CHAPTER 1

Transformative Mediation: Theoretical Foundations[*]

Robert A. Baruch Bush and Joseph P. Folger

Theories of conflict

People understand the mediation process in many different ways today, but at some level all share a basic idea about what a mediator does: A mediator is someone who intervenes to help when people are in the midst of conflict. From this common base, approaches to mediation branch off in different directions because of different views about the *kind* of help the parties want from the mediator. In our view, the kind of help people want depends on many factors, but at the most basic level it depends on how they themselves understand what being engaged in conflict is all about. To put it differently, the kind of help we seek depends on what being involved in conflict *means to us* – what we find most significant and affecting, positively or negatively, about the experience of conflict. Such a view, about what the experience of conflict means to the parties, represents what we call a "theory of conflict."

There are three main *"theories of conflict"* found in the literature of the conflict intervention field: power theory,[1] rights theory[2] and needs theory.[3] Arguably, most people see conflict in all three ways, depending on their specific situation. However, from the perspective of the *intervener* reflecting on what kind of help the client wants and expects, one theory alone is generally the primary basis for answering that question: To put it more precisely, every intervener has a "theory of client expectations" which is itself based on certain assumptions about the client's own theory of conflict. Ultimately, the intervener's view of client expectations is what sets the intervener's own views of his or her role in the intervention, obligations to the client, and methodology of practice.

Because of the multifaceted character of the mediation field, there are mediators whose assumptions about client expectations reflect each of the three different theories of conflict mentioned above. And based on this difference, the mediator's sense of role, obligations and best practices differs

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accordingly. The language of the mediation field has developed to reflect this diversity of views about the services mediators can and should offer to clients. Thus, recent literature recognizes that potential mediation users can retain "evaluative" mediators, who will steer them toward outcomes in substantial conformity with legal rights. Or they can retain "facilitative" mediators, who will work to generate a settlement that meets the needs of all sides. Or they can retain "activist" mediators who will ensure that parties (and even outsiders) are protected against domination and unfairness in the process.[4]

Against this background, the transformative theory of conflict and mediation can be seen as a fourth distinct approach, based on a fourth theoretical foundation. It starts with a different and unique view of conflict and client expectations, leading to a different view of the mediator's role, obligations to clients, and practice methods. We do not claim that only the transformative theory and approach to mediation is valid. However, we believe that it represents a view of conflict and mediation that is not only valid but highly appealing, and our purpose in this chapter and volume is to articulate both the social scientific evidence that supports it and the values that it reflects.[5]

The transformative theory of conflict

The transformative theory of conflict starts by offering its own answer to the foundational question of what conflict "means" to the people involved. According to transformative theory, what people find most significant about conflict is not that it frustrates their satisfaction of some right, interest, or pursuit, no matter how important, but that it leads and even forces them to behave toward themselves and others in ways that they find uncomfortable and even repellent. More specifically, it alienates them from their sense of their own strength and their sense of connection to others, and thus it disrupts and undermines the interaction between them as human beings. This crisis of deterioration in human interaction is what parties find most affecting, significant – and disturbing – about the experience of conflict.

Insights from the fields of communication, cognitive psychology and social psychology, among others, all support this view of what conflict means to people.[6] For example, in one study that asked people to describe their experience of conflict in metaphors, almost all the negative metaphors reflected two primary states: powerlessness, and alienation from the other person.[7] Similarly, trainers who ask people to draw pictures that express their experiences of conflict report similar results.[8] Still other studies, examining what people value *most* in processes for handling conflict, find a strong preference for processes that maximize party decision-making and inter-party communication, because these features counteract and remedy the negative experiences of weakness and alienation that parties find so distressing.[9] In general, research like this suggests that conflict as a social phenomenon is not only, or

primarily, about rights, interests, or power. Although it implicates all of those things, conflict is also, and most importantly, about peoples' interaction with one another as human beings. The evidence confirms the premise of the transformative theory: what affects and concerns people most about conflict is precisely the crisis in human interaction that it engenders.

The Picture of Negative Conflict Interaction

Figure 1 [SEE END OF TEXT] represents this view of the phenomenon of conflict, as transformative theory understands it. Conflict, along with whatever else it does, affects people's experience of both self and other. First, conflict generates, for almost anyone it touches, a sense of their own **weakness** and incapacity. For each of them, conflict brings a sense of relative weakness, compared to their pre-conflict state, in their experience of self-efficacy: a sense of lost control over their situation, accompanied by confusion, doubt, uncertainty, and indecisiveness. This overall sense of "weakening" is something that occurs as a very natural human response to conflict; almost no one is immune to it, regardless of their initial "power position." At the very same time, conflict generates a sense of **self-absorption:** compared to before, each party becomes more focused on self alone – more protective of self, and more suspicious, hostile, closed and impervious to the perspective of the other person. In sum, no matter how strong a person is, conflict propels them into relative weakness. No matter how considerate of others a person is, conflict propels them into self-absorption, self-centeredness. [LEFT SIDE OF FIGURE 1] This response to conflict is not pathological, it is entirely normal.

