenging statements.⁵⁹ The mediator acts on the assumption that parties have the capacity to make their own decisions, and to assess the risks associated with various courses of action for themselves. Parties are assumed to be able to decide whether they want to offer an apology or forgiveness based upon their own sense of whether either is warranted or appropriate. The support the mediator provides in fostering empowerment and recognition gives the parties greater confidence that they are making the best choices and decisions for themselves at the time of the mediation, whether those decisions are about substantive issues or their relationship with each other.

C. INTERVENTION PRACTICES

The transformative approach to practice was first discussed in broad theoretical terms that contrasted this relational model of mediation with an individualist, problem-solving approach. Soon after these early comparative discussions of the model were first offered, the guidelines and skills for practice were delineated and taught in the delivery of large-scale mediation programs and training curricula.⁶⁰ Four sets of transformative mediation

59. Folger & Bush (1996), *supra* note 10, at 223-34, 271.

60. The transformative framework was adopted by the U.S. Postal Service to address employee charges of discrimination. See Robert A. Baruch Bush, *Handling Workplace Conflict: Why Transformative Mediation?*, 18 HOFSTRA LAB. & EMP. L.J. 367, 367-73 (2001) (discussing the rationale for using transformative mediation in the U.S. Postal Service); Cynthia J. Hallberlin, *Transforming Workplace Culture Through Mediation: Lessons Learned from Swimming Upstream*, 18 HOFSTRA LAB. & EMP. L.J. 375, 375-83 (2001) (addressing implementation of the transformative framework); Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in the*

practices are briefly discussed: (1) giving control of the mediation process to the parties; (2) maintaining substantive non-directiveness; (3) supporting parties' expression and exploration of differences; and (4) proactively supporting parties' shifts toward empowerment and recognition. Although this is not a comprehensive list of practices within this orientation, these behaviors characterize the essential elements of transformative interventions.

1. *Yielding Control of the Mediation Process*

Because the objective of transformative mediation is to support constructive shifts in the parties' interaction, transformative mediators give substantial control of the mediation process to the parties themselves. Transformative practice is built on an assumption that there is no clear distinction between the process of mediation and the content of parties' disputes.⁶¹ Because the parties' conflict is constituted by and developed through their interaction with each other and the mediator, the way parties interact is interwoven with the substantive issues of the dispute itself. As a result of this acknowledged connection between content and process, transformative mediators encourage parties to address explicitly any differences they may have about how they want to communicate with each other, and to shape expectations about how the process could best evolve from their respective points of view. In reaching these objectives, mediators facilitate discussion about the ground rules that the parties need in order to work productively on their issues.⁶² Discussions about ground rules for the mediation allow parties to explore critical differences in the way they communicate with each other.

For example, one party may request that there be no interruptions when either party is speaking and the other may demand that interruptions be allowed because this constraint will prevent them from getting personally frustrated when they hear something with which they disagree. Mediators encourage parties to address these differences in the same deliberative way they might address differences they have over substantive issues. This transparent and party-driven approach to developing the mediation process

USPS REDRESS Program: Observations of ADR Specialists, 18 HOFSTRA LAB. & EMP. L.J. 399, 399-427 (2001) (discussing the transformative framework adopted by the Postal Service).

61. See Joseph P. Folger, *Who Owns What in Mediation?: Seeing the Link Between Process and Content*, in *DESIGNING MEDIATION*, *supra* note 52, at 55, 55-61 (discussing the inter-relationship of the mediation process and the content of parties' disputes).

62. See Sally Pope, *Beginning the Mediation: Party Participation Promotes Empowerment and Recognition*, in *DESIGNING MEDIATION*, *supra* note 52, at 85, 85-90 (describing the opening of a transformative mediation session in general).

demonstrates that transformative mediators do not guide or influence how the parties should talk, or what they should talk about, during mediation. It places party control over the mediation process on the same plane as the substantive issues and outcomes of the dispute. Both are assumed to be in the hands of party decision-making and deliberation throughout a mediation session.

