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Style vs. Model: Why Quibble?

Susan Oberman*

INTRODUCTION

Use of labels to connote differences in the range of mediator practices frames the ongoing discourse about “how to” mediate. Mediation scholars and practitioners refer to differences as: *approach, orientation, style,*

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My concerns about the use of the words “style,” “orientation,” and “approach,” to describe differences in mediator practices is the result of the work of Dorothy Della Noce, who in 2002 in her keynote speech to the Virginia Mediation Network, challenged us to define what model we use. Similar to most of my colleagues, I had never entertained the fact that I was using a model. After doing extensive research I found that despite a considerable amount of scholarship on the issue, there was still much confusion and little agreement; for the most part, the contradictions and complexities are being ignored or dismissed in mediation training programs and Standards of Ethics. Even after Leonard Riskin’s keynote address in 2003 at the Virginia Mediation Network, in which he stated that he never meant for his categories of “facilitative” and “evaluative” to be considered mutually exclusive, the use of these terms by many mediators to explain what they do, persisted. This article is an attempt to bring both scholars and practitioners into the conversation that the Transformative Mediation scholars began, and that Leonard Riskin and Ellen Waldman have been working to further, for well over a decade. In addition, the conversation on models is placed in the context of a 150-year history of mediation as it has been promoted and regulated by the courts.

Much appreciation goes to my readers, Ellen Waldman, Dorothy Della Noce, Stephanie Wildman, Terry Rogers and Rachel Mann for their time, attention, suggestions, and encouragement.

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artistry, and *model*.¹ Many might well ask, why quibble?² Why bother arguing amongst ourselves? Why cause conflict over a few simple words? This article contends that language³—what is said, how it is said, and what meanings are assigned to the words—is critical in mediation itself,⁴ and is certainly no less so in defining what mediators do.⁵ Language is the shared experience of the community.⁶ The words used and the meanings given to them inform the actions taken.⁷ Thus, naming and defining the problem⁸ is a key to addressing conflict. The names assigned to differences in mediation theory, ideology, and practice, determine the meanings of these differences.

Before evaluating the terms used to acknowledge mediator differences, it is necessary to recognize historical context. Use of non-legal processes⁹

1. Use of italics throughout the article is meant to alert the reader to the fact that the definitions and practices associated with the italicized words are not to be assumed; there is little analysis, and no agreement on what the meanings and practices are, or should be.

2. Jeffrey W. Stemple, *Identifying Real Dichotomies Underlying the False Dichotomy, Twenty-First Century Mediation in an Eclectic Regime*, 2000 J. DISP. RESOL., 371, 372. Stemple characterizes differences with commentators as “points of distinct conflict or quibble . . .” *Id.* A Foucaultian analysis would point out that his use of the word *quibble* automatically reduces the discourse to a kind of petty, childish problem. See also Joseph B. Stulberg, *Facilitative Versus Evaluative Mediation: A Discussion*, 24 FLA. ST. U. L. REV. 985, 986 (1997).

3. JOHN M. CONLEY & WILLIAM M. O’BARR, JUST WORDS 39 (1998), stating that “[i]f language can be understood as a meaning-making activity rather than a passive reporting function, meaning cannot be chosen arbitrarily. Language is then seen as having the function of permitting or constraining the options that might be available to us.”

4. JOHN WINSLADE & GERALD MONK, NARRATIVE MEDIATION A NEW APPROACH TO CONFLICT RESOLUTION 41 (2000), stating that “mediation is more than just a place where particular interpersonal problems get resolved and some kind of social homeostasis gets restored. It is where we should take care to talk with an eye on the kind of world we are creating because we are always in the process of creating it.”

5. WINSLADE & MONK, *supra* note 4, at 39, stating that “it does not make sense to say that people have thoughts or feelings on the inside that precede their expression. It makes more sense to speak about how discourse and linguistic formulations make up our subjective experience. In other words, language, or discourse, is a precondition for thought.”

6. DONALD E. POLKINGHORNE, NARRATIVE KNOWING AND THE HUMAN SCIENCES 23 (1988), stating that “[l]anguage needs to be understood as more than simply a skill for encoding nonlinguistic thoughts with messages that can be understood by others. Language is both the product and the possession of a community.”

7. See WINSLADE & MONK, *supra* note 4, at 40, stating that “[l]anguage is *performative*, and its use is a form of social action.”

8. MURRAY EDELMAN, POLITICAL LANGUAGE: WORDS THAT SUCCEED AND POLICIES THAT FAIL 29 (1977), stating that “[w]hen we name and classify a problem, we unconsciously establish the status and the roles of those involved with it, including their self-conceptions.”

9. See JEROLD AUERBACH, JUSTICE WITHOUT LAW? 19-20 (1983). Auerbach uses the term “non-legal dispute resolution” to connote dispute resolution practices in communities, specifically during the American Colonial period and later among immigrant communities, that do not reference the law. “The tighter the communal bonds, the less need there was for lawyers or courts. . . [T]hey preferred to live within a communal framework that rendered formal legal institutions superfluous or even dangerous. For them, law was a necessary evil or a last resort, not a preferred choice.” *Id.*

for dispute settlement preceded the law's rise as the reference point for disputes in U.S. culture.¹⁰ In contrast to dispute resolution practices within communities, implementation of informal legal processes came from the court. Promotion of informal legal processes occurred during periods when the courts came under attack.¹¹ Reformers called for increased efficiency, greater access to justice, or both.¹² Mediation is one of several processes offered through the courts that claim to provide informal justice through participation and cooperation.¹³ Mediation has functioned at several junctures in U.S. legal history to deflect criticism from courts, at the same time carrying out the court's agenda to control social conflict.¹⁴ Lack of awareness by both mediators and the public about this history and Alternative Dispute Resolution (ADR) processes (informalism)¹⁵ as a correction for court failures,¹⁶ causes confusion about the relationship

10. Laura Nader, *The Recurrent Dialectic Between Legality and Its Alternatives: The Limitations of Binary Thinking*, 132 U. PA. L. REV. 621, 623 (1984) (reviewing JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* (1983)) noting how "[d]uring the colonial period, legal institutions played a relatively minor role in dispute settlement because the colonists were hostile to external interference that might contribute to community disorganization or that might challenge the basic community value system."

11. See AUERBACH *supra* note 9, at 136, stating that "[a]lternative dispute settlement offered mechanical remedies for political problems: the characteristic response of law reformers since the turn of the century as they struggled to neutralize political opposition to the values that the legal system protected."

12. CHRISTINE B. HARRINGTON, *SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT*, 22 (1985), stating that "[r]eformers maintained that by streamlining both institutions and procedures administrative efficiencies would provide greater access to justice . . ."

13. See HARRINGTON, *supra* note 12, at 22, stating that "to legitimize judicial intervention in a liberal democracy reformers also appealed to participatory ideals. Progressives believed that law would be a more effective socializing agent if citizens participated more directly in informal proceedings."

14. RICHARD HOFRICHTER, *NEIGHBORHOOD JUSTICE IN CAPITALIST SOCIETY THE EXPANSION OF THE INFORMAL STATE*, xxiv-xxv (1987) stating that "[l]iberal legal reformism aspires to solve the problem of social order through cooperation, administrative management of political conflict, and impartial mediation between opposing classes. It views conflict as an evil to be avoided, absorbed, or resolved—all within the prevailing order."

15. See HARRINGTON, *supra* note 12, at 2 stating that "[t]he ideology of informalism is structured by its relationship to delegalization movements and order maintenance concerns . . . Ostensibly replacing formalism as an ideology, informalism retains a legalistic core that ties it to conventional practice."

16. Martha Fineman, *Dominant Discourse, Professional Language and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 754-55 (1988), stating that "[t]hose who flock to mediation as the ideal decisionmaking mechanism accuse lawyers and the adversary system of increasing trauma, escalating conflict, obstructing communication, failing to perceive the need for

between ADR and the law.¹⁷ The parties' self-determination in deciding which process is appropriate, and in knowing what interventions will be used, cannot be fulfilled if mediators themselves are confused.

In the service of case management efficiency,¹⁸ courts define mediation as a generic problem-solving process¹⁹ with minor deviations based on the *artistry* of the individual mediator. This generic process promises the *neutrality* of mediation based on equating *neutrality* with detachment.²⁰ This article challenges the assumption that mediation is a generic process and argues that the terms *artistry* and *style*, when used to describe mediator differences, in effect, conceal mediator bias. In addition to the court's agenda to promote a generic process, there is a contradiction between court support of mediation as a desirable replacement for a judicial decision,²¹ and the endorsement of services delivered by volunteers (or those who will accept minimal remuneration). The assurances made by the court of quality mediation services delivered by volunteers, function as an obstacle to a more comprehensive discourse on mediator differences.

For over a decade, scholars such as Robert A. Baruch Bush, Joseph P. Folger,²² Leonard Riskin,²³ and Ellen Waldman,²⁴ have challenged the

negotiation and counseling, and generally interfering with the development of a process that could help the parties."

17. Richard L. Abel, *Introduction, in THE POLITICS OF INFORMAL JUSTICE VOLUME I: THE AMERICAN EXPERIENCE* 6 (Richard L. Abel, ed., 1982). stating that:

Where formal institutions are largely passive and reactive, informal institutions can be purposive and proactive. They obliterate the fundamental liberal distinction between public and private, state and civil society, what is forbidden and what is allowed. In order to facilitate this expansion, they carefully cultivate the appearance of being noncoercive.

18. Dorothy J. Della Noce, *Mediation Theory and Policy: The Legacy of the Pound Conference*, 17 OHIO ST. J. ON DISP. RESOL. 545,546 (2002), stating that "[d]espite the clear recognition of the unique social value of mediation in various dimensions of human interaction, th[e] argument cast the potential value of the mediation process in terms of improved case management efficiency."

19. See Fineman, *supra* note 16, at 728, regarding the focus in ADR on process changes, not substantive changes: "[B]ecause these changes are presented in procedural terms, the rhetoric concerning mediation has masked, at the same time that it has facilitated, the extensive shifts in substantive results. Labeling changes as procedural makes them easier to accept but also obscures the substantive changes that are taking place."

20. Christine B. Harrington & Sally Engle Merry, *Ideological Production: The Making of Community Mediation*, 22 LAW & SOC'Y REV., 709, 729 (1988), stating that "[m]ediators interpret neutrality as the maintenance of what we might call a 'detached stance,' empathy without acceptance of the values of others."

21. See Fineman, *supra* note 16, at 759, addressing the court support of custody mediation: "Mediators have been empowered by judges and court administrators who dislike custody decisionmaking under the best interest test, or who believe that such cases clog up the system."

22. See generally ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *The Promise of Mediation* (1994).

dominant discourse promoted by the court about a generic mediation process. The evaluative and facilitative labels,²⁵ named by Riskin and widely adopted as the way to differentiate mediation *styles*, prevent other significant issues from being raised.²⁶ This article raises some of the questions necessary to address criticisms about quality and ethics of mediation practices: (Part I) Is there a “mandate” to provide informal justice through mediation? (Part II) Why challenge the generic mediation mythology? (Part III) Does naming differences as ‘styles’ result in greater clarity? (Part IV) Is mediation fulfilling its “mandate” to serve the court? (Part V) What are the obstacles to changing the dominant discourse on mediation? (Part VI) In answering these questions, an alternative framework is proposed to shift the current discourse about generic mediation based on *artistry* or *style*, to a discourse that identifies differences in mediation *models* based on the norms referenced and the theories of conflict named. (Part VII) In conclusion, mediation professionals are challenged to define *models* of mediation that accurately differentiate a variety of mediation practices, based on the norms referenced and the theories of conflict named.

I. IS THERE A MANDATE TO PROVIDE INFORMAL JUSTICE THROUGH MEDIATION?

A. *Understanding Mediation in a Historical Context*

Informal legal processes implemented after the Civil War initiated a shift away from the non-legal dispute settlement processes that traditionally

23. See generally Leonard Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996).

24. See generally Ellen Waldman, *The Challenge of Certification: How to Ensure Mediator Competence While Preserving Diversity*, 30 U.S.F.L. REV. 723, 756 (1996) [hereinafter Waldman, *The Challenge of Certification*]; Ellen Waldman, *Identifying Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J., 703, 769 (1997) [hereinafter Waldman, *Identifying Social Norms*].

25. Richard Birke, *Evaluation and Facilitation: Moving Past Either/Or*, 2000 J. DISP. RESOL. 309, 314, stating that “[m]ediators tended to distill all differences into a stark evaluative-facilitative dichotomy.”

26. Birke, *supra* note 25, at 319, noting:

The debate about when to evaluate or facilitate, and how, is important. But it is not a debate about whether to do one or the other, as every mediation of a legal dispute will involve both. It is also not the only debate that needs to occur about mediation, and perhaps not even the most important.

provided community justice.²⁷ Use of non-legal dispute resolution processes was common in Native American cultures,²⁸ in many colonial American communities,²⁹ and later in immigrant groups.³⁰ In addition, the American commercial sector has a longstanding and continuous preference for non-legal dispute resolution processes.³¹ After the Civil War, in place of non-legal processes that were integral to cohesive communities,³² the court introduced informal legal processes.³³ The introduction of informal processes to increase judicial efficiency and control social unrest,³⁴ was directed in the latter part of the nineteenth century toward the labor movement.³⁵

By the end of the nineteenth-century, in the name of reform, the courts implemented a variety of newly established, informal mechanisms to gather information and provide treatment.³⁶ Mediation was one mechanism used to

27. See AUERBACH, *supra* note 9, at 57, stating that:

In the second half of the nineteenth century, the purposes (if not the forms) of alternative dispute settlement were redefined . . . Until the Civil War alternative dispute settlement expressed an ideology of community justice. Thereafter, as it collapsed into an argument for judicial efficiency, it became an external instrument of social control.

28. Philmer Bluehouse & James W. Zion, *Hozhooji Naat'aanii: The Navajo Justice and Harmony Ceremony* 10 MEDIATION Q. 327 (1993).

29. See AUERBACH, *supra* note 9, at 46, stating that:

[A]s late as the beginning of the new nation in 1790, a New England town ordinance required disputes to be submitted to a committee of 'three discreet freeholders.' Refusal was considered to be 'unfriendly to the peace of the town;' the offending disputant would be treated thereafter with 'contempt and neglect.'

30. See *id.* at 93, stating that "immigrants, like seventeenth-century colonists and nineteenth-century utopians, retained an alternative vision of social organization: not merely an aggregation of individuals but a community with shared values and commitments."

31. See *id.* at 43-44, stating that "[a]s the geographical, religious, and ideological boundaries of community receded, commercial bonds were strengthened. Paradoxically, the pursuit of self-interest and profit generated its own communitarian values."

32. See Bluehouse & Zion, *supra* note 28, at 329, noting "[t]he core of the common law of most native peoples is the 'segmentary lineage system,' which is a method of tracing relationships and adjusting disputes among people who are related to each other in various ways."

33. See AUERBACH, *supra* note 9, at 60, stating that "[t]he freedmen, shunted from law courts to arbitration tribunals, discovered that they were powerless in both settings . . . Neither legality nor informality could remedy the effects of racial discrimination or economic inequality."

34. See Abel, *supra* note 17, stating that "[i]nformalism is a mechanism by which the state extends its control so as to manage capital accumulation and diffuse the resistance this engenders."

35. See AUERBACH, *supra* note 9, at 65, stating that "[a]s long as labor remained the malnourished child of the industrial family, the arbitration process would be controlled by its domineering management parent. Compulsory arbitration in the blunt words of American Federation of Labor president Samuel Gompers was 'industrial bondage.'"

36. See HARRINGTON, *supra* note 12, at 53, stating that "[j]uvenile [c]ourts developed investigative mechanisms to identify social facts about an individual and apply them in the adjudication process. Probation and parole officers, social workers and psychopathic clinics were

deal with the disruptions caused by labor disputes.³⁷ Informal legal processes were touted as the panacea for preventing violence.³⁸ Notable examples of informal dispute settlement processes include arbitration tribunals used to address conflicts between freed slaves and their former owners,³⁹ and industrial arbitration dealing with corporate-labor conflicts in the attempt to quell widespread fear of class warfare.⁴⁰ Long before the Pound Conference in 1976,⁴¹ corporate-labor mediators were trained and employed by U.S. Government agencies.⁴² These government agencies⁴³

used to diagnose the cause of delinquency. Individuals' dossiers served as the basis for treatment-oriented disposition."

37. DEBORAH M. KOLB, *THE MEDIATORS* 3 (1983), stating that "[i]n short, mediation is a policy instrument intended to further the cause of industrial peace . . . labor mediators serve as well to channel the form of disputes, to restrain the power of competing interests, and so to preserve the institutional fabric of the system."

38. See AUERBACH, *supra* note 9, at 64, stating that, "[i]ndustrial arbitration remained a panacea offered by anxious middle-class professionals who felt dangerously squeezed between capital and labor. Their fears of impending national cataclysm prompted their fervent advocacy of arbitration as the only alternative to violent upheaval."

39. See *id.* at 59-60, stating that "[T]he imposition of alternative dispute settlement in the Reconstruction South ultimately expressed the values of those who administered it, not the priorities of those who were its intended beneficiaries. Blacks seldom participated as equals in either the planning or implementation of the new dispute-settlement procedures."

40. See *id.* at 62.

41. See Della Noce, *supra* note 18, at 545, stating that:

The Pound Conference marked an important moment in the history of mediation: the beginning of a concerted effort to stimulate court-connected mediation programs in the United States by framing the contemporary mediation movement—projects then underway in various countries, communities, agencies and courthouses—as a potential remedy for the perceived popular dissatisfaction with the administration of justice.

42. See KOLB, *supra* note 37, at 2, stating that "The Erdman Act of 1898 marked the first time that the federal government recognized mediation as a distinct mode of dealing with industrial disputes. Since that time, the provision of mediation services by the government has been a cornerstone of U.S. public policy on collective bargaining." "The Federal Mediation and Conciliation Service (FMCS), an independent federal agency, has jurisdiction over disputes in industries engaged in interstate commerce, private non-profit health facilities, and agencies of the federal government." *Id.* at 7.

43. See *id.* at 7-8, stating that:

The FMCS traces its roots to the U.S. Conciliation Service which was established in 1913 under the enabling legislation for the Department of Labor. One provision of the act follows: 'The Secretary of Labor shall have the power to act as mediator and to appoint commissioners of conciliation in labor disputes whenever in his judgment the interests of industrial peace may require it to be done' (37 Stat.738# 8.29, USCA #51).

spawned the notion of mediation, as a generic,⁴⁴ value-free⁴⁵ process. The mediation process developed by the government's corporate-labor mediation programs⁴⁶ (later identified as the problem-solving *model*)⁴⁷ still dominates the discourse on mediation,⁴⁸ though it does not identify itself as a *model* or make explicit its theoretical base.⁴⁹

Roscoe Pound, a Harvard Law professor and critic of the legal system, delivered a speech in 1906 detailing the deep and systemic failures of the courts.⁵⁰ Two of the remedies implemented in response to the crisis in the legal system were conciliation and arbitration. Conciliation was intended to provide access to the courts for people with limited financial means, and whose cases dealt with relatively small claims.⁵¹ Arbitration, consistently preferred by business interests, was a way to preserve the self-regulation of the business community.⁵² In effect, these two reforms created a "two-tier justice system," in which conciliation was offered to those who could not buy access to the courts, while arbitration gave businesses and corporations

44. See Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found A Better Way?*, 18 OHIO ST. J. ON DISP. RESOL. 93, 116 (2002), noting "[m]any (perhaps most) court programs offer essentially only one process—a malleable, hybrid form of mediation."

45. See 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, 56 (2002), stating that:

The articulation of social theories is not simply an academic exercise that takes place in a social vacuum. Theories, as explanations of social phenomena, are embedded in distinct perspectives—fundamental beliefs and assumptions about the nature of human beings and the nature of social interaction. Perspectives are ultimately tied to values, ideology, and a preferred moral order.

