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INTRODUCTION: COURT-CONNECTED MEDIATION IN FLORIDA

Over the past twenty-five years, the state of Florida has been recognized across the United States as a leader in the development of court-connected[1] alternative dispute resolution programs. Mediation, in particular, has flourished across the state, with one hundred eleven programs in place in family,

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1. We are using the term "court-connected" to include, "any program or service, including a service provided by an individual, to which a court refers cases on a voluntary or mandatory basis, including any program or service operated by the court." This usage includes "court-annexed" and "court-referred" mediation. NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS IV.

civil, community, and dependency sectors.[2] There are now over five thousand certified mediators working in Florida court-connected programs in various sectors.[3]

Florida's court-connected mediation programs emerged and exist in a highly-regulated legal context. A web of state statutes[4] and rules of court[5] govern the existence, mission, structure, and organization of these programs in varying degrees. There are also rules specifically applicable to the qualifications and conduct of the mediators themselves.[6] In addition, court-connected mediation programs exist within the context of the state's court structure.[7] In fact, we observed that a shorthand has developed in the mediation community around the various levels of the court system and the attendant qualifications for mediators who provide services in their programs. Mediators are generally referred to, and refer to themselves, in terms of the level of court certification they hold: e.g., county civil mediators, family mediators, and circuit civil mediators.

Administrative support and oversight for court-connected mediation programs are provided by The Florida Dispute Resolution Center (DRC) — the administrative arm of the Florida Supreme Court — housed within the Office

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2. 1999 FLORIDA MEDIATION & ARBITRATION PROGRAMS: A COMPENDIUM (Fla. Disp. Resol. Center 12th ed.).

3. *Id.*

4. Chapter 44 of the Florida Statutes contains the most comprehensive mediation provisions. It sets forth the general definition of mediation and the distinctions among various types of programs, depending upon the specific type of court with which the program is associated. It also contains provisions regarding confidentiality, mediator qualifications, standards of conduct, and mediator immunity. Chapter 61 sets forth additional provisions regarding referral to mediation in family cases. Chapter 39 sets forth provisions relevant to juvenile law and dependency mediation.

5. FLA. R. CIV. PROC. ANN. §§ 1.700-1.750 (West 2002) (court rules affecting mediation in Circuit Civil, County Civil, and Small Claims cases); FLA. R. JUV. PROC. ANN. § 8.290 (West 2002) (court rules affecting mediation in dependency cases); and FLA. FAM. R. PROC. ANN. §§ 12.740-12.741 (West 2002) (court rules affecting mediation in family law matters).

6. For example, the Florida Rules for Certified and Court-Appointed Mediators contain the qualifications for certification of mediators, the standards of conduct, and the grievance procedure. They also establish the Ethics Advisory Committee. Administrative Order Number AOSC00-8, *In Re: Rules Governing Certification of Mediators*, contains certification requirements and continuing education requirements.

7. The Florida State Court System, relevant to trial court level mediation practice, can be understood as composed of four major components: County Court, Small Claims Court, Family Court, and Circuit Court. County Court jurisdiction includes civil cases in which the claim is for $15,000 or less. Small Claims Court is a component of County Court, specifically for civil claims of $5000 or less. Family Court was created in 1994, and has jurisdiction over such family matters as dissolution of marriage, property division, parental responsibility, and child support. Prior to 1994, this was a division within Circuit Court. Finally, Circuit Court has jurisdiction over civil cases in which the claim exceeds $15,000. COMPENDIUM, *supra* note 2.

of the State Courts Administrator. Among its many other functions,[8] the DRC collects statistics from each court program, which it organizes and publishes in an annual Compendium of Mediation and Arbitration Programs. The Compendium documents key operational parameters of all mediation programs, including budget and funding sources, caseload, case types, descriptions of staff and mediators, and decisions the clients make regarding the use of representation. The data contained in the Compendium has been supplemented in past years with a number of additional studies on specific programs that have examined primarily quantitative evaluative indices such as case processing time, costs, participant satisfaction, and settlement rates.[9]

In anticipation of potential changes in the funding mechanisms for court-connected mediation, the DRC considered whether and how it could document the successes and social impacts of court-connected mediation, and the factors that contribute to the development, operation, and success of mediation programs in various settings. Although the Compendium and the existing research are useful for providing a descriptive snapshot of the various mediation programs in the state, the quantitative measures relied upon in those reports are not particularly suited to capturing what is "good" about each program and why. Qualitative approaches are more oriented to such research questions.[10] As Deborah Hensler once stated in proposing a research agenda for court-connected ADR:

> To go beyond the lists of what courts have adopted what programs with what provisions, we need thick descriptions of how ADR comes to be in certain courts, how it evolves, and what it means to and for the lawyers and judges who have given it life. We need to go beyond statistical data, to qualitative inquiry, beyond large-scale research to small-bore case studies.[11]

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8. The DRC is responsible for the certification of mediators and mediation training programs. It provides basic certification training for county mediators, and continuing mediator education programs upon request. It provides technical assistance to courts wishing to establish mediation programs. It provides staff assistance to mediator grievance committees, the Advisory Ethics Committee, the Supreme Court ADR Rules Committee, and the Supreme Court ADR Training Committee. The DRC also hosts an annual conference for mediators and arbitrators and publishes a quarterly newsletter.

9. *See generally* R. HANSON, FLORIDA'S FOURTH DISTRICT COURT OF APPEAL APPELLATE MEDIATION PROJECT (1991); K.D. SCHULTZ, FLORIDA'S ALTERNATIVE DISPUTE RESOLUTION PROJECT: AN EMPIRICAL ANALYSIS (1990); J. ALFINI, SUMMARY JURY TRIALS IN FLORIDA: AN EMPIRICAL ASSESSMENT (1989).

10. J.C. Greene, *Understanding Social Programs Through Evaluation, in* HANDBOOK OF QUALITATIVE RES. 981 (N.K. Denzin & Y.S. Lincoln eds., 2d ed. 2000).

11. Deborah Hensler, *A Research Agenda: What We Need To Know About Court-*

With such thoughts in mind, in collaboration with the DRC, we designed and conducted a benchmarking study of seven selected mediation programs in the family, civil and community sectors. While benchmarking studies vary in scope and purpose, all share a common focus on documenting and describing "best practices" in organizations or agencies.[12] Benchmarking allows organizations to identify the factors that contribute to successful performance, document programmatic challenges and innovations, and set standards for excellence that can be followed and modeled across arenas of practice.[13]

We concluded that a benchmarking approach was particularly suited to the research interests of the DRC. The general aims of benchmarking supported the overall goal of the DRC to document the successes and social contributions of mediation to the state, and the practices that contribute to the successful delivery of mediation services within the mediation programs studied. Benchmarking allows researchers to look deeply within a program, to capture its many values, goals and meanings, and to display the key decisions that shape the fundamental practices of the programs.[14] Because benchmarking supports comparisons of experiences, goals, and practices across programs, it fosters the development of insights regarding how certain values shape practice in particular ways, and how certain practices will either promote or inhibit achievement of value-based goals for each program.[15] In terms of program evaluation research, benchmarking sheds light on "what program participants find meaningful, or not, in the program and how this meaning is reflected in their program journey."[16] This qualitative approach is layered and complex, and thus can offer insights into program experience that quantitative studies miss.[17] At the same time, a benchmarking approach is uniquely sensi-

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Connected ADR, 6 DISP. RESOL. MAG. 15 (1999).

12. *See generally* BENCHMARKING FOR BEST PRACTICES IN THE PUBLIC SECTOR: ACHIEVING PERFORMANCE BREAKTHROUGHS IN FEDERAL, STATE, AND LOCAL AGENCIES (PATRICIA KEEHLEY ED., 1996); CHRISTOPHER E. BOGAN & MICHAEL J. ENGLISH, BENCHMARKING FOR BEST PRACTICES (1994); ROBERT J. BOXWELL, JR., BENCHMARKING FOR COMPETITIVE ADVANTAGE (1994).