Similarly, transformative mediators emphasize that parties decide whether they want separate meetings with the mediator at any point in the mediation process. Parties initiate the request for such individual meetings with the mediator. The mediator does not request such sessions or indicate that these meetings are critical to the success of the overall process. The goal of separate meetings in the transformative framework is to assist the parties in gaining greater clarity about their views, what they want to say or not say to each other, and the choices they may want to make. Separate sessions, in other words, are not used by the mediator to control or align parties' behavior with mediators' expectations or the norms of an existing community, nor are they used to carry information from one party to the other or to test for possible terms of agreement. Rather, these sessions offer parties an opportunity to deliberate about any topic or issue that they need to clarify for themselves. Meeting with the mediator separately can foster greater clarity and insight, especially if being in the presence of the other party is disabling or disempowering. The mediator works with the parties in these separate sessions to support their deliberation and to assist with developing the parties' clarity.

2. *Maintaining Non-Directiveness*

Transformative mediators maintain a non-directive stance throughout their interventions.⁶³ Directing the parties towards particular outcomes or reframing issues runs counter to a key premise of the transformative framework, namely, that parties are the best authors of their own choices and decisions. The transformative approach assumes that supporting meaningful shifts in the quality of conflict interaction allows parties in a divisive conflict to draw upon their inherent strength—their deliberative capacity—for making the most appropriate and useful decisions for themselves. If conflict interaction is supported by a mediator who consistently fosters empowerment and recognition, parties are encouraged to reach for and find their own balance of individual strength with social connection—a balance

63. Folger & Bush (1996), *supra* note 10, at 267-69; Nabatchi & Bingham, *supra* note 60, at 410-11.

that is often lost in a spiral of destructive conflict interaction.⁶⁴ Mediator control over either substantive issues or parties' communication undermines, rather than supports, parties' ability to balance personal strength with interpersonal recognition. Such control negates the possibility that parties can struggle to attain this balance and build on their inherent capabilities for agency and perspective-taking. In this sense, the mediator's non-directive posture is vital to transformative practice because mediator influence over parties' issues or communicative choices make the core objectives of transformative practice unattainable.

This non-directive mediator stance means, for example, that mediators facilitate any aspect of parties' decision-making. These aspects include: whether the parties want to address multiple issues or a single topic, whether they want to address the history of the conflict and past actions by either party, whether the parties want to challenge how they are communicating with each other, whether they agree to any settlement terms, and whether they will or will not continue an existing relationship. It also means that the mediator does not adopt a protective or advisory stance. Parties are encouraged to carefully assess their options and risks. Mediators do not, however, try to insure that parties' choices are workable, safe, or acceptable from the mediator's point of view or from a standard that the mediator (or the community) articulates.

3. *Supporting Parties' Exploration of Critical Differences*

Because transformative mediators are focused on the quality of the parties' interaction and not on the development or adoption of particular outcomes, transformative mediators do not hesitate to facilitate discussions parties initiate about deeply divisive issues.⁶⁵ These issues often do not have readily identifiable solutions. In some instances, just broaching such issues may threaten the continuation of the parties' relationship because the parties immediately sense that there may be little or no common ground between them. When parties address deeply divisive issues, they encounter opportunities to confront the challenge of being true to one's own perspectives and views while determining how to acknowledge, live with, accommodate, or reject the differences they have with others. It is in wrestling with the most divisive issues that parties experience the greatest potential for personal development and change.

64. See PROMISE OF MEDIATION, *supra* note 10, at 55 (providing a graphic display of this spiral).

65. *Id.* at 224.

Transformative mediators are comfortable facilitating emotionally charged conflict interaction that often accompanies parties' efforts at addressing divisive issues. In this approach to practice, the parties' intense emotional involvement with issues, and the expression of a wide range of emotions, is seen as an inherent outgrowth of facilitating conflict interaction. Transformative mediators expect and work with, rather than suppress or contain, the entire range of difficult conflict that can unfold as parties address disputes about contractual, personal, professional, family, or community issues.

4. *Proactively Supporting Parties' Empowerment and Recognition Shifts*

Transformative mediators' primary focus is on supporting parties' shifts towards empowerment and recognition as conflict interaction unfolds during the mediation process.⁶⁶ Mediators work with parties' expressions of weakness and self-absorption to support and foster these constructive, interactive shifts. Empowerment and recognition shifts are the result of mediators' sustained and conscious effort to proactively follow, rather than lead, the parties. The practice of proactively following the parties is accomplished by relying upon a core set of transformative intervention skills, including interventions that are aimed at holding up parties' comments and perspectives as they articulate them, so that parties may "hear" and reflect upon what they are saying.⁶⁷ This practice of reflecting comments back to the parties allows parties to more deeply consider the implications of their own remarks, to decide whether what they have said is what they want to be saying, and to restate and refine comments that they may have previously offered. The objective of such interventions is to help the parties develop greater clarity and insight about their own ideas, preferences and reactions. Mediators also summarize extended segments of interaction that occur between the parties.⁶⁸ This practice serves a number of important purposes: it allows the parties, together, to think about the range of issues and perspectives that have surfaced during their negotiations, it enables them to understand key areas of difference and disagreement, it encourages them to think about how important each issue is for them, and it helps them to decide what they want to focus on next in their negotiations.

