Book Review

The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices

Carrie Menkel-Meadow

Robert A. Baruch Bush and **Joseph Folger**. *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*. San Francisco: Jossey-Bass Publishers, 1994. 296 pp.
Deborah M. Kolb and **Associates**. *When Talk Works: Profiles of Mediators*. San Francisco: Jossey-Bass Publishers, 1994. 513 pp.
Sally Engle Merry and **Neal Milner** (editors). *The Possibility of Popular Justice: A Case Study of American Community Justice*. Ann Arbor: University of Michigan Press, 1993. 488 pp.

In one way or another, these three important new books chronicle the dynamic development of the theory and practice of mediation in the United States. Mediation, in a relatively brief span of time, has evolved from a bold, innovative challenge to conventional methods of decision making and dispute resolution to a more professionalized and institutionalized practice, one that is the subject of an ever-increasing number of scholarly books and articles.

With the myriad of voices represented here (two of these books are edited volumes of essays or profiles, so many views of mediation are presented), it might be surprising that a single question weaves its way through the great varieties of stories and analyses of mediation: What transformative potential does mediation have to change people, situations, and political and social structures?

Carrie Menkel-Meadow is professor of law at the University of California at Los Angeles and Georgetown Law Schools and co-director of the UCLA Center for Inter-racial/Inter-ethnic Conflict Resolution. Correspondence may be addressed to her at the UCLA School of Law, 405 Hilgard Ave., Los Angeles, Calif. 90095-1476.

Not all the writers and practitioners here share a similar answer to that question but all are, implicitly if not explicitly, committed to a common vision of what mediation could accomplish, if it doesn't already, in this not very perfect world. If the common vision is not realized in practice, it is because people theorize and work in different environments and under less than optimal conditions to which many have chosen to adapt.

The variety of the adaptations presented in these books provides us with a wonderful opportunity to examine where we have been and where we might go. Together, they inform the reader about what the theoretical underpinnings of the "mediation movement" have been and provide a richly textured and rewarding description of individual and collective journeys through the development of an important social and human movement, as well as the creation of a profession.

The books also reveal that there are differences and cleavages in the field, and that we have advanced to the point where there are multiple models and traditions from which we draw to conceptualize, rationalize, and do our work. For example, all three focus, at least in part, on the ongoing tension between conceptualization of mediation as "therapeutic, helping, or communication" work with individuals as contrasted to a more structural or political analysis of "root causes" (Nader in Merry and Milner) of social problems, conflict, and collective action.

As these books attempt to focus on both the past and future of mediation, in this essay I shall review the contributions and contradictions of "our"[1] field, taking stock of what we have achieved and what might still be possible to accomplish. Taken together, these volumes present us with the opportunity to consider the following "meta-issues" as our field matures:

1. What paradigms, ideologies and philosophies inform our practice? What is mediation for? In one way or another, all of these works suggest a commitment to democratic participation and democratic theory in the resolution of social, personal, and political issues. The practitioners and writers differ, however, on whether the appropriate unit of analysis is the individual or the collectivity, whether process goals (participation and understanding) or substance (agreement) should be the measure of success.

2. Can mediation be used to transform individuals, organizations, systems, and our society? What visions of transformation do mediators call on when they speak of themselves as social change agents and to what substantive, as well as processual values, do they speak? These volumes provide a healthy dose of different perspectives on whether it is possible or desirable to change people or situations and which are more amenable or "permeable" to change.

3. How have the different environments in which mediation is practiced transformed, framed or shaped the contours of the actual practice? Are different philosophies, types of problems, institutional settings or individual personalities most influential in creating the morphology of media-

tion practices? At least nine different models of mediation are described in these books — facilitative ("pure"), evaluative, transformative, bureaucratic, open, closed, community, activist, and pragmatic mediation. One could thus reasonably ask, is there any "core" to the conceptualization and practice of mediation that unites us? Do the author-editors' efforts at typologies succeed (Kolb and Associates' settlement vs. communication "frames"; Bush and Folger's four categories of satisfaction, social justice, oppression, and transformative mediation; and Merry and Milner's examination of multiple "popular justice" models)?[2]

4. After close to thirty years of practice, reviewed in these books, what core "insights" or contributions has the field of mediation made to human problem solving? What knowledge base have we created?