46. See KOLB, *supra* note 37, at 4.

47. See Della Noce, Bush & Folger, *supra* note 45, at 48, stating that:

Bush and Folger argued that the problem-solving model of mediation was based upon an essentially psychological/economic view of human conflict. According to this model, conflict represents a problem in solving the parties' incompatible needs and interests. Because a problem solved is a conflict resolved, the model presumes that a solution—typically represented by a tangible settlement agreement—is 'what the parties want.'

48. Luiz Arturo Pinzan, *The Production of Power and Knowledge in Mediation*, 14 MEDIATION Q. 3, 14 (1996), stating that "[t]he colonization or taking over of mediation by the economic apparatus is reflected in the fact that 'the language of problem-solving mediation contains many of the same terms used to describe marketplace exchange: *optimization, joint gains, gains from exchange*' (Bush and Folger, 1994, p.236)."

49. See Della Noce, Bush & Folger, *supra* note 45, at 49.

50. See AUERBACH, *supra* note 9, at 95.

51. See *id.* at 97, stating that "[c]onciliation was a reform offered by the legal community to a marginal clientele; it was designed to resolve the claims of poor people who could not afford counsel, and who were especially victimized by court congestion and delay."

52. See *id.* at 97, stating that "[a]rbitration, by contrast, expressed the preference of commercial interests, especially in New York, for self-regulation untrammelled by the intrusion of law and lawyers."

protection from the courts.⁵³ In essence, a historical pattern emerges in which informal alternatives to litigation processes are endorsed by the legal system when it comes under attack.⁵⁴

In 1947, Congress passed the Taft-Hartley Amendment to the National Labor Relations Act, which established the use of federally sponsored mediation in collective bargaining.⁵⁵ In 1976, Chief Justice Warren Burger convened the Pound Conference: The National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (named for Roscoe Pound's paper delivered in 1906⁵⁶). The result of the Pound Conference was the introduction of mediation into General District, Juvenile and Domestic Relations, and Circuit Courts.⁵⁷ The courts implemented "alternative" dispute resolution processes, which functioned to preserve the power of the legal system⁵⁸ and to remove those who challenged it.⁵⁹

B. *Mediation's Current Context*

Following the Pound Conference, the court program to implement informalization⁶⁰ introduced mediation into neighborhoods⁶¹ and families.

53. *See id.* at 101.

54. See HARRINGTON, *supra* note 12, at 9, stating that "[a]ttacks on courts are so common that they have become an ordinary part of American political life. The ordinariness of complaints about court explains, in part, why reformers have been able to mobilize general support for judicial reforms."

55. *See* KOLB, *supra* note 37, at 8.

56. J. Clifford Wallace, *Levin & Wheeler: The Pound Conference: Perspectives on Justice in the Future*, 80 MICH. L. REV. 592, 592 (1982).

57. *See generally* Della Noce, *supra* note 18.

58. See AUERBACH, *supra* note 9, at 144, stating that "[a]lternatives are designed to provide a safety valve, to siphon discontent from the courts. With the danger of political confrontation reduced, the ruling power of legal institutions is preserved, and the stability of the social system reinforced."

59. *See id.* at 124, stating that:

Alternative dispute settlement . . . was most enthusiastically prescribed for disadvantaged citizens who only recently had begun to litigate successfully to protect and extend their rights . . . citizens disadvantaged in American society by race, class, age or national origin—those who most needed legal rights and remedies—faced the prospect of reduced possibilities for legal redress, in the name of increased access to justice and judicial efficiency.

60. See HARRINGTON, *supra* note 12, at 3, making the link between informal neighborhood justice and judicial management:

[T]he rise of judicial management in the Progressive period and the reconstruction of court unification in the 1970's [resulted in] . . . [s]pecialized informal tribunals [that]

Thus, the “mandate” to provide informal justice was an extension of the courts,⁶² endorsed by legal professionals who recognized the social consequences of denying access to justice.⁶³ The court built the mediation “mandate” on several assumptions: (1) that informal processes would answer the dissatisfaction with the court by getting the parties to accept responsibility;⁶⁴ (2) that a generic mediation process existed⁶⁵ in which mediator differences are based on the personal *artistry* of the individual mediator and the circumstances of each case;⁶⁶ (3) that the caseload and financial burden on the courts would be lightened by use of alternative dispute resolution volunteers;⁶⁷ and (4) that court interests and parties’ self-determination are served by referring parties to a process that theoretically

centralized judicial management over minor social conflicts . . . The neighborhood justice movement developed in the context of decentralized judicial supervision over minor disputes.

61. See Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee, & David Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV., 1359, 1364, stating that:

In 1979, the Department of Justice opened three neighborhood justice centers—one each in Atlanta, Kansas City, and Los Angeles—to handle criminal and civil disputes . . . Since then, the number of community justice centers has been growing rapidly; as of 1983 more than 170 such centers were operating in 40 states.

62. See HOFRICHTER, *supra* note 14, at xiv, stating that:

The informal state is typified by an emphasis on cooperation and consensus, participation, and privatization . . . [T]he informal systems are forms of law, not isolated spheres. They remain connected to the formal legal system and legal concepts. Both are part of the state and rely on each other, even though the informal state creates an appearance of autonomy.

63. See AUERBACH, *supra* note 9, at 117-18, stating that “[a]fter 1968, when simmering rage exploded in urban ghettos blighted by poverty and racism, the justification for alternatives quickly shifted. Informal mediation was now promoted as ‘an alternative to violence,’ designed especially to coax civil rights activists and their angry ghetto constituencies from the streets to quieter sanctuaries.”

64. See Harrington & Merry, *supra* note 20, at 720, stating that:

Voluntary participation in mediation is viewed as enhancing the development of an individual’s capacity to take responsibility for his or her problems and work out consensual agreements with others . . . [T]he ideological project does not promise that mediation will change power relations or transform communities, it only attempts to make people happier where they are.

65. See Della Noce, Bush & Folger, *supra* note 45, at 59, stating that “[t]ypically policy statements simply address ‘mediation’ in the generic, as if it is a unitary process.”

66. See Susan Silbey, *Mediation Mythology*, 9 NEGOT. J. 349, 350 (1993), stating that:

[T]he mediation mythologists claim that mediation is informal, with no specified rules of procedure. This informality or lack of a specifiable procedure conveys a sense that it is a personal, individualized process adapted by the mediator and the parties to the unique circumstances of the immediate situation, the particular parties and the dispute . . .

67. See Harrington & Merry, *supra* note 20, at 719.

guarantees a common experience of what mediation is,⁶⁸ and what any mediator will do.⁶⁹

Based on the aforementioned assumptions, mediation training programs are geared toward developing skills and techniques.⁷⁰ In conjunction with training, evaluation of mediator competence⁷¹ is often a checklist of how these techniques are performed.⁷² Research⁷³ typically measures settlement rates,⁷⁴ party satisfaction, and/or the quality of the outcomes.⁷⁵ Ethical standards—often addressed as separate from hands on training⁷⁶—if mentioning mediator *style* at all,⁷⁷ continue to treat differences as primarily

68. See Della Noce, Bush & Folger, *supra* note 45, at 59, stating that:

[E]fforts to craft theory-free, value-free policy (or to interpret and enforce existing policies in a theory-free, value-free way) are futile. The underlying theory and values will emerge, because every policy that defines or limits mediation in any way is built on a particular value-based vision of what mediation is and should be, and by its very existence reproduces that vision.

69. See Brazil, *supra* note 44, at 115, stating that “[t]here also can be large gaps between the ADR processes described in a court’s rules and publications and the ADR processes that parties actually experience in their cases.”

70. See Della Noce, Bush & Folger, *supra* note 45, at 45.

71. See Harrington & Merry, *supra* note 20, at 731, stating that:

In local programs, the process of filtering out bad mediators and selecting good mediators, who are then empowered to redefine practice, tends to draw in educated, professional people and eliminate those with close ties to the community who find the detached stance (i.e., the withholding of judgments about human behavior) unnatural.

72. Office of the Executive Secretary, *Mentorship Guidelines for the Certification of Court-Referred Mediators*, SUPREME COURT OF VA., Oct., 2006, http://www.courts.state.va.us/drs/certification_process/mentorship_guidelines.pdf.

73. See Austin Sarat, *The “New Formalism” in Disputing and Dispute Processing*, 21 LAW & SOC’Y REV. 695, 707 (1988), stating that:

Those who conduct empirical research are imagined as allies who can help Goldberg, Green, and Sander facilitate the utilization of nonjudicial dispute processing techniques. *Dispute Resolution* assigns to social scientists a rather narrow project of implementation research that will be captive of the political assumptions and commitments of the alternative dispute resolution movement.

74. See Della Noce, *supra* note 18, at 548, stating that “[t]he primacy of case management goals began to shape mediation practice and policy in significant ways. Settlement of a dispute through a negotiated agreement, a tangible marker of case closure, became part of the definition of mediation and a yardstick for success in mediation.”

75. See Della Noce, Bush & Folger, *supra* note 45, at 44.

76. See Charles Pou, Jr., *Enough Rules Already! Making Ethical Dispute Resolution a Reality*, DISP. RESOL. MAG., Winter 2004, at 20, stating that “[b]asic and advanced mediation training programs should place systematic exploration of applicable codes much closer to the core of their curricula.”

77. See Department of Dispute Resolution Services, *Standards of Ethics and Professional Responsibility for Certified Mediators*, VA. JUDICIAL SYSTEM,

individual. Training that focuses on techniques to develop mediator skills, essentially defines mediation practice as *artistry*.⁷⁸

Both the lack of research dealing with ethics and ideology in mediation practice⁷⁹ and the dismissal of research indicating that mediators are influencing the decision-making of parties,⁸⁰ make the claims of mediation success suspect.⁸¹ A study of several programs showed that a core of mediators are assigned most of the mediations.⁸² This core evolved through a process of selecting those mediators who believed in and demonstrated neutrality, as evidenced by their detachment.⁸³ Thus, while claiming mediation is a process that comes from and serves communities, mediators who most represent these communities are frequently marginalized.⁸⁴

<http://www.courts.state.va.us/soe/soe.htm>, stating that, “[t]he mediator shall also describe his style and approach to mediation.”

78. See Michael Lang, *Out of the Rut and Into the Groove: Developing Excellence in Practice*, MEDIATE.COM, June, 2003, available at <http://www.mediate.com/articles/langM1.cfm>. While promoting reflective practices, Lang’s five-step process merely encourages practitioners to be curious and to develop a hypothesis that they might then test out as the mediation progresses. *Id.* He winds up concluding that with such reflection, the mediator will be more often “in the zone of artistry.” *Id.* His notion of theory is the rationale behind the use of different tools and strategies. *Id.* Although he identifies his “relational” lens as opposed to his wife’s (and co-mediator) “structural” lens, in using reflective practice, Lang never asks mediators to reflect on a theory of what causes conflict as the basis for reflecting on choice of interventions. *Id.* In reflective practice, mediators are encouraged to reflect on a set of decisions, but what theory and research is referenced is again anybody’s guess. *Id.* Artistry is also the focus of Robert D. Benjamin. See generally Robert D. Benjamin, *Gut Instinct: A Mediator Prepares*, FAMILY MEDIATION NEWS, Summer 2001, available at <http://www.mediate.com/articles/benjamin6.cfm> at 2, discussing how “[t]he stroke of genius occurs, and the mediator turns from being a novice to sophisticated practitioner when he or she leaves the beaten path of received wisdom and allows their creative instinct to run free.”

79. See Sara Cobb, *Einsteinian Practice and Newtonian Discourse: An Ethical Crisis in Mediation*, 7 NEGOT. J. 87, 96 (1996), stating that:

The glaring absence of any research on ethical and ideological issues in mediation practice is painfully apparent in this volume [*Mediation Research*, Kenneth Kressel and Dean Pruitt, 1989] . . . at present there are no discourses, vocabularies, metaphors or communication theories complex enough to enable us to deal with these questions.

80. See Della Noce, Bush & Folger, *supra* note 45, at 44.

81. See, e.g., *infra* note 305, listing a source which claims great success with mediation.

82. See Harrington & Merry, *supra* note 20, at 723, stating that, “[a] small fraction of the total pool of mediators in these three programs, handled a disproportionate number of cases. These mediators came to constitute an elite that, along with staff, defined good practice, evaluated other mediators, trained new mediators, and occasionally moved into staff positions themselves.”

83. See *id.* at 730, stating that “[t]he process is defined as neutral and interpreted as requiring a detached stance. Only those who can achieve this stance are likely to become core mediators.”

84. See *id.*, stating that:

Precisely because of their participation and membership in the community, it is difficult for [those mediators] to assume the required detachment . . . Consequently, those mediators who are close to the community tend to be used less often in all of the programs we have studied, despite the program staff’s strong commitment to involve community people.

The language⁸⁵ used by the court when promoting mediation is based on the assumptions that mediation is a value-free (*impartial/fair*) process,⁸⁶ practiced by trained mediators (*neutrals*),⁸⁷ that belongs to the parties (*self-determination/autonomy*),⁸⁸ who come with the intention to negotiate (*good faith*)⁸⁹ as *equals*,⁹⁰ and which responds to their individual⁹¹ (*confidential/private*),⁹² *interests* and needs.⁹³ These words and the concepts

85. See Cobb, *supra* note 79, at 99-100, stating that:

Existing discourses about practice, pulled from a Newtonian paradigm, assume that language functions to *represent* the world, and thus, practitioners, judges, and scholars can assume there *is* an objective position from which to participate in discourse without shaping or contaminating the social processes they observe. Yet descriptions of mediation practice inevitably document the role that language and meaning play in the construction and transformation of disputes, pushing the field toward more Einsteinian descriptions of mediation process.

86. See Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 LAW & SOC. INQUIRY 35, 38 n.12 (1991), stating that:

Mediation presumes both *neutrality* and *objectivity* as both epistemologically and practically possible; however, together these concepts function recursively, invoking and reconstituting each other: 'objectivity' (a reality independent of any observer) makes possible 'neutrality' (the objective position from which one can participate in social relations free of affiliation to any position).

87. See Alison Taylor, *Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence, and Transformative Process*, 14 MEDIATION Q. 215, 216 (1997), stating that "[n]ot only is the view of neutrality inextricably linked to the mediator's model of practice, it is tied as well to the practitioner's view of self and role."

88. See Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 3-4 (2001), stating that "the originally dominant vision of self-determination, which borrowed heavily from concepts of party empowerment, is yielding to a different vision in the court-connected context. Perhaps not surprisingly, this vision is more consistent with the culture of the courts."

89. See Kimberlee K. Kovach, *Lawyer Ethics in Mediation: Time for a Requirement of Good Faith*, DISP. RESOL. MAG., Winter 1997 at 9, 11, stating that "[p]rior criticism of good faith directives is based on the lack of objective standards, and that a demonstration of good or bad faith is dependent on one's state of mind."

90. See Sara Cobb, *The Domestication of Violence in Mediation*, 31 LAW & SOC'Y REV. 397, 432 (1997), stating that "[t]he presumption of equity erases differences in resources, status, legitimacy, power, and physical strength."

91. See Joseph A. Scimecca, *Theory and Alternative Dispute Resolution*, in CONFLICT RESOLUTION THEORY AND PRACTICE 211, 217 (Dennis J.D. Sandole & Hugo van der Merwe, eds., 1993), stating that "ADR, like formal law, is embedded in individualism. As such, the fundamental principle of individual responsibility is seen as the cause of the conflict."

92. See Fineman, *supra* note 16, at 762, stating that "mediation is in the first instance designated as a superior *process*—one based on informality—that can therefore give full protection to the privacy and autonomy of the parties by allowing them to make important decisions for themselves."

they represent are full of complexities, and may conflict with each other.⁹⁴ Parties, as well as many mediators, have little or no context for recognizing how the principles of *self-determination*, *impartiality*, *confidentiality*, *neutrality*, *good faith*, and *equality*, which are expressions of legal protections or rights,⁹⁵ become transformed in mediation into prescriptions for personalized behaviors.⁹⁶

C. *The “Mandate” for Mediation Comes From the Court*

Inherited from the government’s corporate-labor mediation program, the generic problem-solving *model* replaces legal redress based on parties’ rights and responsibilities,⁹⁷ with the pursuit of resolving parties’ individual needs and interests.⁹⁸ Representing informal processes⁹⁹ as “alternatives”¹⁰⁰ to the law, rather than options within the law, denies the reality that the law is

93. See Cobb, *supra* note 90, at 410, stating that “[a]s Silbey and Sarat (1989) note, the discourse of mediation (and more broadly ADR) constitutes needs and interests, as opposed to rights, as the basis for evaluation and action.”

94. See Della Noce, *supra* note 18, at 549, stating that “[t]he broad, inclusive statements of abstract social values that appear in policy statements obscure the reality that some of those values are in tension with each other. Achievement of one may only be possible at the expense of another. Policy statements rarely acknowledge this tension and the inherent potential for goal conflict.”

95. See STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 58 (2d ed. 2004) stating that “[t]o claim a right is thus to invoke symbols of legitimacy that transcend your personal problems. At the same time, you tacitly commit yourself to accept the obligations which inhere in the existing system—that is to say, the pattern of mutual and reciprocal commitments that defines the fabric of the society.”

96. See HOFRICHTER, *supra* note 14, at 132-33 stating that “[l]egal principle is translated into psychological and personal terms, focusing on behavior rather than entitlement. Conflict becomes private, excluded from public scrutiny and made irrelevant to public interest or, more directly, to a class interest.”

97. See Brazil, *supra* note 44, at 129, stating that:

Mediators are understood by many judges to subscribe passionately to a value system that elevates the virtues of agreement, connection, and social peace above the virtues of protecting rights or pursuing legal entitlements, and that mediators might tend to put moral or social pressure on litigants to accept the same value system.

98. See Cobb, *supra* note 79, at 98-99, stating that “[t]he Code of Ethics for mediators . . . fails to define ‘interests’ and thus makes it impossible to comply with the instruction to balance power by representing the interests of those whose interests may not be represented.”

99. See *id.* at 2, stating that:

Informal processes are defined and understood in terms of what they are *not*; they are *not* formal . . . mediation theory and practice draw upon concepts central to formal processes, concepts which confer legitimacy *on the grounds* of these borrowed forms of knowledge, categories for understanding, and vocabularies for practice.

100. See Fineman, *supra* note 16, at 753, stating that “[t]he rhetoric employed criticized the traditional system and established an alternative that called for skills possessed by the helping professionals.”

always a reference point.¹⁰¹ If the “mandate” to improve case management efficiency for the courts is being served,¹⁰² it is questionable that the results for parties are better than court decisions,¹⁰³ or that the community¹⁰⁴ is actually empowered¹⁰⁵ by framing issues as individual and personal.¹⁰⁶ While parties may lack awareness regarding the role of mediation within the law,¹⁰⁷ mediators often are aware that their practices do not conform with

101. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 99 YALE L.J. 950, 968 (1979), stating that:

Divorcing parents do not bargain over the division of family wealth and custodial prerogatives in a vacuum; they bargain in the shadow of the law. The legal rules governing alimony, child support, marital property, and custody give each parent certain claims based on what each would get if the case went to trial.

102. See Della Noce, *supra* note 18, at 547, stating that “[w]hile any or all of the potential social values claimed for mediation might have attracted the courts, the promise of improved case management efficiencies appears to have propelled the interest in, and support for, court-connected mediation.”

103. See Silbey, *supra* note 66, at 352-53, stating that:

Repeated studies have shown, for example, that in divorce mediation, women systematically come out with less financial support and smaller property settlements (see e.g. Kelly and Gigy, 1989; Kelly and Hausman, 1988; Walker, 1992; and Ray and Bohmer, 1992). Studies have also shown that the outcomes produced by mediation and court processes are similar in cases involving minor disputes, small claims, and minor criminal matters (Silbery, 1990).