Support for this account of the human experience of conflict comes from work in the fields of cognitive and social psychology, and neurophysiology, among others. For example, Aaron Beck describes extensive work documenting how people confronted with challenge or threat, as is common in conflict, experience a sense of their own powerlessness, diminishment, disregard and victimization, leading to a sense of hostility, suspicion, and anger towards the other party.[10] While Daniel Goleman, in his pathbreaking work on "emotional intelligence," describes research showing how the neurophysiological response of the brain itself to conflict leads to the phenomena described by Beck.[11] None of this occurs because human beings are "defective" in any way. It is rather because conflict has the power to affect our experience of ourselves and others, in virtually every context in which it occurs.

There is more to the picture: As the cycling arrows in **Figure 1** suggest, the experiences of weakness and self-absorption do not occur independently. Rather, they reinforce each other in a feedback loop: the weaker I feel myself becoming, the more hostile and closed I am toward you; and the more hostile I am toward you, the more you react to me in kind, the weaker I feel, the more hostile and closed I become, and so on. This vicious circle of **disempowerment and demonization** is exactly what political scientists mean when they talk about "conflict escalation." The transformative theory looks at

it more as "interactional degeneration." Before a conflict begins, whatever the context, parties are engaged in some form of decent, perhaps even loving, human interaction. Then the conflict arises and, propelled by the vicious circle of disempowerment and demonization, what started as a decent interaction spirals down into an interaction that is negative, destructive, alienating and demonizing, on all sides.

That is what the spiral line descending at the left of **Figure 1** is meant to represent. The interaction in question does not end when conflict begins, but it degenerates to a point of mutual alienation and demonization. That is the conflict escalation or degeneration spiral. When nations get caught up in that spiral, the outcome is what we've seen all too often in the last decades—war, or even worse than war, if that's possible. For organizations, communities, or families who get caught up in the conflict spiral, the result is the negative transformation of a shared enterprise into an adversarial battle. The negative conflict spiral pictured by transformative theory is also documented by research studies on conflict. Beck, for example, closely examines this kind of vicious cycle, describing how it ultimately can lead to mutual hatred and violence, at both the interpersonal and inter-group levels.[12] Jeffrey Rubin and his colleagues in the field of social psychology describe the central role of fear, blame and anger in producing conflict escalation.[13] International conflict theorists also recognize how escalation is the flip side of interactional degeneration into weakness and self-absorption.[14]

The theory of mediation as conflict transformation

Taking the transformative view of what conflict entails and "means" to parties, one is led to a different assumption, compared to other theories of conflict, about what parties want, need and expect from a mediator. If what bothers parties most about conflict is the interactional degeneration itself, then what they will most want from an intervener is help in reversing the downward spiral and restoring constructive interaction. Parties may not express this in so many words when they first come to a mediator. More commonly, they explain that what they want is not just agreement but "closure," to get past their bitter conflict experience and "move on" with their lives. However, it should be clear that, to help parties achieve closure and move on, the mediator's intervention must directly address the interactional crisis itself.

The reason for this conclusion is straightforward: If the negative conflict cycle is not reversed, if parties don't regenerate some sense of their own strength and some degree of understanding of the other, it is unlikely they can move on and be at peace with themselves, much less each other. In effect, without a change in the conflict interaction between them, parties are left disabled, even if an agreement on concrete issues is reached. The parties' confidence in their own competence to handle life's challenges

remains weakened, and their ability to trust others remains compromised. The result can be permanent damage to the parties' ability to function, whether in the family, the workplace, the boardroom, or the community.[15] Recognition of this possibility and its ramifications for the workplace was the main reason for the United States Postal Service's decision to employ the transformative model exclusively in their REDRESS Program for mediating workplace conflicts.[16] "Moving on," in short, necessarily means moving out of the negative conflict interaction itself, and parties intuitively know this and want help in doing it.

From the perspective of transformative theory, reversing the downward spiral is the primary value mediation offers to parties in conflict. That value goes beyond the dimension of helping parties reach agreement on disputed issues. With or without the achievement of agreement, the help parties most want, in all types of conflict, involves helping them end the vicious circle of disempowerment, disconnection and demonization, alienation from both self and other. Because without ending or changing that cycle, the parties cannot move beyond the negative interaction that has entrapped them and cannot escape its crippling effects.

As transformative theory sees it – with solid support from research on conflict – parties who come to mediators are looking for, and valuing, more than an efficient way to reach agreements on specific issues. They are looking for a way to change and transform their destructive conflict interaction into a more positive one, to the greatest degree possible, so that they can "move on" with their lives constructively, whether together or apart. In fact, just as research supports the transformative view of conflict in general, it supports this view of what parties want from mediators. For example, extensive research on workplace mediation at the U.S. Postal Service shows that parties view interactional transformation as one of the most important reasons for using mediation.[17] The transformative model of mediation is intended to provide this benefit.

Thus, based on the above theoretical view of conflict itself, transformative mediation can best be understood as a process of "conflict transformation" – that is, changing the quality of conflict interaction. In the transformative mediation process, parties can recapture their sense of competence and connection, reverse the negative conflict cycle, re-establish a constructive (or at least neutral) interaction and move forward on a positive footing, with the mediator's help.