5. What concrete techniques, skills or tactics can we learn from the experienced practitioners represented in these volumes? How have these mediators learned or adapted their techniques to serve their philosophies of mediation, the needs of their clients and the institutional settings in which they serve?

6. What real differences in philosophies and practices are presented here? And what standards, if any, are available for assessing what is effective mediation and in what contexts? How is mediation itself to be "evaluated" as a process for human problem solving? Do mediators honestly describe what they actually do? What contradictions exist between stated rationalizations of purpose and actual practice?

Many of these questions turn on the same axes of analysis — Are the parties within a conflict to be the "judge" of its successful resolution or is conflict resolution accountable to those outside of the conflict? Who "owns" the conflict (Menkel-Meadow, forthcoming; Christie 1977)? Is reduction or "management" of a conflict the goal or is the mediation process designed to accomplish other social goals? Does mediation consist of discrete "practice routines or schemas"[3] that can be learned, detached from the personal power and attributes of the particular practitioner? What conditions facilitate or hinder the successful use of mediative interventions and strategies? All three books attempt to illuminate these questions not only by focusing on general precepts that describe the mediation process but also by allowing us to look inside the process, at the "micro-tactics" employed by a wide range of mediators.

The Transformation of Transformation

The three sets of primary author-editors reveal different perspectives on the key theme of the use of mediation to transform. Deborah Kolb and Kenneth Kressel argue in the concluding chapter to *When Talk Works* that the "mythology of the transformative vision" creates unrealistic and unrealizable goals. The hopeful, but critical, voices of Sally Merry and Neal Milner's *The Possibility of Popular Justice* suggest that the visionary goals of community transformation by conflict resolution ideology and community panels are in

reality very difficult to achieve, and even more difficult to replicate across different kinds of modern urban communities.

Yet Baruch Bush and Joseph Folger, in *The Promise of Mediation*, persist in a transformative notion of recognition and empowerment of parties (if not situations or communities or institutions) in mediation, as long as transformation is more narrowly confined to process goals (mutual understanding) and extremely vague substantive goals (more moral and ethical ways of being). The tension between evaluation of mediation as a process or means for dealing with individual conflict versus a political aspiration of mediation as socially, politically, and collectively transformative haunts all three of these volumes.

I shall first review all three of these books and then conclude with a typically mediative intervention — an attempt to reconcile, from competing views of mediation, the disparate perspectives that are presented. I shall suggest that, with more modest claims, mediation still offers the possibility of more than individual conflict resolution. Mediation does represent a possibility for transformative and democratic process, but we must remember also that process is not all. ("The means have become the ends," Laura Nader warns [Merry and Milner, p. 448]). Mediation, like any process, can be turned opportunistically to serve problematic and corrupt ends. Thus, those of us who continue to hold a commitment to mediation as a progressive means for socially transformative ends must be ever-vigilant about our practices and the uses to which they might be put.

How Mediation Works

The book that ranges most broadly across the variations of the entire field is *When Talk Works* by Deborah Kolb and other members of a research team sponsored by the Program on Negotiation at Harvard Law School. *When Talk Works* is a series of profiles of twelve accomplished mediators, divided into three groups — professionals, builders of the field, and those who use mediation as an element in their practice. (Other possible categories were clearly possible, among which could be: the "practical problem solvers," the "social or political transformers," the "therapeutic," the "community empowerers," or the "visionary peacemakers.")

The "professionals" profiled (pp. 17-237) — Frances Butler (child custody), Patrick Davis (special education), Howard Bellman (environmental, public policy, and labor), William Hobgood (labor grievances) and Patrick Phear (family and divorce) — all represent mediators who make a living by mediating virtually full-time, either in salaried or institutional positions (Butler and Davis) or in more "private" practice (Bellman, Hobgood, and Phear). The "builders of the field" (pp. 239-354) consist of a group of mediators who have created the models from which many mediators work: Albie Davis (in community and court programs), Eric Green (in legal and business disputes), and Lawrence Susskind (in public policy disputes). The field builders can afford to recreate themselves and their models as they pick and choose their

work (usually, but not always with other sources of income and insights, as in the case of Green and Susskind's academic affiliations).

