INTRODUCTION
Four Decades, Four Cycles:
A Satellite in Orbit, or an Explorer Breaking Free?

The acceptance and use of mediation by courts – at the state and federal level – has grown steadily over the last several decades. Today, mediation is a central element in the overall case-management system of many courts, and this phenomenon continues to grow unabated. At the same time, however, another quite different phenomenon has emerged – the expression of serious criticism from mediation scholars and experts about the way mediation is used by the courts. Indeed, it appears that judges and lawyers in the court system, on the one hand, and mediation experts on the other, understand court-related mediation – and mediation itself – in very different terms. Ironically, then, the moment of mediation’s widest acceptance by the courts has become the occasion for intense concern and even fearfulness from the mediation “community” itself.

This Article will suggest that the current ambivalence about the relationship of mediation to the courts is only the latest phase of a four-decade-long tension in this “partnership” of two very different dispute resolution processes. From the earliest beginnings of the “modern mediation field” in the late 1960s to the present, the relationship of mediation to the courts has cycled back and forth between two orientations. In the first, mediation has been seen and has served as a faithful “servant” of the court system, performing functions vital to the courts and to effective judicial administration. In the second, mediation has been encouraged and has sought to “break free” and establish itself as a separate and distinct conflict resolution process, performing very different functions that are vital to society but unrelated to judicial administration per se. The cycling between these two orientations is driven by the very different potentials mediation offers as a social process, as viewed through different professional eyes. These different views explain why some today are gratified by what they see as mediation’s success in finding a firm place in the court system, while others are discouraged by what they see as the court system “capturing” mediation and depriving it of its real social value.

To understand these different views of mediation, and thus the different attitudes toward court-related mediation today, the historical perspective of the 40-year history of the relationship of these two processes is essential. Against that context, the contending views of the relation of mediation to the courts can be better understood; and sounder conclusions can be reached about the best way to support a healthy relationship between these processes. This Article is intended to present a brief history and analysis of this relationship over the four decades from 1968 to 2008. The frame for that history is the cycling between the two orientations described above –
mediation as serving the courts, or mediation as breaking free – and the history is divided into four periods, roughly corresponding to the four decades involved.

An important qualification on this history is that it focuses on how mediation has functioned as a conflict intervention process in relation to the courts in particular. It is obvious to any student of the field that mediation has operated in many other venues over the last four decades, venues without a clear and direct connection to the court system. Thus, mediation has been used in the context of: managing public policy disputes and formulating public policy; resolving administrative claims in areas subject to regulations on discrimination, special education, healthcare, and social services; mediating conflict among student peers in educational settings at all levels; and addressing conflicts among staff, and with clients or customers, in businesses in the public and private sector. In many of these sectors, mediation has operated largely independent of the courts – although, in most of them, there are points of contact at which the conflicts involved may enter the court system. That is, the “shadow of the law” is a very long one indeed. In any event, in order to keep the presentation within manageable limits, the present history will not address the use of mediation in all of these areas directly and specifically. However, while differences can be found in the way mediation has evolved in these different arenas over the forty year period in question, many of the patterns described in this history can probably be found in those other arenas too. Therefore, this history of mediation in relation to the courts can shed light on how its use has evolved in other contexts, although the specifics of the history of mediation in other contexts will not be addressed specifically here.

To start now with an overview, which also outlines the structure of the succeeding four Parts of this Article: The first cycle in the relationship of mediation and the courts, roughly corresponding to the 1970s (though beginning in the late ‘60s), positioned mediation as “Clearly in Orbit” around the court system, used as a “diversion” mechanism to channel various cases out of the courts. In the second cycle, corresponding to the 1980s, many began to view mediation as “Breaking Free” of the courts, becoming instead an instrument for “community, private ordering, problem-solving, and reconciliation” – values quite different from those driving the legal system. The third cycle, in the 1990s, found mediation “Back in Orbit” as the courts begin to enthusiastically embrace it as a tool for case management and settlement production. Finally, in the fourth cycle, beginning in the late ‘90s and continuing today, mediation has shown a strong impulse toward “Breaking Free Again” and reaching toward new goals of generating “insight”, “understanding” and “transformation” rather than focusing on settlement in the shadow of the courts.