Human Capacity for Conflict Transformation

How does mediation help parties in conflict reverse the negative conflict spiral? Out of what resource is that kind of transformation generated, and what is the mediator's role in doing so? The first part of the answer to this question points not to the mediator at all, but to the parties themselves. The critical resource in conflict transformation is the parties' own basic humanity – their essential strength,

decency and compassion, as human beings. As discussed earlier, the transformative theory of conflict recognizes that conflict tends to escalate as interaction degenerates, because of the susceptibility we have as human beings to experience weakness and self-absorption in the face of sudden challenge.

However, the theory also posits, based on what many call a "relational" theory of human nature, that human beings have inherent capacities for strength (i.e., agency, or autonomy) and responsiveness (i.e., understanding, or empathy), and an inherent social or moral impulse that activates these capacities when people are challenged by negative conflict, ultimately overcoming the tendencies to weakness and self-absorption.[18] When these capacities are activated, the transformative theory asserts, the conflict spiral can reverse and interaction can regenerate, even without the presence of a mediator as intervener. In fact, the same research that documents the negative conflict cycle also documents the power of the human capacities for strength and understanding to operate in the face of challenge and conflict, and ultimately to transform conflict interaction.[19]

Figure 1 [FULL FIGURE] expands the picture presented earlier and illustrates this positive potential of conflict interaction. It is true that people in conflict tend to find themselves falling into the negative cycle of weakness and self-absorption. But it is equally true that people do not necessarily remain caught in that cycle. Conflict is not static. It is an emergent, dynamic phenomenon, in which parties can, and do, move and shift in remarkable ways, even when no third party is involved. They move out of weakness, becoming calmer, clearer, more confident, more articulate and more decisive – in general, **moving from weakness to strength**. They shift away from self-absorption, becoming more attentive, open, trusting, and understanding of the other party – in general, **shifting from self-centeredness to responsiveness** to other. Just as studies document conflict's negative impacts and the downward conflict spiral, they also document the dynamics of these positive shifts and the upward, regenerative spiral they engender.[20]

The arrows moving from left to right in **Figure 1** represent these shifts, the movements parties make from weakness to strength and from self-absorption to understanding of one another. In transformative theory, these dynamic shifts are called "**empowerment**" and "**recognition**."[21] Moreover, as the figure suggests, there is also a reinforcing feedback effect on this side of the picture. The stronger I become, the more open I am to you. The more open I am to you, the stronger you feel, the more open you become to me, and the stronger I feel. Indeed, the more open I become to you, the stronger I feel in myself, simply because I'm more open; that is, openness not only requires but creates a sense of strength, of magnanimity. So, there is also a circling between strength and responsiveness once they begin to emerge.

Why do we call this "conflict transformation?" Because as the parties make empowerment and recognition shifts, and as those shifts gradually reinforce in a virtuous circle, the interaction as a whole begins to transform and regenerate. It changes back from a negative, destructive, alienating and demonizing interaction to one that becomes positive, constructive, connecting and humanizing, even while conflict and disagreement are still continuing. This reversal of the conflict cycle from negative and destructive to positive and constructive is what the spiral line ascending at the right of **Figure 1** represents. The keys to this transformation of conflict interaction are the empowerment and recognition shifts that the parties themselves make. No matter how small and seemingly insignificant, as these shifts continue and accumulate, they can transform the entire interaction. Is it hard for those shifts to occur? It most certainly is, especially for parties who have been overcome by the sense of weakness and self-absorption that conflict first brings. It's hard, but it's eminently possible.

Moreover, the potential and value of conflict transformation is by no means limited to cases where the parties have some kind of preexisting and ongoing relationship. The reason is simple: the negative conflict cycle is almost always a part of people's human experience of conflict, and almost always something that they want to change. This last point highlights another key premise of the theory behind transformative mediation.

Human Motivation for Conflict Transformation

Thus far, we have emphasized that substantial evidence supports the view that what people dislike most about conflict are its impacts of disempowerment and disconnection, as well as the view that people have the capacities to reverse the cycle that produces them. However, even if this evidence is accepted, the question remains: *Why* are people so deeply affected and touched by these negative impacts? And why, as a result, do they care so much about reversing the negative conflict spiral? Answering these "why" questions means going beyond the realm of practice and research, to the realm of belief or ideology.

Thinkers in different fields offer insights that shed light on these "why" questions – and all their insights are grounded in what can be called a "relational" conception of human nature or identity. According to that view, all human beings share a common nature, the core of which is a dual sense of both individual autonomy and social connection.[22] Put differently, as a matter of basic human consciousness, every person senses that she or he is a separate, autonomous agent authoring her or his own life, and at the same time senses that she or he is an inherently social being, connected to other people in an essential and not just instrumental fashion. Moreover, in this "relational" view, awareness of both individual agency and social connection is not just a peripheral characteristic – it is the very essence of human consciousness, the core of our identity as human beings. Each part of this duality,

individuality and connectedness, is equally important to our fundamental sense of human identity, and we struggle constantly to give each its place and balance or "relate" them – hence the term "relational" – in all our affairs.

