RECLAIMING MEDIATION'S FUTURE: RE-FOCUSING ON PARTY SELF-DETERMINATION

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The premise of the Symposium that occasioned this Issue was that mediation is presently underutilized almost everywhere, and that the reason for this phenomenon is that the public simply doesn't grasp the great value of the process due to inadequate outreach and education efforts about mediation as an alternative to the legal system. Some suggest that greater use of mandatory mediation policies is called for as a response, rather than continuing the fruitless effort to explain mediation's value to an apparently unreceptive public.[1] We disagree about both the cause and the solution for lack of public interest in mediation. We believe that mediation's lack of success in the dispute resolution "market" is not

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[1] *See, e.g.,* Giuseppe De Palo, *Voluntary Mediation: Apparently, the False Prince Charming*, MEDIATE.COM (Mar. 2014), http://www.mediate.com//articles/PaloResponse.cfm.

due to the public's lack of knowledge about the process, but rather to the public's dissatisfaction with the mediation process as they have actually encountered it, in the courts and elsewhere. That is, the problem lies not with an uninterested community of potential users, but with the failure of mediation providers to deliver a "product" that lives up to its promises and offers something truly new and valuable to its users.

For ourselves and the colleagues we've worked with for many years, our first premise has always been that *self-determination, or what we call empowerment, is the central and supreme value of mediation*—a premise probably shared by many in the field. This is what we were struck by when we began, and believed was uniquely served by mediation. Empowerment is the heart of the mediator's mission, and we value self-determination above all. We believe in the value of upholding party choice, and we also believe that increasing understanding, reaching sustainable resolution, and other goals all rest on the foundation of genuine party self-determination. And we believe that the experience of self-determination is what *parties themselves* value most in the mediation process—and most mediation as currently practiced does not provide that experience to mediation clients. The explanation for the current state of mediation usage is the current state of mediation practice. Our views on this have been explained in many places.[2]

At this point in the evolution of mediation, the question in our view is, what has happened to the mediator's unique mission of supporting self-determination? There is no such thing as envisioning the future without understanding the past and present. In the case of our field, there are many metaphors to describe mediation's current state, and how we got here. For us, as we reflect on the state of the field today, the most accurate metaphor is that mediation has been "captured". But, captured by what?

Social science research and historical events—from the Zimbardo experiment[3] in the 1970s to Abu Ghraib in this decade—provide an important lesson: Environments change people more easily than people change environments. Thus, one can argue that mediators were changed by the environments they worked in, es-

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[2] *See, e.g.,* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT (2d ed. 2004); Robert A. Baruch Bush, *Taking Self-Determination Seriously: The Centrality of Empowerment, in* TRANSFORMATIVE MEDIATION: A SOURCEBOOK 51 (Joseph P. Folger, Robert A. Baruch Bush & Dorothy J. Della Noce eds., 2010) [hereinafter SOURCEBOOK].

[3] *See* THE STANFORD PRISON EXPERIMENT, http://www.prisonexp.org (last visited Mar. 20, 2015).

pecially courts and other authoritative agencies, adopting the case-settlement goals and practices favored by their "hosts" and forgetting about self-determination. Institutional pressures pushed mediation practice to a place that many of us did not anticipate and certainly did not want.[4]

But is it really just the courts who became the captors of our field? No, it goes much broader and deeper. As we see it, mediators were captured by what could be called a problem-solving culture, a professional culture of expert fixers, protectors, and problem solvers, who focus on relieving the pain and frustration of unmet needs and tangled problems, applying their skills to protect clients from both themselves and each other. ADR scholar Deborah Kolb reported in her study of mediator practices that for a majority of the mediators she studied:

> Questions become suggestions in the guise of a query. . . . These mediators frequently make suggestions on matters of substance . . . [using their] expertise as the touchstone of their efforts at persuasion and influence. They acknowledge that they make judgments about what is a good and bad agreement and try to influence the parties in the direction of the good. . . . [They] are strongly inclined to believe that without their substantive and procedural know-how, the parties would flounder and a good settlement would be elusive.[5]