104. See Stephanie Wildman, *Democratic Community and Privilege: The Mandate for Inclusive Education*, 81 MINN. L. REV. 1429, 1430 (1987), stating that:

Community is a complicated idea. The classic concept of community seemed to refer to residential communities. We retain this concept in the notion of neighborhoods, but in modern life we often don't know the people who live two houses or two apartments down from ours. In modern urban life we live in conditions of alienation and isolation, yearning for connections and community. The nature of our potential communities has changed.

105. See HOFRICHTER, *supra* note 14, at 131, stating that:

Ironically, whereas traditional notions of popular justice normally incorporate the community context and social conditions in seeking a just outcome . . . mediation normally excludes such considerations . . . [T]he content of the conflict is divorced from collective interests, segregated from similar cases, and limited to the immediate relations between the disputants.

106. See Scimecca, *supra* note 91, at 217, stating that “[t]his focus [on individual responsibility] enhances social control by not looking to structured inequalities in the society as the reason for conflict. Grievances are trivialized and the basic social structure is rarely, if ever, questioned.”

107. See generally HARRINGTON, *supra* note 12.

statements made in promoting mediation, but they fail to question the mythology.¹⁰⁸

The court is the source of most referrals to mediation programs, and in many states, exercises oversight of mediation and mediators.¹⁰⁹ The endorsement of mediation and ADR through the courts conflates informal legal processes with the role of traditional non-legal processes¹¹⁰ that existed in closely knit communities.¹¹¹ It is, therefore, incumbent upon mediation scholars and practitioners to question the legitimacy¹¹² of mediation as it carries out its role in serving the “mandate” of the court.¹¹³ In order to answer the critics, mediation scholars have searched for frameworks other than the generic problem-solving *model*.

108. See Waldman, *Identifying Social Norms*, *supra* note 24, at 757, stating that “[a]lthough the mediators were aware that many of their behaviors undercut and exposed the cleavage between myth and reality, this disjunction did not prompt them to question the myth’s validity.”

109. See, e.g. TEX. CIV. PRAC. & REM. CODE ANN. § 154.001-154.073 (Vernon 2008), available at <http://tlo2.tlc.state.tx.us/statutes/docs/CP/content/html/cp.007.00.000154.00.htm>; CAL. EVID. CODE §§ 703.5, 1115, 1125-1128, 1152-1155 (West 2008), available at <http://www.agreement.com/docs/CaliforniaMediationStatutes.pdf>; CAL. CODE CIV. PROC. §§664.6-664.7 (West 2008), available at <http://www.agreement.com/docs/CaliforniaMediationStatutes.pdf>; FLA. STAT. ANN. § 120.573 (West 2008) available at http://consensus.fsu.edu/ADR/adr_statutes.html; FLA. ADMIN. CODE ANN. r. 28.106.111 & 28.106.400-405 (2008), available at http://consensus.fsu.edu/ADR/adr_statutes.html; VA. CODE ANN. §§ 8.01-576.4 to 8.01-581.26 (2008), available at <http://leg1.state.va.us/000/1st/LS800320.HTML>.

110. See AUERBACH, *supra* note 9, at 134-35, stating that “[t]he new urban mediation alternatives contradicted virtually every prerequisite for informal justice that comparative anthropology and American history provided. Communities played no role in their design or implementation.”

111. See *id.*, stating that:

Once the fundamental attributes of social cohesion are missing, the substance of mediation has been transformed, though its form is unchanged. Then, however, its otherwise benign qualities endanger isolated individuals with minimal resources. The weaker party, denied opportunity for legal redress, will be at an even greater disadvantage as informality compounds inequality. At this point it becomes appropriate to inquire whose interests mediation serves and whether it promotes or retards the ends of justice that its proponents claim to pursue.

112. See *id.* at 144, stating that:

The ideal of equal justice is incompatible with the social realities of unequal wealth, power, and opportunity, which no amount of legal formalism can disguise. In an unequal society, the Haves usually are better served by legal formalism than the Have-Nots, a disparity that creates a persistent legitimacy crisis.

113. See *id.* at 120, stating that “[t]he element of urgency that finally institutionalized alternative dispute settlement in the 1970s came from within the legal system itself, where signs of congenial breakdown were abundant.”

II. WHY CHALLENGE “ARTISTRY” AND THE GENERIC MEDIATION MYTHOLOGY?

A. Mediation Scholarship and Research Document Mediator Influence/Bias

In the early 1980’s, the broad claims made about the mediation process began to be challenged by researchers.¹¹⁴ Deborah Kolb in her observation of two sets of mediators—one group of federal the other state mediators—concluded that the more a mediator mediates, the more consistency is found in how the mediator structures and manages the case.¹¹⁵ In fact, Kolb states that the mediator actually “imposes an order on the dynamics of the case rather than discovers one.”¹¹⁶ Kolb later says, “Indeed, the process appears to be more one of pattern and routine than it is of creativity and innovation.”¹¹⁷ Further research bears this out:

[M]ediator style appeared to operate below the level of conscious awareness; style was something mediators ‘did’ without fully recognizing the underlying coherence or ‘logic’ behind their style. Mediators were capable of articulating why they adopted the style they exhibited when their style was pointed out to them, but this took a conscious effort and the assistance of other team members.¹¹⁸

B. The Transformative Mediation Model Challenges the Dominant Discourse

Robert A. Baruch Bush and Joseph P. Folger introduced and defined transformative mediation in 1994 in their book, *The Promise of*

114. See Della Noce, *supra* note 18, at 552, stating that:

Researchers also began to assess the many claims made on behalf of the mediation process . . . Evidence began to accumulate that mediators were engaging in patterns of practice that did not accord with the rhetoric of the field; that is, in the pursuit of settlement, mediators were exerting influence in their sessions in ways that did not demonstrate neutrality, did not honor party self-determination, and were sometimes even coercive.

115. See KOLB, *supra* note 37, at 6.

116. *Id.*

117. *Id.* at 150.

118. Kenneth Kressel, Edward Frontera, Samuel Florenza, Frances Butler, & Linda Fish, *The Settlement Orientation vs. The Problem-Solving Style in Custody Mediation*, 50 J. SOC. ISSUES 67, 72, (1994).

Mediation.¹¹⁹ Bush and Folger challenged the rest of the mediation field to define other *models*.¹²⁰ Making no claim to be the only viable *model*¹²¹ of mediation, transformative mediation proponents called for an articulation of the theoretical bases for mediator interventions.¹²² They contended that clear definitions of the ideologies¹²³ on which distinct mediation practices are founded, would insure that consent of the parties to mediation is based on accurate information.¹²⁴ With the articulation of transformative mediation theory in *The Promise of Mediation* in 1994, Bush and Folger challenged the dominant discourse¹²⁵ of problem-solving mediation by presenting another *model*, with a very different theoretical basis and, therefore, a different goal.¹²⁶ In the transformative model, the mediator theorizes that the parties care more about transforming the interaction than about reaching settlement.¹²⁷ Success in this *model* is not measured by settlement, but by increased responsiveness and positive interaction between

119. See generally BUSH & FOLGER, *supra* note 22.

120. See *id.* at 25, stating that “the mediation movement is diverse and pluralistic. Not all mediators follow the practices described by any one story of the movement. Rather, there are different approaches to mediation practice, with different and varied impacts”

121. Dorothy Della Noce, *What Is A Model For Mediation Practice? A Critical Review of Family Mediation: Contemporary Issues*, 15 MEDIATION Q., Winter 1997, at 135-36, stating that “model implies something more substantial than a practitioner’s preference or idiosyncratic style. It suggests an example of practice that is capable and worthy of imitation, a clear and detailed exemplar to which a practitioner can refer for guidance.”

122. See Della Noce, Bush, & Folger, *supra* note 45, at 40-41, stating that:

The impressive growth in the use of mediation in the U.S. stands in marked contrast to the slower growth in the explanation and understanding of mediation practice. The mediation field has been criticized by more than one scholar for its lack of an articulated theoretical framework—a coherent explanation of the ‘when and why’ of mediator intervention. Without such explanation, practitioners lack grounded guidance for their interventions, and the mediation process is open to many criticisms.

123. See Harrington & Merry, *supra* note 20, at 711, stating that “[i]deology is not simply a set of ideas or attitudes; it is constitutive in that it forms and shapes social relationships and practices. Ideology contains symbolic resources that can be drawn on by groups who use their power to promote their interests.”

124. Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOTIATION J. 217, 230 (1995), stating that “[a]s long as the parties understand the roles and different approaches to mediation, an ideology of choice can be satisfied. What becomes problematic is when the parties do not understand or agree to what they actually receive.”

125. See Fineman, *supra* note 16, at 736, stating that:

In order to become dominant, a discourse often must compete with other potentially dominant discourses—it must exert control over the concepts and ideas that are understood to be the foundation of the area. Language is the medium through which this form of property is appropriated; the ideology and assumptions underlying it are bought or sold by those with the ability to validate one discourse over another.

126. See BUSH & FOLGER, *supra* note 22.

127. See Della Noce, Bush & Folger, *supra* note 45, at 51.

the parties, and a greater sense of empowerment of each party.¹²⁸ Inherent in the transformative mediation *model* is the acknowledgment that the mediator has influence. This influence is to be used in the service of empowerment of the parties.¹²⁹

Transformative mediation theory and its implementation initiated a new discourse in the mediation field, one in which differences in mediator practices were tied to values and assumptions.¹³⁰ Some scholars and practitioners¹³¹ welcomed this perspective, while it was rejected by others.¹³² Reasons for the resistance to the clarification of *models* based on their theoretical underpinnings may range from unwanted practical consequences,¹³³ to inability to accept differences in the field.¹³⁴ More significantly, this resistance has implications for policy in legislation, regulation, training, and standards of ethics.¹³⁵

C. Riskin's Grid Looks for Rationales to Explain Mediator Decisions

Following Bush and Folger's lead, Leonard Riskin's 1996 article, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*,¹³⁶ presented an overview of the discourse among scholars and professionals, and offered a "grid" for the purpose of identifying differences in mediator practices.¹³⁷ The grid uses the terms "evaluative"

128. See *id.*

129. See BUSH & FOLGER, *supra* note 22, at 104-05.

130. See Della Noce, Bush & Folger, *supra* note 45, at 55.

131. See WINSLADE & MONK, *supra* note 4.

132. See Della Noce, Bush & Folger, *supra* note 45, at 57, stating that:

[O]ne incentive to deny value-based theoretical distinctions is that mediators may thereby remain in the comfort zone of their lay theories, and avoid grappling with such thorny issues as the inevitability of their own influence on the conflict, the value-based nature of that influence, the value-based nature of differences among mediators, and the implications of those differences for practice and policy.

133. See *id.* at 44, stating that:

It is apparently preferable to mediators, and even to some mediation experts, to protect the mythical frame and disregard contrary research findings, than to accept the research findings and risk being left without a frame of any kind. The myths are functional. Mythology fills the void created by the absence of articulated theory by providing at least some sort of 'intellectual and emotional scaffolding' for mediators.

134. See *id.* at 58.

135. See *id.* at 59.

136. See Riskin, *supra* note 23.

137. See *id.*

and “facilitative” to name two ends of a continuum that differentiates mediator strategies and techniques.¹³⁸

In essence, Riskin addressed the *artistry* issue by attempting to show that mediator practices were not mysteries, but explainable decisions; and he proposed a solution.¹³⁹ Riskin’s “grid” postulated that distinct functions of evaluation and facilitation could be identified (and thereby the strategies and techniques that would be used), in order to recognize differences in mediator *orientations*.¹⁴⁰ Riskin named the problem: “Some of these processes have little in common with one another. And there is no comprehensive or widely-accepted system for identifying, describing, or classifying them.”¹⁴¹

The confusion about different mediation processes has produced an ongoing argument about whether mediators can evaluate the possible outcomes in court,¹⁴² what kind of cases are appropriate for mediation,¹⁴³ how to select and train mediators,¹⁴⁴ what techniques are advisable, and what responsibility the mediator has for the outcome.¹⁴⁵ Riskin points out that: “The confusion is especially pernicious because many people do not recognize it; Or they claim that such forms [*i.e.* evaluation] do not truly constitute mediation.”¹⁴⁶

Riskin’s goal was to facilitate discussion, clarify arguments, and provide “a system for categorizing and understanding approaches to mediation.”¹⁴⁷ In the article, Riskin cites many of the categorizations and labels used by scholars and practitioners to identify what a mediator will do.¹⁴⁸ Riskin uses the terms *orientation* and *approaches* interchangeably to address differences.¹⁴⁹

138. See *id.* at 23-24.

139. See *id.* at 11-12.

140. See *id.* at 26.

141. *Id.* at 8.

142. See *id.* at 9, stating that “[E]ffective mediation,” claims lawyer-mediator Gerald S. Clay, “almost always requires some analysis of the strengths and weaknesses of each party’s position should the dispute be arbitrated or litigated.” But law school Dean James Alfini disagrees, arguing that “lawyer-mediators should be prohibited from offering legal advice or evaluations.” Formal ethical standards have spoken neither clearly nor consistently on this issue.

143. See *id.* at 10.

144. See Waldman, *Identifying Social Norms*, *supra* note 24, at 759, stating that “[t]he prerequisites for participation in the numerous state and federal court-annexed mediation programs in existence reveal a complete lack of consensus on what training, experience, or academic background best prepares an individual to mediate.”

145. See Riskin, *supra* note 23.

146. *Id.* at 12.

147. *Id.* at 13.

148. Susan Oberman, *Mediation Theory vs. Practice: What Are We Really Doing? Re-Solving A Professional Conundrum*, 20 OHIO ST. J. ON DISP. RESOL. 775, 780-81 n.17 (2005).

149. See Riskin, *supra* note 23, at 12-13.

Riskin certainly succeeded in promoting discussion in the field regarding identification of mediator differences. A plethora of articles followed that address his grid. In a response to the controversy engendered by the 1996 article, Riskin, in 2003, refines the terminology of his original grid and offers up eight more grids.¹⁵⁰ He did not endorse the adoption of his “evaluative” and “facilitative” descriptors by many mediators and mediation programs, as the way to inform parties of the *style* the mediator would use.¹⁵¹ In fact, Riskin goes so far as to say; “[L]abeling a mediator’s approach to the role of mediator as *either* facilitative *or* evaluative—which offers convenience and perhaps a comforting belief that we can understand what’s going on—may obscure what’s *really* going on.”¹⁵²

D. Waldman’s Categories Define Differences in Mediation Models Based on the Norms Referenced

Another response to Bush and Folger’s challenge was Ellen Waldman’s analysis, which names three categories of mediation that would distinguish among *models* based on the norms they reference.¹⁵³ Waldman’s categories of mediation—Norm-Generating, Norm-Educating and Norm-Advocating¹⁵⁴—create another paradigm, one that furthers identification of differences in mediation practices¹⁵⁵ and provides a frame for identifying the theory of conflict on which each *model* rests.¹⁵⁶ Based on Waldman’s

150. Leonard Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 3-4 (2003).

151. *Id.* at 13-14, stating that:

Some commentators have dealt with facilitation and evaluation as if they were alternatives, treating the continuum—on which I said many mediators move around—like a dichotomy. And many commentators employed these concepts as if they were real and represented actual orientations toward practice and they routinely distinguished between “facilitative mediation” and “evaluative mediation.”

152. *Id.* at 17.

153. See generally Waldman, *The Challenge of Certification*, *supra* note 24; see also Waldman, *Identifying Social Norms*, *supra* note 24.

154. Waldman, *The Challenge of Certification*, *supra* note 24, at 729, stating that “[t]his typology identifies three mediation models: norm-generating, norm-educating, and norm-advocating.”

155. See Oberman, *supra* note 148, at 778, stating that “[w]ithin this framework, mediators can choose from a range of tools and strategies *and* specify differences in models. The multiple issues and decisions the mediator encounters are addressed by looking at the parameters of each mediation: What norms are being referenced?”

156. See Della Noce, Bush & Folger, *supra* note 45, at 48, stating that:

framework, a comparison of *models*¹⁵⁷ would look at “theory of conflict, empowerment of parties, basis of authority of the mediator, control of the process, and definition of success.”¹⁵⁸ Waldman’s categories are not rigidly exclusive; For example, an agreement to mediate that presents legal parameters should be used in all cases. Adoption of Waldman’s framework allows for a wide range of *models*, including those that reference the law and/or other social norms. Waldman’s categories expand definitions of mediation beyond generic mediation, offering legitimacy to a range of *models*.¹⁵⁹

Norm-Generating Mediation applies to any mediation in which the parties reference primarily their own values and standards. While all mediation operates “in the shadow of the law,” Norm-Generating models focus the attention on the interpersonal issues.

Norm-Educating Mediation is based on the theory that people who are well-informed make better decisions. While guided by their own values, participants will also gather all relevant information throughout the mediation process. In addition, they are encouraged to learn skills of negotiation for use outside the mediation.

Norm-Advocating Mediation is any mediation in which legal statutes or institutional regulations dictate the parameters of the mediation agreement. Parties must be informed of these restrictions prior to and throughout the mediation.¹⁶⁰

Each model of mediation practice assumes a particular view of the nature of conflict, which in turn is built upon and reflects the underlying values and assumptions of a particular ideology. Bush and Folger . . . argued that a mediator’s preferred framework for practice was less a matter of situational strategy or personal style than it was a matter of his or her fundamental ideology.

157. See Waldman, *The Challenge of Certification*, *supra* note 24, at 728, stating that “the credentialed mediators of the future should be well-equipped to diagnose which meditative model is appropriate and assess their own competence in delivering services according to that model.”

158. See Oberman, *supra* note 148, at 778-79, 822 app. A.

159. See Waldman, *The Challenge of Certification*, *supra* note 24, at 748, noting that in the view of “[m]any mediation theorists . . . the norm-generating model represents the only true or ‘good’ mediation.” See also Donald Weckstein, *In Praise of Party Empowerment—And of Mediator Activism*, 33 WILLAMETTE L. REV. 501, 504 (1997), stating that “any attempt to limit true mediation to facilitative or ‘norm-generating’ mediation is inconsistent with the predominant practice, the societal function of mediation, its historical roots, and a mediator’s ethical responsibilities.”

160. See Oberman, *supra* note 148, at 787.

Prior to the publication of Waldman's framework, existing analyses failed to clarify differences in the range of practices being called mediation.¹⁶¹ After Waldman's framework was published, few scholars acknowledged or recognized its potential¹⁶² to both clarify real differences, and include a full spectrum of practices. Waldman's elegant framework allows transparency about the decisions mediators make, and supports parties' self-determination by asking: what norms are being referenced? Those choosing to offer norm-generating mediation *models* would function primarily without reference to external social norms. Those choosing either norm-educating or norm-advocating *models* would include reference to external norms in their practice of mediation.¹⁶³

E. Scholars Agree There Are Real Differences in Mediator Practices, but Disagree on How to Deal With Them

Some of Riskin's critics address problems with the facilitative vs. evaluative categorization, while others protest the limitation it places on the mediator's ability to go beyond any either/or category.¹⁶⁴ Riskin himself maintains that the more flexibility a mediator can demonstrate, the better.¹⁶⁵ This debate has left us with some mediators using "evaluative" and "facilitative" categories in an attempt to meet standards requiring mediators

161. Michael Moffitt, *Casting Light on the Black Box of Mediation: Should Mediators Make Their Conduct More Transparent?*, 13 OHIO ST. J. ON DISP. RESOL. 1, 5 (1997), stating that "[o]ne likely reason why none of these models has yet been universally embraced by the mediation community is that none of the proposed typologies adequately describes or guides mediators through the range of difficult decisions they must make during a mediation."

162. See Weckstein, *supra* note 159, at 505. Weckstein chooses Waldman's categories as one of three significant analyses emerging from the many attempts to find clarity in defining differences in mediation practices. *Id.* Riskin in his 2003 article acknowledges that Waldman's categories do not fit within his framework, but makes no attempt to reconcile the two. See Riskin, *supra* note 150, at 24 n.93.