This relational view of human nature is expressed in many fields today, in different terms. In social psychology, the study of human "happiness" and "well-being" finds that they are the results of having an integrated, relational sense of autonomy and social connection, more than any other factor.[23] In political science, sociology and law, "communitarian" theory asserts the importance of fostering both individual freedom and social responsibility, linking this to a belief in the relational nature of human identity.[24] In moral philosophy, postmodern and feminist thinkers reject views of moral consciousness as stemming from either autonomy or connection, adopting instead a dialogic conception in which the fully developed moral sense attends equally to both, to the claims of self and other in dialogic relation, however difficult this may be.[25] The overall "relational worldview" implied by these different disciplinary views finds broad support today, in many fields.

Returning to the above questions: Why are people so affected and disturbed by the disempowerment and disconnection of the negative conflict cycle, and why does reversing that cycle matter to them so much? The answer flows from the relational conception of human identity as just summarized. If a person's core sense of identity is linked to his or her sense of both autonomy and connection, and *if both of those are compromised at the very same time*, it makes perfect sense that this will be a profoundly disturbing experience. In effect, the core sense of identity that undergirds the person's life – strong self connected to other – is thrown into question by conflict. This is why the weakness and alienation produced in negative conflict is so repellent to parties in conflict – it violates their very identity, their sense of who they are as human beings. To remain in such a condition is as painful to people as if they were imprisoned and forced to live like animals. Indeed some describe the negative conflict cycle itself as a kind of prison.[26]

This also explains why people who find themselves in negative conflict interaction look for ways to change and reverse the interactional degeneration, with or without a third party's assistance: People want to get out of the essentially inhuman experience of negative conflict interaction. The motivation can also be seen from the positive angle. That is, assuming that people retain some sense of their core humanity, even when embroiled in negative conflict interaction, the impulse to reassert their humanity can also be seen as the motivator for their efforts to change the conflict interaction. Sometimes this is referred to as the social or moral impulse inherent in human nature. Whichever adjective is used, the meaning is the same: it is the impulse to reassert one's core human identity, in a situation where it has been compromised.

Based on this theoretical understanding, parties' motivation to change negative conflict interaction is both real and powerful. This view of party *motivation* is a fundamental element of the transformative theory. An equally fundamental element of the theory is the view that parties have the *capacity* to change negative interaction, as argued above. Without both these elements, the transformative theory of mediation would make little sense: If parties don't have the desire or motivation to change conflict interaction, it would be pointless to offer them the means to do so; and even if they do have that desire, it would be pointless to proceed if they did not also have the capacity to do so.

The Role of the Mediator in Conflict Transformation

The most important premises of the transformative theory are that parties have both the desire and the capacity for conflict transformation. Helping to support this desire and capacity is the "value-added" that the mediator brings to the table, supporting parties in a process of changing the quality of their conflict interaction, and most importantly, reversing its negative and destructive spiral. Mediators do this by providing important help and support for the small but critical shifts by each party, from weakness to strength and from self-absorption to understanding. They do this by using their skills both to highlight the opportunities for shifts that surface in the parties' own conversation and to support the parties' efforts to utilize them. **Figure 1** describes the potential effects of the mediation process on conflict interaction and the transformation and regeneration of the human interaction between the parties, even as the conflict continues to unfold. The Figure as a whole reflects both the original spiral into destructive conflict and the regeneration of positive interaction through the mediation process.

In this picture, the mediator stands, as it were, at the bottom of the figure, offering specific forms of support that help the parties make empowerment and recognition shifts, when and as they choose, and thereby change the quality of their conflict interaction. This is perhaps the central claim of the transformative theory – that mediators' interventions can help parties transform their conflict interaction. And like the other elements of the theory, there is research to support it.[27]

Definitions

The above discussion brings us to the definition of mediation itself, and the mediator's role, in the transformative model. Both of these definitions differ markedly from the normal definitions found in training materials and practice literature – in which mediation is usually defined as a process in which a neutral third party helps the parties to reach a mutually acceptable resolution of some or all the issues in dispute, and the mediator's role is defined as establishing ground rules, defining issues, establishing an agenda, generating options, and ultimately persuading the parties to accept terms of agreement.[28]

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By contrast, in the transformative model:

- **Mediation is defined** as a process in which a third party works with parties in conflict to help them change the quality of their conflict interaction from negative and destructive to positive and constructive, as they explore and discuss issues and possibilities for resolution.

- **The mediator's role** is to help the parties make positive interactional shifts (empowerment and recognition shifts) by supporting the exercise of their capacities for strength and responsiveness through their deliberation, decision-making, communication, perspective-taking, and other party activities.

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

Specific practices tied to these definitions and goals are discussed elsewhere in this volume.[29] However, it is important to introduce here a few important principles that should guide the mediator in supporting empowerment and recognition shifts – all of which grow out of a proper understanding of the dynamics through which these shifts occur.

Guiding Principles

First, these are shifts that the parties, and the parties alone, can make. No mediator can "get" parties to shift out of weakness or self-absorption, nor should he try. Parties gain strength and openness by making decisions by and for themselves, in their own way and at their own pace. A mediator who tries to "get" shifts to happen actually impedes this process by removing control of the interaction from the parties' hands. Put differently, this mediator violates the defined goal of supporting empowerment by *supplanting* party decision-making.