Underlying this mode of practice, as implied by Kolb's conclusion, is the mediators' belief that disputing parties themselves lack capacity for rational decision-making and mutual understanding. Lacking the former, parties will make shortsighted, ill-considered decisions, leading to unnecessary impasse or suboptimal agreements. Lacking the latter, parties will tend to exploit each other, leading to one-sided, unfair agreements. The parties' cognitive and emotional deficits must therefore be supplemented by the mediator's skills and expertise, in order to protect them from harming both themselves and each other.[6]

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[4] *See, e.g.*, Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 3–33 (2001) (describing settlement practices among court-appointed mediators). *See generally*, 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, 732–39 (2008) (citing numerous sources that describe coercive practices among court-connected and other institutionally-based mediators).

[5] Deborah M. Kolb & Kenneth Kressel, *Conclusion: The Realities of Making Talk Work, in* WHEN TALK WORKS: PROFILES OF MEDIATORS 459, 471–74 (1994).

[6] See 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, 29–32 (1996) (discussing the view that

We have described, elsewhere, how this has become the common view of "best practices" in facilitative mediation: Mediators are accountable for the quality of the agreement reached, including its optimality and its fairness to all parties. In this view, to ensure such fairness and optimality, mediators can and should employ various measures to add substantive knowledge and creativity to the discussion, and to counteract "power imbalances" that risk unfair outcomes.[7] This "problem solving" conception of the mediator's mission, influenced heavily by Fisher and Ury's problem-solving theory of negotiation,[8] meant in practice that the mediator came to be seen as "chief problem solver", directing the parties through a process that they are unlikely to navigate successfully on their own. As mediators were drawn in by this problem-solving vision, the subtler, finer, and ultimately higher value of party self-determination was simply overwhelmed by the problem-solver role. At the same time, another rationale for mediator directiveness emerged in what we've called the "harmony" model, where similar practices were seen as necessary to bring about reconciliation, peace and harmony in the parties' relationship.[9] The impact on reducing party self-determination is the same, even though the goal is different. (For purposes of this discussion, we can consider the peacemaker role a subset of the problem-solving conception, in which the problem is a "relationship" problem.).

We suggest that the directive mediator role was attractive, whether as problem-solver or peacemaker, not only because of what it seems to accomplish, but because of *how it feels*—to be the experts who can do what common folks cannot, protecting people from their own inevitable bad choices and decisions. Mediators are needed and valued for their skills, their art—and also their *wisdom.* This is a stark contrast to the self-effacing, minimalist task of "supporting party self-determination" that was originally at the heart of the mediator's role. Were we supposed to reject the role of star for the role of understudy? On television, Dr. Phil draws loud applause when he tells his "clients" what they're doing wrong,

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mediators are needed in order to reduce what behavioral psychologists describe as cognitive and other barriers to settlement).

7 *See* Robert A. Baruch Bush & Joseph P. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO ST. J. ON DISP. RESOL. 1, 10–18 (2012) (describing the "accountability" and "power balancing" views of the mediator's role).

8 ROGER FISHER & WILLIAM URY, GETTING TO YES (1980).

9 *See generally*, Joseph P. Folger, *Harmony and Transformative Mediation Practice: Sustaining Ideological Differences in Purpose and Practice,* 84 N. DAK. L. REV. 823 (2008) (describing the harmony model, including its premises and implications for practice).

and what they should do instead. Obviously, the applauding audience approves of Dr. Phil's interventions (and would like to do the same for their friends or family members). As problem solvers, mediators can do much the same thing, with praise and professional approval. In the meantime, supporting self-determination fades as a prime aim of the mediator's work.