13. *Id.*

14. *See supra,* note 12.

15. *Id.*

16. *See* Greene, *supra* note 10, at 988.

17. Hensler, *supra* note 11. This type of study is also consistent with a recent recommendation made by the Massachusetts Supreme Judicial Court/Trial Court Standing Committee on Dispute Resolution. MASS. SUPREME JUDICIAL COURT/TRIAL COURT STANDING COMM. ON DISP. RESOL., REPORT TO THE LEGISLATURE ON THE IMPACT OF ALTERNATIVE DISPUTE RESOLUTION ON THE MASSACHUSETTS TRIAL COURT (1998). In reviewing research on court-annexed ADR programs, this committee found that although most of the existing research on court mediation programs was strictly quantitative, many of the compelling reasons for ADR programs are qualitative in nature and need to be addressed with methods that capture the broad spectrum of ADR practices and effects. The goals of this type of study also serve the Florida Judicial Branch's

tive to the possibility that different mediation programs might define success, and the factors that support its achievement, quite differently.[18]

The full report of the benchmarking study (containing the research questions, research perspective, methodology, site selection rationale, sampling rationale, data analysis, individual case studies, comparative insights across case studies, and implications for policy and practice) is available elsewhere.[19] Our focus in this article is on certain insights that emerged at the macro level re-

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long-range strategic objectives for the development and implementation of alternative dispute resolution in the state. In the 1998-2000 Operational Plan, the Florida Judicial Branch encouraged the development of "strategies for the evaluation of local dispute resolution and community justice projects which document activities and improvements in case outcomes and activities and facilitate assessment of services . . . ." FLA. JUD. BRANCH, HORIZON 2000: THE 1998-2000 OPERATIONAL PLAN FOR THE FLORIDA JUDICIAL BRANCH 9 (1998).

18. We approached this research with full knowledge that making any claims about the success, best practices, or effectiveness of any mediation program would be an exceedingly complex undertaking, as well as a politically provocative one, because at this time there is no single, fixed, objective standard in the mediation field for evaluating program success that everyone connected to the field would accept as meaningful. There is a great deal of debate in the mediation community about what constitutes effective mediation, and hence a successful mediation program. *See* R.A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994). This is largely because contemporary mediation practice is shaped by a variety of underlying goals and values, including those of mediators, program administrators, users, and policy-makers at the local level, as well as by more global ideological and cultural assumptions about the nature of conflict, the nature of human interaction, and what it means to "resolve" conflict. *Id.* Likewise, the DRC itself conveyed no fixed policy position to us regarding definitions of successful mediation practice and programs in Florida, nor did it ask for benchmarking to be conducted according to any external standard. As a result, one of our earliest decisions in this project was to carefully define key terms when we set out to benchmark the factors that contributed to program success. We defined "success" in terms of what goals any given program tried to achieve for itself, anticipating that all programs would not share the same goals, or even value similar goals similarly. Likewise, we used the term "best practice" in the study to describe any practice that reasonably advanced the goals of a particular program. That is, the "best practices" identified in the study do not reflect our opinion as to what is best about mediation programs in any general sense, or according to any generally accepted external standard, but only in terms of how those practices served to advance the particular goals of any given program. Conversely, "poor practices" are those that impeded that program's goal achievement. Given this usage, it is apparent that a "best practice" of one program may be a "poor practice" of another. The key to determining any program's success and its "best practices" would be identifying program goals and the underlying values those goals reflect on the program's own terms. Benchmarking is well suited to this task.

19. J.P. FOLGER et al., A BENCHMARKING STUDY OF FAMILY, CIVIL AND CITIZEN DISPUTE MEDIATION PROGRAMS IN FLORIDA (2001) (available from the Florida DRC as well as from the Inst. for the Study of Conflict Transformation, affiliated with Hofstra Univerity School of Law, *available at* http://www.transformativemediation.org).

garding the very nature of court-connected mediation, as we analyzed and tried to develop explanations for our empirical findings. Specifically, we will address the fundamental value-based dilemma of court-connected mediation programs, three different approaches to addressing this dilemma through which mediation programs and the courts have forged their relationship in Florida, and some implications of these insights for practice and policy.

THE DILEMMA OF COURT-CONNECTED MEDIATION

Through individual case studies and comparative analyses across case studies, we observed that court-connected mediation programs attempted to serve a wide variety of goals as a result of the actual or perceived needs and expectations of three key stakeholder groups:[20] the judicial system, the community, and the mediators. We also observed that certain practices tended to serve the needs of certain stakeholder groups more than others, and that certain key program decision-points marked the struggle to satisfy the competing interests of the three stakeholder groups. Analysis of program choices at these key decision-points revealed which group the program valued more highly in that instance. Clusters of choices at these key decision-points, in turn, contributed to the overall character of programs. That is, while no single decision determined the nature of a program, clusters of decisions repeatedly enacted by a program ultimately revealed the priorities of a program and shaped the program accordingly.

As we noted different patterns of decisions exhibited in various programs, and different prioritizations these patterns revealed in terms of goal achievement and stakeholders served, we questioned why a program might favor one stakeholder group over another at key decision-points. It seemed obvious to us that such choices were based on fundamental social values; but, the questions were: which values, and why. Therefore, we considered how we might surface and identify the underlying values that shaped a program's choices at the key decision-points. This led us to explore the very reasons for court-connected mediation programs, both at a general social policy level and at the level of individual programs.

Historically, mediation was not a usual and customary part of the United States judicial system. The growth of "court-connected" mediation did not begin in earnest until the 1976 Pound Conference.[21] Mediation, like the judi-

20. "Key stakeholders" are those groups whose support is essential to the success of the program, or those whom the program considers essential to its survival.

21. Dorothy J. Della Noce, *Mediation Theory and Policy: The Legacy of the Pound Conference*, 17 OHIO ST. J. ON DISP. RESOL. 545, 547 n. 8 (2002) (citing COURT-ANNEXED MEDIATION:

cial system, is an institution with its own history, traditions and norms.[22] Each institution developed largely independently of the other. Court-connected mediation, therefore, represents a connection forged between two distinct social institutions.

Social institutions are built upon, reflect, and propagate the ideologies of the institutions' members.[23] "Ideologies" are the socially constructed, socially shared, meaning systems that members of social groups use to view, organize, interpret, and judge their surrounding world.[24] Functionally, "ideologies allow people, as group members, to organize the multitude of social beliefs about what is the case, good or bad, right or wrong, *for them,* and to act accordingly."[25] Because ideologies always imply a preferred moral order, social institutions are not value-free. They are built on a moral vision — a vision of what constitutes morally "good" human interaction in the particular context of the institution. With respect to the institutions of the United States judicial system and mediation, the relevant context is conflict resolution; hence, each institution is built on a particular vision of how human beings can, and should, engage in and resolve *conflict.* The preferred moral orders of each in-

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CRITICAL PERSPECTIVES ON SELECTED STATE AND FEDERAL PROGRAMS (Edward J. Bergman & John G. Bickerman eds., 1998)) (Detailing a variety of ADR programs in the state and federal courts, and tracing the growth in court-connected mediation to the Pound Conference); Kovach, *supra* note 1, at 21-23 (tracing the modern development of court-connected mediation to the Pound Conference); and Deborah R. Hensler, *In Search of "Good Mediation:" Rhetoric, Practice and Empiricism, in* HANDBOOK OF JUSTICE RESEARCH IN LAW 231-268 (Joseph Sanders and V. Lee Hamilton eds., 2001) (Analyzing various studies of court-connected mediation conducted in the 1990's). *See also* Douglas A. van Epps, *The Impact of Mediation on State Courts,* 17 OHIO ST. J. ON DISP. RESOL. 627, 629 (2002) (Noting "explosion" of court-connected mediation after the Pound Conference, and examining the impact on court caseloads and judicial culture.)