Second, the mediator should expect that, normally, parties do not begin to shift out of self-absorption until they have first shifted out of weakness and gained greater strength in some degree. Simply put, people are unlikely to extend themselves to others when they are still feeling vulnerable and unstable. Therefore, empowerment shifts are usually the first to occur, as the desire and capacity for strength reasserts itself, and supporting them is where the mediator's help is likely to be needed first. On the other hand, when such shifts do occur, they are often followed quickly by recognition shifts, as the desire and capacity for connection reasserts itself. Thus, gains in strength often lead directly and

quickly to gains in responsiveness. Interactional change usually begins with a party becoming calmer, getting clearer, and thus regaining strength; with this renewed strength, the party then begins to open up to a different view of the other. This pattern is very common in the dynamic that unfolds in a transformative mediation session.

Third, while there is likely to be a dynamic interplay of empowerment and recognition, as just described, the move toward conflict transformation is unlikely to be smooth and even. Rather, empowerment and recognition shifts are often followed by retreats back into weakness and self-absorption, as the interaction reaches new or deeper levels; and the retreats are then followed by new shifts into strength and openness, and so on. In pursing the goal of supporting shifts, the mediator has to be prepared for this back and forth, in order to follow along and be ready to provide support for new shifts as the opportunities for them arise. Ultimately, the cycling shifts and retreats tend to move forward, and the overall interaction changes in quality from negative to positive – but great patience is required of the mediator in *allowing* that movement rather than trying to "move" the parties forward.

Fourth, while the mediator's job is to support empowerment and recognition shifts, *the transformative model does not ignore the significance of resolving specific issues*. Rather, it assumes that, if mediators do the job just described, the parties themselves will very likely make positive changes in their interaction and find acceptable terms of resolution for themselves, where such terms genuinely exist. Consider the strong logic of this claim: If empowerment and recognition shifts occur, and as a result the parties are interacting with clarity and confidence in themselves (strength) and with openness and understanding toward each other (responsiveness), the likelihood is very high that they will succeed in finding and agreeing on solutions to specific problems, without the need for the mediator to do that for them. More importantly, they will have reversed the negative conflict spiral and begun to reestablish a positive mode of interaction that allows them to move forward on a different footing, both while and after specific issues are resolved and even if they cannot be resolved. Research on transformative mediation has shown that it can and does produce both of these impacts – resolution of specific issues and, even more important, interactional change, just as the theory predicts.[30]

Finally, it is important to point out that, to focus on and successfully pursue the goal of supporting interactional shifts, two fundamental things are required of the mediator – apart from various specific skills discussed elsewhere in this volume. The first requirement is that the mediator must never lose sight of the overall point of his or her "mission": to help the parties transform their conflict interaction from destructive and demonizing to positive and humanizing. Maintaining this clear perspective is not all that easy in a professional culture that generally views attainment of agreement or settlement as all important. The other requirement is a deep acceptance of the premises about human

motivation and capacity that constitute the ultimate foundation of the transformative theory. It will be very difficult for a mediator to stop trying to "get the parties" to make shifts, unless she or he is firmly convinced that doing so is not only impossible but *unnecessary* – because the parties have both the desire and capacity to make those shifts for themselves.

The value of conflict transformation: Private and public

A final and important point concerns the value or benefits associated with conflict transformation. Various views of the benefits of mediation are found in the literature, and discussion of private and public benefits of the process generally mixes the two together, not differentiating between them. Questions have been raised about why disputing parties themselves – as opposed to public policymakers – would find this approach to mediation useful. Most of those questions have been implicitly answered by the discussion of this chapter. Nevertheless, it is useful here to "unpack" the transformative view of mediation's benefits, separating private from public as clearly as possible.

As explained above, *disputing parties themselves* want and value conflict transformation and regard it as a benefit, because they want to escape the negative personal impacts of destructive conflict interaction, and they want to reestablish the positive experience of competence and connection that is found in constructive conflict interaction. If so, then mediation offers a great benefit to parties in conflict: it helps them conduct conflict itself in a different way. It supports the virtuous circle of personal empowerment and interpersonal recognition that de-escalates and "de-embitters" conflict so that, even if conflict continues, it is no longer dehumanizing and demonizing. Transformative mediation thus helps disputing parties "move on with their lives," with a restored capacity for living those lives — including a sense of their own competence as well as confidence in their ability to connect to others.

All this involves the *private benefits* that, according to transformative theory, are sought and valued by disputing parties themselves. In addition to these benefits to the parties themselves, conflict transformation has important *public benefits*, effects that advance the goals of society generally. Identifying these distinct public benefits is especially important in formulating public policy on mediation.[31] If all mediation's benefits are private, there is no value in establishing public policies to promote or support its use. Private users can be counted upon to make their own decisions about whether to use the process, based on its benefits to them. However, if using mediation creates value for society, public policy should encourage disputants to use mediation even when they might not do so for the private benefit alone. Indeed, the widespread adoption of court-ordered mediation is one example of the kind of policy that can *only* be justified by mediation's public benefits. In general, discussions of the *public benefits* of mediation have focused on its value in saving public resources when cases are settled,

reducing court backlogs, facilitating speedier disposition of cases, and thus allowing more efficient use of limited public resources.[32]