So our story of how our field got to its present state is this: mediators were attracted by the directive problem solver "mission", with the result that party self-determination took a back seat. With this primary shift in focus, there were many "unintended consequences"—which further reduced the importance of party self-determination. Most important of these was the increased focus on the mediator having expert substantive knowledge, in order to make sure that settlements were optimal and fair. For example: ADA mediators must be *experts* on disability law—including knowledge of statutes, regulations, and even court decisions![10] Another example: family mediators in some states, like Florida, must become *experts* on not only family law but finances, accounting and pension funds.[11] The impact has been profound:

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[10] *See, e.g.*, ADA MEDIATION STANDARDS WORKGROUP, ADA MEDIATION GUIDELINES, *Guideline III.A* (ADA Mediator Training Contents*), available at* http://www.mediate.com/articles/adaltr.cfm ("At a minimum, ADA mediator training should include: Substantive law and procedural issues [including]: a. ADA or other applicable federal or state statutes and/or local ordinances. b. State and federal regulations and policy statements. c. Court decisions applying these legal principles. d. Other related laws (*e.g.,* Family and Medical Leave Act of 1993, Workers Compensation, Age Discrimination in Employment Act, Social Security Disability). . . .").

[11] *See* SUPREME COURT OF FLORIDA, MEDIATION TRAINING STANDARDS AND PROCEDURES, PART 3.02 (j)–(k), *available at* http://www.flcourts.org/core/fileparse.php/262/urlt/AOSC10-51.pdf.

Required content of training includes:

(J) Florida Family Law in Family Mediation.
- (1) Identify issues of geographic relocation.
- (2) Identify issues of equitable distribution.
- (3) Identify issues of shared and sole parental responsibility laws.
- (4) Identify issues of parenting plan including time sharing schedule.
- (5) Identify issues of child support and child support guidelines.
- (6) Identify issues of spousal support.
- (7) Identify issues of grandparent rights.
- (8) Identify issues of domestic violence.
- (9) Identify issues of abuse and neglect.
- (10) Identify issues of paternity.

(K) Financial Issues in Family Mediation.
- (1) Identify sources of information necessary for parties to complete a financial affidavit.
- (2) Complete a financial affidavit.
- (3) Explain the significance of asset valuation issues (e.g., valuation date; cost basis; future tax liabilities; and valuation basis.)
- (4) Discuss the importance of full financial disclosure.

with the emphasis on expert knowledge, many mediators have been squeezed out, disqualified by increasingly onerous qualification standards that demand such knowledge as a prerequisite for practice. When one of us did research on mediation practice in the late 1980s he interviewed a woman who was called the "mother of family mediation" in Florida. But she was no longer practicing, because under newly adopted standards, she was considered unqualified. Ironically, in a field that supposedly values diversity, heightened qualification standards have meant the exclusion of many minorities for whom acquiring the necessary expert knowledge was simply too costly.[12] Now this trend is moving to its logical conclusion. We have just heard that in one country, lawyers who want to be mediators are told that they are exempt from mediation training. Legal knowledge in itself qualifies a third party to be a mediator.

Beyond the requirement of substantive expertise, mediators whose role is that of problem solvers must also undergo rigorous training in essential practice skills. However, the skills taught are not skills that prioritize party self-determination. On the contrary, the focus is on skills that involve controlling, managing, and directing clients through the process. Chris Honeyman's work on the "common core" of mediator skills describes how the skills of conflict control and management dominate the agenda of mediator training and assessment.[13] We recently made a short survey of the

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(5) Explain the significance of business valuation issues (e.g., businesses; sole proprietorships; partnerships; and corporations.)

(6) Explain the significance of tax issues relating to dependency exemptions; sale of marital residence; earned income tax credit; transfers of stock or property; legal expenses; innocent spouse rule; filing status issues; life insurance products; property transfer rules; alimony; and pensions and retirement plans.

(7) Explain the significance of valuation and division issues relating to pension and retirement plans, including, but not limited to, the use of Qualified Domestic Relation Order (QDRO) and its implications.

(8) Explain the issues of valuation of life insurance for equitable distribution purposes.