In the following Parts of this Article, each of these cycles is explored in some detail, but one question implied by this overview should be stated and held in abeyance: will the cycling process sketched here continue to repeat itself, with the satellite returning to orbit each time; or are the successive cycles moving toward a point where the satellite actually breaks free. In the Conclusion of the Article, some suggestions will be offered regarding what factors may determine the answer to this question.
PART ONE – 1968-78
First Cycle: Clearly in Orbit – “Diversion” from the Justice System

A. Beginnings: labor mediation methods applied to urban disorders
Many of those involved in the mediation field today might be surprised to learn that, in an important sense, the “modern” mediation field grew out of the urban turmoil and civil unrest that struck the U.S. in the late 1960s. Prior to those momentous events – the disorders in Detroit, Watts, Boston, and elsewhere – mediation was a process used almost exclusively in the labor-management sector. Its use in other arenas of conflict, outside small enclaves where traditional cultures functioned, was practically unheard of. Then, when tensions over racial discrimination, school and housing integration, policing practices, and similar issues boiled over into open conflicts between groups of citizens, or citizens and government, an insight born of necessity emerged and launched the modern mediation field. Experts in labor mediation and community activists, supported by visionaries in government and the nonprofit sector, imagined that just as mediation had provided an alternative to violent intergroup conflict in the early era of collective labor-management bargaining, the process might provide an alternative to the same kind of conflict in the streets of our cities.

The result was the initiation of an effort to provide visible, accessible conflict resolution resources to cities beset by conflict. Among the first to contribute to this effort were: the Community Relations Service (CRS) of the U.S. Department of Justice, a cadre of individuals trained to intervene as mediators in serious interracial and interethnic conflicts; the National Center for Dispute Settlement (NCDS), established by the American Arbitration Association (AAA) as a nonprofit program to provide interveners for major community conflicts and resources for community education; and the Institute for Mediation and Conflict Resolution (IMCR), another nonprofit center established by a noted labor mediator. The latter two were both funded by the Ford Foundation, which continued to be the primary funder of mediation and other conflict resolution programs for a decade.

Initially, these and similar programs deployed trained interveners to mediate major intergroup conflicts of many kinds. One of the early exemplars of this work, Bill Lincoln, was a former community organizer who became a mediator under the NCDS program. Lincoln described his first assignment by the AAA to intervene in a volatile interracial community conflict in Rochester, New York.

In 1971 there was a school desegregation battle in Rochester, New York. A Washington D.C. representative person from the American Arbitration Association called me up and said ‘We’ve been asked to organize a massive mediation effort. People are getting hurt, and some schools are being temporarily closed. Someone in the community has to convene this community….’ My first—informal as it was—mediation was in the streets of Rochester New York in the midst of a racial disturbance while arranging for fire fighters going into intercity areas without fear of being shot. It was right in the street between several fire fighters, police officers, and several Black leaders. I said ‘We’re not going to resolve racism and the grievances of Blacks and Whites tonight, but it may be in the best interests of the entire community if buildings here are not burned.’ We had to work out that the firefighters would not be targets, and how they could kind of ‘team up’ with Black leaders. Without such cooperation—indeed the commitment by community Black leaders—we would never have made it through that night.
Other individuals working for CRS, NCDS, IMCR and other organizations, did similar work in other emergent crises: Ted Kheel, George Nicolau, Willoughby Abner, Joseph Stulberg. Some were lawyers, some mediators, some community activists. All were talented and brave, and all brought mediation to a troubled urban landscape. In the view of many, this was the beginning of the modern mediation field. In other words, in its earliest period of “modern” use, mediation was seen not as an alternative to the courts, but as an alternative to the streets.

B. From the Streets to the Courts, from Intergroup to Interpersonal Conflict: community mediation centers

Its proponents soon realized that mediation could be useful for handling not only intergroup conflict, but interpersonal conflict as well. In fact, the reasoning behind the two uses was linked. As an early report on what came to be known as “community or neighborhood mediation” explained, “The major problem of American justice is … the inability of our system to deal promptly and justly with the little cases that can create festering sores and undermine confidence in society.” The link to large-scale conflict is implied if not clearly stated: A single interpersonal conflict left to fester could escalate into a major intergroup conflict, with disastrous consequences – and incidents of such escalation were not hard to find. On the other hand, providing a means of “promptly and justly” addressing the interpersonal incident could avoid the escalation. From this insight was born another key step in the growth of the mediation field: the introduction of accessible, local “community” or “neighborhood mediation centers”, where trained individuals could be found to serve as mediators in interpersonal conflicts of all kinds.