163. See Waldman, *The Challenge of Certification*, *supra* note 24, at 755.

164. See Moffitt, *supra* note 161, at 4-5.

165. See Riskin, *supra* note 150, at 32, stating that:

First, the very idea of an overall orientation could imply, to some, a kind of rigidity in a mediator, an unwillingness to respond to circumstances. Thus it may impair the mediator's ability, and that of the parties and their lawyers, to approach situations with an open mind. Second, as demonstrated above in connection with the old grid, it is nearly impossible—and generally unwise—to label a particular mediator with an overall orientation.

to define their *styles*,¹⁶⁶ while others maintain that these distinctions cause unnecessary divisions in the profession¹⁶⁷ and add little to either parties' or mediator's understanding of what will take place.¹⁶⁸ Still others declare the effort to distinguish between methods to be unrealistic and impractical.¹⁶⁹ One proclaims: "the 'war' is over and eclectic mediation has carried the day."¹⁷⁰ In yet another argument, mediators are encouraged to integrate frameworks.¹⁷¹ Critics of the transformative model have seen it as grandiose or irrelevant to the consumer.¹⁷²

The challenge presented by Bush and Folger, Riskin, Waldman, and others¹⁷³ to accurately identify real differences in mediation theory and practice¹⁷⁴ is ignored by continuing to frame the discourse as a choice between evaluation or facilitation. The ongoing debate between evaluative vs. facilitative (or directive vs. elicitive)¹⁷⁵ is no longer productive and certainly not the only important issue to be addressed.¹⁷⁶ Naming¹⁷⁷ "the

166. See Department of Dispute Resolution Services, *supra* note 77. Despite this directive that the mediator must disclose his (or her) style to the parties, in the Mentorship Guidelines for the Certification of Court-Referred Mediators, the mentor is never required to explain his or her style to the mentee. Office of the Executive Secretary, *supra* note 72. The guidelines merely require, in section III. 1.5, that the mentor must "[i]nform the mentee that he or she must seek mentorship with more than one Mentor in order to receive a variety of feedback and to experience more than one mediator style." *Id.*

167. See Birke, *supra* note 25, at 309, stating that:

This [Riskin, 1996] article sparked an enormous amount of debate among practitioners and academics. Practitioners split into two camps, one composed of those who identified themselves as evaluative mediators and the other who called themselves facilitative mediators. Many academics took positions in the debate, and the net effect was a polarization of the field. This four year-old split had educational value when it was first announced, but the polarizing effect has eclipsed the educational value. The time has come to put this debate to rest.

168. See *id.* at 319.

169. See Stemple, *supra* note 2, at 383.

170. *Id.* at 388.

171. See Cheryl A. Picard, *Exploring an Integrative Framework for Understanding Mediation*, 21 CONFLICT RESOL. Q. 295, 309, concluding that "the mediation community can no longer continue along the road of binary thinking. Instead, it is challenged to find a more integral, more holistic, and more inclusive view of its work. The key word here is *integral*, meaning to bring together the range of mediation ideologies."

172. See Menkel-Meadow, *supra* note 124, at 240, stating that "[t]he grandiose claims made on behalf of mediation have had to be more modestly stated as the analyses and evaluations of work have demonstrated that parties do not always share the transformative visions of the mediators—they just want their problems solved."

173. See Scimecca, *supra* note 91.

174. See Della Noce, Bush & Folger *supra* note 45, at 56, stating that "practitioners accept that differences among themselves exist at the level of 'style' of practice, but deny that these differences exist at the level of theory, values or ideology."

175. See Riskin, *supra* note 150, at 20.

176. See Birke, *supra* note 25, at 319.

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problem” as evaluative vs. facilitative prevents consideration of other paradigms¹⁷⁸ that might clarify differences in mediator practices. The challenge to articulate the theoretical basis of differences in mediation practice introduced by Bush and Folger, and furthered by Riskin, was answered by Waldman. However, despite the extensive research and scholarship, little appears to have changed in the design of training,¹⁷⁹ establishment of ethical standards,¹⁸⁰ or evaluation mechanisms¹⁸¹ of

177. See EDELMAN, *supra* note 8, at 29, stating that “[h]ow the problem is named involves alternative scenarios, each with its own facts, value judgments, and emotions.”

178. See BUSH & FOLGER, *supra* note 22, at 3, stating that:

Scholars and thinkers in many fields have begun to articulate and advocate a major shift in moral and political vision—a paradigm shift—from an individualistic to a relational conception. They argue that, although the individualist ethic of modern Western culture was a great advance over the preceding caste-oriented feudal order, it is now possible and necessary to go still further and to achieve a full integration of individual freedom and social conscience, in a relational social order enacted through new forms of social processes and institutions.

179. See Pou, Jr., *supra* note, 76 at 20, stating that:

Many basic training programs treat ethics as a fortieth-hour afterthought. ADR practitioners often are not especially aware of, or thoughtful about, ethical standards. Numerous program administrators complain that trainers often are reticent about taking positions, and that a good percentage of neutrals do not recognize when an ethics issue arises.

180. In comparing the standards of practice from the Texas Association of Mediations, with The Standards of Practice for California Mediators, The Model Standards of Conduct for Mediations (which have been adopted by the American Arbitration Association, the American Bar Association, and the Association for Conflict Resolution), and the Standards of Ethics and Professional Responsibility for Certified Mediators, Supreme Court of Virginia, in only two places is there any mention of mediator *style, approach, or orientation*. See generally Texas Association of Mediators, *Standards of Practice for Mediators*, May, 2003, <http://www.txmediator.org/TAM%20SOP.pdf>; California Dispute Resolution Council, *Standards of Practice for California Mediators*, MEDIATE.COM, Aug., 2000, <http://www.mediate.com/articles/cdrctstds.cfm>; American Arbitration Association, American Bar Association & Association for Conflict Resolution, *Model Standards of Conduct for Mediators*, Sept., 2005, http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf; Department of Dispute Resolution Services, *supra* note 77. Only the Virginia Standards of Ethics and Professional Responsibility for Certified Mediators requires the mediator to make his or her *style* explicit. Department of Dispute Resolution Services, *supra* note 77. In the Model Standards of Conduct Section IV. 3. it requires the mediator merely to “have available for the parties information relevant to the mediator’s training, education, experience and approach to conducting a mediation.” *Id.* Thus whether generated by the court or a professional organization in the efforts to regulate and certify mediators, the assumption of a generic process persists. *Id.*

181. See Brazil, *supra* note 44, at 146-47, stating that:

One source of concern is a pattern I have noticed in responses to some surveys that ask parties, lawyers, and neutrals to report what occurred at an ADR session and to assess the

mediation. Naming the differences in what mediators do as facilitative vs. evaluative and identifying these strategies as *styles*, *approaches*, or *orientations*, for all intents and purposes obscures mediator bias. From a social constructionist perspective,¹⁸² this dominant discourse within the mediation community avoids a discourse on *models* that identifies the norms each references and the theories on which each is built.¹⁸³

III. HOW DOES NAMING “DIFFERENCES” AS “STYLES” FUNCTION AS A PROTECTION OF MEDIATOR BIAS?

A. Eclectic Mediation is the Same as “Artistry”

A significant amount of scholarship and research contradicts the presentation of mediation by the courts as a generic process. Thus, it would seem fair to say that scholars and practitioners would agree: *there are important differences in what mediators do*. Riskin’s 1996 article made the confusion about what mediators are doing visible. However, the persistent use of his terms “evaluative” and “facilitative” as differentiating mediator *styles* has resulted in a ten-year debate in the field that misses the point. Even those arguing against an either/or paradigm, often still accept these terms as defining the range of mediator practices.¹⁸⁴ Even if there was agreement that mediators neither facilitate nor evaluate exclusively, would the only other conclusion be that all mediators are eclectic: picking and choosing whatever works at the moment?¹⁸⁵ Isn’t concluding that eclectic mediation is “the” reality, and naming differences as *style* a perpetuation of the original position of mediation as *artistry*?

contributions the ADR process made. In this pattern . . . the reports from the neutrals are consistently much more favorable than the reports from the lawyers or the parties.

182. See WINSLADE & MONK, *supra* note 4, at 38, stating that:

All knowledge is derived from a perspective. Perspectives are relative to particular cultural or social versions of reality. In this sense, knowledge can never be final and is relative to time and place and to the social landscape out of which it has been produced. The position from which something is viewed is as important as the object being viewed in the construction of a particular reality.

183. See Pinzan, *supra* note 48, at 13 stating that “[a] pre-supposed ‘hidden knowledge’ of mediation, garnished with countless judicial terms that alienate the ordinary citizen, are frequently the most ingenious smoke screen to hide an abysmal ignorance of the theory and practice of mediation.”

184. See Stemple, *supra* note 2, at 377. Even while Stemple argues for eclecticism, he attempts to categorize what kinds of cases lend themselves to facilitation and which to evaluation. *Id.*

185. See *id.* at 383, stating that “[d]espite state statutes defining mediation as facilitative and despite the policing of a facilitative orthodoxy by some states, mediation appears to be eclectic in practice.”

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In the problem-solving *model* the cause of conflict is seen as the incompatible needs and interests¹⁸⁶ of the parties.¹⁸⁷ The stated goal of the problem-solving *model* is to reach fair and tangible settlements.¹⁸⁸ Mediators present themselves as “impartial neutrals who have no authority and no wish to impose their views on disputing parties.”¹⁸⁹ Mediators claim to be free of any motive or bias.¹⁹⁰ In the problem-solving perspective, because each case and situation is seen as different, mediators claim to ply their trade in a way that is specific to each set of circumstances.¹⁹¹ By this definition, the problem-solving *model* thus bases its effectiveness¹⁹² on the mediator’s individual *artistry*.¹⁹³

It should, therefore, come as no surprise that mediators often characterize what they do as *artistry*.¹⁹⁴ The claim to *artistry* produces a mysteriousness (some have called it “the magic of mediation”),¹⁹⁵ in which

186. See Cobb, *supra* note 79.

187. See Della Noce, Bush & Folger, *supra* note 45, at 49, stating that “[b]ecause a problem solved is a conflict resolved, the model presumes that a solution—typically represented by a tangible settlement agreement—is ‘what the parties want.’”

188. See *id.*

189. See *id.* at 43.

190. See Elizabeth A. Moreno, *The Mediator’s Role: Tackling the Illusion of Objectivity*, LABORING RESULTS, March 2004, available at <http://www.mediate.com/articles/morenoE1.cfm>, stating:

Researchers of studies conducted by Stanford University, have concluded that even when we think we are compensating for our bias, it is not something we can easily remove or factor out of our decisions because it operates unconsciously. We are far better at spotting bias in others than in ourselves.

191. See KOLB, *supra* note 37 at 3, stating that “[t]he artistry of mediation stems, then, from the mediator’s ability to analyze and then smoothly to handle unique circumstances as they arise.”

192. Jeanne M. Breit, Rita Drieghe, & Debra L. Shapiro, *Mediation Style and Mediation Effectiveness*, 2 NEG. J. 277, 278 (1986), stating that “[i]t is impossible to evaluate the effectiveness of mediation, since there is no criterion for failure.”

193. See KOLB, *supra* note 37, at 4, stating that:

Given the uniqueness of case situations that they must analyze and remedy, it is evident that no two mediators can compare their approaches on the basis of the same set of facts. Consequently, the development of each mediator’s approach or style is always shaped by experiences that are highly personalized and differ from those of his colleagues.

194. See *id.* at 3, quoting a noted practitioner:

The task of the mediator is not an easy one. The sea that he sails is only roughly charted and its changing contours are not clearly discernible. Worse still, he has no science of navigation, no fund inherited from the experience of others. He is a solitary artist, recognizing at most, a few guiding stars and depending on his personal powers of divination.

195. See Moffitt, *supra* note 161, at 6, noting:

every case is unique and each mediator is unique, and therefore he or she cannot predict what tools and strategies will be needed.¹⁹⁶ Use of the *artistry* description along with the generic or problem-solving *model* has dominated the discourse on mediation, making it impossible to predict or define what any mediator will do in any given situation. If mediation skill is due to *artistry*, then training is superfluous.¹⁹⁷ In addition, defining what mediators do as *artistry* places mediators beyond the scope of public scrutiny and accountability.¹⁹⁸ How can it be determined that a mediator has “crossed a line,” if there is no line drawn at the outset?¹⁹⁹

B. The “Artistry” Definition Obscures the Connection to the Law

Thus, the *artistry* explanation leaves the door wide open for critics who make compelling arguments that mediation, while claiming to replace hierarchical legal relationships²⁰⁰ with self-determination of the parties, in fact furthers the role of the court as a mechanism of socialization.²⁰¹ In the name of cooperation and preservation of personal autonomy and privacy,²⁰²

Many Mediators and scholars treat mediation within any model as if it were a black box or a kind of magic show in which the mediator “does her thing” for or to the participants without explaining what “her thing” is or how or why it is expected to work. Indeed, some mediators treat their role like that of a magician’s, avoiding explanations as if they were secrets that would ruin the effects of their efforts.

196. See KOLB, *supra* note 37, at 4.

197. See Breit, Drieghe, & Shapiro, *supra* note 192, at 278, stating that “[t]he mediator-cum-artist view implies that mediation skills cannot easily be acquired through training; mediators are born not made, according to this viewpoint.”

198. See KOLB, *supra* note 37, at 4.

199. See Fineman *supra* note 16, at 754, stating that:

The use of rhetorical devices serves the institutional interests of those in the mediation business who wish to stake out an area for their own control. Their language, which is cast as neutral and professional, is political. This fact has been obscured, however, because their rhetoric has confined the debate to a procedural level.

200. George Pavlich, *The Power of Community Mediation: Government and Formation of Self-Identity*, 30 LAW & SOC’Y REV. 707, 711 (1996), stating that “early critics of the alternative dispute resolution proposals have argued that far from restricting state control over individual lives, of empowering and liberating individual disputants, community mediation programs actually expand and intensify state control.”

201. See Christine B. Harrington, *Delegalization Reform Movements: A Historical Analysis*, in THE POLITICS OF INFORMAL JUSTICE VOLUME I: THE AMERICAN EXPERIENCE, *supra* note 17, at 43, stating that “[p]ound argued for the ‘socialization of law’ in order to ‘secure social interests in the modern city’ (1913: 311). By this he meant that laws had to be created by society ‘to protect men from themselves . . .’ The scope of judicial administration would be enlarged by the ‘socialization of law.’”

202. See HOFRICHTER, *supra* note, 14, at xiv.

mediation and other alternative dispute resolution forms invisibly²⁰³ or informally represent the state as embodied in the law.²⁰⁴ Presentation of Alternative Dispute Resolution as generic and value-free distorts the reality that these processes are descended from and imposed by the court as extensions of the law. Indeed, the complex relationship between mediation and law is apparent when the authority of the court is on one hand invoked by mediators to give themselves legitimacy,²⁰⁵ and on the other portrayed as an undesirable alternative.²⁰⁶

C. Use of the Label “Style” Does Not Clarify Differences in Mediator Practices

Use of the word *style*²⁰⁷ became a frequent choice for acknowledging differences²⁰⁸ in mediator practices²⁰⁹ in the effort to answer the critiques of

203. See *id.* at 30-31, stating that “[i]f we understand the state as a system of social relations that create order and maintain the rule of capital, we can begin to explore the way in which order is created in everyday life, absent the visible presence of state apparatus”

204. See *id.* at 47, stating that “[l]egal relations, as an element of state power, are embedded in reproducing the social order of capitalism and cannot be understood fully apart from this element. Law embodies and articulates class relations”

205. See Fineman, *supra* note 16, at 764-65, stating that “[t]he political victory of the helping professions is manifested by the conferring of legally significant rights and obligations, through the explicit delegation of decisionmaking authority to the social workers and mediators.”

206. Susan Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL’Y 7, 13 (1986), stating that:

Mediators in the court-based program stress that going to court is time-consuming and expensive They emphasize loss of control and possible arbitrariness of the court . . . offered at the same time that the mediators seek to legitimize themselves and the outcomes of mediation through association with the court.

207. The words *approach* and *orientation* are often used synonymously with *style*, and in some states have been incorporated into ethical guidelines. See, e.g., Department of Dispute Resolution Services, *supra* note 77, which in Section D.1.c. provides:

The mediator shall also describe his style and approach to mediation. The parties must be given an opportunity to express their expectations regarding the conduct of the mediation process. The parties and mediator must include in the agreement to mediate a general statement regarding the mediator’s style and approach to mediation to which the parties have agreed.

208. See Birke, *supra* note 25, at 314, stating that “Professor Riskin’s influential article . . . showed that mediation was not all alike, he gave the public a tool to distinguish between them, and he gave mediators a tool to distinguish themselves from their competitors.”

209. See Kressel, et al., *supra* note 118, at 68, noting “[i]t has been observed for some time that mediators do indeed have stylistic preferences (Kolb, 1983; Silbey and Merry, 1986; Susskind & Ozawa, 1985; Vanderkooi & Pearson, 1983).”

mediation, and to distance from the *artistry* definition. However, *style* as a formulation for recognizing differences continues to obscure them,²¹⁰ and makes it impossible for consumers to know what process they will encounter.²¹¹ Current descriptions of mediator *styles* do not provide accurate distinctions among mediation practices.²¹² While perhaps serving the court by perpetuating the myth of generic mediation, the confusion does not serve the profession or the public.²¹³ Lack of clarity about mediation *models*²¹⁴ calls the promise of self-determination into question.²¹⁵

Labeling differences in mediation practices as mediator *style*, in the attempt to refute the *artistry* description, resulted in widespread acceptance of categories based on Riskin's grid as either evaluative or facilitative. The continued focus on Riskin's identification of evaluative and facilitative strategies as descriptors of *style* has prevented other significant issues from being raised.²¹⁶

D. Names Define Reality

The ability to create language is perhaps the most uniquely human trait.²¹⁷ It distinguishes humans from their mammalian cousins. It provides

210. Dorothy Della Noce, *Mediation Policy: Theory Matters*, VA. MEDIATION NETWORK NEWS, July, 1999 at 4, stating that “[i]t [“style”] appears to be consistent with the rhetoric of mediator neutrality, which has somehow come to mean that mediators have no plan, no values, no agenda, no goal, no premises, and no theory beyond doing the clients’ bidding.”

211. See Waldman, *Identifying Social Norms*, *supra* note 24, at 769, noting “[i]f mediators, like most professionals, are expected to obtain informed consent to their interventions, they can do so only by providing thoughtful and accurate information about the process.”

212. See Abel, *supra* note, 17 at 9, stating that “they stress superficial stylistic differences between informal and formal institutions—dress, manner, speech, location, hours—in order to conceal the fundamental similarities of substance.”

213. Waldman, *Identifying Social Norms*, *supra* note 24, at 707, stating that:

Although the mediation literature is rich with “thick descriptions” of various mediator styles, it lacks a theoretical framework that takes adequate account of the disparate role social norms play in different mediation models. This conceptual gap hinders our efforts to construct meaningful professional standards, and impedes both practitioner and client understanding of what mediation entails.

214. See Della Noce, *supra* note 121.

215. Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 777 (1999), stating that “[u]nderlying the consent and empowerment rhetoric is a central inquiry: what does informed consent require in mediation? Unlike the concept of informed consent in the physician-patient and attorney-client relationships, the meaning of informed consent in mediation practice has received little attention.”

216. See Birke, *supra* note 25.

217. See Edelman, *supra* note 8, at 58, stating that “[l]anguage is the distinctive characteristic of human beings. Without it we could not symbolize; we could not reason, remember, anticipate, rationalize, distort, and evoke beliefs and perceptions about matters not immediately before us.”

a tool to organize and categorize things, to point out objects that are visible, and to refer to things that are invisible: allowing for the formulation of abstractions. But language is not just a tool for identifying material objects; It always exists within a social context.²¹⁸ For example, looking at the word *immigrant* would give us a picture of the complexities of context in what might seem to be simple or straightforward words.