(9) Discuss the role of life insurance to secure support.

(10) Calculate child support based on child support guidelines and consideration of additional economic needs of children.

(11) Identify different types of financial experts and resources.

Id.

12 *See* Maria Volpe et al., *Barriers to Participation: Challenges Faced by Members of Underrepresented Racial and Ethnic Groups in Entering, Remaining, and Advancing in the ADR Field,* 35 FORDHAM URB. L.J. 119 (2008) (reporting on a study of minority individuals' degree of participation as mediation and ADR providers in the New York metropolitan area).

13 *See* Christopher Honeyman, *The Common Core of Mediation*, 8 MEDIATION Q. 73 (1990); *see generally* Robert A. Baruch Bush, *One Size Does Not Fit All: A Pluralistic Approach to*

content of current training programs, and it revealed that in most programs, little has changed since Honeyman conducted his studies.[14] In one demanding program of training for mediators in Europe, two full days are spent solely on "reframing" what parties say to change their language into "better" terms more likely to pro-

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Mediator Performance Testing and Quality Assurance, 19 OHIO ST. J. ON DISP. RESOL. 965, at 970–81 (2004) (reporting that training and assessment focuses on the mediator leading the parties through a sequence of stages—opening the session and setting ground rules, gathering information, defining issues, generating options, generating movement (by persuasion), and achieving agreement and closure).

> [T]he principle [is] that in all these stages of mediation, the mediator is the one who controls and conducts the process at every stage, and effective mediation practice requires the exercise of considerable control, direction, and influence to keep the process moving toward the goal of settlement. This operating principle of mediator process control, despite the centrality of the value of self-determination in the mediation process, is often explained with the conventional wisdom that "the parties control the outcome, but the mediator controls the process." *Id*. at 971–72.

14 *See, e.g.*, *Training Sessions*, PENNSYLVANIA COUNCIL OF MEDIATORS, http://www.pamediation.org/showtrainings.cfm (describing mediator trainings offered under the aegis of the Pennsylvania Council of Mediators, which include topics such as: using neutral language; developing interactive strategies for handling conflict; handling emotions; communicating effectively as a mediator; asking effective questions; brainstorming for solutions; building agreements; framing negotiable issues that lead to joint problem solving; power balancing). *See also* CAROL ORME-JOHNSON & MARK CASON-SHOW, BASIC MEDIATION TRAINING: TRAINERS' MANUAL (2002), *available at* http://www.campus-adr.org/CR_Services_Cntr/MIT_all.pdf (presenting a manual for campus ADR programs, including instructions such as: "Reframing means choosing your words carefully in order to: de-escalate hostility and calm emotions; move from positions to interests; describe issues as solvable problems; develop shared goals, whenever possible, or trade-offs. To reframe effectively you must know what direction you want the negotiation to go. Reframing Goals: 1. To de-escalate and calm: let the speaker feel heard; use neutral language and 'I statements'; describe the speaker's feelings, not the other person's character, e.g., reframe 'She is a slob!' into 'It bothers you when you find her papers spread around the office.' 2. Move from positions to interests: Dissect position into the elements that particularly matter by asking Why? What would be the best possible outcome here for you? (fantasy outcome—gets more interests on table). 3. Describe issues/concerns as solvable problems by: changing an attack on a person to a description of a problem or behavior; changing a list of past wrongs to future goals; fractionate broad demands into components. . . ."); SPECIAL EDUCATION RESOLUTION CENTER, OKLAHOMA STATE UNIVERSITY, DISPUTE RESOLUTION IN SPECIAL EDUCATION THROUGH MEDIATION (CFR 300.506) (2008), *available at* http://www.directionservice.org/cadre/exemplar/artifacts/OK%2037.3%20Dispute%20Resolution%20in%20Spec%20Ed%20through%20Mediation.pdf (presenting a manual for special education mediation training, including instructions that: "The mediation session consists of several phases: 1. INTRODUCTION—The mediator begins the session promptly and explains the mediation process and the ground rules of the session to all participants. 2. JOINT SESSION—Both parties in the dispute are given an opportunity to present the issue(s) from their point of view without interruption. *Only the mediator may ask questions or summarize what has been said."*) (emphasis added). We note, however, that in some programs, elements of training have shifted somewhat in the direction of greater party control, for example by replacing classic "reframing" instruction with a focus on "reflection" of parties' comments without reframing or softening language. *Comments*, Discussion with staff/mediators from the New York Peace Institute, Jan. 12, 2015.