One of the earliest of these centers was established in Rochester, New York, after the mediation of major conflicts there, like the one mentioned above. Others were opened in other cities, including Philadelphia, Columbus, Boston, Manhattan, and many other places. Sometimes the programs operated as nonprofit agencies, sometimes they were run under government auspices. Almost always, these programs were “fed” their cases by the justice system – local courts, prosecutors and police. The reason for this relationship was threefold: First, those criminal justice agencies were the “gatekeepers” for interpersonal disputes of all kinds, the places most likely to be asked for help by citizens in conflict. Second, the kinds of cases involved were usually “minor” in character, not financially or socially consequential enough to justify (for the parties or the public) serious litigation, but nevertheless troublesome and potentially capable of escalating to larger conflict. Finally, while formal justice procedures were unlikely to provide effective help in such cases, it was believed that mediation could do so better.

In this way, mediation became linked to the courts – and the first cycle of the relationship between the two was born, in which mediation was seen as useful servant of the courts. In the language of that time – still common today – mediation became a “diversion” process, channeling cases out of the criminal justice system and resolving them “promptly and justly”. Of course, mediation continued to be used independently of the courts, for larger-scale conflict. But to the extent it was linked to the courts, that link was established in the mode of a satellite-servant orientation.

Community mediation centers multiplied across the country through the 1970s, and have continued to do so to this day. As of 1981, there were roughly 140 programs, and today there are several hundred. Significantly, the funding of such centers, in this first decade of the history under consideration, was not mainly from private foundation sources, but from governmental
sources. In fact, the primary initial funder of community mediation centers was an agency called the Law Enforcement Assistance Administration (LEAA), a funding arm of the U.S. Department of Justice. The presence of LEAA as a funding source indicated that mediation in these community centers was seen as a useful instrument of the justice system, a satellite of the system that was therefore deserving of justice system financing. By the late 1970s this link between mediation and the justice system was strong enough that the U.S. Attorney General’s office “showcased” the relationship by establishing federally-funded “model” Neighborhood Justice Centers (NJCs) in several major cities. Today, many of the original separately-funded centers have been taken over by local government, which was part of the original intent. And still today, the major part of the caseload of these centers comes from the local courts, criminal and civil, as well as from prosecutors and police.

C. Mediation as Diversion from the Courts: serving for settlement and disposition

A final part of the picture of this first decade was established more firmly by later research, but is important to note here the early findings of research on community mediation. There was considerable rhetoric, in the initial push to establish community mediation centers, that they would serve as places where citizens could engage in “self-determination” by resolving for themselves how to settle their differences, in their own communities. However, the actual practice of mediation in these centers, usually conducted by trained volunteers from different communities than those the parties lived in, was heavily settlement-oriented. That is, the main function of mediation in these centers was to generate settlements in the cases that had been “diverted” to them, so that those cases would not return to the justice system. In the process of performing that function, the reality of mediation practice was often quite directive and even coercive, in contrast to the rhetoric of self-determination on which the centers were founded. In other words, both at the level of institutional linkage and also at the level of individual mediator practice, mediation served the purpose of diverting cases from courts and other justice system agencies and disposing of them efficiently.

Thus, while mediation began the first decade of this history as an “alternative to the streets,” it soon became institutionalized in community mediation centers as an “alternative to the courts”. And in this first cycle of the mediation-courts relationship, mediation was intended to be and readily became a satellite and servant of the courts, a forum to which cases could be “diverted” when they were too minor to warrant formal adjudication, but too troublesome to ignore completely. The climax of this first cycle was not only the establishment of the model NJCs in 1977, but the praise given to community mediation in general, at a watershed federal judicial conference convened in 1976 by then Chief Justice Warren Burger. At that conference, Professor Frank Sander of Harvard Law School delivered what has come to be regarded as a seminal address on ADR, in which he highlighted and praised “work that has been undertaken under the auspices of LEAA to divert certain types of minor criminal offenses … to a mediational proceeding.” Indeed, Sander’s focus on community mediation at this important conference lent academic support to the Attorney General’s soon-to-be-launched NJC program, and it brought community mediation to prominence with the many courts that had not yet encountered it. Clearly embodied in Sander’s presentation is the orientation that mediation can serve the courts as a diversion mechanism. Mediation was the satellite, orbiting and serving the planet that launched it.
PART TWO – 1978-88
Second Cycle: Breaking Free – “Community, Private Ordering, Problem-Solving, and Reconciliation”

Even before the end of the first cycle, some began to question the orientation that saw mediation primarily as the satellite of the courts. In fact, the questioning began in the very sector that saw the mediation satellite launched – community mediation of neighborhood disputes. In major part, the questioning focused on the gap between “rhetoric and reality in the neighborhood justice movement”, and it generally came from critics on the political left who believed that “satellite”-type mediation was becoming a very effective means of extending the state’s control over the life of citizens.