66. *Id.* at 110-12.

67. *Id.* at 131-214

68. *See id.* at 155 (providing an example of and purpose for a mediator-initiated summary during a mediation).

IV. SOURCES OF MISUNDERSTANDING

Although the harmony and transformative frameworks differ significantly in their ideological premises, core purposes, and intervention practices, the differences between them are often muted or lost in practitioners' and stakeholders' conceptions of alternative approaches to practice. There is a tendency to see the two approaches as equivalent in purpose and practice, or not to adequately distinguish between them. There are three primary reasons why the approaches are seen as similar or are cast as stylistic variations of the same underlying orientation to practice. Examining these reasons suggests the steps that can be taken to maintain an accurate understanding of the two ideological approaches to conducting mediation.

A. ASSUMING COMMONALITY IN DIFFERENCE

One source of misunderstanding about the frameworks is that both the harmony and transformative models are perceived as different from the facilitative problem-solving approach. They share an "other" status in common, which makes them vulnerable to being seen as overly similar. As noted above, the problem-solving approach is the most widely known and adopted framework of practice across the sectors in which mediation is provided.⁶⁹ It was articulated at the inception of the alternative dispute resolution movement and it quickly became the standard for court-based and community mediation programs, as well as for private practitioners. The most influential books written about the design and practice of mediation in the United States during the first three decades of the alternative dispute resolution movement were based upon the problem-solving framework. Almost all mediation training was designed to build practitioners' skill-base in problem-solving practice.⁷⁰ Although the roots of both the harmony and transformative frameworks existed in non-mainstream arenas of practice, they were not well represented in the public discourse of the alternative dispute resolution field until the mid-1990s. When these two frameworks began to emerge more formally in the field, they were both

69. BUSH & FOLGER, *supra* note 2, at 55-77.

70. For general overviews of problem-solving models of mediation practice, *see, e.g.*, KATHY DOMENICI & STEPHEN W. LITTLEJOHN, *MEDIATION: EMPOWERMENT IN CONFLICT MANAGEMENT passim* (2d ed. 1996); JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION passim* (1984); DEBORAH KOLB ET AL., *WHEN TALK WORKS: PROFILES OF MEDIATORS passim* (1994) (providing well-known mediators' perspectives on their own practice); CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT passim* (2d ed. 1996); KARL SLAIKEU, *WHEN PUSH COMES TO SHOVE: A PRACTICAL GUIDE TO MEDIATING DISPUTES passim* (1996); JOSEPH B. STULBERG, *TAKING CHARGE/MANAGING CONFLICT passim* (1987).

recognized as different from the prevailing form of practice. However, this contrast tended to mute the perceived differences between them.

B. MISUNDERSTANDING DIFFERENCES IN CORE PURPOSE

The contrast effect that placed the harmony and transformative practice in the same “other” category is clearly justified. In reality, both approaches *are* different from a facilitative problem-solving framework; both define their core purpose differently from the problem-solving approach to practice. Neither approach supports placing a mediator’s focus on solving problems or negotiating settlement terms for disputing parties. Instead, in the harmony framework, the mediator’s focus is on reconciliation—the restoration of the parties’ relationship. In the transformative framework, the mediator’s focus is on transforming the quality of the unfolding conflict interaction so that parties can make clear and deliberate choices about any issues they choose to address. Although these two different purposes are easily distinguishable from a problem-solving objective, and can be readily seen as such, clarifying and maintaining the difference *between* these two goals is challenging.

This is in part because one *possible* outcome of transformative practice can be the restoration of parties’ relationship. Although the mediator’s objective is not to achieve this outcome, when parties shift toward greater empowerment and recognition, they can and sometimes do decide to strengthen, recommit to, or heal their relationship. Apologies and forgiveness can be initiated by the parties, for example, as a way to overcome perceived offenses or transgressions in the history of a relationship.⁷¹ However, in the transformative framework, the objective is to help the parties clearly decide *whether* this is what they want to do, not to insure that it does occur.⁷² Reconciliation happens only if the impulse to do so comes from the parties themselves and the clarity they achieve during the mediation process. The parties are as likely to decide, based on shifts toward

71. See PROMISE OF MEDIATION, *supra* note 10, at 196-214 (describing an interaction that demonstrates parties’ movement toward a positive change in their relationship within a transformative mediation).