The public value of *conflict transformation* is overlooked in most discussions of the public benefits of mediation. However, the public benefits of conflict transformation are quite important, particularly in debates over the value of mediation by comparison to the formal legal process, debates that were quite intense some years ago and have resurfaced more recently.[33] Conflict transformation has public benefits that flow from parties experiencing empowerment and recognition shifts within a mediation process aimed at supporting these shifts. In our contemporary society, citizens increasingly suffer from learned dependency – whether on experts, on institutions, on addictive substances, etc. – and from mutual alienation and mistrust, especially along lines of race, gender and class. The resulting civic weakness and division threaten the very fabric of our society.[34] Therefore, personal experiences that reinforce the civic virtues of self-determination and mutual consideration are of enormous public value – and this is precisely what the process of conflict transformation provides. This is the public benefit of conflict transformation, and it is critical to discussions of the public value of mediation, by comparison to the formal legal process or other ADR processes.[35]

This discussion is *not* intended as an argument that *only* the conflict transformation benefits of mediation matter – whether to private parties or to public policymakers. Parties may indeed be interested in other kinds of private benefits, especially those related to expeditious settlement of the dispute on favorable terms, and public decision-makers may also be drawn to mediation for other reasons, including efficiency. The point here is rather that *conflict transformation should also be seen as an important benefit* of mediation, sought and valued by both private parties and policymakers charged with furthering public, societal interests.
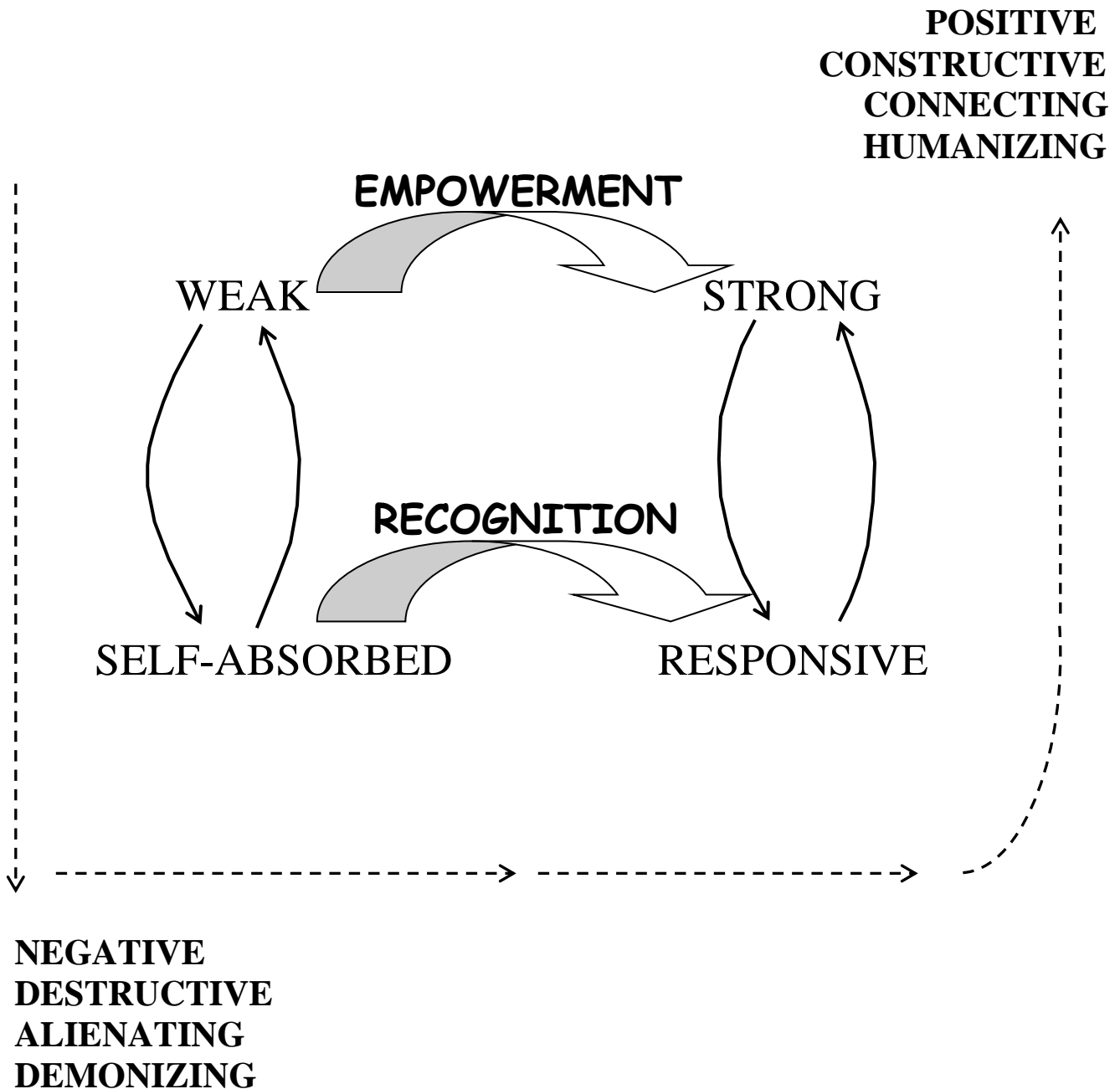
The promise of mediation as a transformative process