duce agreement. Mediators trained like this are truly captured, wedded to a directive, problem-solver role that is almost impossible to deconstruct, much less escape. Some potential mediators leave the field after they participate in this type of basic training, because they feel it is inconsistent with who they are and who they want to be in serving future clients.

Like the requirement of substantive expertise, this view of mediation skills is based on the premise that conflict conversation is dangerous, and therefore won't be productive if it is not tightly controlled.[15] In our own work, we train mediators to "let go" of control, and we often hear them express a profound fear of "what will happen" if they do so—for example, the fear of escalation and even violence unless negative comments are reframed and "neutralized". Again, this fear is based on the assumption that parties themselves can't prevent or reverse escalation, and thus must be protected from hurting themselves and each other. The impulse is similar to that of parents: We don't want our children to make mistakes because we love them and don't want them hurt; so we step in with the expertise born of our experience. And when push comes to shove, we shove! By contrast, the reason for holding back that controlling impulse is that we trust in the parties' capacity, and we realize that stepping in to control deprives them of opportunities for self-determination and empathy.[16] We understand that parties often don't seize those opportunities until they are at the "edge of the cliff". At the "moment of truth", they realize that they don't want to hurt each other, or themselves. But walking to the edge with them is both scary and difficult. This is the fear that we hear from mediators in training, in response to our asking them to "let go" of control and "follow the parties". In short, truly supporting self-determination is very hard, and it challenges our assumptions about what our clients can really do for themselves.[17] So even if the field started with this as our goal, it turned out to be easier and more comfortable to switch to a problem-solving vision

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15 *See* BUSH & FOLGER, *supra* note 2, at 242–47 (describing the "ideology of social separation and conflict control" and associated skills and practices).

16 *See id*., at 250–59 (describing the "ideology of social connection and conflict transformation" and associated skills and practices).

17 See Chicago Public Media & Ira Glass, *This American Life, Episode 544: "Batman*, (Jan. 9, 2015), *available at* http://www.thisamericanlife.org/radio-archives/episode/544/batman, for a powerful example of the same phenomenon in the work of Daniel Kish, founder of World Access for the Blind and expert in human echolocation, which allows blind persons to move freely through their environment using echoes of oral "clicks" to navigate. Though the method is remarkably effective, the friends and family and even teachers of Kish's students find it very hard to "let go" of their protective impulses.

and a more directive, controlling role. And that is precisely what has happened.

What has been lost by this switch away from a focus on supporting party self-determination? Perhaps it is better to put the question positively: why does self-determination matter so much that we value it above *mediator-driven* problem-solving and peacemaking? Indeed, why was it originally seen as the central value of the mediation process? As we have argued elsewhere,[18] supporting party self-determination—i.e., *supporting and not supplanting party decision-making*—has impacts beyond merely solving problem issues. A non-directive, party-driven mediation process can (and usually does) lead not only to solutions *but also* to positive gains in the parties' experience of their own competence, their understanding of one another, and the quality of the interaction between them, both during and after the conflict. By contrast, directive practices, even if they generate solutions, rarely enhance the parties' sense of personal capacity and competence, or their sense of mutual understanding and empathy. The latter benefits simply cannot be gained through a top-down directive process; they can only be realized from the bottom up, by the parties themselves, in a process that fully supports and enacts self-determination. And the failure to provide that kind of party-directed process is the best explanation, in our view, for the public's lack of enthusiasm for mediation.