72. See David Bloomfield, *On Good Terms: Clarifying Reconciliation*, BERGHOF REPORT No. 14, October, 2006, at 23-24. Bloomfield argues:

Forgiveness is something (often one of the few things) that remains in the power of victims to give or withhold. A reconciliation process aims to make that forgiveness possible. But a fair reconciliation process should not achieve the bestowing of forgiveness through pressure on victims. Reconciliation as a process works towards the (idealistic) goal of an end-state of reconciliation where forgiveness may happen at the discretion of victims; if it happens earlier during the process, that is a prerogative of the unpressurised victim.

Id.

empowerment and recognition, that they do not want to restore or renew their relationship, offer an apology, or extend forgiveness. In the transformative framework the goal remains the same in either case—to help the parties clearly and deliberately decide what they want to do about their relationship and their substantive issues—wherever that takes them. The sole emphasis is on supporting the quality of parties' deliberation, not on reaching any particular outcome through the mediator's guidance or influence.

Because transformative practice supports the possibility of relationship restoration and is not focused exclusively on the negotiation of tangible issues, the distinction between the goals of harmony and transformative interventions is easily lost. There is a tendency to assume that “transforming the quality of parties' interaction” is synonymous with “establishing positive, harmonious relationships between the parties.” This is understandable because “transforming the quality of parties' interaction” does, in one sense, constitute changing the quality of the parties' relationship.

At the broadest level, change in the parties' interaction can legitimately be seen as a positive change in the parties' relationship. This is because there is a well-established link between any human interaction and the relationship that is defined by those participating in the interaction.⁷³ From a communication theory perspective, all changes in interaction in some way alter relationships. The quality or character of any interpersonal relationship is shaped by the interaction that created it. Any changes that occur in interaction between people inevitably create changes in their relationship. Seen from this point of view, when significant shifts toward empowerment and recognition occur during a transformative mediation, the interaction between the parties during the intervention changes and these changes result in a re-definition of the parties' relationship as well. Transformative shifts allow parties to move from being reactive, defensive, confused and hostile, to being deliberate, calm, clear, and open. These shifts change the quality of interaction between the parties and, as a result, the parties experience each other differently. In effect, parties establish a “new” relationship while they are interacting in a mediation, one that allows them to talk with each other and make confident decisions without being clouded by

73. This vision of the link between communication and relationship was clearly articulated by the family systems theorists. See, e.g., PAUL WATZLAWICK, JANET HELMICK BEAVIN, & DON JACKSON, *PRAGMATICS OF HUMAN COMMUNICATION passim* (1967) (articulating the foundational principles of pragmatics and the link between communicative messages and relationship definition); PAUL WATZLAWICK & JOHN H. WEAKLAND, *THE INTERACTIONAL VIEW passim* (1977) (discussing the implications of the pragmatic view for therapeutic interventions in relationships).

unwarranted biases, false assumptions, misunderstandings, confusion, or uncertainty about their own or each other's points of view.

In the transformative framework, this qualitative change in interaction *during* the mediation is valued as positive change and is acknowledged as establishing a more constructive relationship between the parties on their own interactive terms. However, the altered interaction which results from transformative shifts during mediation, implies nothing about the choices parties make regarding the nature or status of their relationship moving forward. The relationship parties develop through shifts in empowerment and recognition can enable them to more deliberately and clearly assess how they want their relationship to be defined. It helps them to decide whether they want to end, change, or continue their relationship as it is. In other words, clear and deliberate choices by the parties—about the current status or future of their relationship—are made possible by transformative shifts in mediation.

The transformative goal of changing the quality of interaction is clearly different from the harmony goal of insuring the continuation or maintenance of a relationship based on a common set of values. However, to see and sustain this difference in core objectives of the two frameworks, it is necessary to understand that any decisions parties make can be accomplished through “better” or “worse” interaction that unfolds among them. Decisions can be made from states of weakness, uncertainty and self-absorbed blindness or they can be made from positions of strength, clarity, understanding and openness.⁷⁴ Reconciliation that is achieved without empowerment and recognition can be unstable or unsatisfying, while decisions to end relationships based on empowerment and recognition can be satisfying and sustainable. What matters in the transformative approach is the quality of interaction that supports parties as they make choices and decisions about any issues that divide them. This distinction between the two models is critical, but is easily misunderstood in discussions and assessments of the two frameworks.