The transformative view of what mediation can and should offer to parties and to the public, as demonstrated by this chapter, is both practically and theoretically based. From the insights of psychology, communication, philosophy and other fields, we have understood why conflict transformation matters to people and how it can theoretically occur through mediation. From the insights of political and social theory, we have learned why conflict transformation benefits not only private parties but society as a whole. From the parties, groups and mediators that we have worked with and studied over many years, we have learned that this theoretical promise of what mediation can offer is real. It is not a magical vision, nor naïve; its belief in human strength and decency carries the deepest truth within it. The promise mediation offers for transforming conflict interaction is real, because

skilled mediators can support the parties' own work, create a space for that work to go on, and, most important, stay out of the parties' way. Transformative mediators allow and trust people to find their own way through their conflict, and more importantly, find themselves and each other, discovering and revealing the strength and understanding within themselves. Elsewhere in this volume, various authors offer a wide range of examples of how the transformative theory of conflict and mediation has taken hold and affected the field. Those examples show that the theory of conflict transformation is increasingly emerging as reality in many arenas of mediation practice.

FIGURE 1

"CONFLICT TRANSFORMATION"
(CHANGING CONFLICT INTERACTION)

POSITIVE
CONSTRUCTIVE
CONNECTING
HUMANIZING

EMPOWERMENT

WEAK   STRONG

RECOGNITION

SELF-ABSORBED   RESPONSIVE

NEGATIVE
DESTRUCTIVE
ALIENATING
DEMONIZING

[1] *See, e.g.*, Richard Abel, *The Contradictions of Informal Justice*, *in* THE POLITICS OF INFORMAL JUSTICE (1982). In power theory, conflict is seen as a struggle for domination or against subjugation, and the help needed is help in organizing and mobilizing support and resources of all kinds for the struggle.

[2] *See, e.g.*, Owen M. Fiss, *The Supreme Court Term 1978 – Forward: The Forms of Justice*, 93 HARV. L. REV. 1 (1979). In rights theory, conflict is seen as a contest between competing claims of right, in reference to some set of governing principles, and the help needed is analysis and advocacy by someone expert in the set of principles that govern.

[3] *See, e.g.*, Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754 (1984). In needs theory, conflict is seen as a problem in how to meet seemingly conflicting needs with limited resources, and the help needed is problem-solving assistance from someone expert in the methods of joint-gains problem solving.

[4] *See, e.g.*, Grace E. D'Alo, *Accountability in Special Education Mediation Practice*, 8 HARV. NEGOT. L. REV. 201, 205-06 (2003).

[5] One other introductory point: While each of the different theories of conflict and mediation may be valid – including the transformative theory – we do not believe that they can be combined or integrated, at either the theoretical or practical levels. Thus, while we do not argue that only one approach to mediation is valid, we do argue that only one can be coherently practiced at a time. The support for this proposition has been set forth elsewhere, and can be examined. However, to fully understand and appreciate what is presented in this volume, it is best to encounter the principles and practices of the transformative approach on their own terms. Doing so will give a sense of the coherence of the approach, even for those who remain skeptical about it.

[6] *See* JOSEPH P. FOLGER & MARSHALL S. POOLE, WORKING THROUGH CONFLICT: A COMMUNICATION PERSPECTIVE (1984); JOSEPH P. FOLGER ET AL., WORKING THROUGH CONFLICT: STRATEGIES FOR RELATIONSHIPS, GROUPS AND ORGANIZATIONS (4th ed. 2001) [hereinafter FOLGER ET AL., WORKING THROUGH CONFLICT]; Robert A. Baruch Bush & Sally G. Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 PEPP. DISP. RESOL. L.J. 67 (2002); AARON T. BECK, PRISONERS OF HATE: THE COGNITIVE BASIS OF ANGER, HOSTILITY, AND VIOLENCE (1999); JEFFREY Z. RUBIN ET AL., SOCIAL CONFLICT: ESCALATION, STALEMATE AND SETTLEMENT (2nd ed. 1994); DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ (1995).

[7] Suzanne McCorkle & Janet Mills, *Rowboat in a Hurricane: Metaphors of Interpersonal Conflict*, 5 COMM. REP. 57 (1992).

[8] Paul Charbonneau, *How Practical is Theory?*, *in* DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK (Robert A. Baruch Bush & Joseph P. Folger eds., 2001).

[9] EDGAR ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); 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 (1996).

[10] BECK, *supra* note 6.

[11] GOLEMAN, *supra* note 6.

[12] BECK, *supra* note 6.

[13] RUBIN ET AL., *supra* note 6.

[14] Terrell A. Northrup, *The Dynamic of Identity in Personal and Social Conflict*, *in* INTRACTABLE CONFLICTS AND THEIR TRANSFORMATION (Louis Kriesberg et al. eds., 1989).

[15] *See, e.g.*, FOLGER ET AL., WORKING THROUGH CONFLICT, *supra* note 6. For this reason, current discussions emphasize the importance of the "sustainability" of resolutions, and recognize that changes in parties' attitudes and interactions are crucial to sustainability. *See* Robert A. Baruch Bush, *Staying in Orbit, or Breaking Free: The Relationship of Mediation to the Courts over Four Decades*, 84 N.D. L. REV. 705, 746-48 (2008).