22. For various perspectives on the history of mediation, see SARAH R. COLE, ET. AL., MEDIATION LAW, POLICY & PRACTICE §§ 5:1-5:4 (2d ed. 2001); JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPLETE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 1-17 (1984); KIMBERLEE K. KOVACH, MEDIATION PRINCIPLES AND PRACTICE 18-21 (1994); R. A. Baruch Bush, *Dispute Resolution – The Domestic Arena: A Survey of Methods, Applications and Critical Issues, in* BEYOND CONFRONTATION: LEARNING CONFLICT RESOLUTION IN THE POST-COLD WAR ERA 9-37 (John A. Vasquez, et. al., eds., 1995); Della Noce, *supra* note 21; *see generally* THE POLITICS OF INFORMAL JUSTICE, (R. Abel ed., 1982) (describing the history and current trends in the "informal justice" arena).

23. TEUN A. VAN DIJK, IDEOLOGY: A MULTIDISCIPLINARY APPROACH 186-190 (1998).

24. *See generally,* J.M. BALKIN, CULTURAL SOFTWARE: A THEORY OF IDEOLOGY (1998); T. EAGLETON, IDEOLOGY: AN INTRODUCTION (1991); J.B. THOMPSON, IDEOLOGY AND MODERN CULTURE (1990); VAN DIJK, *supra* note 23.

25. VAN DIJK, *supra* note 23, at 8 (emphasis in the original).

stitution are visible in the day-to-day activities of the institution.[26]

The United States judicial system is built on an *adversarial vision* of conflict resolution.[27] In this vision, conflict is viewed as a contest between parties asserting competing claims or rights.[28] The key to conflict resolution is the application of objective rules and precedents to the facts, in order to determine whose rights deserve to be enforced. Generally, in the judicial system people are assumed to be *relatively incapable* of resolving their own conflicts. Decision-making authority is essentially removed from party control — parties are given binding rules and precedents to follow, which are interpreted and applied by judges. The conventions of the judicial system further remove control from the parties and reinforce the parties' presumed incapacity. Lawyers tend to speak for parties, in all but small claims venues. Parties are typically unfamiliar with the discourse of the legal system, the very nature of their disputes are transformed by legal conventions, and those whose "relationship-based" discourse does not match the "rights-based" discourse of the legal system generally find themselves at a disadvantage.[29]

In contrast, mediation is built upon different (essentially non-adversarial) visions of conflict resolution and human capacity. We use the plural form "visions" because the mediation movement is actually "diverse and pluralistic" in its underlying social visions rather than monolithic.[30] Baruch Bush and Joseph Folger provided a useful framework for understanding the diversity of the field by identifying three different "stories" of the mediation movement: (1) the social justice story — in which the most important goal of mediation is promoting social equality (or reducing inequality) among individuals; (2) the satisfaction story — in which the most important goal of mediation is "producing the greatest possible satisfaction for the individuals on all sides of a conflict"; and (3) the transformative story — in which the most important goal is transforming the quality of the human interaction in the midst of con-

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26. *Id.*

27. *See* RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS (1989) (an empirical study analyzing the adversarial vision underlying the legal system and its implications for law practice).

28. *Id.* at 6-11.

29. *See generally* John M. Conley & William M. O'Barr, *Rules vs. Relationships In Small-Claims Disputes, in* CONFLICT TALK (A. Grimshaw ed., 1990); John M. Conley & William M. O'Barr, JUST WORDS: LAW, LANGUAGE AND POWER (1998); William Felstiner, et al., *The Emergence and Transformation of Disputes: Naming, Blaming and Claiming*, 15 LAW & SOCIETY REVIEW 631 (1980-81); and Lynn Mather & Barbara Yngvesson, *Language, Audience, and the Transformation of Disputes*, 15 LAW & SOCIETY REVIEW 775 (1980-81). *See also* William Felstiner & B. Pettit, PATERNALISM, POWER, AND RESPECT IN LAWYER-CLIENT RELATIONS, *in* HANDBOOK OF JUSTICE RESEARCH IN LAW 135-153 (Joseph Sanders and V. Lee Hamilton eds., 2001).

30. BUSH & FOLGER, *supra* note 18, at 25.

flict.[31] Despite the very different assumptions about conflict resolution and the nature of human beings that each of these "stories" reflects, a key assumption they all share is that people are *fundamentally capable* of resolving their own conflicts — even if the stories differ markedly in how they define the nature and extent of that capacity. This is often framed as the *empowerment dimension* of mediation,[32] an inherent, fundamental benefit that users of mediation experience, in contrast to the disempowerment people often experience when they encounter the formalities of the judicial system.[33]

Another dimension that has historically separated mediation from other forms of conflict resolution is its emphasis on the value of party-to-party communication. That is, the mediation process is built on assumptions about the fundamental value of direct human connection for constructive conflict resolution, typically realized through face-to-face conversation and interaction. Through their interactions in a mediation session, parties can, and do, shift from destructive and dehumanizing patterns, to constructive and re-humanizing patterns.[34] This has been framed as the *recognition dimension* of mediation.[35] This dimension of the mediation experience contrasts with the

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31. *Id.* at 15-32.

32. *Id.* at 25.

33. It is this empowerment dimension that is most often cited as what distinguishes mediation from traditional methods of conflict resolution (most notably, litigation), and as the primary benefit to be gained in choosing mediation. *See*, e.g., J. FOLBERG & A. TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION (1984); Cole, et al., *supra* note 22, at §§ 1.1 and 5.2; EDWARD W. SCHWERIN, MEDIATION, CITIZEN EMPOWERMENT, AND TRANSFORMATIONAL POLITICS (1995). This benefit is usually concretized by drawing contrasts between mediation – an informal process in which a disinterested third party assists people in talking together and making their own decisions in a creative and collaborative process – and the traditional judicial system with its formal legal processes that discourages parties from talking with each other and that authorizes the judge, rather than the parties, to make the decisions. *Id. See also* Hensler, *supra* note 11.

34. R.A. Baruch Bush & Sally G. Pope, *Changing the Quality of Conflict Interactions: The Principles and Practice of Transformative Mediation*, 3 PEPP. DISP. RESOL. L.J. (forthcoming 2003).

35. BUSH & FOLGER, *supra* note 18. Mediation models differ in the extent to which they incorporate the recognition dimension, with the transformative model most clearly embracing the recognition dimension as an effect, goal, and independently valued outcome of the mediation process. For elaboration, see Dorothy J. Della Noce, *Seeing Theory In Practice: An Analysis Of Empathy In Mediation*, 15 NEGOTIATION JOURNAL 271-301 (1999) and Dorothy J. Della Noce, *Recognition In Theory, Practice And Training*, *in* DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK 96-111 (J.P. Folger & R.A.B. Bush eds., 2001).

cycle of interpersonal dehumanization and demonization that parties often experience in the traditional judicial system, which discourages direct party-to-party interaction and encourages parties to engage with each other in particular, institutionalized ways.[36]

In this historical context, court-connected mediation can be understood as promising an alternative to the perceived deficiencies of the judicial system by promising to restore *voice and choice* to people involved in conflict. Restoring voice and choice means supporting the parties' efforts to exercise their decision-making capacity (empowerment) and supporting their efforts to express themselves and create an opportunity to be understood by the other party in new and important ways (recognition). Through the dynamics of empowerment and recognition, the fundamental character of the interaction between the parties can be changed.[37] People can speak more freely, make choices about how to proceed, explain what they want, and gain a better understanding of themselves, their situation, and each other, regardless of the outcomes for those involved in the conflict.