C. ASSUMING PRACTICE EQUIVALENCY

A third source of misunderstanding about the frameworks stems from a failure to recognize that mediation *practices*—specific skills and intervention moves—cannot be divorced from the *purposes* to which these

74. See James Antes, Joseph P. Folger & Dorothy Della Noce, *Transforming Conflict Interactions in the Workplace: Documented Effects of the USPS REDRESS Program*, 18 HOFSTRA LAB. & EMP. L.J. 429, 429-67 (2001) (illustrating how the quality of interaction changes through empowerment and recognition in cases involving the United States Postal Service REDRESS mediation program).

practices are put. A mediator's intent shapes the impact of any skill he or she employs in conducting interventions. Any particular practice can be used for different purposes, depending upon the underlying goal of the practitioner who is using it.⁷⁵ When this principle is ignored or overlooked, it is easy to assume that the skills used in the harmony framework are the same as the skills used in the transformative framework. Although there is similarity in the overall nature of the skills, there are critical differences in how the skills are employed within the two approaches to practice.

For example, the practice of holding separate meetings with the parties can be seen as a possible or characteristic practice of both frameworks. Separate meetings are held in either approach to practice.⁷⁶ But seeing this practice as a marker of commonality across the two frameworks is seriously misleading. Holding separate meetings with individual parties is a practice that serves very different purposes in the two approaches, as indicated in the above descriptions of core practices. Separate meetings can be used by a mediator in the harmony framework to move parties toward reconciliation while minimizing the risk of face loss that can easily occur in a joint session.⁷⁷ Alternatively, in the transformative framework, separate meetings can be used to help parties think clearly about how they see the issues, themselves, or each other. It can provide a time for careful and deliberate thinking, unaffected by the presence of the other party. These differences in the *use* of separate meetings suggest that the practice itself says nothing about the impact or function it serves in different mediation contexts. The purpose that a mediator carries into the process shapes the use of this specific practice and contributes to the outcomes achieved in the mediation.

Other apparent practice similarities create misunderstandings about the two frameworks as well. Both models place an emphasis on attentive or supportive listening, but mediators listen for very different purposes when

75. Bush, *supra* note 1, at 982-1004; *see also* Paul Charbonneau, *How Practical is Theory?*, in *DESIGNING MEDIATION*, *supra* note 52, at 43 (discussing the importance of linking practitioner skills to deeper purpose in mediation training).

76. Because the transformation of parties' interaction is the main focus in the transformative model, separate meetings are typically used less often than in the harmony approach. Separate meetings with parties most often occur briefly at the intake of a case and as requested by parties during the process.

77. *See* Mark Davidheiser, *Conflict Mediation and Culture: Lessons from the Gambia*, 13 *PEACE & CONFLICT STUD.* 33 (2006). In his study of mediation in Gambia, Davidheiser found:

Caucuses also enabled the circumlocation of social norms that can inhibit reconciliation processes. In caucuses disputants could express viewpoints and emotions that would be inappropriate in a group meeting. . . . Caucuses therefore played a vital role in the reconciliation process and in the therapeutic aspects of mediation, as they allowed disputants to vent negative emotions without violating social mores.

Id.

practicing within these alternative models.⁷⁸ In the harmony model, the mediator often listens to find points of commonality, to notice when there is explicit or implicit support for shared values, or to recognize when choices are being considered that threaten relationships. In the transformative framework, mediators listen for moments in parties' interaction where shifts toward empowerment and recognition can be supported or where there are important differences between the parties that need to be highlighted.⁷⁹ Similarly, providing summaries of parties' comments and contributions can serve different purposes within the two frameworks. Summaries can be offered to parties in an effort to reframe what they have said in a way that aligns expectations with the goals of reconciliation or the preservation of shared values. Alternatively, summaries can be offered to help the parties hear what they are saying and to help them decide whether their statements accurately reflect their own sentiments and thoughts. Any of these specific practice differences can be overlooked if the purpose driving the use of the skill is not explicitly identified and acknowledged.