The critique argued that many claims made about mediation and its benefits were not borne out in actual practice, including the claims that community mediation improved communicative capacities of disputants, operated without coercion, dealt with the roots of problems, and allowed disputants to solve their own problems themselves. The critics pointed to early research on community mediation centers that documented how all these claims were negated by the actual practices of mediators working in those centers. Typically, those mediators restricted direct communication between parties, employed various coercive techniques to produce agreements, dealt at best only with superficial aspects of conflicts, and took a major role in formulating solutions to the problems presented. In short, community mediation practice, according to the critics, was not all that different from what litigants might encounter from judges in small claims courts. If mediation was just another such satellite, the critics argued, it represented nothing new or positive, but simply one more device to shore up a flawed justice system. Beyond this negative view of the “mediation-as-satellite” orientation, however, many others came forward in this second period with more positive views of mediation that suggested a different orientation to the mediation-courts relationship.

A. Mediation as a Means of Building Community Capacity: community boards

Beginning in 1977, a program was developed in San Francisco, California, that consciously rejected the idea that mediation was a satellite process of the justice system. The Community Boards Program (CBP) was founded by a former legal services lawyer with a strong belief in community-building at the grass roots level, and it offered a very different view of how mediation could and should relate to courts and other justice institutions. CPB intentionally refused funding from the justice system – at the very height of the period of widespread LEAA funding for mediation centers – and instead sought private foundation funding, precisely in order to be independent of the court system. Moreover, CPB refused to seek or accept cases from courts or prosecutors, and only accepted referrals from individual police officers, on an informal basis and without compulsion. Other cases came from community sources directly, through churches, neighborhood groups and associations, and individuals.

In the view of its founder, Raymond Shonholtz, CPB would use mediation as a true alternative to the courts, through which members of communities, acting through mediation panels, would help other community members address disputed issues. The aim was not only to permit individual citizens to resolve their own problems, but “building capacity in neighborhoods to better manage individual and community issues and conflicts.” Problems would be solved without recourse to formal legal and political institutions, and in the process citizens would develop the capacity for self-governance, such that “a range of conflicts [could] be heard by the community itself.” For
Shonholtz, disputing through the courts and legal systems weakened both the individual citizen’s power and the community’s integrity, and CBP mediation was meant to counteract both of these by “devol[ving] to the most essential unit of democratic society, the citizen, the full power and ability to effectuate a range of rights and responsibilities without any governmental or intermediary structure.” In the long term, CBP saw mediation as a means to “strengthen a neighborhood’s capacity to meet the local needs of citizens and build a more cohesive, interactive community.” In short, CBP wanted the mediation satellite to break away from the court system planet and reach for a new kind of conflict resolution process, one aimed not at settling disputes but at building social capacity, connection and community.

In this view of the orientation of mediation to the courts – explorer of new worlds, not servant or satellite – Shonholtz and the CBP were not entirely original. For example, one of the early, influential scholarly works on community mediation had argued for a “complementary, decentralized system of justice”, parallel to and independent of the court system, in which mediation would take the form of a “community moot”, the traditional forum for dispute resolution in African customary society. For law professor Richard Danzig, “the moot … would be unique in prompting community discussion about situations in which community relations are on the verge of breaking down….” Danzig argued that this community-oriented mediation process should be supported by people “not because they want community control of the operations of the current system, but rather because they want a new system, one which fills a need overlooked in urban America to date.” In short, he envisioned something like the program that Shonholtz actually sought to create in the CBP, and for quite similar reasons. While few other programs followed the CBP model per se, it attracted a great deal of attention and had considerable impact in forming a new view of the orientation of mediation to the courts – as breakaway explorer, not orbiting satellite.