More importantly, this historical context also highlights that the notion of court-connected mediation presents a fundamental ideological dilemma.[38] Court-connected mediation represents a marriage between two distinct social institutions, which are built upon fundamentally different ideologies or moral visions. In essence, when the proposed alternative is wedded to the institutional status quo, the resulting dilemma is how to reconcile the inevitable conflict of moral visions.[39]

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36. *See, e.g.*, Conley & O'Barr, *supra* note 29; JACK & JACK, *supra* note 27.

37. Bush & Folger, *supra* note 18; Bush & Pope, *supra* note 34.

38. *See generally* MICHAEL BILLIG ET AL., IDEOLOGICAL DILEMMAS: A SOCIAL PSYCHOLOGY OF EVERYDAY THINKING 8-42 (1988) (discussing ideological dilemmas as difficult choices that implicate conflicts among certain socially shared beliefs, images, representations, values and moral orders). For examples of studies that have yielded a variety of insights by examining mediation through an ideological lens, *see* BUSH & FOLGER, *supra* note 18; DOROTHY J. DELLA NOCE, IDEOLOGICALLY BASED PATTERNS IN THE DISCOURSE OF MEDIATORS: A COMPARISON OF PROBLEM-SOLVING AND TRANSFORMATIVE PRACTICE 148-331 (2002); Christine B. Harrington & Sally Engle Merry, *Ideological Production: The Making Of Community Mediation*, 22 LAW & SOC'Y REV. 709-35 (1988); SCHWERIN, *supra* note 33.

39. A similar dilemma has been identified in the context of community mediation. *See, e.g.*, Sally Engle Merry & Neal Milner, *Introduction* to THE POSSIBILITY OF POPULAR JUSTICE, 3, 3-30 (S.E. Merry & N. Milner eds., 1993), asking, "But is popular justice within the state law possible? Or do the ambiguities of authority, procedure, ideology, and practice inherent in constructing an oppositional justice within a state-dominated legal system make popular justice a practical impossibility?" *See also, e.g.*, Peter Fitzpatrick, *The Impossibility Of Popular Justice*, *in* THE POSSIBILITY OF POPULAR JUSTICE, 453-74 (S.E. Merry & N. Milner eds., 1993). *Cf.* Harrington & Merry, *supra* note 38 (analyzing ideological production in community mediation).

This dilemma is not academic: as we observed in conducting our study, program administrators and policy-makers confront it every day. Each day, in the seemingly mundane day-to-day practices of the program, administrators and policy-makers make choices among the various goals they seek to achieve, and the various stakeholders they seek to serve. Where those goals and stakeholders' interests reflect competing moral visions, the decisions of administrators and other policy-makers reflect a valuing of one moral vision over another. Thus, ideological analysis of day-to-day practices, and the choices they reflect, provides insight on how any given program addresses the fundamentally dilemmatic nature of court-connected mediation.[40]

Through our study of court-connected mediation programs in Florida, we identified three different approaches to the dilemma presented by connecting the courts and mediation: *assimilative, autonomous, and synergistic.* Each approach reflects a distinct, value-based vision for forging a connection between mediation and the courts.

In the following sections, we present the contours of, and evidence for, each approach. It is important to note that we use these three terms in two ways: to characterize *program decisions*, as well as to characterize *programs* themselves. As the full study indicates, programs are made up of numerous and myriad practices, reflecting the decisions made by any number of people in response to the needs of a variety of competing stakeholders. It is unlikely that all of the decision-makers of any given program share precisely the same approach to reconciling the competing social visions on which court-connected mediation is based. Thus, any given program is likely to exhibit practices that reflect more than one approach. Nonetheless, we do suggest that clusters of decisions can be identified within programs, and that in some cases, these decisions cluster to such an extent that the program itself could be characterized as predominantly assimilative, autonomous, or synergistic. We encountered a number of such programs in our study.

THE ASSIMILATIVE APPROACH

By the assimilative approach, we describe the process of *adapting mediation to the underlying values and norms of the court system.* In our study, certain clusters of program practices evidenced the assimilative approach. Three that we highlight are: (1) practices that imbue mediation with the au-

40. *See* VAN DIJK, *supra* note 23; BILLIG, ET AL., *supra* note 38.

thority and formality of the courts, (2) the mapping of legal language onto mediation, and (3) an emphasis on case processing.

Certain program practices operated to *impart the authority and formality of the court to the mediation program.* Location was an obvious example. Mediation programs that were located in the courthouse could not help but take on the same air of authority, credibility, and formality as the court. Mediators and administrators alike noted this effect in their interviews, and many expressly valued their courthouse presence for this very reason. Other practices had a similar effect, such as the requirement that clients undergo security screening at the courthouse entrance prior to going to the mediation room, or the use of official-looking mailings and scheduling notices, or the collection of filing fees by a clerical staff person. Similarly, some practices operated to imbue the mediators themselves with the authority of the court, such as walking into the courtroom with the judges, sitting in the courtroom as cases were assigned to them, being handed case files by clerks or judges, and having decision-making authority over the legal forms used to process cases and/or the language used to complete those forms.

Another marker of assimilation was the *mapping of legal language onto the mediation process.* For example, in some programs we heard the mediation session called a "hearing" and the mediation rooms called "hearing rooms." The mediation schedule was called a "docket." Conflicts were "cases." Attending mediation was equated with having "a day in court" or "being heard" by a third party. Mediation parties were routinely identified as "plaintiffs" and "respondents." The parties' agreements were called "stipulations." In addition, the wording of parties' agreements was in some programs standardized into boilerplate legal language that clearly was not the parties' own. In some cases, parties' participation in crafting an agreement consisted of little more than "filling in the blanks" on detailed, standardized, pre-prepared legal forms.

A third cluster of practices that signaled assimilation were those that *emphasized case processing as the goal of mediation.* As noted above, during some interviews disputes were framed as "cases," in the legal tradition, and references to individual people, or the human experience of conflict, were notably absent. This use of the "case" as the preferred unit of analysis (that is, the unit that was considered significant for observation, examination, discussion, and measurement) shaped other practices as well. For example, case processing, in terms of number of cases moved and how efficiently and smoothly those cases moved, was often the preferred measure of program success. Mediators were explicitly or implicitly evaluated, or evaluated themselves, on the number of cases closed, which often meant the number of settlements reached. Mediator training and inter-office memos tended to focus

on procedures for moving cases through the system, or on improving understanding of case-specific legal standards. In some programs, agreements that could fit into standardized forms, and therefore move a case easily through the courts, were favored over unique and creative decisions that might require judicial scrutiny or even risk judicial rejection. It is important to note that decisions that emphasized the importance of case management simultaneously made other program decisions less likely. For example, where there was a heavy emphasis on practices built around case processing, comparatively little attention was paid to what actually occurred in the mediation rooms, what the mediators actually did, and what that experience was like for the parties. This trade-off was particularly evident in the quality control dimension. How mediators conducted their sessions, in terms of theories of practice, style, or interactive strategies, was not a significant facet of training or evaluation in assimilative programs. The client experience was measured in terms of "client satisfaction," typically via either complaints received or post-mediation surveys. The surveys performed had a perfunctory quality: they tended to be distributed and collected selectively and sporadically, and were widely viewed by mediators and administrators alike as invalid, unreliable, and generally uninformative.

While none of these assimilative practices alone signaled an overall assimilative approach, the presence of multiple practices in any program drew attention, because the effect was cumulative. In clusters, these practices assimilated mediation into the judicial system. They conveyed a clear message that the court was in charge of the conflict, and thereby detracted from mediation's character as an alternative to the judicial system, by working against party voice and party choice at many levels.