For over twenty years, as we articulated and then developed the approach called transformative mediation based firmly on the value of party self-determination, we kept thinking that our fellow mediators would join us—since they mostly agreed that the developments sketched above were gaining ground and submerging the values we'd originally held dear. We hoped that they would join us in stepping away from the problem-solving culture of expertise and directiveness that was taking over, and join us in returning to the original vision of self-determination and party empowerment. Some have certainly done so, but not nearly enough to overcome the tide of problem-solving. We've been swimming against the current for two decades and it has been challenging and at times profoundly discouraging.

Now, we are asking our mediation colleagues to step up and redeem the pledge to place self-determination at the center of this unique and precious process. Mediation could be a jewel in demo-

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[18] *See* Bush & Folger, *supra* note 7, at 35–42.

cratic cultures that reject elitist pretensions and instead maintain that the common ordinary citizen is truly extraordinary. S/he is capable of both great strength and great compassion, powers that surface from within and need not be supplied from without. Mediation at its heart—in the principle of self-determination—expresses that democratic ethic perfectly. But today we have surrendered to the culture of directiveness and expertise, which we began by rejecting when the mediation movement first got started. Reclaiming our original principles is the best way to revitalize the process and regenerate public interest in using it.

We challenge you—to join us in rolling back the tide, to put down the mantle of expertise, to start moving away from the directive, problem-solver role. Begin reclaiming the job of truly supporting our fellow human beings who, when in difficult straits, need only modest assistance from us to find their own strength, their own solutions, and their own compassion for each other. And who can learn from choices they make that are not perfect, or even don't work out for them at all.

More concretely, *we place before you an agenda* that we'd like to see you adopt, a platform for escaping the problem-solving vision that has captured us, for returning to the original vision of the mediation field and *making that our future*. Here are the specifics of that agenda:

1. **End once and for all the fiction that evaluative case settlement is mediation.** Call it settlement conferencing, or something else similar—but not mediation. Language has consequences, and impacts, and "evaluative mediation" is indeed "an oxymoron" that simply confuses both mediators and clients.[19] Can't we all agree that this, at least, *is not mediation at all*, and shouldn't be simply "accepted" because the train left the station? Call the train back! If we take a united stand on this it will open eyes and minds, get attention, and invite further changes. It will meaningfully and publicly reassert the mediation field's commitment to self-determination as the core value of our work.

2. **Undertake a fundamental redesign of mediator training**. Mediator training is the "gateway", the place where most mediators are first captured and led away from a true commitment to self-determination. We need to make major changes in the contents

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[19] *See* Kimberlee K. Kovach & Lela P. Love, *"Evaluative" Mediation is an Oxymoron,* 14 ALTERNATIVES HIGH COST LITIG. 31 (1996); *see also* Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate,* 24 FLA. ST. U. L. REV. 937 (1996).

and goals of the required basic training. We should reduce the attention given to reframing, to setting mediator-imposed ground-rules, to techniques for shaping agendas and managing or venting emotions, to probing for underlying needs and interests, and to leading parties through a set of phases that are aimed at reaching agreement as the only valuable outcome of the process.[20] Do any of these really support party self-determination? If not, why are they at the core of training programs? Indeed, once trained in these methods, mediators are programmed in a way that makes it almost *impossible* to support party choice and let parties talk through issues for themselves. Instead of these skills of control, we can and should train mediators in the skills of supporting and not supplanting party deliberation and decision-making, supporting but not forcing parties' mutual understanding and empathy, following and not directing or leading parties through the process.[21] It's not too late to redesign mediator training. And without doing that, mediation will remain captive to the culture of expert problem solving.