An *immigrant* is someone who has left their country of origin and legally entered another country. This word is likely to evoke images of the waves of U.S. *immigrants*, many of whom experienced prejudice and discrimination until being assimilated into the culture. Still, these immigrants had legal status and many became proud U.S. citizens. Coexisting with these images, what is masked by the word *immigrant* in U.S. culture, is the fact that other than Native Americans, we are all descended from *immigrants* (though the seventeenth and eighteenth century Europeans came as *colonists* and by using that label, escaped identification with and as *immigrants*). And while most *immigrants* came willingly to the U.S., many of African descent were brought against their will, as slaves. Japanese *immigrants*, some of whom served in the U.S. military and many of whom became U.S. citizens, were put in prison camps or deported during WW II. As *immigrants/colonizers*, Europeans conquered and appropriated land already occupied by Native Americans, and then committed legally sanctioned genocide²¹⁹ to maintain possession of it. When we hear current discussions of the “problem” of immigration, all these contexts or realities are being referenced, although the theft of land and resources and the crimes against humanity are rarely, if ever, mentioned.

218. See *id.*, noting:

Language is always an intrinsic part of some particular social situation; it is never an independent instrument or simply a tool for description. By naively perceiving it as a tool, we mask its profound part in creating social relationships and in evoking the roles and the ‘selves’ of those involved in the relationships.

219. See WARD CHURCHILL, *A LITTLE MATTER OF GENOCIDE: HOLOCAUST AND DENIAL IN THE AMERICAS 1492 TO THE PRESENT* 70 (1997), quoting Raphael Lemkin’s definition of genocide:

Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves [even if all the individuals within the dissolved groups physically survive].

A Foucaultian analysis of language, specifically of the law²²⁰ and mediation as an option within the law, makes the connection between language and the reality of people's everyday lives: words frame thoughts.²²¹ In a Foucaultian perspective, "the dominance²²² of a particular discourse inevitably reflects the power structure of society."²²³ For example, using the word "terrorists" defines the discourse quite differently than if replaced by "freedom fighters." Contrary to the old adage: "sticks and stones may break your bones but names will never hurt you," names can be damaging²²⁴—so much so that preventing further harm, makes some words unutterable. Even when names are not purposefully used to hurt,²²⁵ a name is a symbol that represents an idea, belief, and/or perception. The symbolic aspect of a label goes beyond mere identification of an object; it creates a reality.²²⁶

The *artistry* and generic mediation descriptions create a reality that actually predicts very little about what a mediator will do.²²⁷ If the parties do not understand the process to which they are agreeing, self-determination is in jeopardy.²²⁸ Similarly, the continued use of the word *style*,²²⁹ (or

220. CONLEY & O'BARR, *supra* note 3, at 2, stating that "[t]his research looks at the law's language in order to understand the law's power. Its premise is that power is not a distant abstraction but rather an everyday reality . . . To the extent that power is realized, exercised, abused or challenged, the means are primarily linguistic."

221. See *id.* at 7, stating that:

Discourse in Foucault's sense is not simply the task itself, but also the way that something gets talked about. Logically, the way people talk about an issue is intimately related to the way that they think about it and ultimately act with respect to it. Discourse is thus a locus of power.

222. See *id.*, stating that "the repeated playing out of the dominant discourse reinforces th[e] structure. Discourse, as Foucault put it in *The History of Sexuality*, 'can be both an instrument and an effect of power'"

223. *Id.*

224. See MARSHALL ROSENBERG, *NONVIOLENT COMMUNICATION: A LANGUAGE OF COMPASSION* (2001).

225. *Id.* at 2, stating that "[w]hile we may not consider the way we talk to be 'violent,' our words often lead to hurt and pain, whether for ourselves or others."

226. See CONLEY & O'BARR, *supra* note 3, at 2, stating that "we not only describe reality but create our own realities"

227. See Kressel et al., *supra* note 118, at 81, stating that "[w]ithout a clear professional consensus on the parameters of the role, it is perhaps understandable that mediator behavior will be vulnerable to shaping by the situational pressures"

228. See Welsh, *supra* note 88, at 92-93, stating that:

Self-determination has been identified as the fundamental core characteristic of the mediation process. Nevertheless . . . the existence and meaning of self-determination cannot be taken for granted. Indeed current trends in the institutionalization of court-connected mediation are challenging courts and mediation advocates to clarify the meaning of "self-determination" and to develop effective mechanisms to protect it.

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orientation/approach) used in scholarly articles and in some instances in ethical guidelines and statutes²³⁰ is inadequate as the conceptualization of mediator differences. The dictionary definition of *style*²³¹ gives a range of meanings including: expression, performance, good taste, comfortable mode of living, fashion, the gnomon of a sundial, and a pointed writing instrument. The dominant discourse on mediation *style* seems to come closest to the “fashion” definition.²³²

E. Labeling Differences as “Style” Obscures Mediator Bias

The failure of the label *style* to accurately differentiate among mediation practices raises serious questions about standard assurances of mediator *neutrality*.²³³ The guarantee of mediator *neutrality*²³⁴ is a pledge that the mediator “makes no assessments, judgments, or value interventions.”²³⁵ This assumption ignores the mediator’s history,²³⁶ education, experiences, and perspectives acquired over a lifetime—the lens through which each individual perceives reality.²³⁷ In Sara Cobb’s poststructuralist analysis of

229. See Kressel et al., *supra* note 118, stating that “[m]ediator style refers to a cohesive set of strategies that characterize the conduct of a case.”

230. See Department of Dispute Resolution Services, *supra* note 77.

231. THE AMERICAN HERITAGE COLLEGE DICTIONARY 1372 (4th ed. 2002).

232. See Della Noce, *supra* note 210, at 4, stating that “[a] notion has taken hold that . . . mediator practices are no more consequential than a whim, and as easily donned, shed, changed, and mixed and matched as the day’s clothing.”

233. See Cobb, *supra* note 79, at 98, stating that “[a]s others have noted, once the neutrality of the mediator is called into question, so is the legitimacy of mediation practice as a whole.”

234. See Scimecca, *supra* note 91, at 218, stating that “[t]he supposed neutrality of the third party favors compromise and conceals the fact that values which confirm the existing advantages between unequals are necessarily biased (Laue, 1982).”

235. WINSLADE & MONK, *supra* note 4, at 35.

236. See John A. Powell, *The Multiple Self: Exploring Between and Beyond Modernity and Postmodernity*, 81 MINN. L. REV. 1481, 1490 (1997), stating that:

Hegel was the first philosopher of the modern period to suggest that reason and identity are not transcendental, but instead need to be viewed in a historical context . . . Because reason was not only the essence of man, but also the primary tool that enabled man to understand and order the experiential world, the conclusion that reason is relative inherently undermines modern conceptions of the world as objectively ordered and knowable

237. See Moreno, *supra* note 190, at 2, stating that:

Mediators have to recognize that they have biases. We all have biases. We have all had negative experiences . . . e.g., that I lost my job because I had a male supervisor who did not like me. From then on the memory of the disaster is colored by the experience, the perception, and the bias against male supervisors.

objectivity she argues that: “[O]bjectivism is fundamentally a *Newtonian* concept—reflective of a universe in which it is possible to stand outside (narrative) time and (social) space, separate and autonomous from interpretive frames, relational patterns, and communicative processes”²³⁸

Each of us is always hearing and seeing from a perspective,²³⁹ a point of view: mediators are not blank slates.²⁴⁰ These perspectives are formed by life experiences in families and cultures, and by governments and educational institutions.²⁴¹ The use of language and the interpretation of what others say is part of that perspective.²⁴² Believing in the ideology of *neutrality*²⁴³ and the individual ability to be *objective*²⁴⁴ or *neutral*, most mediators do not question it.²⁴⁵ While research has shown that it is impossible to be aware of biases since they operate unconsciously,²⁴⁶ it is

238. Cobb, *supra* note 79, at 89.

239. See Catherine Pierce Wells, *Improving One's Situation: Some Pragmatic Reflections on the Art of Judging*, 49 WASH. & LEE L. REV. 323, 336 (1992), noting “[a]s human beings, our individual perspectives are such intimate and constant companions that we forget that they are there. Thus, we need constant reminders that we each have our own distinctive window on the world.”

240. See Mary Thompson, *Teaching Ethical Competence Activities for Training Mediators*, DISP. RESOL. MAG., Winter 2004, at 23, stating that “[e]thical behavior involves far more than knowing a code of ethics. It involves understanding the personal factors that play a part in a mediator’s ethical decision making, e.g., morals, biases, religious and cultural values. These factors impact the mediator’s . . . choice when ethical tenets come into conflict.”

241. See Pinzan, *supra* note 48, at 9, stating that “[t]he mediator, torn between his or her goals, interests, background, or some hidden agenda, may even have a decisive influence over what is considered relevant to the mediation process (Gibson, Thompson, and Bazerman, 1993, discuss how mediators also suffer from involuntary cognitive biases that affect them in dispute resolution).”

242. See Wells, *supra* note 239, at 323, quoting Justice Cardozo regarding the objectivity of judges:

All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; . . . In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.

243. See Cobb, *supra* note 79, at 89, stating that “[p]roblematically, informal processes have appropriated the concept and the discourse of neutrality with none of the formal procedural rules or codes for *practicing* neutrality.”

244. See Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS J. OF WOMEN IN CULTURE & SOC’Y 637, 644-45 (1983), stating that “[o]bjectivity is liberal legalism’s conception of itself. It legitimizes itself by reflecting its view of existing society, a society it made and makes so by seeing it, and calling that view, and that relation, practical rationality.”

245. See Scimecca, *supra* note 91, at 218, stating that “[v]ery few, if any, practitioners of ADR challenge the neutrality position; for them it is an unexamined assumption. As such, their neutrality supports the status quo, no matter how unequal it may be.”

246. See Moreno, *supra* note 190, at 1, noting:

Psychologists who study the effect of bias on decision-making indicated that we are always wrong if we think that we can be impartial and exhibit no bias . . . even when we

now widely understood that, in the words of Justice Cardozo, “we can never see . . . with any eyes except our own.”²⁴⁷ Meaning making is thus a highly subjective activity.²⁴⁸ Without an awareness of the way bias informs perception, *objectivity*—the ideology behind the act of *neutrality*—functions as a dangerous illusion. The illusion of *objectivity* grants rationality²⁴⁹ and power to those who define it, and oppresses those subject to its definitions.²⁵⁰ Mediation thus reinforces power imbalances²⁵¹ that exist between parties outside mediation through the perspectives of mediators,²⁵² many of whom come from privileged and educated backgrounds.²⁵³ From the point of view of their own privilege,²⁵⁴ mediators are therefore likely to be aligned with the more powerful²⁵⁵ in an environment that silences the less

think we are compensating for our bias, it is not something we can easily remove or factor out of our decisions because it operates unconsciously.

247. Wells, *supra* note 239.

248. See POLKINGHORNE, *supra* note 6, at 7, stating that “[e]ach of us has direct access to only one realm of meaning: our own. Because it is not available to direct public observation, the region of meaning must be approached through self-reflective recall or introspection in our mental realm.”

249. See MacKinnon, *supra* note 244, at 645, stating that “[i]f rationality is measured by point-of-viewlessness, what counts as reason will be that which corresponds to the way things are. Practical will mean that which can be done without changing anything.”

250. See EDELMAN, *supra* note 8, at 136, stating that “the conspicuous labeling and segregation of some as ‘deviants’ constitutes a potent, though masked and subtle reinforcement of conventional thought and behavior. Those who are so labeled serve as a benchmark for everyone, marking off normality from unacceptability.”

251. See *id.* at 212, stating that “[w]here bargaining resources are equal, participation produces real influence on who gets what. When they are strikingly unequal, as is almost always the case, participation becomes a symbol of influence that encourages quiescence, rather than substantive gains, for the powerless.”

252. See *id.* at 152, noting that “[i]n this century, the ‘helping professions’ have reinforced inequality by equating adjustment to existing social, economic, and political institutions with psychological health.”

253. See Harrington & Merry, *supra* note 20, at 724, stating that “core mediators, people who mediate most often . . . tend to be more educated than the total mediator pool and are more likely to have professional backgrounds in law or the helping professions.”

254. See Trina Grillo, *Antiessentialism and Intersectionality: Tools to Dismantle the Master’s House*, 10 BERKELEY WOMEN’S L. J., 16, 30 (1995). Grillo makes the point that our perspectives and experiences are often a result of our privilege, in essence, obliviousness is privilege, stating that “[o]ne of our privileges is to not notice that we are heterosexual, to assume that laws, customs, and habits should be, while non—discriminatory, based on the norm of our heterosexual lives.” *Id.*

255. See Scimecca, *supra* note 91, at 218, stating that “from the perspective of Weberian conflict theory, the role of power must be assessed, before the parties can begin to deal with misunderstanding and any lack of communication.”

powerful.²⁵⁶ Despite assertions that mediation is voluntary, the expectation of participation in mediation²⁵⁷ can become coercive when based on the concept of acceptance of responsibility,²⁵⁸ especially in court referred cases. Mediators inherently advocate for both participation and resolution.²⁵⁹ Thus the iterations that the actions of mediators come from a “value-free, culturally neutral perspective, can no longer be justified.”²⁶⁰

F. Defining Neutrality of the Mediator as Detachment is Not the Same as the Role of Peacemaker in Traditional Non-Legal Processes

The promise of *neutrality* in mediation, particularly in its role of serving the court, is a departure from the traditional roots of non-legal practices. In their article on the Navajo Justice and Harmony Ceremony,²⁶¹ Philmer Bluehouse and James W. Zion articulate the concept of the integration of justice and community.²⁶² Non-legal practices²⁶³ that exist in many indigenous cultures²⁶⁴ differ from the Western judicial tradition in the relationship to power and authority. Navajo culture rests on a sense of harmony among all living things. Coercion is alien to Navajo relationships

256. See Cobb, *supra* note 90, at 399, stating that “silence inevitably supports the existing regime, legitimates those who silence victims, and undermines the rule of law itself.”

257. See EDELMAN, *supra* note 8, at 126, stating that:

Because participation symbolizes democracy, it systematically clouds recognition of conflicting interests that persist regardless of negotiation. The adoption of formal procedures for direct or indirect participation in decisions conveys the message that differences stem from misunderstandings that can be clarified through discussion or that they deal with preferences that are already compromised . . . such routines perpetuate and legitimize existing inequalities in influence, in the application of law, and in the allocation of values.

258. See Harrington & Merry, *supra* note 20, at 720, stating that “[v]oluntary participation in mediation is viewed as enhancing the development of an individual’s capacity to take responsibility for his or her problems and work out consensual agreements with others.”

259. See Cobb, *supra* note 90, at 414, stating that “the morality of mediation itself frames the interpretation of action—‘right’ and ‘wrong’ are subsumed by the ideals of ‘participation’ or ‘conflict resolution.’”

260. CONLEY & O’BARR, *supra* note 3, at 40.

261. See Bluehouse & Zion, *supra* note 28.

262. See *id.* at 329, stating that “Navajos know their clan relatives and interact with them, prompted by strong values which create Navajo solidarity. Those values are virtues which become an engrained emotional cement to bond the individual to the clan and the clan to the individual.”

263. See *id.* at 335, stating that “[t]he English words *mediation* and *arbitration* do not accurately reflect how Navajos feel about their justice ceremony.”

264. See *id.* at 330, stating that “[m]ost tribes did not have strong leaders with absolute or hierarchical power, as was typical of European vertical systems of authority. Most tribal leaders were persuasive and not coercive.”

and, in itself, may be seen as evil.²⁶⁵ In contrast, when applying mediation techniques in the context of the American legal system, or in supposed “communities” that lack the real bonds of traditional communities,²⁶⁶ the focus shifts from restoring harmony to the social fabric²⁶⁷ to dealing with isolated acts.²⁶⁸ In Navajo culture, the peacemaker’s role is to reaffirm the social values which both parties and peacemakers hold dear.²⁶⁹ In U.S. culture, the role of the neutral has been equated with detachment.²⁷⁰

Production of community mediation in U.S. culture was initiated from the top down, from the courts and the legal hierarchy,²⁷¹ as opposed to the integral use of non-legal processes in traditional cultures.²⁷² As a result of the endorsement of the courts, mediation emerged from three distinct sectors of the community: “[1] the delivery of dispute resolution services, [2] social transformation, and [3] personal growth.”²⁷³ Though each context has a

265. See *id.* at 332, stating that “[c]oercion (forcing someone else to do one’s will) is alien to Navajo thought about human relationships. It is contrary to Navajo morals and can be an evil in itself.”

266. See *id.* at 331-32, noting “[r]eality is not segmented or compartmentalized in the Navajo world view. There is no separation of religious and secular life. Everything has its place in reality and in a relationship to the whole which is something like the clan relationship.”

267. See Nader, *supra* note 10, at 624, quoting Auerbach in pointing out the difficulty in importing communal ideologies into American legal structures:

There is every reason why the values that historically are associated with informal justice should remain compelling: especially the preference for trust, harmony and reciprocity within a communal setting. These are not, however, the values that American society encourages or sustains; in their absence there is no effective alternative to legal institutions.

268. See Bluchouse & Zion, *supra* note 28, at 334, stating that “a peacemaker helps the parties identify how they have come to the state of disharmony. Non-Indian dispute resolution tends to focus more on the act which caused the dispute.”

269. See *id.* at 234, noting:

Peacemakers have strong personal values, which are the product of their language and rearing in the Navajo way. These values are also the teachings of Navajo common law . . . Navajo peacemakers, unlike their American mediator counterparts, have an affirmative and interventionist role to teach parties how they have fallen out of harmony by distance from Navajo values.

270. See Harrington & Merry, *supra* note 20.

271. See Delgado et al., *supra* note 61, at 1366, noting “[t]he current ADR movement enjoys broad support; its proponents include Chief Justice Burger, the American Bar Association, legal educators, legal journals, corporate counsel, federal and state legislators, and the media.”

272. See AUERBACH, *supra* note 9, at 140, stating that “[a] striking feature of indigenous community dispute settlement, not only in the American experience but in the various cultures that still nourish it, is the virtually total absence of access to justice as a problematic issue.”

273. Harrington & Merry, *supra* note 20, at 710.

different agenda, all three reference the *neutrality* of the mediation process,²⁷⁴ and thereby of the mediators themselves, as a way to resolve the contradictions between consensual²⁷⁵ and community²⁷⁶ justice. The ideology of *objectivity* and the practice of *neutrality* as detachment are used to justify the benefits of mediation and to give mediation organizations that fulfill these criteria, access to material resources.²⁷⁷ *Neutrality*, defined as a “detached stance,”²⁷⁸ is a vastly different criterion than found in traditional non-legal processes.²⁷⁹

G. “Style” Disappears When Promising “Neutrality” Thereby Obscuring Power Imbalances

Naming differences in mediator practices as *styles*, functions as a cover-up for *bias*²⁸⁰ when viewed in the context of the unquestioned assumption of *neutrality* of both the mediation process and its practitioners. What is *style*, but the individual mediator’s experience, education, and perspective?²⁸¹ If, on one hand, mediators continue to pledge *neutrality*, and on the other, to explain away differences in mediator practices as *style*, the power imbalances between the parties, of the parties in relation to the mediator, and of the court and state over the parties,²⁸² remain invisible. The obfuscation

274. See *id.* at 723, stating that “all three programs address the ambiguities between the symbolic demands of community justice and consensual justice by focusing on the neutrality of the process.”

275. See *id.* at 717, stating that “[c]onsensual justice refers to justice produced through a voluntary process.”

276. See *id.* stating that “[c]ommunity justice associates mediation with democratic values, such as community participation and neighborhood self-governance, and it evokes the sense of a cohesive community”

277. See *id.*

278. See *id.* at 730.

279. See Bluehouse & Zion, *supra* note 28, at 334, stating that “[a] peacemaker, as a *naat’aanii*, is selected because of personal knowledge of Navajo values and morals and the demonstrated practice of them.”