The third category represents a diverse group of professionals who mediate almost without knowing it ("extending the reach of mediation," pp. 355-458). These are people for whom mediative interventions are simply a part of their repertoire of techniques for trying to solve a wide variety of human, institutional, and international disputes. Included in this group are Juju Atkinson (a lay magistrate), Jimmy Carter (a former president active in international dispute resolution efforts), Linda Colburn (a community and public housing manager), and Joseph Elder (an independent Quaker activist in international dispute resolution).

The variety of stories told by this diverse group of mediators should be obvious. Variations in recruitment to and interest in the field, professional paradigms used, interventions and techniques used, stated and implicit goals and philosophies of mediation provide a rich source of material to be analyzed by practitioners, theorists, and students.

Much can be learned from this very readable (almost novel-like in its page-turning qualities) volume. Though the chapters are sometimes uneven in the depth with which they probe or challenge their subjects or in the extent to which the researcher intrudes too much in the telling of the story, these profiles taken together give us the closest look we have yet had on the "inside" of the magic and hard work of the mediation process.

As a teacher of mediation, I know I shall use *When Talk Works* to ask students to explore the different philosophies and goals that mediators articulate and then contrast them with the techniques they choose. (Some mediators work congruently with goal and behavior; others reveal themselves in these chapters to violate their own precepts.) Though one might have wished for some more overarching analysis of the profiles — in my view, the concluding chapter comes too late — several clear themes emerge from the diversity of practice presented here.

Among the mediators profiled in *When Talk Works*, there are clear differences of opinion as to whether mediators attempt to focus on the problems presented by the parties or expand to either the "underlying interests" or more contextually expansive problems (e.g., broader employment, which could evolve from a dispute about health and safety conditions, or community planning, which could stem from a siting dispute). Thus, mediators must have to rationalize to themselves, if not to the institutions to which they are accountable, whether they see the immediate parties or some external community or institution as their "client" or focus of attention. Mediators like Hobgood and Susskind are "chosen" by their clients and thus can afford to be clearer and perhaps more expansive about their goals. Those working in more institutional settings (courts, community programs, government agencies) know they will be judged and evaluated by the number of successfully-mediated agreements or settlements.

A recurring, if disturbing, theme in these profiles is the extent to which mediators do control, manipulate, or dictate either the discourse of mediation (Cobb and Rifkin 1991; Greatbatch and Dingwall 1989) or specific outcomes. Frances Butler, for example, is profiled as a highly successful countermodel to the common philosophy of passive facilitator. She is described as an expert, activist child custody mediator who uses leading questions and makes suggestions for specific outcomes, and is highly regarded for so doing.

At another level of mediator manipulation is the somewhat "deceptive" humility expressed by family mediator Patrick Phear. While expressing skepticism that he does any more than temporarily quiet down marital and psychological pain, researcher Austin Sarat paints a picture of a deliberately intentioned "orchestrator" of marital conversation and problem solving. Sarat's essay is strongest in providing the interlinear critique of what the mediator says he is doing versus what he may actually be doing. As a contrast, both labor mediator William Hobgood and public policy mediator Lawrence Susskind seem to disclose to the parties what they are about (solving problems beyond the immediate ones posed in a particular mediation).

The level of mediator "control" of the process reveals another underlying theme not expressly dealt with in the profiles: that is, the extent to which mediator charisma or personal power determines mediator practice. Much of the literature on international mediation has focused on whether the independent "power" of the third-party intervenor (Smith 1994) is an essential element of successful dispute resolution. In these profiles the variations of personality come through to the reader, even if they are not distilled or analyzed by the authors or editors. Interesting questions remain embedded in these profiles: To what extent is gender a factor in personal power and charisma? If a particular model of mediation is premised on charismatic power, how can that charisma be taught, reproduced, and — dare I say? — institutionalized (Weber 1968)? Are parties really consenting to agreements if they are under the influence of a charismatic "facilitator"? What are the sources of influence that produce charismatic leadership in mediation?

I have often been intrigued by some common themes in the personal histories of those drawn to mediation — victims or children of the holocaust, of alcoholics, of divorce, of diasporas. Are we drawn to healing the broken aspects of our own personal and geopolitical lives? Do variations in mediator practices reveal the "working out" of different life experiences? How much should parties know about their mediators when choosing, for those who can choose?