3. **Publicize widely the research that documents the pervasiveness of mediator pressure (even coerciveness) and its devastating effects on party self-determination.** Educate policymakers and institutional clients on what that research shows: unless ordered into mediation by courts or other agencies, people lack interest in mediation—and that is because mediation never delivered the new and different experience it promised. It only offers more of the same authoritative judgment that courts, arbitrators, and settlement officers have been dispensing—but worse, because mediation lacks any oversight or protections against abuse by the third party, and mediator pressure and coercion is common.[22] Why would anyone be seriously interested in it, unless ordered to participate? Recent studies confirm that mediation is underutilized—and this will continue to be so until the

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[20] *See* Bush, *supra* note 13, at 971–72.

[21] *See* Robert A. Baruch Bush & Joseph P. Folger, *Transformative Mediation: Core Practices, in* SOURCEBOOK, *supra* note 2, at 31; Robert A. Baruch Bush, *Mediation Skills and Client-Centered Lawyering: A New View of the Partnership*, 19 CLINICAL L. REV. 429, at 434–45 (2013) (summarizing party-supporting skills and contrasting them with party-controlling skills); BUSH & FOLGER, *supra* note 2, at 131–214 (describing specific party-supporting skills in context of a case study).

[22] *See, e.g.*, Welsh, *supra* note 4.

process offers the real opportunity for self-determination that makes it unique.[23]

4. **Change the requirements on mediator qualifications.** Perhaps most important, do away with demands for mediator substantive knowledge and expertise as qualifications for practice. If mediators are really not decision makers (more a myth than a reality today), why do they need substantive expertise? And if they are required to acquire it, mediators will use this expertise to influence and direct the parties, as studies have shown.[24] So don't make us experts in the first place! Let us be experts only in supporting self-determination and the parties' capacity to work through their own conflicts.
5. **Join the larger culture critique** that questions the elitist helper/ fixer/ protector/problem-solver role itself—a role based on a "deficit" view of our fellow human beings—and reaffirms belief in universal human capacities for agency and empathy that need no infusion of wisdom from elites, professional or otherwise.[25]
6. **Reach out to the wider society**, finding and telling stories that illustrate how mediation exemplifies this positive view, with parties directing and working through their own conflict conversations, and mediators supporting but never supplanting them.[26] These stories can present the ideal of self-determination realized in actual practice—as the mediation process was originally envisioned four decades ago.

Before it is too late, before we forget what self-determination looks like and why it matters to the people we serve—let's realign our goals and practices with the early roots of the field and leave our problem-solving pretensions behind. No matter how attractive

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[23] *See, e.g.*, De Palo, *supra* note 1. In an unpublished study by one of the authors of the present article, participants in court-ordered mediation reported they would be unlikely to use the mediation process again, because it was not that different from small claims court.

[24] *See* Kolb and Kressel, *supra* note 5.

[25] *See* BUSH & FOLGER, *supra* note 2, at 239–56 (contrasting these two views of human beings—one assuming inherent deficits in the capacities for agency and empathy and one assuming inherent sufficiency of these capacities).

[26] For examples of such stories, see Dan Simon, *Transformative Mediation for Divorce: Rising Above the Law and the Settlement, in* SOURCEBOOK, *supra* note 2, at 249; Winnie Backlund, *Elder Mediation: Why a Relational Model Works*, *in* SOURCEBOOK, *supra* note 2, at 307; Bernard le Roux, *Restorative Justice and the Transformative Approach to Crime-Related Mediation*, *in* SOURCEBOOK, *supra* note 2, at 229; Peter Miller & Robert A. Baruch Bush, *Transformative Mediation and Lawyers: Insights from Practice and Theory*, *in* SOURCEBOOK, *supra* note 2, at 207.

and enticing they may have seemed, they have lured us away from our true and unique mission—offering a "safe haven" from the culture of experts, a haven in which parties can act with true self-determination, showing that *they* are the real "stars" of the conflict resolution experience, and mediators are merely "supporting" actors. We need to make a strong, public statement that marks a new beginning for the field, its organizations and its clientele. The field needs a public turn-around so that our organizations can once again flourish, and our stakeholders and clients will turn to us once again for a service that can be immensely valuable.