THE AUTONOMOUS APPROACH

A different approach to the dilemma of court-connected mediation identified in the study was the autonomous approach: the mediation program was operated as autonomously as possible, with the goal of *maintaining a separate identity from the court.* This approach allowed the program to ground itself in the traditional values of the mediation community, and resist assimilation to the values and norms of the judicial system. In our study, certain clusters of program practices evidenced the autonomous approach. Three that we highlight are practices that: (1) established a separate identity for the me-

diation program; (2) maintained flexibility in process design; and (3) focused on conflict interaction.

A number of practices operated to *establish a separate identity for the mediation program.* Again, location was an obvious example. A location that was away from the courthouse, even if court-connected, created a sense of a separate — and therefore different — social institution. A similar effect was also achieved in a program that was located in the courthouse, but was furnished and decorated to create a distinctive warm and inviting atmosphere. Other practices that served to establish a separate identity for mediation programs included using separate brochures and advertising materials for the mediation program, using separate letterhead, and relying on sources of funding that were independent of the court.

A second marker of the autonomous approach was *broad discretion and flexibility in the design of conflict intervention processes.* In this approach, mediation was defined in the broadest sense as a third party intervention in conflict. As a result, the mediation process was not defined or constrained by the limitations of a legal "case." Responsiveness to party-driven definitions of the nature of the conflict and the identities of interested parties, as well as to party needs in the design and delivery of services, tended to be paramount from the very first contact. There was room for significant and ongoing party input into how mediation would be conducted. For example, mediations were convened prior to the ripening of a legal claim or the filing of a case in court. Similarly, parties had the option to return to mediation as their situations and needs changed even after the case (if indeed one was ever pending) was closed. In addition, because mediation tended to be defined as broadly as the parties needed, not only was the mediation process free from the constraints of a legal case, but, the parties were also free to discuss any topic that was relevant to them at the time of their meeting (whether or not the topic was technically "relevant" by legal standards). Mediation sessions were structured so that the parties had time to think through their choices, talk with each other, and make their own decisions. This was accomplished by allocating an adequate length of time for the mediation sessions themselves or by allowing parties to continue sessions, take extended breaks, or reconvene, as they needed. Multi-party dialogue processes (as opposed to settlement-oriented mediation processes constrained by the typical two-party, plaintiff-defendant format of a legal case) were not uncommon.

Finally, another marker of the autonomous approach was an *emphasis on conflict interaction*, rather than the "case," as the unit of analysis. For example, conflicts were discussed in terms of people rather than legal cases. Program success tended to be conveyed through the sharing of human stories of unfolding conflict rather than by giving outcome statistics. In particular, these

stories tended to emphasize proof of human capacity to handle conflict (as seen in the mediation sessions themselves) as well as proof of the capacity-building effect of mediation (as seen in party interactions long after the mediation had concluded). Quality control practices were oriented to capturing and addressing what was happening in the mediation session itself, whether by debriefing the intervention experience with the parties or by providing opportunities for mediators to work in teams and later debrief the experience with each other. Mediator education and training emphasized interaction skills and theories as opposed to legal standards and case processing concerns. Standardized legal boilerplate agreements were seldom, if ever, used.

As was noted above, no single autonomous practice indicated that a program favored the autonomous approach. Rather, the effect of multiple autonomous practices in any program was cumulative. In clusters, these practices — such as flexibility in process design and an emphasis on the unfolding conflict interaction — operated to ground the program in the traditional mediation assumption of party capacity, as well as the corresponding premises of honoring party voice and choice. Practices that established a separate identity for the mediation process were complementary, because they emphasized the message that mediation was a meaningful alternative to the judicial system — a place where the parties, not the courts, were in control of their conflict process and its resolution.

THE SYNERGISTIC APPROACH

A third approach to the dilemma of connecting mediation to the courts that we identified was the synergistic approach, that is, *building the two processes together in such a way that the total is more than the sum of the parts*. In this approach, mediation was not maintained as a separate physical institution per se. The benefits of a court connection were valued, even while the constraints of the court context were acknowledged and respected. Yet every effort was made to honor the historical vision and values underlying the mediation process, by preserving party voice and choice as much as is possible within the context of the court system. Again, in our study, certain clusters of practices evidenced this approach. Those that we highlight are: (1) program leadership practices with a synergistic vision; (2) partnering with community members; and (3) practices that preserved the integrity of the mediation process "in the room."

One marker of the synergistic approach was *leadership with a synergistic vision.* While each of the approaches we described above certainly benefited from strong leadership, the leadership practices in this approach evidenced the synergistic vision — true to the core historical values of the social institution of mediation while responding in a sensitive way to the demands of the court context. For example, leaders prepared the case closure reports that contained the case processing information of interest to the courts, but strove to keep this marker of success in perspective by looking for other measures or markers of success, balancing the case closure statistics with these other measures or markers, and arguing for reasonable closure rate goals that would not put undue outcome pressures on mediators or mediation practice. Another example of synergistic leadership was the credibility these leaders built with both the courts and the mediators. They exhibited an excellent understanding of the court's processes, needs, and limitations, coupled with a strong identification with the mediators, their values, and their professional needs and development. These leaders also had excellent communication with both the court system and the mediators (as contrasted with privileging either representatives of the judicial system or the mediators in their communications). They not only communicated the needs of the court system to the mediators, but also communicated the needs of the mediators — and the distinct values underlying the mediation process — to representatives of the court system. Through this multi-directional communication, context-sensitive adaptations to the mediation process developed, and conversely, the courts and judges adapted their practices and expectations to accommodate mediation without assimilating it to the extent that its unique character was lost.

Another marker of the synergistic approach was the effort made by members of the mediation program to *partner in various ways with members of the community*, in order to bring community voices and perspectives into the program. Examples included having advisory boards composed of community members, and developing program procedures and policies in concert with relevant community groups and agencies, such as domestic violence victims' advocates, social service agencies, and minority group advocates. These connections prevented programs from developing a court-based "tunnel vision," i.e., an exclusive focus on serving the needs of the judicial system, no matter how close the connection with the courts.

Finally, the synergistic approach was evidenced by practices that *preserved the integrity of the mediation process itself, by focusing on what happens "in the room."* Programs that favored a synergistic approach were not entirely free of the constraints imposed by working with disputes that had ripened into legal "cases," as the autonomous programs were. But, while these programs may not have had as broad a latitude as the autonomous programs

in terms of what conflicts they could deal with, when and how the conflicts were referred, or how to design the conflict intervention process, their practices did exhibit a notable emphasis on preserving party voice and choice within the constraints of a court-connected program. For example, party choice was preserved through some flexibility about the length of the mediation sessions and the ability to continue a session, by putting telephones in the mediation rooms so that parties could easily obtain the necessary information to allow them to make fully informed decisions, by affording parties the option of leaving mediation at any time after the opening statement whether an agreement was reached or not, by allowing parties to choose the mediator, and by allowing parties to decide whether a representative, attorney, or other support person would attend mediation with them.

Another place where party choice was typically preserved in this approach was in the decision to mediate or not. This included not only fully opening the decision about whether and when to leave mediation to the parties, but also opening the decision for a party to choose mediation in those cases where there might be factors arguing against its use. For example, some programs allowed parties to choose mediation in cases where there had been domestic violence in the parties' history, or in eviction cases, while other programs in the state had outright proscriptions against mediation in those instances.

Synergistic programs also made an effort to preserve party voice, by providing sufficient time in the mediation sessions for the parties to talk with, listen to, and build new understandings with each other. As stated in one program, it was important to ensure that the parties had "the opportunity to say whatever they wanted to say." This often included allowing the parties to discuss emotional issues or issues that may not have seemed directly relevant to "the case," but were certainly relevant to the parties and their interactions at the time of their meeting.