[16] Robert A. Baruch Bush, *Handling Workplace Conflict: Why Transformative Mediation?*, 18 HOFSTRA LAB. & EMP. L.J. 367 (2001); Cynthia J. Hallberlin, *Transforming Workplace Culture Through Mediation: Lessons Learned from Swimming Upstream*, 18 HOFSTRA LAB. & EMP. L.J. 375 (2001).

[17] Lisa B. Bingham, *Mediating Employment Disputes: Perceptions of Redress at the United States Postal Service*, 20 REVIEW PUB. PERS. ADMIN. 20 (1997); James R. Antes, Joseph P. Folger & Dorothy J. Della

Noce, *Transforming Conflict Interactions in the Workplace: Documented Effects of the U.S. Postal Service REDRESS Program*, 18 HOFSTRA LAB. & EMP. L.J. 429 (2001).

[18] Dorothy J. Della Noce, *Seeing Theory in Practice: An Analysis of Empathy in Mediation*, 15 NEGOTIATION J. 271 (1999) (offering a succinct description of the "relational" theory and referencing the literature that supports it). *See also* notes 23-25 *infra* and accompanying text.

[19] BECK, *supra* note 6; GOLEMAN, *supra* note 6; ALFIE KOHN, THE BRIGHTER SIDE OF HUMAN NATURE (1990).

[20] *See, e.g.,* BECK, *supra* note 6.

[21] Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition? The Mediators Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253 (1989) [hereinafter Bush, *Efficiency and Protection*]; Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1 (1989-90) [hereinafter Bush, *Mediation and Adjudication*] (containing the earliest descriptions of "empowerment" and "recognition" shifts).

[22] *See* Della Noce, *supra* note 18.

[23] Ann B. Bettencourt & Kennon Sheldon, *Social Roles as Mechanisms for Psychological Need Satisfaction Within Social Groups*, 81 J. PERSONALITY & SOC. PSYCHOL. 1131 (2001); LIND & TYLER, *supra* note 9.

[24] MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); AMITAI ETZIONI, THE NEW GOLDEN RULE (1996); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

[25] CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982); Carol Gilligan, *Adolescent Development Reconsidered*, *in* MAPPING THE MORAL DOMAIN (Carol Gilligan, Janie V. Ward & Jill M. Taylor eds., 1988); Joel F. Handler, *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*, 35 UCLA L. REV. 999 (1998); DARYL KOEHN, RETHINKING FEMINIST ETHICS: CARE, TRUST AND EMPATHY (1998).

[26] BECK, *supra* note 6.

[27] *See, e.g.,* James R. Antes et al., *supra* note 17; Janet K. Moen et al., *Identifying Opportunities for Empowerment and Recognition in Mediation*, *in* DESIGNING MEDIATION, *supra note 8, at 112.*

[28] *See, e.g.,* Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85 (1981); JAMES J. ALFINI ET AL., MEDIATION THEORY AND PRACTICE (2nd ed. 2006); CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT (1986); JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION (1984).

[29] *See* Robert A. Baruch Bush & Joseph P. Folger, *Transformative Mediation: Core Practices* (this volume).

[30] *See* Antes et al., *supra* note 17; Karen Intrater & Traci G. Gann, *The Lawyer's Role in Institutionalizing ADR*, 18 HOFSTRA LAB. & EMP. L.J. 469 (2001); Lisa B. Bingham & Tina Nabatchi, *Transformative Mediation in the USPS REDRESS Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L.J. 399 (2001); Lisa B. Bingham, *Mediation at Work: Transforming Workplace Conflict at the United States Postal Service*, *in* HUMAN CAPITAL 2004 199 (Jonathan D. Breul & Nicole W. Gardner eds., 2002).

[31] *See* Bush, *Mediation and Adjudication*, *supra* note 21 (describing the ongoing debate over the public benefits of mediation in relation to the formal legal process).

[32] *See* Marc S. Galanter, *A Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States*, 12 J.L. SOC'Y (1985) (discussing the tendency of public benefit discussions to focus on administrative efficiency).

[33] *See, e.g.,* Bush, *Mediation and Adjudication*, *supra* note 21; Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 1 J. DISP. RESOL. 81 (2002).

[34] ETZIONI, *supra* note 24 ; Handler, *supra* note 25.

[35] Bush, *Mediation and Adjudication*, *supra* note 21 (clarifying the public benefit of mediation in terms similar to those discussed in the text here). Interestingly, while the efficiency arguments for mediation's public value have long been given great weight, it increasingly appears that those arguments have been overstated and that they lack evidentiary support. That is, according to the most recent and thorough research, the use of mediation actually has little impact in reducing the time and cost of case disposition in the legal system. *See* Hensler, *supra* note 33. If so, then what justifies public policy ordering – or even encouraging – parties to use mediation? This question has resurfaced recently with considerable force, and it cannot be answered except by pointing to public benefits of mediation beyond efficiency. Those are the very benefits just discussed, and they are all connected to conflict transformation, and to the practice of mediation as a transformative process.