B. Mediation as a Means of Private Ordering for Families: divorce mediation

Another move toward this new view of mediation and the courts was superficially less dramatic, but substantively more important. This move came from a very different quarter, and for quite different reasons. Beginning in the 1970s, slow changes in family law accelerated into a growing movement for “no-fault” divorce. Impressed by evidence of the devastating effects of fault-based litigation on post-divorce family mental health – especially that of children – courts began to reject the fault requirement and favor “divorce by consent” for “irreconcilable differences.” However, doing away with the need to prove fault did not automatically do away with the need to resolve divorcing parents’ differences about parenting – or custody and visitation, as it was then called. The difficulty was that conducting adversary proceedings to determine “parental fitness” and the child’s “best interests” would simply put the negatives of the fault system back in place, despite the changes in the substantive law.

Faced with this quandary, courts were open to an idea put forth by a small but growing number of family lawyers and mental health professionals: the mediation process offered a way to help parents resolve custody disputes without undue acrimony and on terms tailored to each family’s needs. In fact, these early “divorce mediators” were already offering the mediation process to clients in the private market, since they were familiar with the court system and saw it as inimical to their clients’ real needs. They saw mediation as meeting those needs far better. As stated by Jay Folberg, a law professor and early advocate of divorce mediation,
Mediation can help the parties learn how to solve problems together … and recognize that cooperation can be of mutual advantage. Mediation is bound by neither rules of procedure and substantive law nor by other assumptions that dominate the adversary process. The ultimate authority in mediation belongs to the parties…. [T]he emphasis is not on who is right and who is wrong … but on establishing a workable resolution that best meets the needs of the participants.

As in community mediation, party self-determination was presented as a core characteristic and benefit of mediation. Similarly, Folberg and others stressed the communicative and emotional benefits of mediation: “Mediation reduces hostility by encouraging direct communication between the participants…. Feelings of esteem and competence are important byproducts of the mediation process….”

This view of mediation, a view that stressed its major differences from adversarial court proceedings, adopted the insight proposed a decade earlier by an early and seminal mediation scholar, Professor Lon Fuller: “The central quality of mediation [is] its capacity to reorient the parties to each other … by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.”

Significantly, Fuller offered this summary of mediation’s character as part of an argument that family conflicts could best be resolved by mediation rather than in court. Nearly a decade later, the wisdom of his view became the basis for both practitioners’ and courts’ gravitating to the mediation process for family disputes.

Thus, the private mediators’ vision of mediation’s value to clients coincided with the courts’ realization that the no-fault era required some kind of new process. Though this meshing of views was by no means quick or easy – in some jurisdictions, it is still far from complete – it represented another significant change in the view of mediation’s orientation to the courts. Divorce mediation could never be fully free from the legal process, given the need for judicial confirmation of mediated agreements; however, it was nevertheless an important step away from the view of mediation as mere satellite. In the divorce context, mediation was not seen simply a venue to which cases could be diverted for efficient settlement and disposition. Rather, it was seen as a genuinely different process than adjudication, in which parties could communicate more fully, address their problems with greater flexibility and creativity, and make decisions about their own families for themselves. Although “the shadow of the law” was still there, many in the divorce mediation field saw that shadow as quite a faint one, and saw the mediation process as breaking new ground as a way to help divorcing couples “privately order” their affairs and structure their relationships, largely outside the court system.

There was also another way in which the emergence of divorce mediation was a major step toward mediation’s “breaking free” of the courts. For the first time, there was the possibility of mediation becoming a full-fledged profession, and not just a volunteer activity or part-time job. The emergence of full-time professional divorce mediators, whose clients often came to them directly rather than from the court system, meant that mediators could begin thinking about what their profession really entailed. What were the ethical standards required of a mediator, and the competencies – as a mediator per se, rather than a lawyer, therapist, etc.? The need to define the profession and practice also meant the opportunity to assert an independent identity and mission, free of the courts’ dominance. The growing practice of divorce mediation led, in relatively rapid succession, to the formation of a new professional organization – the Academy of Family
Mediators, the first organization of its kind in the mediation field – and the development of standards of practice, minimum training requirements and credentials, and other similar measures. All this contributed to the sense that mediation was indeed reaching “breakaway” velocity on its path to becoming a separate social process, linked to the courts but not subservient to them.