Again, no single practice indicated that a program favored the synergistic approach. Rather, the effect of multiple synergistic practices in any program was cumulative. In clusters, these practices operated to emphasize and preserve the traditional assumption of party capacity that underlies the social institution of mediation, as well as the corresponding premises of honoring party voice and choice. Yet these practices were context-sensitive, and reflected an effort to balance those core values with the practical needs and constraints of the judicial system.

SOCIAL IMPACT: THE QUESTION OF VALUE-ADDED

The assimilative, autonomous, and synergistic approaches each demonstrated a different mode of reconciling the distinct moral visions underlying the judicial system and mediation when those two institutions were merged into court-connected mediation. The assimilative approach privileged the vision and values of the judicial system over those of mediation. The autonomous approach privileged the vision and values of mediation over those of the judicial system. Lastly, the synergistic approach attempted to integrate the two into a hybrid social institution that balanced the fundamental vision and values of mediation with the practical needs and constraints of the court system.

Identifying these approaches through empirical research affords a number of important insights. It becomes apparent that assimilation is not an inevitable consequence of the institutionalization of mediation.[41] On the contrary, programs have choices about the nature of the connection they forge with the courts. Those choices are value-based, ongoing, and malleable. It also becomes apparent that programs that choose to resist assimilation can do so by grounding themselves firmly in the vision and values of mediation, no matter how close the court connection.[42] Finally, identifying these three approaches to court-connected mediation allows us to consider what court-connected mediation does — and might — offer as "value-added"[43] to the citizens of Florida. We concluded that the answer was not the same for every mediation program. Rather, it depended on the approach any given program favored for connecting mediation with the courts — assimilative, autonomous or synergistic — because that approach was reflected in the majority of the program's practice decisions. These practice decisions, in turn, shaped the experience of all who came into contact with the program.

Based on our study, we characterized the actual and potential primary social impacts of court-connected mediation — the "value-added" — in two dimensions: more efficient case management processes (the assimilative approach), or a meaningful alternative to traditional judicial processes for resolving conflicts (the autonomous and synergistic approaches). We discuss these impacts below, and also consider their specific implications for the

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41. *Cf.* Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?* 6 HARV. NEGOT. L. REV. 1 (2001).

42. *See* Della Noce, *supra* note 21 (discussing the importance of theoretical clarity as a source of grounding for court-connected mediation programs).

43. This concept of "value-added" is adopted from Robert A. Baruch Bush, *What Do We Need A Mediator For?: Mediation's "Value-Added" For Negotiators,* 12 OHIO ST. J. ON DISP. RESOL. 1-36 (1996).

three key stakeholder groups identified in the study: the judicial system, the community, and the mediators.

EFFICIENCY GAINS: MAINTAINING AND ENHANCING JUDICIAL CASE MANAGEMENT

In a number of programs in our study, program administrators, court administrators, judges, and mediators alike described mediation primarily as a "case management tool" and their mission as "fully integrating" mediation into the courts in order to enhance case management efficiency.

The primary value of mediation articulated for the assimilative approach in our study was that it provided a tool for enhancing the court's case management processes by adding certain efficiencies.[44] Other social values, if noted at all, were considered incidental and serendipitous. This privileging of case management efficiency had a number of social impacts. The experience of users of the court system might be enhanced in quantitative ways. Users might get more timely hearing dates if they needed a judge, or get the opportunity to resolve the case more quickly, and with less strain on their resources, by using mediation.[45] But there was little evidence that their qualitative experience of conflict resolution changed. While there might appear to be at least some opportunity for that experience to be different in the context of the mediation room itself, whether that opportunity was realized depended solely on the mediators and their commitment to a form of practice that focused on the *quality* of conflict interaction. We generally did not observe this type of commitment among the mediators in assimilative programs. Because it was a notable practice of assimilative programs to employ only outcome-

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44. *Cf.* Harrington & Merry, *supra* 38, at 727 (observing that community mediators who oriented to a "service delivery program" emphasized "their contribution to the smooth functioning of the court").

45. In our study, participants voiced a general perception that these quantitative efficiencies were achieved, although we did not independently measure quantitative efficiencies. For analyses of quantitative studies that suggest that empirical support for the mediation field's claims to quantitative efficiencies is equivocal at best, see, Bergman & Bickerman, *supra* note 21; Deborah R. Hensler, *ADR Research at the Crossroads*, 1 J. DISP. RESOL. 71-78 (2000); Hensler, *supra* note 11, at 232; Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 690-96 2002); and NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH: A REPORT ON CURRENT RESEARCH FINDINGS – IMPLICATIONS FOR COURTS AND FUTURE RESEARCH NEEDS (Susan Keilitz, ed., 1994). *See also* van Epps, *supra* note 21, at 629-30.

based, quantitative measures of quality control and to pay little or no attention to the human experience of conflict interaction as it unfolded in the mediation session, the mediators received powerful implicit messages about what counted and what did not. It appeared to be exceedingly difficult for mediators to resist these pressures.

In our analysis, preference for the assimilative approach reflected that a program privileged the values and vision of the judicial system over those that have historically informed the institution of mediation. While the urge to integrate mediation into the existing system can be understood as a response to the early challenges to court-connected mediation, the decision to meet those challenges by assimilating into the existing system, rather than preserving an identity apart from it in some way, reflected a fundamental assumption about the goodness of the existing system. That is, the assimilative approach reflected the assumption that the judicial system could be enhanced quantitatively through mediation (e.g., more, less, faster, cheaper), but it need not be fundamentally changed. No qualitative changes in the judicial system — in its underlying assumptions, goals, principles and values, or the experience of human beings who engage its processes — were needed or desired.

Assimilative programs, based as they were on the same values and assumptions as traditional court processes, reinforced the assumed incapacity of the parties to resolve their own disputes. They reinforced the courts as the place for citizens to turn for the resolution of disputes, and they reinforced court control over the processing of those disputes. Therefore, they tended to serve well those stakeholders who are closely aligned with the judicial system: lawyers, judges and administrators.

However, a stakeholder group that is typically viewed as being without significant power in the judicial system appeared to be less well-served: the community at large, particularly those members of the community with relatively few resources, or cases that were viewed as "small," "little," or "emotional." The risk to these stakeholders — if assimilative mediation was viewed as a substitute for court processes — was that they would be offered quasi-judicial processes in the guise of mediation, with "justice" being determined and meted out by mediators who were not trained to administer justice, and not subject to judicial review and oversight. One program supervisor in our study specifically identified this risk as reality, noting that mediators engaged in some "arm-twisting" in small claims cases, while also noting that family mediators could never get away with such tactics given the clients they serve. Moreover, where the parties' "emotional" cases were diverted from traditional court processes to an assimilative mediation program, a question emerged whether those conflicts were "heard" in mediation for what they were — as mediators were not supported or encouraged to address the

human, emotional issues. Rather, they were primarily oriented to case processing.

In addition, assimilative programs did not tend to serve the needs of the mediators well. Many programs characterized by clusters of assimilative practices cited a lack of space, a lack of administrative and/or support staff and services, and a lack of sufficient funds to pay mediators. This suggested that the emphasis on case management efficiency that accompanied the assimilative approach was in tension with the standing of mediators (and program administrators) to make a defensible claim to the court's resources. Programs that asserted their primary value in terms of resources saved, or how few resources were needed to accomplish a job, may actually have defeated their own claims to a larger portion of those resources. This was one way to explain the anomaly we observed time and again in the course of our study: programs that were roundly cited as highly valued by all who were interviewed nonetheless struggled to piece together a functional mix of volunteers, low-paid contractors, and inadequate physical space.