280. See Christopher Honeyman, *Patterns of Bias in Mediation*, 1985 J. DISP. RESOL., 141, 141, stating that “[l]ike all other dispute resolution processes, mediation has inherent tendencies to benefit certain people and to harm others. For want of a less inflammatory word, these tendencies must be called biases.”

281. See Powell, *supra* note 236, at 1484, stating that “far from being a unitary and static phenomenon untainted by experience, one’s core identity is made up of the various discourses and structures that shape society and one’s experience within it.”

282. See HOFRICHTER, *supra* note 14, at 153, stating that:

The revitalization of neighborhood dispute resolution forums is a phase in an ongoing restructuring and expansion of the capitalist state. A central feature in the structuring concerns the continued blurring between the state and civil society such that the state does not appear to be the state but rather part of the landscape of community social life.

of power is accomplished by attribution of differences in mediator practices to *style*, thereby avoiding accountability of the mediator's responsibility to balance power.²⁸³ Thus, questioning the use of the word *style* to describe mediator differences is analogous to Cobb's deconstruction of *neutrality*: "[N]eutrality 'disappears' itself in order to remain unavailable for critique and, like a loyal servant, reappears to fend off critiques that may dislodge the institutions that derive their power from this concept."²⁸⁴

Style 'disappears' when we promise *neutrality*, and appears when explaining different choices mediators make about content and process.²⁸⁵ *Style*, as a descriptor, does not indicate what a mediator will or will not do, and offers no discernable reference point for parties to make an informed choice.²⁸⁶ While well-intentioned mediators²⁸⁷ may attempt to fulfill the requirements of transparency by informing parties of their *style*,²⁸⁸ the primary benefit of the label "*style*" is to maintain the appearance of offering a predictable process with negligible variations. Predictability in mediation benefits the court by assuring parties of uniformity in substance and quality of mediation. In support of the court's agenda, some mediators claim that it is too confusing, self-indulgent, and burdensome to share differences in mediation practices with parties.²⁸⁹ Others suggest that in serving the

283. See Scimecca, *supra* note 91, at 217, stating that "ADR, if it is to be more than another mechanism of social control, must take the unequal distribution of power into consideration and try to resolve the dispute without assuming that the parties are equal and thereby, by default, coming out on the side of the more powerful."

284. See Cobb, *supra* note 79, at 15.

285. See BUSH & FOLGER, *supra* note 22, at 71, stating that "it is somewhat surprising that mediator influence or directiveness is not commonly viewed as problematic . . . it is partly because mediator influence is not obvious; in fact, it is easily masked."

286. See Nolan-Haley, *supra* note 215, at 778-79, stating that "the state of informed consent in mediation today is often more illusory than real. Parties, particularly those without lawyers, often enter mediation without a real understanding of the process and leave mediation without a real understanding of the result."

287. See EDELMAN, *supra* note 8, at 151, stating that "[t]he overwhelming majority want to believe that their own roles are meaningful contributions to the greater good, and so have good reason to accept the reassuring perspective on public affairs, rather than one that upsets both their belief in institutions they have supported and their belief in themselves . . ."

288. Jeffrey Krivis & Barbara McAddo, *A Style Index for Mediators*, MEDIATE.COM, Dec., 1997, <http://www.mediate.com/articles/krivis4.cfm>.

289. See Stemple, *supra* note 2, at 384, stating that "[e]ven the most sophisticated disputants will be confused and possibly put off by a mediator's strict adherence to the facilitative mode interrupted by bursts of self-conscious rhetoric about changing modes or a mediator's decision to alter or end the process in which the parties have invested substantial effort."

court's mandate, mediation undermines parties' self-determination.²⁹⁰ If mediation and other ADR processes were indeed initiated to further the court's agenda of informal justice, then it makes sense to ask: is mediation succeeding in fulfilling the "mandate" to serve the court?

IV. IS MEDIATION FULFILLING ITS 'MANDATE' TO SERVE THE COURT?

A. *One Example of Court Oversight: The Supreme Court of Virginia*

Since the mandate for introducing mediation in the courts came from an attempt to address dissatisfaction with the court, it stands to reason that mediation is seen to benefit the court. Mediation and ADR processes, reinvigorated by the Pound conference, ultimately produced court-referred mediation in many states, such as Virginia,²⁹¹ based on the values and goals of the justice system.²⁹² Using the example of the Supreme Court of Virginia's oversight of mediation for the state courts offers a window into the functioning of mediation through the court. In 1987 Virginia's Chief Justice Harry L. Carrico began the process of introducing informal processes into the Virginia courts by the appointment of a Commission on the Future of Virginia's Judicial System. In 1988 a Mediation Statute was passed by the General Assembly.²⁹³ By 1989, the Futures Commission report recommended ten "visions," including one to provide a range of dispute resolution options so that parties might "select a process that best meets the

290. See Welsh, *supra* note 88, at 25, stating that "[p]erhaps inevitably, current evidence strongly suggests that the 'legitimacy handed to [the ADR movement] by its assimilation into the court system' has come at a price."

291. See Department of Dispute Resolution Services, *Mediation Historical Background*, VA. JUDICIAL SYSTEM, http://www.courts.state.va.us/drs/general_info/history.html, which states:

The Futures Commission conceptualized the various dispute resolution options as lying along a continuum, with those processes which are least formal and include the most party control over the outcome at one end, and those processes which are the most formal and include a third party decision-maker at the other end: conciliation, mediation, early neutral evaluation, summary jury trial, arbitration, settlement conference, adjudication.

The use of the label ADR, Alternative Dispute Resolution, cites these processes as *alternatives* to the law. Here it is established that these are *options* within the law, not *alternatives* to it. *Id.* The use of the label *alternatives* is itself misleading.

292. See Della Noce, *supra* note 18, at 555, stating that "[t]he mediation process itself was distorted in the service of the values and goals of the justice system."

293. VA. CODE ANN. §§ 8.01-581.21 to 8.01-581.26 (2008).

needs of their case.”²⁹⁴ In 1991 the Department of Dispute Resolution Services was established within the Office of the Executive Secretary.²⁹⁵

The statistical data available from the Supreme Court of Virginia for the fiscal year 2003-04, shows the total allotment for mediation is \$1,204,410.²⁹⁶ This does not include the operating costs of the Office of Dispute Resolution and the grants given for court coordinators in localities around the state, which come from other sources. Nor does it include compensation for time spent by the clerks in the localities who are assigning and processing the cases referred to mediation. The allotment refers only to what is paid to mediators. Cases in General District, Juvenile and Domestic Relations (J & DR) and Circuit Courts, each receive different compensation. In General District Court, cases are reimbursed at \$90 per case, in J&DR Court \$100 per case, and in Circuit Court, \$200 per case. The data collected by the Supreme Court indicates that most cases take an average of: 0-2.0 hours in mediation sessions, 1.25 hours for case management (intake and orientation, setting up sessions, data entry, etc.) and .75 hours for writing agreements, averaging approximately 4.0 hours.²⁹⁷ The hourly compensation for General District Court cases would then be \$22.50 per hour, J&DR cases \$25 per hour and Circuit Court cases \$50 per hour, although only the time spent in mediation sessions is actually compensated.

B. *Mediation Functions as a Volunteer Profession*

Given these numbers, it is doubtful that most mediators are motivated by economic gain. Although \$20-\$50 would be considered a decent hourly wage by most standards, case referrals may be intermittent and unpredictable, and as in Virginia, these allotments are spread out among many mediators statewide. There is no income security or other employee benefits for mediators. Thus, it is unlikely that many mediators will find this a viable way to make a living. Most mediators volunteer through mediation

294. Department of Dispute Resolution Services, *supra* note 291.

295. *Id.*

296. Office of the Executive Secretary, *Statistical Mediation Information: Mediation Expenditures by Fiscal Year*, SUPREME COURT OF VIRGINIA, available at http://www.courts.state.va.us/drs/general_info/statistical.pdf. The chart indicates that \$1,204,410 was spent on mediation. *Id.* Mediations in the state totaled 2431 for General District Court, 5272 for Juvenile and Domestic Relations Court and 150 for Circuit Court. *Id.* Additional charts list hours spent in three categories: hours of mediation, case management and agreement writing. *Id.*

297. *Id.* at 12-14.

centers that receive the bulk of the monies paid for mediation²⁹⁸ to defray their operating expenses. Many mediators “keep their day jobs” and work around busy schedules to offer what they believe to be a service that benefits their communities. While not quite “charity work,” the low fees create a public expectation that mediation should be free or low-cost²⁹⁹ even when offered privately, in essence, derailing professionalism. Though appearing to advocate for mediation, the current climate established by the court keeps the pool of certified mediation practitioners operating as “on call” volunteers for minimal compensation. Thus the system provides mediators the inner satisfaction of offering an option to parties that is said to be, “tremendously successful,”³⁰⁰ but does not offer adequate financial compensation.

C. Comparison of the Total Number of Cases in General District, Juvenile and Domestic Relations and Circuit Courts with Number of Cases Mediated, Indicates Mediation is Having a Minimal Impact

Based on the case and budget numbers, mediation is not having much impact on alleviating court dockets or saving the courts money. In Virginia in 2004, General District Court had 3,215,144 new cases,³⁰¹ of which 2431 were mediated,³⁰² (.0008 per cent). The Juvenile and Domestic Relations Courts had 511,078 new cases³⁰³ of which 5272 were mediated,³⁰⁴ (.01 percent) and of the 105,197 new civil cases in Circuit Court,³⁰⁵ 150 were mediated through court referrals (.001 per cent).³⁰⁶ Thus, the numbers of mediated cases is quite small in comparison to the total number of cases in

298. *See id.*

299. *See* Brazil, *supra* note 44, at 141, stating that “[s]ome courts and parties will want neutrals to work at economy rates, or pro bono, while organizations of neutrals are likely to press for payment at professionals’ market rates (agreeing to perform only limited work for free as a public service).”

300. Office of the Executive Secretary, *DRS Explores Quality Assurance Initiatives, RESOLUTIONS: A QUARTERLY UPDATE ON DISPUTE RESOLUTION*, Dec. 2005, at 1, available at http://www.courts.state.va.us/drs/resolutions/2005/december_2005_resolutions.pdf, stating that “[p]arty satisfaction with the mediation process is well over 90% and the agreement rate is, on average, 80-85% . . . [indicating that] family mediation has been tremendously successful”

301. COMMONWEALTH OF VIRGINIA, CASELOAD STATISTICS OF THE DISTRICT COURTS (2005), http://www.courts.state.va.us/csi/dbr1_2004.pdf.

302. *See* Office of the Executive Secretary, *DRS Explores Quality Assurance Initiatives, supra* note 300.

303. *See* COMMONWEALTH OF VIRGINIA, *supra* note 301.

304. *See* Office of the Executive Secretary, *DRS Explores Quality Assurance Initiatives, supra* note 300.

305. COMMONWEALTH OF VIRGINIA, CIRCUIT COURT CASELOAD STATISTICS: CIVIL (2006), http://www.courts.state.va.us/csi/age_of_concluded_civil_cases_2006.pdf.

306. *See* Office of the Executive Secretary, *Statistical Mediation Information, supra* note 296.

each court. The annual budgets of these courts in 2004 were \$73,056,390 for General District Courts,³⁰⁷ \$54,467,738 for J&DR Courts³⁰⁸ and \$81,372,587 for Circuit Courts,³⁰⁹ amounts that are quite substantial when compared to the total mediation budget for all courts, of \$1,204,410. Given the numbers of cases mediated compared to the case volume in the courts, one might wonder, is mediation mostly window-dressing? If mediation has not lived up to its “promise” in relation to the courts, how does this failure present obstacles to changing the dominant discourse on mediation?

V. WHAT ARE THE OBSTACLES TO CHANGING THE DOMINANT DISCOURSE ON MEDIATION?

A. Identifying Five Major Obstacles to Changing the Discourse on Mediation

This article has described three obstacles that prevent change in the dominant discourse on mediation: (1) the effective use of mediation and ADR to deflect criticism away from the court, supporting the court’s contention to have reformed itself; (2) the presentation of mediation as a generic process (despite much evidence to the contrary), where differences are due to the *artistry* of the practitioner, and where cooperation and compromise replace rights and justice; and (3) use of the word and concept of mediator *style* to address differences in how mediation is practiced, while it actually functions as a cover up for mediator bias. Here we will address two additional obstacles: (4) the confusion caused by promotion of mediation as delivering “informal” justice while obscuring its relationship to the law; and (5) the de-professionalizing of mediation through dependence on volunteers, at the same time promising quality of service.

307. VIRGINIA DEPARTMENT OF PLANNING AND BUDGET, JUDICIAL AGENCIES BUDGET TABLES (2006), <http://www.dpb.state.va.us/budget/vabud/vabud.cfm?vTable=O&vBiennium=2004-2006&vSecretary=Judic&vSort=N>.

308. *See id.*

309. *See* COMMONWEALTH OF VIRGINIA, *supra* note 301.

B. Promotion of Mediation as Delivering “Informal” Justice Obscures its Relationship to the Law

1. Mediation is an option within the legal system and functions as a mechanism of informalism

Despite the relatively small percentage of court cases using mediation, as we have seen in the case of The Commonwealth of Virginia, the discourse on mediation has been quite successful in presenting itself as a vital and user-friendly³¹⁰ “alternative” to a slow, cumbersome, and financially exhausting legal system.³¹¹ Framing the discourse on mediation as an “alternative” to the legal system perpetuates a mythology about mediation as separate from the law.³¹² Mediation is one element in a repeatedly used strategy to reform the courts through informal legal mechanisms.³¹³ Mediation serves the purposes of legal informalism by addressing issues as if they exist only between individuals,³¹⁴ rather than as members of groups.³¹⁵ First, defining conflict as existing between individuals, informalism then looks for solutions that focus only on the specific individuals involved.³¹⁶ Mediation, as an integral part of the court’s agenda

310. See CONLEY & O’BARR, *supra* note 3, at 39-40, stating that “[c]ritics charge that the very user-friendly qualities that have made mediation so popular also make it dangerous”

311. See Department of Dispute Resolution Services, *supra* note, 291 at 4, stating that “[t]he public’s perception of resolving a dispute through traditional adjudication is that the time and expense involved is overwhelming. Disputants have become frustrated with long court delays and discovery processes, the complexity of the law, and the unproductive use of their resources.”

312. See AUERBACH, *supra* note 9, at 98-99, stating that “[b]ecause alternatives to litigation revived within a highly developed legal culture, conciliation—and arbitration—had to be reconciled with legal norms and values, and rendered acceptable to the legal profession.”

313. See Abel, *supra* note 17, at 7, stating that “[i]nformal institutions are said to be a necessary response to inexorable economic forces. The courts are ‘overcrowded,’ there is ‘too much’ litigation, crime rates are rising, the prisons are full.”

314. Silbey, *supra* note 66.

315. See Fineman, *supra* note 16, addressing how mothers as a group disappear in mediation which deals only with individuals: “The focus of my inquiry is not the power of individuals within any particular mediation context; rather, it is the lack of power that leaves custodial mothers as a group disadvantaged in a political process”

316. See Abel, *supra* note 17, at 7, stating that:

It is just because individuation is the primary function of informal institutions that they can accomplish their purpose using staff who possess little or no training, operate with minimal supervision, and are bound by few rules . . . The goal is not regimentation but disaggregation. Informal institutions produce this result by treating all conflict as individually caused and amenable to individual solution.

See also Linda L. Putnam, *Challenging the Assumptions of Traditional Approaches to Negotiation*, 10 NEG. J. 337, 341 n.4 (1994), stating that:

to offer informal justice, both enhances and obscures its connection to the legal system. The notion of providing “informal justice” through ADR processes that serve the court, impacts the mediators, the public (community), and the parties.

Preserving the social order is the basic agenda of the court system.³¹⁷ Late nineteenth century Small Claims, Juvenile, and Conciliation³¹⁸ courts sought to “Americanize the immigrant, rehabilitate the delinquent, the deviant, and the discontent,”³¹⁹ thus establishing social control.³²⁰ Whether the reason stated for current court support of informalization is crowded dockets,³²¹ over-litigiousness of the culture,³²² cost reduction,³²³ or

Individual agency is a value that is esteemed in Western culture. It stems from a belief that society is made of distinct and radically separate human beings who act independently and are accountable for their own choices (Folger and Baruch Bush, 1994). It differs from a communitarian society in which an individual's identity is connected to and intertwined with other people (Putnam and Kolb in press).

See also Bluehouse & Zion, *supra* note 28, at 329, which states that “[t]he core of the common law of most Native peoples is the ‘segmentary lineage system,’ which is a method of tracing relationships and adjusting disputes among people who are related to each other in various ways.”

317. See HOFRICHTER, *supra* note 14, at 29, stating that:

Increasingly, formal state apparatuses have also had to accept more tasks as private institutions such as church and family have become inadequate to handle private and public disorder . . . although police handle these activities and other moments of conflict, they cannot resolve, regulate or prevent them or, in other ways, manage the social environment in accordance with the requirements for order in a capitalist society.

318. See Nader, *supra* note 10, at 630, noting “[c]onciliation, however, did not develop from within the communities it was intended to serve. Rather, it was established for low-income communities by the legal establishment itself in order to remove trivial claims from the judicial system.”

319. See HOFRICHTER, *supra* note 14, at 20.

320. See HARRINGTON, *supra* note 12, at 53, stating that “[t]he domestic relations, small claims, and conciliation courts were called ‘socialized courts’ in the sense that their ‘procedures and remedies focused on diagnosis, prevention, cure, education’ . . . Progressives claimed that the specialized tribunals provided ‘social justice’ in contrast to ‘legal justice.’”

321. See Della Noce, *supra* note 18, at 546, stating that “[d]espite the clear recognition of the unique social value of mediation in various dimensions of human interaction, this argument cast the potential value of the mediation process to the justice system primarily in terms of improved case management efficiency.”

322. James E. McGuire & Frank E.A. Sander, *Some Questions About “The Vanishing Trial”*, DISP. RESOL. MAG., Winter 2004, at 17, noting “[a] new study shows a sharp decline in the number of federal trials between 1962-2002—from 11 percent to 1.8 percent in civil cases, and from 15 percent to less than 5 percent in criminal cases.”; see also William F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC’Y REV. 631, 631, 651 (1980-81) stating that “transformation studies render problematic one of the most fundamental political judgments about disputing—that there is too much of it, that Americans are an over-contentious people, far too ready to litigate (e.g., Rosenberg,

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preserving relationships,³²⁴ the underlying agenda continues to be to manage and control conflict, or to eliminate it altogether.³²⁵ The court's agenda of social control is reinforced by the individual mediator's choice to perpetuate it.³²⁶ Mediators, for the most part do not think of themselves as agents of the courts or the state despite the fact that they may be certified and paid by the court, and are aligned with the (often hidden) agenda of the court.³²⁷

2. Informalism is portrayed as what the community wants and claims to empower individuals and communities

Legal "informalism" it is said, appeals to the public as the answer to its dissatisfaction with the courts.³²⁸ Indeed, informalism may suit the U.S. cultural affinity for the "quick fix."³²⁹ If the assumption is made by the public, the courts, and many mediators, that disputes are interpersonal rather than collective,³³⁰ then individuals refusing mediation are seen as

1972, Ehrlich, 1976, Kline, 1978). The transformation perspective suggests that there may be too little conflict in our society."

323. See Abel, *supra* note 17, at 7.

324. See HARRINGTON, *supra* note 12, at 96, stating that "[t]he shift toward preserving the ongoing relationships of consumers and families is a response to rights movements . . . The power imbalance between individuals and small businesses or corporations is a fundamental barrier to equal justice in minor civil disputes."

325. See HOFRICHTER, *supra* note 14, at xxxiv-xxv, stating that "[l]iberal legal reformism, aspires to solve the problem of social order through cooperation, administrative management of political conflict, and impartial mediation between opposing classes. It views conflict as an evil to be avoided, absorbed, or resolved—all within the prevailing order." "[M]ediation colonizes thought about conflict, particularly the idea that there is too much conflict in society and mediation is the solution." *Id.* at 157.