V. SUSTAINING THE DIFFERENCE

It is important that the differences between the harmony and transformative frameworks remain clear in mediators' and stakeholders' conceptions of practice, as well as in the minds of clients who participate in the process. Sustaining these differences at both a conceptual and practice level is important for several key reasons.

A. PRESERVING THE VALUE OF ALTERNATIVE FRAMEWORKS OF PRACTICE

The unique contributions of either approach to practice are easily undermined if the differences that exist between them are not maintained in practice. The central purpose of each approach is essentially incompatible with the other—working toward the achievement of one purpose negates the attainment of the other.⁸⁰ The different outcomes of each approach become unattainable if the practices are not consistently aligned with the purposes of each approach. If, for example, a particular community establishes mediation to help preserve its values and to maintain relationships

78. Joseph P. Folger, *Mediacion Transformativa: Preservacion Del Potencial Propio De La Mediacion En Escenarios De Disputas*, 18 REVISTA DE DERECHO 38, 40 (2007).

79. See, e.g., Dorothy Della Noce, *Seeing Theory in Practice: An Analysis of Empathy in Mediation*, 15 NEGOTIATION J. 271, 271-301 (1999) (providing a related discussion of how empathy functions differently in mediation depending upon the core purpose behind practice).

80. See PROMISE OF MEDIATION, *supra* note 10, at 228-32 (discussing generally why different ideological approaches to practice are incompatible).

among its members when conflicts arise, then only mediation practices that are aligned with the harmony model can clearly and consistently support this goal. If someone works within a transformative framework in this setting, there is no assurance that shared values will be preserved or that relationships will be restored. The emphasis in the transformative framework on party empowerment opposes any effort by the mediator to bring the parties toward reconciliation or to encourage parties to align with a shared set of implicit or explicit values. Transformative mediators support the expression of differences and resistance to community-held values if parties want to challenge the existing harmony of the group. Although such challenges can be risky for parties who take contrary positions in a conflict, transformative mediators are willing to discuss the contrary positions with the parties to preserve the core principle of party empowerment on which the transformative model is built. A mediator's support for the expression of core differences with community values would be seen as inappropriate, dangerous, or even unethical if a mediator was expected to align their practice objectives with the goals of a harmony intervention. It would be very difficult for a mediator to conduct transformative practice if strong harmony expectations were in place. The cultural milieu would place pressure on the mediator to avoid supporting parties' voices in the conflict if those voices challenged the core values or relationships in the community or organization.

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

B. SUPPORTING PRACTITIONER CHOICE

The differences between the harmony and transformative frameworks need to be clearly articulated and sustained in order to support mediators in making choices about how they want to conduct their practice. Choosing between these approaches to practice cannot be guided simply by a

mediator's desire to master the intervention skills associated with each framework. Because these two frameworks are rooted in fundamentally different ideological premises, the core values of an adopted approach to practice need to resonate, to some degree, with a mediators' personal ideology—their views of human nature, conflict, and the role of social institutions in addressing conflicts.⁸¹ It is difficult for mediators to practice confidently and effectively within a framework if it is not consistent with their core values. Skills that mediators learn in training or adopt from professional backgrounds, are easily overridden by their personal value orientation in the throes of actual intervention work.⁸² Mediators' implicit instincts about what makes conflict productive and their inherent comfort with some types of outcomes become the guiding influences on moment-to-moment practice choices. An ideological framework that does not resonate with one's personal orientation to conflict and beliefs about human capacity is not easily sustained in mediation practice.

Practitioners who are uncomfortable with the expression of emotion, the possibility of not finding common ground, or not achieving reconciliation between parties, find it difficult to conduct transformative practice. The process and outcomes are unsatisfying because they are not aligned with what practitioners value. Similarly, mediators who are uncomfortable with taking a proactive role in aligning parties' disputes with the underlying values of a community can find it difficult to conduct effective harmony practice. Their sense that fairness, self-determination and party voice should be the core of practice is repeatedly violated. Clarification of the premises and core purposes of each framework enables mediators to consider and assess whether their own implicit orientations to conflict are aligned with either of these approaches to practice and the outcomes they intend to foster. Distinguishing between the two frameworks' underlying premises helps to clarify mediators' own personal expectations for the work they want to perform.