The explanation offered here suggests that unless mediators and mediation programs can articulate (and verify with data) a value they bring to the citizens of the state beyond case management efficiency, they will remain in the position of having little legitimate claim on resources. In the long-term, an under-funded and underserved body of mediators may leave the public ill-served, because only limited quality control demands can be made on volunteer and low-paid contract mediators.[46] Moreover, the assimilative approach could make the continued viability of a mediation program itself tenuous. If mediation is valued only for its case management efficiency, and empirical studies do not support the efficiency claims made on behalf of mediation, there will be little compelling reason to continue a mediation program built on these goals alone.[47]

Identification of the assimilative approach, and certain observations associated with it, also raised questions for further research. First, we observed a

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46. In our study, mediators in predominantly assimilative programs were the least likely to be systematically evaluated for quality control purposes, particularly with respect to their conduct "in the room." These mediators considered the lack of evaluation a matter of professional pride—a mark of their status.

47. Hensler, *supra* note 45, at 77 (suggesting that the threat posed by the lack of empirical support for efficiency claims explains the growing hostility to empirical research on ADR from members of the ADR community and the courts who have an investment in the continuation of existing programs).

lack of diversity in the mediator pools in those programs with significant clusters of assimilative practices. This lack of diversity was observed in communities where there were diverse populations, and existed despite affirmative recruiting efforts.[48] Future research might explore whether this lack of diversity is a common characteristic of assimilative programs, and whether this might be attributed to a perception that mediation does not differ significantly from the status quo of the judicial system. For members of diverse populations who have historically experienced the status quo as oppressive, perhaps there is little appeal to becoming part of that system. Second, many participants in busy court-connected mediation programs based on the assimilative approach observed in the course of their interviews that members of the local community did not seem to be aware of, value, or voluntarily choose the mediation program (despite affirmative efforts at raising community awareness). Future research might explore the connection between the assimilative approach and voluntary use of the program by community members, and whether lack of voluntary use, if found, is associated with lack of community awareness, or with the perception by community members that this approach to mediation is not a meaningful alternative to the status quo of traditional judicial processes.

Conflict Interaction Gains: Providing a Meaningful Alternative

For those programs in our study that favored either the autonomous or the synergistic approach, the emphasis was clearly on preserving and honoring the underlying values that have historically made mediation a unique social institution. In these approaches, the primary value articulated for court-connected mediation was that mediation added something qualitatively different to the judicial system in terms of human interaction: an opportunity for people involved in conflict to talk with each other, in their own voices, build new understandings, and make their own decisions about how to proceed. Case management efficiencies were perceived as a by-product of improved human interaction, but not treated as a goal in themselves. This privileging of human interaction gains, too, had a number of social impacts.

Participants in these programs, whether community members, mediators, or judicial system stakeholders, noted in their interviews the value of provid-

48. *Compare* Harrington & Merry, *supra* note 38, at 724 (finding that minority group mediators were a notable presence only in the mediation program that was based on a "social transformation" vision) with the study described here, which found the greatest diversity in the mediator pool of an autonomous program.

ing the citizens of Florida with a meaningful alternative to litigation for the resolution of conflict — a qualitatively different human experience. This was perceived to have a significant impact on the public's perception of available avenues for addressing their disputes. It was also perceived to have a capacity-building effect: improving the ability of ordinary citizens to handle conflict constructively, and even at a broader level, reducing dependence on litigation as the preferred method for resolving disputes.

Another impact, (cited particularly in the interviews of stakeholders in a program based on the autonomous approach), was that the program was perceived as supporting citizens in their efforts to build a "civil society," that is, a society in which people with differences interact constructively through conflict. Many of the stakeholders interviewed in these programs tied the qualitative interpersonal transformations that they witnessed or experienced in mediation to broader societal transformations. As they described it, social transformation begins in mediation when people are supported in talking together, increasing their understanding of each other's situation, deliberating, and making decisions about how to proceed.[49] As the skills are learned, the practices and the effects carry over into other life situations. For example, participation in the process may have given some people greater ability to ar-

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49. There is a significant body of scholarly literature that supports this perception. The transformational power of conversation, or dialogue, is cited by communication scholars, organizational theorists, and political scientists, among others. *See, e.g.*, RONALD C. ARNETT & PAT ARNESON, DIALOGIC CIVILITY IN A CYNICAL AGE (1999); STANLEY DEETZ, TRANSFORMING COMMUNICATION, TRANSFORMING BUSINESS (1995); LINDA ELLINOR & GLENNA GERARD, DIALOGUE: REDISCOVER THE TRANSFORMING POWER OF CONVERSATION (1998); WILLIAM ISAACS, DIALOGUE AND THE ART OF THINKING TOGETHER (1999); MARGARET J. WHEATLEY, LEADERSHIP AND THE NEW SCIENCE (1992); STEPHEN WOOLPERT, ET AL., TRANSFORMATIONAL POLITICS: THEORY, STUDY AND PRACTICE (1998). This is also a recurrent theme in the writings of some conflict theorists. *See, e.g.*, BUSH & FOLGER, *supra* note 18; Terrell A. Northrup, *The Dynamic of Identity in Personal and Social Conflict*, *in* INTRACTABLE CONFLICTS AND THEIR TRANSFORMATION 55-82 (Louis Kriesberg et al. eds., 1989); Richard D. Schwartz, *Arab-Jewish Dialogue in the United States*, *in* INTRACTABLE CONFLICTS AND THEIR TRANSFORMATION 180-209 (Louis Kriesberg et. al. eds., 1989); W. BARNETT PEARCE & STEPHEN W. LITTLEJOHN, MORAL CONFLICT: WHEN SOCIAL WORLDS COLLIDE (1997). *See also* Schwerin, *supra* note 33 (discussing the relationship between the empowerment dimension of mediation and "transformational politics"). In a similar vein, sociologist Anthony Giddens has developed a sizeable body of theoretical work relating the situated interactions of ordinary social actors with institutional and societal reproduction and transformation. *See, e.g.*, ANTHONY GIDDENS, CENTRAL PROBLEMS IN SOCIAL THEORY: ACTION, STRUCTURE AND CONTRADICTION IN SOCIAL ANALYSIS (1979); ANTHONY GIDDENS, THE CONSTITUTION OF SOCIETY (1984); and ANTHONY GIDDENS, NEW RULES OF SOCIOLOGICAL METHOD (2d ed. 1993).

gue for their needs and to pursue efforts to change communities through other channels, including using the appropriate use of the courts to address issues of rights and protections. For others, it may have meant restoration of relationships and the building of greater interpersonal understanding or even interpersonal trust. While these may sound like intangible impacts, they were cited by many of the participants in this study (particularly those describing their experiences with mediation programs using the autonomous approach) as impacts they experienced and valued.

Thus, the programs that emphasized conflict interaction gains were perceived as serving the community members well, providing an experience that was qualitatively different from the status quo of judicial case management. These programs allowed community members to build on the assumed capacity of human beings to handle their own disputes and provided the opportunities for them to do so by supporting party voice and party choice wherever possible.

Such programs were also perceived as promising a positive impact on the courts. That is, it was supposed that citizens who were supported in developing their capacity for handling their own problems might not rely so heavily on the courts to solve their problems for them. It was foreseeable that repeat litigation might decrease and that eventually a competent citizenry would bring fewer claims to court.[50]

These programs also served the mediators well, relieving them of undue case processing pressures while acknowledging they brought more than just case processing skills to the table. In the autonomous and synergistic approaches, mediators were valued for bringing a unique talent for fostering constructive conversations in the midst of conflict.