326. See Della Noce, Bush & Folger, *supra* note 45, at 57, stating that "it became apparent that mediators not only have influence on the conflict interaction and outcome, but they also have meaningful choices about the nature and extent of their influence. Further, those choices are embedded in, reflect, and reproduce each mediator's fundamental social values and preferred moral order."

327. See KOLB, *supra* note 37, at 172, stating that "whatever bias toward money or institutional or professional interests exists in the system is mobilized through the actions of the mediators."

328. See Abel, *supra* note 17, at 8, stating that "[a] second line of argument in favor of informalism is that the people want it. They are said to be dissatisfied with the courts and to prefer institutions that are speedy, cheap, and more approachable."

329. See Honeyman, *supra* note 280. Honeyman describes three categories of bias: personal, situational and structural. Honeyman calls "the tendency for the process to favor a quick or easy way out instead of a real and enduring solution" a form of bias. *Id.* at 145.

330. Deborah M. Kolb & Jeffrey Z. Zubin, *Mediation Through a Disciplinary Prism*, in HANDBOOK OF NEGOTIATION RESEARCH 244 (Max H. Bazerman, Roy J. Lewicki & Blair H. Sheppard eds.), stating:

Many of the cases channeled into mediation are ones that are labeled 'interpersonal disputes' . . . Critics argue that when violence against women, neighborhood quarrels, and landlord tenant disputes are channeled into mediation, these issues are reduced to

uncooperative. By this reasoning, those choosing not to participate³³¹ in mediation (which is presented as voluntary), are often stigmatized as adversarial.³³² Many believe the “opportunity” to mediate should be mandated by the court.³³³ Critics maintain that pressure to mediate, to dissuade parties from using more adversarial processes,³³⁴ is an abandonment of the hard-won political struggle to petition the courts for redress when rights are at stake.³³⁵

The similarity in the reform movements of the late nineteenth and mid-twentieth centuries³³⁶ is the claim that informal processes would increase community³³⁷ involvement and keep conflicts in the community from becoming social crises.³³⁸ Concerns about loss of individual rights in

individual problems that ignore and depoliticize their social and economic causes. By individualizing these matters, there is less possibility for collective action or systemic change.

331. See Pavlich, *supra* note 200, at 710, stating that “[i]n proponent’s formulations mediation emerges as a means of empowering individual disputants to free themselves of the state’s tutelage . . . It provides, they argue, an opportunity for individuals to reclaim control over conflict resolution by choosing a settlement process that requires—rather than thwarts—their active participation.”

332. See Silbey, *supra* note 66, at 352, stating that “[t]he routine recourse to mediation creates a bias against those who do not participate, with the result that they are often negatively characterized and thus stigmatized as adversarial by those who rely on mediation to resolve a good share of the dispute caseload.”

333. See Harrington & Merry, *supra* note 20 at 721, stating that “[l]eaders in the service delivery project have begun to rethink the role of voluntary participation in the mediation movement, as a result of the low caseloads in mediation programs . . . The incentives that have been proposed and established in a number of jurisdictions make mediation mandatory for certain types of cases.”

334. See Abel, *supra* note 17, at 8 stating that “[i]nformalism represents an attempt by the dominant classes to impute wishes to the dominated so that the *former* can enjoy speedy, inexpensive access to authoritative courts from which the *latter* have been excluded.”

335. See HARRINGTON, *supra* note 12, at 173, stating that “[t]he alternatives movement seems to have abandoned an important resource and arena for political struggle—rights and courts . . . By turning to diversion or an alternative justice system, we move away from rights as a politics resource to the politics of consensus building outside or in the shadow of legal institutions.”

336. See *id.* at 68-69, stating that “delegalization reform in both periods is an attempt to expand the judicial capacity of courts and court-related institutions to manage minor disputes through the use of informal procedures, mediation and arbitration.”

337. See Wildman, *supra* note 104.

338. See HARRINGTON, *supra* note 12, at 31, stating that “[r]eformers maintain that a proactive dispute process will redress the crisis with court capacity for two reasons: (1) it increases community involvement in the management of everyday conflicts, and (2) it absorbs the mass of unresolved conflicts before they turn into bigger problems.”

mediation,³³⁹ are compounded in critiques of the impact of mediation on the community.³⁴⁰ In their claims to serve the community³⁴¹ by promoting harmonious relationships,³⁴² informal processes may in fact be preventing communities from looking at ways to take collective action.³⁴³ By addressing conflict as an individual problem and offering solutions for individuals, the socio-political content of conflict is removed.³⁴⁴

3. Diversion away from litigation, toward cooperation, without reference to hard won legal rights, undermines those seeking justice

The conception of mediation as an alternative to the legal system, rather than an option within it,³⁴⁵ thus creates an obstacle to a discourse about mediation that would include the law as a resource for individuals and oppressed groups seeking equality.³⁴⁶ Presentation of informal legal processes as preferable to formal ones undermines deeply held American beliefs in the right to seek justice,³⁴⁷ a fundamental promise of

339. See Cobb, *supra* note 90, at 411-12, stating that “while rights construct the relation between self and community, their reformulation into needs disintegrates that community, as actions that were obligated within a normative frame are reframed as actions that please or appease an individual.”

340. See HOFRICHTER, *supra* note 14, at xiv, stating that “NDR falsely affirms the neighborhood as the basis of justice in the community . . . it presents an idea of community and collective self-help that is contrived, uses community culture against itself as a form of regulation and, by its presence, distracts attention from broader community issues.”

341. See AUERBACH, *supra* note 9, at 134-35, stating that “[t]he new urban mediation alternatives contradicted virtually every prerequisite for informal justice that comparative anthropology and American history provided. Communities played no role in their design or implementation.”

342. See *id.* at 117-18, stating that “[a]fter 1968, when simmering rage exploded in urban ghettos blighted by poverty and racism, the justification for alternatives quickly shifted. Informal mediation was now promoted as ‘an alternative to violence,’ designed especially to coax civil rights activists and their angry ghetto constituencies from the streets to quieter sanctuaries.”

343. See Abel, *supra* note 17, at 9, noting “[i]nformal justice claims to be a ‘community’ institution, but the residential community it serves is usually just the figment of some reformer’s imagination. Indeed, by individualizing conflict and facilitating exit from relationships, informal institutions undermine community rather than create or preserve it.”

344. See *id.*, stating that:

To the extent that class issues can be reduced to interpersonal ones, conflicts will be handled in some form. All other conflict must be managed by being translated into technical issues devoid of political content and isolated from more profound struggles or antagonisms that transcend the individual or limited group.

345. See Oberman, *supra* note 148, at 801.

346. See AUERBACH, *supra* note 9, at 145, stating that “[l]egal institutions may not provide equal justice under law, but in a society ruled by law it is their responsibility.”

347. See SCHEINGOLD, *supra* note 95, at 3, stating that “[t]he law is real, but it is also a figment of our imaginations. Like all fundamental social institutions it casts a shadow of popular belief that

democracy.³⁴⁸ When mediation operates as a diversion from seeking justice, it perpetuates the acquiescence of those who have historically sublimated their grievances.³⁴⁹ The shift away from legal principles and “bright line” legal rules in mediation has meant that placing blame and finding fault is seen as adversarial.³⁵⁰ In no-fault divorce cases, for example, the family is viewed as a closed system in which all members are held responsible for what happens within it.³⁵¹

Mediation thus buries ‘right’ and ‘wrong’ beneath the ideals of ‘participation’ and ‘conflict resolution,’³⁵² and personalizes disputes, so that the actions of one party toward another become a shared psychological problem.³⁵³ When the discourse on “participation” and “conflict resolution” silences the discourse on rights,³⁵⁴ the law disappears as the reference point.³⁵⁵ As long as mediators perpetuate the court agenda behind informal justice,³⁵⁶ there can be no “reflection” on how mediation impacts the

may ultimately be more significant, albeit more difficult to comprehend, than the authorities, rules, and penalties that we ordinarily associate with law.”

348. See *id.* at 37, stating that:

The myth of rights, in sum, encourages the view that the United States Constitution is a beneficent document which is in large measure responsible for both our affluence and our domestic tranquility. Our constitutional order is said to be responsive to reason rather than power, to promote the public interest, and to nurture change within a reassuring framework of continuity.

349. See *id.* at 132, stating that “[o]ne of the primary obstacles to social change is the acquiescence of the oppressed.”

350. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1548, 1560 (1991), stating that:

The informal law of the mediation setting requires that discussion of principles, blame, and rights, as these terms are used in the adversarial context be deemphasized or avoided. Mediators use informal sanctions to encourage parties to replace the rhetoric of fault, principles, and values with the rhetoric of compromise and relationship.

351. See *id.* at 1561.

352. See Cobb, *supra* note 90, at 430.

353. See *id.*

354. See *id.* at 414, stating that “[w]hen violence is domesticated, the morality of mediation itself frames the interpretation of action—‘right’ and ‘wrong’ are subsumed by the ideals of ‘participation’ or conflict resolution. Conversely, when it is not domesticated, rights are maintained in the discourse.”

355. See *id.* at 399, stating that “[w]herever victims are disappeared, silence invariably supports the existing regime, legitimates those who silence victims, and undermines the rule of law itself.”

356. See HARRINGTON, *supra* note 12, at 12, stating that “[i]nformal procedures are idealized as nonadversarial, rehabilitative, and preventative methods for resolving conflict.”

communities it purports to serve.³⁵⁷ Only if and when mediators and the public recognize the role of informal processes as they actually exist among a range of legal options, will the decision of the parties to choose ADR, truly be based on self-determination.

C. Mediation is De-Professionalized Through Use of Volunteers, While at the Same Time it Promises Quality of Service

The remaining obstacle to a comprehensive discourse on mediation is the tension created between the promise to provide quality of service, and the reality of overseeing a large volunteer mediator pool spread throughout a state. Again using Virginia as an example, keeping track of certified mediators and the cases being mediated, the mentorship process, and all trainings statewide, is already a daunting task.³⁵⁸ New mediators are mentored through the certification process³⁵⁹ by experienced mediators, primarily through community mediation centers. Though mentors *may* charge for mentoring services, it is often done without compensation, maintaining the number of certified mediators statewide, at approximately 1000. Once a mediator is certified, oversight comes primarily from evaluations filled out by the parties. If a mediator gets a poor evaluation, the Office of Dispute Resolution will contact the mediator to find out what her

357. See Tim Hedeem & Patrick Coy, *Community Mediation and The Court System: The Ties That Bind*, 17 *MEDIATION Q.* 351, 355-56 (2000), stating that:

The current state of relations between community mediation and the justice system raises a number of concerns regarding the integrity and viability of mediation. With the high proportion of community mediation programs' caseloads and funding coming from the court system, many programs may find themselves in tenuous, if not compromising positions.

Hedeem and Coy name six areas of concern, the last of which (but not least) is "the loss of focus on 'community' in community mediation." *Id.* at 356.

358. See Office of the Executive Secretary, *DRS Explores Quality Assurance Initiatives*, *supra* note 300, at 1, stating that "[i]n an effort to ensure the quality and competency of mediators that provide services in court-referred matters, the Judicial Council adopted Guidelines for the Training and Certification of Court Referred Mediators, Guidelines for the Certification of Mediation Training Programs, Standards of Ethics, Grievance Procedures, and Client Evaluations."

359. See Office of the Executive Secretary, *Membership Guidelines*, *supra* note 72.

perspective is—but concrete remedies short of revoking certification³⁶⁰ are non-existent.³⁶¹

In 2003-05 the Virginia Association of Community Conflict Resolution (VACCR) and the Virginia Mediation Network (VMN) initiated a Mediation Peer Consultation program to address the court's concerns about quality assurance in mediation.³⁶² The program was to be run through mediation centers, by volunteer facilitators, at no cost to (voluntarily) participating mediators.³⁶³ The Mediation Peer Consultation program continued to use a generic concept of mediation.³⁶⁴ There was no attention given to how a facilitator who uses one *style* would supervise a mediator who uses another. In keeping with reflective mediation concepts, there was no reference to any *model*. Rather, each mediator would learn to use the process for his own inner awareness.³⁶⁵ Thus, in joining with the court in the effort to provide high quality mediation services, many respected scholars and mediation

360. See Caroll E. Dubuc, *Credentialing for Mediators: Will One Size Fit All?*, RESOLUTIONS: A QUARTERLY UPDATE ON DISPUTE RESOLUTION, Jan. 2005, at 10, available at <http://www.courts.state.va.us/drs/resolutions/january2005.pdf>, asserting that “maintaining the quality of mediators with an available sanction of de-certification by the same Supreme Court which admits lawyers is a positive element.”

361. See Waldman, *The Challenge of Certification*, *supra* note 24, at 724, stating that “identification of the criteria by which qualified mediators may be distinguished from charlatans has proven elusive.”

362. See Dubuc, *supra* note 360, at 9, noting that “[t]he VMN had previously conducted a one-day colloquium on quality and credentialing in 2002, and last year at its annual meeting it had an extended session on credentialing with panelists who were in the administrative functions for credentialing in three fairly sophisticated state programs in Florida, Texas and Georgia.”

363. Mediator Peer Consultation Workshop, Charlottesville, Va. (June 30, 2005) (unpublished PowerPoint presentation, on file with the author). The project was a joint venture of VACCR and VMN with the goals of providing a “Low-cost sustainable mechanism for developing mediator competency.” *Id.* In the stages of mediator development, (based on Lang’s model) they list in ascending order: “Novice, Apprentice, Practitioner, Artist.” *Id.*

364. See Della Noce, Bush & Folger, *supra* note 45, at 43, stating that “[t]he mythic world of mediation is one in which one practitioner of the art is pretty much like another in regard to motives and orientation to the role.”

365. Judy Cohen, *Reflective Practice: How Veterans Can Benefit from Rookie Training*, 21 ALTERNATIVES, Mar. 2003, 43, available at <http://www.mediate.com/articles/cohen5.cfm?nl=25>, stating that:

Reflective practitioners are attuned to their reactions and can articulate what is behind gut feelings or intuition in order to carry out effective interventions. They can anticipate the unexpected. The reflective mediator goes further by thinking carefully through a range of process options while contemplating interventions to make in mediation. Reflective practitioners have brought their practice to a deeper level.

practitioners further the de-professionalizing³⁶⁶ of mediation, continuing to use words that define differences as *style* or *artistry*, or choosing to ignore the issue altogether.

VI. CHANGING THE DISCOURSE

A. Changing the Discourse Would Further Transparency

Several major changes would need to occur in order to shift the current discourse towards an accurate identification of differences in mediator practices. The first is to raise awareness of mediators and the public regarding the use of “informal” processes to deflect criticism from the court, thus recognizing context and content of the court’s agenda. The second is to address the contradictions in administering and assuring quality of mediation primarily delivered by volunteers.³⁶⁷ The third is to change both the language and practice regarding mediator differences from *styles* to *models* through revamping of training.³⁶⁸ Training that reflects the theoretical basis of each model and the norms each references would produce greater transparency which in turn, supports party self-determination. Transparency about mediation models as well as information about the range of legal options, would counter the prevailing notion that conflict itself is undesirable,³⁶⁹ which has discouraged demands for justice.

366. See Silbey, *supra* note 66, at 349, noting that “[s]ocial scientists . . . use the term ‘profession’ with self-conscious specificity to denote a formally associated, self-regulated occupation with a technical, expert knowledge base that makes claims to serve public and ethical goals.”

367. See Harrington & Merry, *supra* note 20, at 719, stating that:

The legal profession and the government have provided resources for building programs compatible with the service delivery project. These reformers speak about community justice in terms of expanding ‘access to justice’ . . . through the establishment of mediation programs that train lay citizens to be mediators and provide this service in their communities

368. See Waldman, *The Challenge of Certification*, *supra* note 24, at 728, stating that “to rely on prevailing levels of theoretical naivete to justify training that perpetuates this lack of sophistication appears illogical and unwise.”

369. See Sarat, *supra* note 73, at 700 which notes that “Goldberg, Green, and Sander seem to see disputes as problematic in and of themselves, as socially undesirable events. They see disputing as pathological, not as indicative of emergent political struggles for valued ends or as symptomatic of deeper social problems requiring structural change.”

B. Lack of Attention to Theory Results in Creation of “Lay” Theories

Mediation is criticized for lacking a theoretical base.³⁷⁰ Some scholars acknowledge that differences may be due to prior professional training³⁷¹ or philosophies.³⁷² However, most mediation training gives little attention to theory.³⁷³ Emphasis in training is on developing skills or techniques³⁷⁴ such as: *active listening, empathy, negotiation*; or on using tools: *guidelines, caucuses, agreements to mediate*; and learning strategies: *clarification of issues, shifting awareness, reality testing*. But there is rarely a discourse on “the when and why,”³⁷⁵ on what causes conflict and therefore what would resolve it. When there is no specific theory, human beings will develop their own, as ‘lay theorists’³⁷⁶ in order to act. Michael Lang explains that theories “act like lenses. They help us to filter experiences, interactions, communications and behaviors and out of them to construct meaning.”³⁷⁷ And how “[w]ithout theory, we are like a sailboat without a keel, blown away by the wind”³⁷⁸

Lack of attention to theories of what causes and resolves conflict results in defining mediation as a series of techniques or instruments.³⁷⁹ Without a

370. See Scimecca, *supra* note 91.

371. See Andrew I. Schwebel, David W. Gately, Maureen A. Renner & Thomas W. Milburn, *Divorce Mediation: Four Models and Their Assumptions About Change in Parties’ Positions*, 11 MEDIATION Q. 211, 214 (1994), asserting that “at least four different divorce mediation models can be identified (with many divorce mediation approaches falling under each): the legal model, the labor management model, the therapeutic model, and the communication and information model.”

372. See Menkel-Meadow, *supra* note 124, at 223, stating that “[d]ifferences in philosophies about purpose (achieving ‘justice,’ reducing the pain, promoting public participation and community control) have concrete effects on techniques chosen.”

373. See Lang, *supra* note 78, at 5.

374. See BUSH & FOLGER, *supra* note 22, at 45, stating that “there is a strong interest in identifying and implementing techniques that can help individual mediators achieve settlements and generate party satisfaction, which are seen as the main goals of the process.”

375. See Della Noce, Bush & Folger, *supra* note 45, at 41-42, stating that “[w]ithout such explanation, practitioners lack grounded guidance for their interventions, and the mediation process is open to many criticisms.”

376. See *id.*, stating that “mediators, like all other social actors, are ‘lay theorists’—people with their own vocabularies, frames of meaning, interpretive schemes and resources, and explanations for their social worlds and activities.”

377. Lang, *supra* note 78, at 7.

378. *Id.* at 5.

379. See Della Noce, *supra* note 18, at 553-54, noting:

Even before the Pound Conference, there had been little attention paid to explaining mediation as an independent and unique social process, built on a particular set of values,

theoretical framework to reference, mediators create their own.³⁸⁰ These “lay theories” are based on the mediator’s experience and perspective.³⁸¹ While these borrowed or created theories attempt to make up for the lack of theory specific to mediation, they are inadequate to provide accurate information on the decisions mediators make and why they make them.³⁸² Defining mediation as *artistry* or naming *styles* based on strategic decisions (i.e. to evaluate or facilitate), avoids addressing the theories of conflict on which the strategic and tactical decisions are based.³⁸³ If a mediator’s theory of what causes conflict underlies the choice of strategies and tactics to resolve it,³⁸⁴ then an analysis that focuses on the theory of conflict and names *models* based on these theories, would put to rest the mythology of generic mediation and its attribution of differences to *style* or *artistry*.³⁸⁵

to achieve particular social goals through the grounded practices of third parties. After the Pound Conference, the lack of a distinct and coherent theoretical basis for the mediation process very likely contributed to the ease of instrumentalizing the process.

380. See Della Noce, Bush & Folger, *supra* note 45, at 42, asserting that:

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

381. See *id.*, stating that “[a]s mediators interact with the parties during the course of the mediation process, they constantly draw upon their preferred theoretical frameworks—whatever the source—to interpret the unfolding interactions and to make choices about when and how to intervene based upon their interpretations.”