Also embedded in these profiles, but not explicitly analyzed, are the often diametrically opposed cleavages in both the meta-purposes of mediation and particular "micro-tactics" used to effectuate those purposes. At first blush, one could characterize these differences as being located in the varieties of professional paradigms that have contributed to mediation epistemology: the law, mental health, labor, democratic theory, public policy.

Together, these disciplines are producing an eclectic body of knowledge that we are just beginning to recognize as ethnocentric and problematic on its own terms (see the Shook and Milner essay in Merry and Milner).

Is mediation based on Western notions of problem solving and "open communication" — a culture of mediation informed both by the technocratic optimism of American "can-do-ism" with a peculiarly intrusive (but healthy, I would argue) focus on feelings? How does this culture of mediation work across class, ethnic, race, and role differences? (How honest can you be in expressing your hostile and resentful feelings to your boss when you really need to keep your job?)

Ultimately, I think these questions turn more on individual differences about the purpose of mediation than they do on structural conditions, though these factors obviously interact with one another. As an illustration, consider the different views expressed about how "far" one goes in exploring feelings — not just of the parties themselves, but in the next steps of empathy (asking them to feel for and with each other [Kohn 1990]) and beyond the immediate parties in the dispute (Hobgood's approach to the employment situation by looking at effects on the industry and larger labor community).

Susskind honestly admits that he is working for democratic participation and community involvement and is "not the guy for therapeutic" (p. 346) dispute resolution; he is a practical problem solver. In describing Phear's psychological approach (inspired by an eclectic Gestalt technique repertoire), Sarat comments on how the mediator asks the parties to focus on their own needs and not to make statements on behalf of the other (pp. 210-12). Yet this flies in the face of more empathic-oriented mediators who explicitly focus on getting the parties to understand each other and articulate the needs of the other, not just the self. I hesitate to attribute this to any particular professional paradigm because even the psychologically-oriented divorce mediators differ among themselves (see Haynes 1992 and Friedman 1993); in addition, "instrumentalist" lawyers can often ably focus on the more empathic aspects of mediation (Menkel-Meadow 1992). In the public policy arena, Susskind and Bellman reveal different philosophies; Bellman seems more concerned with accomplishing an outcome or closure while Susskind seems more committed to the democratic principles embedded in process concerns.

Differences in philosophies about purpose (achieving "justice," reducing the pain, promoting public participation and community control) have concrete effects on techniques chosen, like whether and how to conduct caucus sessions. Whole essays could have been written to analyze and match up mediation philosophies with variations on interventions used. Susskind, for example, is perhaps clearest and most articulate about his goals and what motivates him to do his work — he seeks to increase public participation in the policy-making process and thus defends his accountability not only to the parties but to constituents outside of a particular dispute. As those famil-

iar with the literature know, this is a much contested position (see the *Vermont Law Review* debate between Stulberg 1981 and Susskind 1981) but one which clearly dictates particular choices in method (i.e., few separate meetings during official "sessions" and active "coaching" or advice on advocacy to parties between meetings to empower, if not equalize, party endowments). In more acute mediation settings, the simply stated goal of "peacemaking" or violence reduction can lead to very different tactics employed in the public arena of Jimmy Carter's international mediations and Linda Colburn's "on-the-spot" public housing interventions.

Even seeming similarities of purpose become more complex when artfully deconstructed by the analysts of these profiles. William O'Barr's profile of Juju Atkinson, a lay magistrate, reveals the differences between docket-clearing settlements or dispositions of legal cases and "agreements between the parties" that focus on both the parties' underlying interests and more realistic possibilities for resolution than the formal legal system can provide (pp. 370-71). Like several other women mediators profiled in these pages, Atkinson is a living testament to the arguments of feminist theorists that problems can be more "deeply and congruently" solved with nurturing, helpful, and facilitative interventions than command or ordered approaches to social control. Yet even the deeper "agreement" model here is more focused on individual dispute resolution than the broader workplace and community concerns of Hobgood or Susskind.