C. MEETING STAKEHOLDER EXPECTATIONS

The differences between these two frameworks also need to be clearly articulated in order to establish appropriate expectations for stakeholders

81. Joseph Folger & Robert A. Baruch Bush, *A Response to Gaynier's "Transformative Mediation": In Search of a Theory of Practice*, 23 CONFLICT RESOLUTION Q. 123, 123-27 (2005); Charbonneau, *supra* note 75, at 41-42.

82. Joseph P. Folger & Robert A. Baruch Bush, *Developing Transformative Training: A View From the Inside*, in DESIGNING MEDIATION, *supra* note 52, at 169.

who adopt, institutionalize and regulate mediation programs.⁸³ If directors of courts, social service agencies, or community centers do not have an accurate understanding of the differences between these two frameworks of practice, the goals they set for their programs may not be met and attempts to document success will be thwarted. Stakeholders may unknowingly adopt mediator practices that are incompatible with their implicit goals and visions of success.

Those who administer victim-offender programs, for example, might want to adopt a conflict intervention process that aims at establishing conciliatory relationships between offenders and victims, relationships that are built on offenders' apologetic posture and victims' receptivity to admissions of guilt for offensive behavior. These expectations would not necessarily be met if a transformative approach to practice were implemented in such a program. Parties could construct this kind of relationship if they chose to do so, but there would be no effort made by transformative mediators to insure that reconciliation was achieved. Alternatively, a director of a victim-offender program might want to establish a program in which both parties are free to say whatever they want to say to each other and to construct whatever kind of relationship that emerges from their own facilitated interaction during the mediation process. In this vision, party empowerment for both victim and offender may be the over-riding objective. The program director may see reconciliation as one possible outcome, but he or she places a higher priority on the creation of party-constructed outcomes because these outcomes are seen as having the most significant value and are the most sustainable. In this case, the program director would not want the intervener to promote or steer the process towards reconciliation because he or she values party empowerment—and its value to the parties—over relationship restoration. In this case, transformative practice would meet the desired expectations of the program and its vision of success.

Confusion between the two frameworks has hindered the adoption of the transformative practice in some institutional settings. When stakeholders mistakenly assume that transformative practice prioritizes the achievement of reconciliation (based on any of the reasons noted above), those who value party-driven processes are reluctant to adopt the approach. In court-based programs, for example, administrators who believe that transformative practice attempts to achieve harmony goals can easily

83. See Bush, *supra* note 1, at 982-1000 (examining the implications of taking different approaches to assessing the quality of mediation practice); Della Noce, *supra* note 3, at 960-64 (discussing the different expectations set for mediator performance testing).

assume that parties will not successfully address or settle tangible issues that arise in disputes over contracts, service provision, distribution of resources, etc. They mistakenly assume that transformative mediators de-emphasize or ignore these issues and instead focus primarily or exclusively on the restoration of relationships.⁸⁴ The concern is that the parties will not be supported in their efforts to reach valued settlements of real issues.

This is a damaging misperception because transformative practice supports the parties' pursuit of any issues that they want to address, including the settlement of resource and other tangible issues. Transformative mediators facilitate the development of settlements if the parties themselves want to address these issues and if they decide that there are areas of agreement that can form the basis for settlements. Transformative mediators also support parties' decisions to not address relationship issues such as trust or reconciliation. Because of the extensive research conducted on the United States Postal Service mediation program, there is now substantial evidence that transformative practice does indeed support the disposition of a full range of issues when the parties decide to pursue these objectives in mediation.⁸⁵ Despite this body of research, the tendency to see transformative objectives as inconsistent with the settlement of tangible issues persists. The lesson here is clear: not distinguishing accurately between the harmony and transformative frameworks can unnecessarily limit the arenas of practice in which transformative mediation can be implemented. Transformative mediation can meet the goals of program administrators and clients who are interested in a range of possible outcomes but who want the distinguishing characteristic of mediation to be its emphasis on party self-determination.

VI. CONCLUSION

The mediation field is in its adolescence. It is still establishing its identity within the alternative dispute resolution movement and it is still seeking a more visible and appealing profile in the eyes of the public at large. Some of the vulnerabilities of the field at this point in its evolution are reflected in the way in which the harmony and transformative frameworks of practice

84. See PROMISE OF MEDIATION, *supra* note 10, at 217-18 (discussing this misunderstanding about the focus and outcomes of transformative mediation).