C. Mediation as a Means of Creative Problem-Solving: help in “getting to yes”

Partially but not entirely related to the divorce mediation phenomenon, another force contributed to mediation’s move toward breaking out of the courts’ orbit in this second period. That contribution came from another, related field – negotiation. In the early 1980s, many in the negotiation field were strongly attracted by a new “theory” that appeared, arguing that negotiation did not have to be a zero-sum gain with winners and losers. That theory, advanced for a wide audience by Roger Fisher and William Ury, introduced and established the notions of “win-win bargaining” and “getting to yes” in the culture and practice of negotiation. Some of the central notions of the theory soon had an impact on the mediation field as well. Most important among these notions was the concept that conflicts could and should be seen not as struggles for position, but as problems in how to meet seemingly (but not necessarily) incompatible needs and interests. The “problem-solving” or “integrative” view of conflict and negotiation, which replaced the “positional” or “distributive” view as the favored vision of how the negotiation process should generally be conducted, became the basis for the view that mediation should also be seen as a process for addressing conflicts through creative, mutual problem-solving, not just a process of settling cases in the shadow of expected court outcomes.

Prior to the advent of Fisher and Ury’s Getting to Yes in 1980, mediation theorists paid little attention to the idea of problem-solving. Mediation was seen as an intervention designed to put a failed positional bargaining process back on track. The new theory of negotiation had a major impact on that view of mediation. The clearest indicator of this impact is the appearance for the first time, in the literature of the mediation field, of the language of “needs and interests”. The needs-and-interests language was the core of the new negotiation theory, reflecting the changed view that negotiation was not an adversarial battle for positions but rather a mutual problem-solving process aimed at uncovering and integrating needs and interests. The needs-and-interests language, essentially absent from early mediation literature, appeared in texts on mediation soon after 1980 and gradually became central to an understanding of what mediation does.

Thus, in the original edition of a classic text on mediation first published in 1986, Christopher Moore wrote,

> Often parties are engaged in a positional process that is destructive to their relationships, is not generative of creative options, and is not resulting in wise decisions. One of the mediator’s major contributions to the dispute resolution process is assisting the negotiators in making the transition from positional to interest-based bargaining.

Moore’s references to “creative options”, “wise decisions”, and “interest-based bargaining” were direct reflections of the language used by Fisher and Ury in describing integrative negotiation.

Similarly, Jay Folberg, a key figure in the development of divorce mediation, explained in another important, early text on mediation practice that
… mediation is a promising if not compelling process when compared to the adversary [court process]. Mediation can educate the participants about each other’s needs and … help them learn to work together … and see that through cooperation all can make positive gains…. They may, with the help of their mediator, consider a comprehensive mix of their needs, interests, and whatever else they deem relevant…. Mediation is a win/win process.

Like Moore’s language, Folberg’s references to “needs and interests”, “positive gains”, and “win/win” were clear reflections of the influence of problem-solving negotiation theory. Toward the end of the decade under discussion, a further generation of negotiation theorists, studying barriers to reaching integrative solutions in negotiation, suggested directly that mediation could and should be seen as a way to support mutual problem-solving when the parties were unsuccessful on their own. Eventually, the language of “mutual problem-solving to meet needs and interests” became part and parcel of standard mediation texts, training guides, competency tests, and ethical standards – at least, within the mainstream of what has come to be called “facilitative” mediation practice.

The significance of this development in the conception of mediation’s purpose and practice, as regards the present history, is that it represented another major step toward seeing mediation as a “breakaway” process separate from and not subservient to the courts. Thus, accompanying the characterizations of mediation as facilitated problem-solving, there is a constant effort to differentiate this sort of process from the adversary process of the courts. The passages quoted above from Folberg illustrate this intentional contrasting, as does the following from a more recent mediation text:

[M]ediation is fundamentally different from adjudication…. Adjudication and the rule of law can clarify and develop public norms [and] give society precedents that promote order by guiding similarly situated actors. Mediation, on the other hand, enhances communication, fosters collaboration, and encourages problem solving…. In comparing these two very different approaches to addressing disputes, it is important to note that they serve different masters and have their own distinct logic and integrity.