While the autonomous and synergistic approaches were both built on the historical mediation vision and fostered its impact, there was a notable difference between the two approaches. The autonomous approach essentially rejected the court context in order to retain the purity of its vision and values. This was undoubtedly effective for achievement of its goals; but in rejecting the constraints of the court context, such programs also lost some of the attendant benefits. For example, they did not have the support of the court's re-

50. While this perceived impact was not measured directly or quantitatively in this study, insights on how such a study might be conducted, as well as support for the reasonableness of the perception, can be found in the work of Professor Lisa Bingham. Professor Bingham has studied the effects of offering transformative mediation —an approach explicitly grounded in the traditional mediation values of supporting party voice and choice —to parties involved in EEO disputes at the United States Postal Service. See L.B. Bingham and M.C. Novac (2001), *Mediation's Impact on formal complaint filing: Before and after the* REDRESS™ Program at the United States Postal Service, 21 REV. OF PUB. PERSONNEL ADMIN. 308.

sources (funding, facilities, personnel, etc.). They also did not have the same access to a ready stream of clients as the court-based programs did,[51] which meant that they expended a great deal of effort and resources on community outreach. Synergistic programs tended to have more support in terms of resources, and might potentially have reached more clients, given the volume of clients that flows through the courts. However, this is not to say that one approach should be preferred over another. In fact, it is very likely that the autonomous and synergistic programs served different citizen populations in different ways with the same fundamental vision. The autonomous programs may have been reaching populations, and dealing with issues, that the synergistic programs (given the constraints of working with ripened, pending legal cases) were not. Together in one community, both may have more impact than either alone; but, the disparity in resources between the two is a factor to be considered, and possibly remedied, by the appropriate funding agency.

One final point on both the autonomous and synergistic approaches concerns case processing efficiency — nothing in the study indicated that programs that favored either of these approaches were any less efficient than programs that favored the assimilative approach.[52] The distinction is that autonomous and synergistic programs did not measure success exclusively in case processing terms. While statistical reports were maintained, the statistics did not have the same meaning in autonomous or synergistic programs as they did in assimilative programs. Therefore, it was important for programs pursuing the autonomous or synergistic vision to consider, and use, evaluation and measurement approaches that captured the qualitative impacts they hoped to make, were making, and valued.[53]

INSIGHTS AND IMPLICATIONS

There are a number of insights and implications that emerged from this study that deserve separate emphasis. These insights and implications are use-

51. *Cf.* Harrington & Merry, *supra* note 38, at 721-22 (citing the low caseloads of community mediation programs that did not have close connections with the courts or well-developed court referral systems, and how these programs were disadvantaged in terms of funding when compared to programs that emphasized efficiency gains).

52. It is worth noting that the distinctions drawn in this study among the assimilative, autonomous and synergistic approaches, and the markers identified for programs that privilege any given approach, establish a basis for future comparative empirical research on this question.

53. *See infra*, notes 56-58 and accompanying text.

ful to court administrators, program directors, funding agencies and legislatures in terms of designing or redesigning programs, setting funding priorities and policies, and supporting the preferred social impacts of mediation.

A most fundamental insight is that mediation programs, like the mediation process itself,[54] are based on and reflect underlying visions of the value of conflict resolution processes and the capacities of human beings in conflict. These visions and values shape operating decisions on a daily basis, and also shape the experience of every person who comes into contact with the program. They are visible in certain clusters of program practices, which we have identified here as assimilative, autonomous, and synergistic. Programs will serve their key stakeholders in different ways, and have different social impacts, depending upon which cluster of practices predominantly characterizes the specific program.

An implication of identifying the value-based nature of mediation programs is the need for program decision-makers to develop a heightened awareness of how the nature of a mediation program is shaped and reshaped with each program decision. Program administrators need to understand the importance of monitoring the fit between the articulated values underlying a program and the values that are visible in program decisions. Significant inconsistencies indicate a need for re-examination, and possibly re-alignment, of values, priorities, and practices. A related implication of this study is that programs can examine their practices to determine whether their practices are consistent with the social impacts they wish to promote. The insights afforded by this study with respect to assimilative, autonomous and synergistic programs, and the clusters of practices that characterize each, can be used diagnostically to enable programs to evaluate their own program practices.

Another important insight from this study is that mediation is a complex social institution which, like all institutions, has its own history, traditions and norms, and is constructed on a foundation of fundamental values and assumptions.[55] To "institutionalize" mediation in the courts is to connect it in a very fundamental way with the judicial system, so that each institution becomes, in some way, a part of the other. As the study reported here demonstrates, the core values of one institution or the other will predominate in a given court-connected program. Since mediation and the judicial system are built on incompatible assumptions about human nature, human capacity, and the goals of conflict interaction, an implication of this insight is that any mediation program must consider whether and how to preserve the values of mediation

54. *See generally* BUSH & FOLGER, *supra* note 18.
55. VAN DIJK, *supra* note 23.

within the institution, because programs do have choices in this regard. The study also suggests that the approach to institutionalization privileged by any court-connected mediation program will shape the ultimate social impact of the program by shaping its day-to-day practices and the experiences of those who come into contact with it.

A related implication is that funding agencies should take into account the kinds of social impacts they are interested in fostering as they make their funding decisions. This means that funding agencies should investigate the kind of mediation program they are funding, and not assume that all programs are the same, or that they all have the same social impacts. This study provides agencies with the diagnostic tools to pursue their agendas.

This study also indicates a need to further develop and refine the tools and techniques for qualitative research on mediation programs and their impacts, and to make such research programs accessible to court-connected mediation program. The study suggests that it is especially important for court-connected mediation programs pursuing the autonomous or synergistic approaches to develop and pursue innovative research designs to tap into the social effects that are meaningful for them,[56] so they are not evaluated exclusively on case processing measures. Some participants in this study, particularly participants discussing their experiences with autonomous and synergistic programs, cited the need for such research approaches, but noted their inability to craft and conduct such research to the extent they would like. For example, one participant in this study noted the importance of finding ways to document the "non-event" of violence that was averted and the corresponding litigation that never had to be filed. Some participants provided narrative evidence of increased human capacity to engage in constructive conflict interaction — a foundation for qualitative empirical studies[57] that was not being tapped. Other participants told stories of long-term effects on parties'

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56. For mediation studies that measure impacts other than outcome efficiencies, *see* L. Bingham & T. Nabatchi, *Transformative Mediation In The USPS REDRESS™ Program: Observations Of ADR Specialists* 18 HOFSTRA LAB. & EMP. L.J. 399; L. Bingham & M. Novac, *Mediation's Impact On Formal Discrimination Complaint Filing: Before And After The REDRESS™ Program At The United States Postal Service, in* MEDIATION AT WORK: THE REPORT OF THE NATIONAL REDRESS™ EVALUATION PROJECT OF THE UNITED STATES POSTAL SERVICE 149 (2001); Bingham and Novac, *supra* note 50; and Antes, et al., *supra* note 53.

57. *See, e.g.*, James R. Antes, Joseph P. Folger & Dorothy Della Noce, *Transforming Conflict Interactions In The Workplace: Documented Effects Of The USPS REDRESS™ Program*, 18 HOFSTRA LAB. & EMP. L.J. 429 (2001) (providing an example of such a study).

ways of interacting with each other and within the community — effects that could be captured through longitudinal research. The development of tools and techniques to support research into alternative measures of program impact might also benefit assimilative programs, by tempering the driving force of case processing concerns.[58] However, in those programs it will be equally important to educate key stakeholders in the judicial system on the value of these alternative measures of program impact.

Finally, all of the above insights and implications impact mediation policy-making. Whether mediation policy is set through the legislature, the courts or the programs themselves, this study demonstrates that policy decisions — such as decisions about who can practice mediation, what qualifications are necessary, what outcomes are measured and valued, what programs are funded and to what extent — help shape the goals of the mediation program, its day-to-day practices, and its ultimate impact on the community and society.

58. *See* Della Noce, *supra* note 21; *see also* Antes, et al., *supra* note 57.