382. See *id.* at 47, stating that:

[S]eparately or together, they [borrowed theories] provide an insecure foundation for mediators. They fail to encourage a serious examination of the reality that mediator practices can and do influence parties’ conflict, the questions of what kinds of influence are appropriate and why, the nature of differences in mediators’ motives and orientations, and how different underlying ideologies shape mediators’ goals

383. See Cobb, *supra* note 79, at 3, asserting how:

[G]uidelines for mediation practice are murky and filled with vagaries and paradoxes: mediators must manage the *process* (in discourse) but must not impact the *substance* of the dispute. This distinction between content and process in communication is central to the existing rhetoric and assumptions about ethical practice. Yet, from a poststructural perspective, the content of the dispute is constructed through discourse processes, and in turn, those processes are a function of the content of the dispute.

384. See Della Noce, Bush & Folger, *supra* note 45, at 41-42, stating that:

If ‘theory’ is understood as ‘the when and why’ of intervention, it is apparent that mediators must have a theory underlying their practices, no matter how naive or obscured . . . even if not drawing upon articulated scholarly frameworks for mediation practice, mediators can and do actively construct their own theoretical frameworks to give meaning and order to their work.

385. See Waldman, *The Challenge of Certification*, *supra* note 24, at 728, stating that “[o]ne might further object that the field is not sufficiently reflective about the models it employs and their appropriate uses to require that neophyte mediators be trained in and tested on this knowledge.”

C. *The Set of Norms Referenced Informs the Mediator's Choice of Interventions*

Waldman defines social norms as “those principles and standards that have attained consensus status in society.”³⁸⁶ She defines legal norms as “principles and standards encoded in the law.”³⁸⁷ Mediators trained in the norm-generating *models* have, for the most part, been reluctant to introduce information into mediation. However, critics argue that use of a process that in many instances excludes attorneys and that views demands for legal rights as adversarial, places the less powerful and less informed parties at a disadvantage.³⁸⁸ The theory behind the norm-educating *models* holds that parties’ autonomy is enhanced by having all necessary information, thereby making informed decisions.³⁸⁹ In norm-educating *models* information about protective norms³⁹⁰ is offered during mediation so that no party would make a decision in which they might forfeit entitlements, because they were unaware of their existence.³⁹¹ In norm-advocating *models*, legal and ethical norms create the framework for negotiation. The mediator’s role is to safeguard or advocate for inclusion of social and/or legal norms and values in the agreement.³⁹² Although a discussion of how to determine which *model* best serves the parties in any given situation is beyond the scope of this article, it is important to reiterate that Waldman’s categories, even the norm-advocating *model*, do not include evaluation of the probable outcome in court.

D. *“Reality Testing” is an Example of Referencing Norms*

“Reality testing,” a term that is often cavalierly used, is in fact a reference to social/political norms. “Reality testing” has generally been talked about as one of the tools in a mediator’s “bag of tricks.” For example,

386. Waldman, *Identifying Social Norms*, *supra* note 24, at 708.

387. *See id.*

388. *See id.* at 725 n.86, stating that “Richard Delgado and colleagues . . . conclud[e] that informal dispute resolution is likely to disadvantage racial and ethnic minorities.”

389. *See* Weckstein, *supra* note 159, at 503, stating that “[t]he key to self-determination is informed consent. A disputant who is unaware of relevant facts or law that, if known, would influence that party’s decision cannot engage in meaningful self-determination.”

390. *See* Waldman, *Identifying Social Norms*, *supra* note 24, at 738, stating that “‘protective norms’ . . . serve to protect one (or both) of the parties from exploitation or abuse.”

391. *Id.* at 739.

392. *Id.* at 745.

by referencing the expense and unpredictability of court, many mediators strive to keep parties in negotiation and urge them to reach settlement. However, the strategy of reality testing is dangerously vague³⁹³ and without Waldman's framework which makes the norms referenced explicit, it functions as yet another loophole for bias. Using Waldman's categories, in the norm-educating and norm-advocating *models*, mediators will reference the law and other social norms, thus resolving some aspects of the issue of bias by making certain biases transparent.³⁹⁴ Best practices for mediators—even those who are attorneys—still would not sanction referencing what a judge might decide. Parties would understand the *model* of mediation to which they are consenting prior to signing the agreement to mediate, and would therefore be granting permission for the form of reality testing the mediator will use. The norm-generating mediation *models* would not reference the law once the agreement to mediate is signed, since parties have agreed that they wish to reference their own values and norms.

E. Waldman's Categories Offer a Basis for Training and Evaluation of Mediators

Many mediation skills and standards are difficult to decipher and put into practice, without clarity about the *model* used and the norms referenced. Waldman, in discussing a bill voted down by the California legislature, lists a series of skills mediation trainees are expected to demonstrate: "(1) Explaining and administering the process. (2) Facilitating the flow of communication. (3) Empowerment of the parties. (4) Active listening. (5) Ethical behavior. (6) Organization of the issues. (7) Conflict analysis. (8) Developing options with the parties. (9) Managing negotiation. (10) Strategy planning. (11) Use of neutral language."³⁹⁵ Implementation of these skills varies significantly according to what *model* is used. As long as the mediation profession continues to assume that the only true mediation is the generic problem-solving *model*, or by default declares that all mediation is eclectic, there is little chance to distinguish among models and therefore no real self-determination of parties. Without the option of norm-educating and norm-advocating *models*, mediation continues to reinforce the notion that all disputes are interpersonal, obscuring reference to any social

393. See Waldman, *The Challenge of Certification*, *supra* note 24, at 751, stating that "considerable unclarity surrounds the mediator's role as the agent of reality."

394. See Moreno, *supra* note 190, at 2, stating that "[m]ediators may argue that because they are not the ultimate decision makers in a mediation, they do not need to be aware or even recognize their biases. However, in not recognizing their own biases and acknowledging that they are susceptible to biases, they are creating barriers to resolving conflict."

395. Waldman, *The Challenge of Certification*, *supra* note 24, at 752.

norms.³⁹⁶ Without identifying real differences in *models*, training of mediators fails to address the wide range of processes available to consumers, thereby allowing mediators' biases to continue to operate under the radar screen.

F. End Mediator Confusion by Recognizing the Agenda of Social Control

Confusion about³⁹⁷ and resistance to identifying differences based on the norms or values³⁹⁸ being referenced and the theories of conflict resolution underlying the different *models*³⁹⁹ has proved to be substantial.⁴⁰⁰ Such resistance prevents mediation from taking its place among the other professions,⁴⁰¹ as it fails to address claims of critics who charge that court "support," although providing free or low-cost mediation,⁴⁰² carries a hidden (or not so hidden) agenda of social control.⁴⁰³ Social control⁴⁰⁴ is apparent

396. See *id.* at 754.

397. See *id.* at 729, noting that "[u]nfortunately, each classification system utilizes different terminology and charts the contrasts between mediation models along different axes. As a result, these efforts at clarification enrich our vocabulary but create a backwash of confusion."

398. See THE AMERICAN HERITAGE COLLEGE DICTIONARY, *supra* note 231, at 948, defining "norm" as "[a] standard, model, or pattern"; *Id.* at 1514, defining "value" as "[a] principle, standard or quality considered worthwhile or desirable."

399. See Scimecca, *supra* note 91, at 212, stating that "[a]lthough there are many comprehensive theories of conflict, theories of conflict resolution are few and far between."

400. See Della Noce, Bush & Folger, *supra* note 45, at 58, stating that "the clarification of value-based theoretical distinctions in the field is fundamentally threatening because, ironically enough, the field of mediation does not yet have the capacity to deal constructively with difference."

401. See Scimecca, *supra* note 91, at 211, stating that "those who practice ADR will not become true professionals until ADR incorporates a theoretical base to undergird its practice."

402. See Abel, *supra* note 17, at 5, stating that "[i]nformal processes appear to be less expensive than formal, since the costs of legal institutions are largely attributable to personnel and informal institutions replace highly paid professional with low-paid or volunteer lay persons or paraprofessionals."

403. *Id.* at 6, stating that:

Informal institutions allow state control to escape the walls of those highly visible centers of coercion—court, prison, mental hospital, schools—and permeate society. In place of mechanisms of confinement and exclusion (which, by definition, are spatially delimited) they substitute processes of penetration and integration that are dispersed and all-encompassing.

404. Social control can be subtle, but is often evident in the language used to define a problem. Mediators, especially in serving the court, use language to establish the legitimacy of the process and their individual authority. See EDELMAN, *supra* note 8, at 75, noting how "[t]he helping professions are the most effective contemporary agents of social conformity and isolation. In playing this political role they undergird the entire political structure, yet they are largely spared from self-

in the promotion of mediation as a way to “manage” conflict.⁴⁰⁵ Social control operates in mediation by removing political content from a dispute, making the conflict interpersonal and individual, thus disconnecting parties from community.⁴⁰⁶ The message conveyed is that conflict itself is bad,⁴⁰⁷ and the remedies to preempt further disruptions⁴⁰⁸ are compromise and cooperation.⁴⁰⁹

VII. CONCLUSION: A CHALLENGE TO DEFINE MODELS

A. Do Not Build a House Without a Blueprint

Asking what *model* will be used (thinking of a *model* as a blueprint, as if for building a house) makes sense, if we wish to build the house we want. We can build a house without a model or blueprint, but there would be no way of knowing how it would turn out. A proposal to name mediation models that explains how we think about what we do, cannot be dismissed because it will be more difficult for the courts to provide oversight or too incomprehensible for parties to grasp.⁴¹⁰ Such arguments are ultimately self-serving and circular, perpetuating the invisibility of the court and the law and the hidden influences of the mediator’s bias on the parties’ conflict.⁴¹¹ Acknowledging mediator influence inherent in each *model*

criticism, from political criticism, and even from public observation, through special symbolic language.”

405. The terms “conflict management” and “conflict resolution” are often used interchangeably. However, the meanings are entirely different. See THE AMERICAN HERITAGE DICTIONARY, *supra* note 231, at 839, defining “manage” as “to direct or control the use of”; *Id.* at 1184, defining “resolve” as “[t]o make a firm decision about” or “[t]o cause (a person) to reach a decision.”

406. See HOFRICHTER, *supra* note 14, at xxv, noting that:

To the extent that class issues can be reduced to interpersonal ones, conflicts will be handled in some form. All other conflict must be managed by being translated into technical issues devoid of political content and isolated from more profound struggles or antagonism that transcend the individual or limited group.

407. See Sarat, *supra* note 73.

408. See HOFRICHTER, *supra* note 325, at xxiv-xxv.

409. See Fineman, *supra* note 16, at 732, discussing how mediation rhetoric has redefined conflict in divorce:

The dominant rhetoric no longer describes divorce as a process that terminates the relationship between spouses, establishing one as the custodial parent with clear responsibilities. Rather, divorce is now described as a process that, through mediation, restructures and reformulates the spouses’ relationship, conferring equal or shared parental rights on both parents although one, in practice, usually assumes the primary responsibility. . . .

410. See Stemple, *supra* note 289, at 384.

411. See Della Noce, Bush & Folger, *supra* note 45, at 57.

supports empowerment of parties as opposed to the use of the words *style* or *artistry*, which fail to give accurate information about what the mediator will or will not do. Information about the model and other ADR processes would reduce the potential for coercion in mediation to make confessions⁴¹² and concessions.⁴¹³

B. Research Findings Link Mediator Influence to Social Norms

On the surface the efforts to humanize the courts⁴¹⁴ and to make informal legal remedies accessible to the citizenry, appear to be benign. However, many argue that what is getting lost in pursuit of settlements is the exercise of hard won legal rights.⁴¹⁵ Others claim that mediation does not challenge the traditional view of law, but by claiming to deliver *neutrality*, actually maintains the “objectivist” paradigm.⁴¹⁶ Presentation of mediation as a generic process in which differences are attributed to the personal *style* or *artistry* of the mediator, may serve the court in maintaining an ongoing pool of mediators who are seen as interchangeable with one another. However, continuing to present mediation as a generic process, using the terms *artistry* and *style* to connote differences, does not acknowledge the

412. See Pavlich, *supra* note 200, at 723, stating that “the mediators try to extract and fashion particular sorts of confessions by constantly probing for information, rephrasing issues, praising or castigating confessors—all of which are directed at dispute settlement.”

413. See CONLEY & O’BARR, *supra* note 3, at 40, stating that “in the cooperative ambience of the mediation session, people with strong legal and moral claims may be induced to let down their guard and make concessions that are neither required by law nor consistent with their interests.”

414. See Harrington, *supra* note 201, at 51, stating that “[s]ocial workers and psychologists provided new resources for handling juveniles and linked courts to social agencies. The state, represented by probation and parole officers, was cast in the role of ‘friend,’ helping poor and working-class immigrant children to become socialized or ‘Americanized.’ Both developments rendered the courts more interventionist.”

415. See HARRINGTON, *supra* note 12, at 78, stating that “[c]onsumer and public interest groups shared this concern: access to *equal* justice may conflict with the other two goals of promoting harmony and maintaining public order”; See also HOFRICHTER, *supra* note 14, at xv, noting:

Ironically, it [NDR: Neighborhood Dispute Resolution] arose at a time of growing rights consciousness in the late 1960’s and early 1970’s—women’s rights, environmental rights, children’s rights, and, in general, person over property rights. This latest emergence of NDR comes amid new social movements that cannot be contained by the formal legal system.

416. See Janet Rifkin, *Mediation From a Feminist Perspective: Promise and Problems*, 2 LAW & INEQ. 21, 23 (1984), stating that “what is not yet known is whether in practice, mediating disputes reflects feminist jurisprudential differences from the male ideology of law or whether mediating simply reinforces the ‘objective epistemology’ of law.”

research findings and scholarship that link mediator influence to “fundamental social values and preferred moral order.”⁴¹⁷ As Kolb found in relation to corporate-labor mediation: “[M]ediators are not passive actors within the system, and the more they share its ideology, the more likely it is that they will, sometimes unwittingly, mobilize or accentuate the biases that already exist in the system.”⁴¹⁸

C. Who is Benefiting From the Current Discourse on Mediation?

Thus, we are left to ponder the question, who is benefiting from the current discourse? Perhaps the court benefits in alleviating some case volume, or enhancing court revenues⁴¹⁹ by obtaining free or low-cost services, or by offering what seem to be alternatives to formal processes. The individual parties using mediation primarily express satisfaction,⁴²⁰ and may likely be saving money in court costs and attorneys fees. The public is satisfied by the quick fix, exemplified in high settlement rates.⁴²¹ Mediators continue to willingly offer their services despite paltry levels of remuneration. So everybody is happy. It is a win-win solution.

Yet the “red flag” goes up when there is subtle (or not so subtle),⁴²² coercion to be cooperative and conciliatory,⁴²³ thus calling into question

417. See Della Noce, Bush & Folger, *supra* note, 45 at 57.

418. KOLB, *supra* note 37, at 164.

419. SUPREME COURT OF VIRGINIA, STATE OF THE JUDICIARY REPORT (2005), http://www.courts.state.va.us/reports/2005/state_of_the_judiciary_report.pdf. Chief Justice Hassell stated that Virginia’s Judiciary System collects over 1.2 billion dollars annually for the Commonwealth. *Id.*

420. See Office of the Executive Secretary, *Statistical Mediation Information*, *supra* note 296, which shows that 93% of parties found mediation helpful, 90.7% would use mediation again, 94.1% would recommend it to others and 83.7% reached agreement.

421. See Della Noce, *supra* note 18, at 550-51.

422. See Fineman, *supra* note 16, at 767-68, asserting that “by branding opposition to mediation and joint custody as the manifestation of a psychological problem to which mediation is itself the solution, mediation rhetoric forecloses any effective expression of women’s legitimate concerns.”

423. While mediation is still voluntary in most states, there are hidden coercions to mediate. For example, in determining custody, the deciding judge must refer to the factor #7 in the Virginia statute. VA. CODE ANN. § 20-124.3 (2008). That factor requires the court consider: “The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child.” See also Fineman, *supra* note 16, at 766, noting how:

One of the most harmful assumptions underlying social workers’ discourse is that a parent who seeks sole custody of a child has some illegitimate motivation . . . the general assumption is that the parent who is willing to live up to the ideal of shared custody and control is the one with the child’s real interests at heart.

mediator practices.⁴²⁴ Critics maintain that the attention on informal or alternative processes, is a distraction from holding the court accountable to be accessible and to dispense justice.⁴²⁵ Using words such as *neutrality*, *impartiality*, *self-determination*, *fairness*, and *good faith* in a context that substitutes cooperation for legal rights,⁴²⁶ makes these ideals not only meaningless, but potentially poisonous.⁴²⁷ The promise of mediation to be: “an informal process in which a neutral third party with no power to impose a resolution helps the disputing parties try to reach a mutually acceptable settlement,”⁴²⁸ is suspect when critiqued by an analysis that looks at communication as “symbolic, relational and highly political.”⁴²⁹

D. Reality Testing About Mediation: It Is Necessary to Name Models in Order to Fulfill the Mandate of Self-Determination of the Parties

The critics point out the contradictions between the promise of mediation and the actuality. Let’s do some *reality testing* about mediation. Naming specific *models* based on differing theories of what causes and resolves conflict and identifying the norms each model references, would make the process choices visible,⁴³⁰ understandable, and clear to mediators and parties. Training and mentoring that clarifies, compares, and differentiates among mediation *models*⁴³¹ and explains other dispute

424. See Della Noce, *supra* note 18, at 552.

425. See HARRINGTON, *supra* note 12, at 78, quoting the Director of Legal Services Corporation Thomas Ehrlich: “[T]here is a danger, which we have seen, that the new forums will become institutionalized screening mechanisms for moving cases out of the court system instead of attempts to deliver justice with better results and greater access by the public.”

426. See CONLEY & O’BARR, *supra* note 3, at 46, stating that “in her book *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (Fineman 1991), Fineman characterizes the recent history of divorce law as a successful struggle by the ‘helping professions’ (social workers and various kinds of therapists) to substitute their discourse for that of the law.”

427. See VICTOR KLEMPERER, *THE LANGUAGE OF THE THIRD REICH* 14 (Martin Brady trans., Continuum 2006) (1957), stating that “[w]ords can be like tiny doses of arsenic: they are swallowed unnoticed, appear to have no effect, and then after a little time the toxic reaction sets in after all.”

428. See BUSH & FOLGER, *supra* note 22, at 2.

429. Cobb, *supra* note 79, at 89.

430. See Moffitt, *supra* note 161, at 8, noting:

The gap between what a mediator *explains* to the parties and what she tries to *do* with, to or for the parties is often wide. This reluctance towards transparency is reflected both in the existing prescriptive mediation literature and in the current lack of descriptive research focusing on this question.

431. See Oberman, *supra* note 148, at 821 n.198.

resolution processes⁴³² would prevent further misconceptions about and misrepresentations of the available processes. Such training and mentoring would give mediators a way to fulfill the requirement of insuring self-determination of the parties.⁴³³ Rather than promoting a “one size fits all”⁴³⁴ or “one-stop-shopping”⁴³⁵ process, mediators would thus support parties in determining whether they would be better served as individuals or groups, by a specific mediation *model*, another dispute resolution process, or by exercising their right to be heard in court.

432. See VA. CODE ANN. § 8.01-576.4 (2008) (“Scope and Definitions”). In defining “Dispute Resolution proceeding” the statute names “mediation, conciliation, early neutral evaluation, nonjudicial settlement conferences” and also allows for “any other proceeding leading to a voluntary settlement conducted with the requirements of this chapter.” *Id.* Yet very few mediators are familiar with other processes besides litigation and it would very likely be rare to find a mediator who would discuss all these options with parties in the orientation, or to find this emphasized in mediation trainings.

433. See Oberman, *supra* note 148, at 818.

434. See Dubuc, *supra* note 360.

435. See Stemple, *supra* note 2, at 384.