The point could not be clearer: Mediation is not at all a satellite serving the courts; it is an independent and “very different” process serving very different social goals. The problem-solving theory provided not only a practical but an intellectual justification for seeing mediation as breaking away from the courts and entering truly different conflict resolution territory. And it was this problem-solving theory that, for over a decade, held sway in all sectors of the mediation field – whether in the divorce arena, community centers, or otherwise. One prominent scholar described mediation as “problem solving with an optimistic, creative third-party facilitator,” and stated that “what we have learned from mediation as a field [are] ‘insights into human problem solving’…” Such a view certainly presented mediation as something very different from, and much more than, a satellite of the courts.

**D. Mediation as a Means to Reconciliation and Healing: victim-offender mediation**

One final development illustrates the way in which mediation, during the second decade/cycle of this history, moved in the direction of breaking free of the orbit of the courts. Indeed, this last development is the strongest example of how mediation was viewed as moving far beyond that
orbit – even though it remained linked to the courts in a very concrete way. Beginning in the late 1970s, programs were established, first in a few jurisdictions and then in many more, to offer mediation as a process of reconciliation between victims and perpetrators of crime. By the end of the 1990s, there were nearly 300 such programs operating in the U.S.

These programs, first referred to as victim-offender reconciliation and later as victim-offender mediation, were based on a variety of different influences, but all of them were vastly different from the legal framework of the courts themselves. While the process used in these programs was generally similar to that in other mediation venues, the aims were quite different: to bring about healing of the victim’s sense of violation, “reintegration” of the offender (often but not always a juvenile) into the community, and reconciliation of victim, offender and community. Usually, some specific agreement about offender conduct was involved, including restitution of some kind to the victim, but this was seen as reflective of reconciliation rather than important per se.

As a practical matter, these programs had to be linked to the criminal courts, since the cases and parties were found there. The courts’ viewpoint on these programs was similar to the view of divorce mediation: Adjudication, incarceration and punishment of offenders, especially juveniles, was seen as serving little purpose, or indeed doing more harm than good; while mediation might accomplish something different and reparative, for all involved. From the viewpoint of the mediators, the good to be achieved was related to the value placed on healing and reconciliation, which reflected the mixed but largely consistent influences motivating those who established these programs.

Those influences ranged from theologically-based church “conciliation” to nonwestern traditions of conflict resolution. The first programs in the U.S. were established by those experienced in the conciliation process in Mennonite religious communities, who saw the potential value of applying their model of mediation to victim-offender cases. Later, connections were made with countries abroad, especially Australia and New Zealand, which suggested the use of elements from traditional mediation in the Maori culture. Ultimately, the practices of victim-offender mediation were rationalized as part of the larger criminal justice theory known as “restorative justice”, which was expounded in somewhat different versions both in the U.S. and abroad.

Two well-known practitioner theorists of victim-offender mediation explained the view entailed in victim offender mediation or reconciliation:

We view justice not primarily as punishment or retribution but as restoration of broken relationships. This involves the paradox of working on accountability and forgiveness. Such an approach assumes that conflict resolution goes beyond settlement or agreement [and] includes the dimension of relational reconciliation, the creation of something new…. The VORP [victim-offender reconciliation program] model attempts to work at the restoration and the rehumanization of the conflict…. [I]t views justice as … the restoration of both parties rather than the imposition of pain to deter; the repair of social injury and the encouragement of mutuality and reconciliation.

The practices used to achieve these ends varied somewhat from those of mediation in other venues, but there was a great deal of similarity. The point here, however, is not to detail those practices. It is rather to indicate that the advent and spread of victim-offender mediation
represented another example of how mediation was viewed, in this second decade of the history recounted here, as a new social process, breaking away from the orbit of the courts even as it remained linked to them. As with the theory of “problem solving” mediation, victim-offender mediation saw itself as “fundamentally different” from the processes of the court system. It certainly was related to the courts, but it was related as an equal partner serving radically different values, not as a mere satellite of the court system.

E. Mediation Breaking Free: a new social process, not a mere satellite

In all the examples discussed above from the second decade of mediation’s history, it is evident that this decade involved the strong impulse to move mediation beyond the orbit of the court system per se. Whether as an instrument for capacity-building in communities, a means of private ordering in family conflicts, a part of a new conceptualization of conflict resolution as problem-solving, or a powerful method of reconciliation – in each and all of these perspectives, mediation came to be seen as far more than a satellite orbiting and serving the courts. Rather, it represented, in many different ways, a new social process which, even if it could still relate to the courts, promised to carry the enterprise of conflict resolution into entirely new dimensions.

…… [to be continued]