85. See, e.g., Jonathan F. Anderson & Lisa Bingham, *Upstream Effects From Mediation of Workplace Disputes: Some Preliminary Evidence from the USPS*, 48 LAB. L.J. 601, 601-08 (1997) (documenting various effects of mediation beyond the parties' experience within the process itself); Lisa Bingham & Cristina Novac, *Mediation's Impact on Formal Discrimination Complaint Filing: Before and After the REDRESS Program at the United States Postal Service*, 21 REV. OF PUB. PERSONNEL 308, 308-31 (2001) (providing evidence regarding the impact of mediation on the emergence of conflict across the organization); Hallberlin, *supra* note 60, at 377-83.

have been discussed and implemented. The analysis presented here suggests that mediation currently faces three particular challenges as the field continues to mature and evolve.

First, the field must overcome its reluctance to acknowledge and explore core differences among the major frameworks of mediation practice. Part of the reluctance to address these differences stems from the inevitable consequence of doing so. Creating clarity about practice alternatives, and the incompatibility among them, necessitates choice. If essential and incompatible differences among models of mediation are fully recognized, practitioners and stakeholders need to decide what their core goals and objectives are in using mediation, and which framework is consistent with these objectives. Clarity of difference confronts practitioners and their clients with the fact that they are making a choice, even if they are not articulating the basis for it. Regardless of whether choices about practice alternatives are made implicitly or explicitly, these choices are significant in determining what will be accomplished when mediation is provided.

As different approaches to practice are adopted, professionals in the field need to embrace, and not resist, choice. Theorists and practitioners need to be willing to clearly and honestly describe the differences among the existing approaches and the contrasting rationales for adopting them. It also means that professionals in the field need to recognize that blending practice frameworks undercuts the value that any one approach to practice can provide. If blended approaches are developed, then the goals and practices of these models must be clarified and scrutinized as well. No approach to practice can be developed or used without invoking some core purpose and without relying on a set of ideological premises.⁸⁶ There is no ideology-free zone of mediation practice.

Second, the discourse of the field needs to focus more on the ideological bases of practice and less on the stylistic variations within ideological frameworks. Ideological differences are real and consequential. If the field represents core differences in practice as variations in mediator style and does not acknowledge that these differences are rooted in different ideological premises, the differences among approaches to practice will continue to be blurred. This blurring undermines stakeholder support for mediation overall and creates forms of practice that are confusing to clients. The current tendency to construct new approaches to mediation based on different theories of conflict does not necessarily contribute to ideological

86. See BUSH & FOLGER, *supra* note 2, at xii (offering Rubin's commentary acknowledging the ideological foundations of all mediation practice).

clarity.⁸⁷ Theories of conflict carry their own ideological assumptions and these assumptions need to be explicitly examined and discussed when models of practice are built upon them. All too often in the mediation field, these assumptions are not identified. In fact, conflict theory often masks ideology. There needs to be greater recognition that conflict theory instructs practitioners on how to *analyze* conflict, but conflict theory does not clarify the ideologically based choices that mediators need to make about how they will *intervene* in conflicts.

Third, the core difference between the harmony and transformative frameworks lies in the extent to which mediation, as a conflict intervention process, preserves and fosters party self-determination. The transformative framework sets party empowerment as the highest value on which to construct mediation practice. The harmony framework, on the other hand, values interpersonal reconciliation and social stability over party self-determination. The outcomes that harmony interventions are aimed at achieving are valued more than the preservation of party self-determination in the process itself. Although the importance of self-determination is increasingly recognized in the mediation field, there is a pressing need to address the role that self-determination plays in defining and preserving mediation's unique contribution as a form of dispute management.⁸⁸ There are many forums of conflict intervention that settle issues and/or foster reconciliation among parties but do not rely on self-determination as the defining characteristic of the process. And there are many mediators working from different ideological perspectives who espouse the value of self-determination, but do not enact this principle in practice. The field needs to continue to ask whether mediation can sustain its unique appeal—indeed, whether it *has* any unique appeal—if self-determination is not the cornerstone of mediation practice.

87. For example, narrative theory is a communication theory of conflict in general that serves as the conceptual foundation for narrative mediation, but the underlying ideological assumptions on which mediators build their narrative approach to intervention in conflict are not acknowledged or clarified. See, e.g., JOHN WINSLADE, NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION *passim* (2000) (discussing the nature and practice of narrative mediation).

88. See, e.g., Nancy Welsh, *The Thinning Vision of Self-Determination in Court Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, *passim* (2001) (arguing for the need to preserve and foster party self-determination in court-based mediation practice).