When Talk Works reveals a richly textured description of the profession at a particular moment in time. Though some readers might prefer more thematic and cross-cutting syntheses of the significant issues woven through these essays (whole chapters could have been written, for example, on variations in mediator philosophy, accountability to parties or others, the role of professional paradigms in creating the knowledge base for mediation, differences in interventions chosen, the role of structural or institutional settings in affecting mediation choices, active vs. more passive models, different definitions of mediation "success"), this volume of essays will evoke these issues for many years to come, and can productively be mined by all mediation researchers and practitioners.

Before I suggest some synthesis of my own, let me recommend several essays for particularly close reading. Kolb's profile of labor mediator William Hobgood is best for placing the work of mediation in a broader context and explaining the forces that affect mediation both internally and from such external forces as the realities of labor-management relations and broader industrial and organizational policy. Sarat's essay is best at keeping a critical and analytic distance from the story related by his subject; on the other hand, Sarat's essay is often plagued by his own views (and some misunderstandings) of the mediation and therapeutic process. John Forester's profile of Lawrence Susskind is both inspirational in revealing the sources and explicitly articulated philosophy of Susskind's democratic participation models of public policy

mediation, yet subtly revealing of both the tensions and rewards of combining an activist mediator career with the more contemplative and critical eye of the academic.[4] Susskind articulates a theory of mediation as democratic process (maybe not ideal, but better than most of what else we have) that enables him to explicate the particular means he uses in mediation.

Sally Merry's profile of Albie Davis can be productively read in conjunction with the Merry-Milner volume, which focuses on San Francisco's Community Boards mediation efforts, for the development of different approaches to community empowerment. Davis seeks to preserve and nurture the values of individual autonomy within an effort to empower the disenfranchised that radiates more realistic layers of the tensions between individual and community life than Ray Shonholtz's sometimes simplistic notion that conflict resolution ideology can create a community (see Merry and Milner, pp. 201-238). Davis's philosophy (p. 267), inspired by Mary Parker Follett, expresses one of the key and least often recognized aspects of mediation — that it need not result in compromise (see also Menkel-Meadow, forthcoming) and that mediation (both doing it and being in it as a party) draws on both our intellects and our emotions. Davis's description of her many years in mediation offers the most complete expression of the many strands that inform it, with a recognition that some of the perceived "tensions" between individual and larger community, task orientation and therapy, practical problem solving and community social change need not be seen in either-or dichotomous ways, but inform each other and allow a protean social practice. Merry may be too quick to label her a "personal growth" school mediator; I see the Albie Davis profile as revealing the commitment of a politically conscious mediator who is aware of gender, class, and race inequalities in the larger society that affect who has power, both inside and outside of the mediation process.

When Mediators Teach

Perhaps one of the most interesting aspects of *When Talk Works* is what the profiled mediators, as a group, have taught us about mediation theory and practice. Taken together, the profiles instruct the reader on a number of different levels, three of which I shall try to synthesize here. First, given the variety of human activities in which mediators are engaged, we can begin to develop a catalogue of what we have learned from mediation as a field — I like to think of this as the "insights into human problem solving" we have gained from mediation. Second, at the level of technique, these profiles are rich with examples of new, different, or idiosyncratic interventions that may help the rest of us in the field expand our professional repertoires. Third, taken together, these insights into human problem solving and particular techniques form the beginning of a catalogue of models of mediation that is far more complex than the often dichotomous typologies described in the literature (see e.g., Silbey and Merry 1986).

Core Insights in Human Problem Solving

At the risk of repeating some obvious propositions about negotiation and mediation, these profiles reveal the following contributions of what facilitated negotiation can accomplish:

1. Third-party mediators reduce waste and inefficiency in negotiation by discovering more information and learning more about parties' underlying needs than can typically be uncovered in dyadic negotiation (see Raiffa 1991).

2. It is often more productive to expand, rather than to narrow, issues in order to create more issues for trade (see profiles of Butler, Susskind, Phear, Hobgood, Atkinson, and Carter). This is an insight I wish legal mediators (especially judges and magistrates) would come to understand. Much legal dispute settlement activity is focused on narrowing disputes, which often makes resolution more difficult, rather than easier.

3. Mediation is more likely than other forms of dispute resolution (negotiations, administrative hearings, legislative processes) to explore the underlying interests and needs that cause people to frame more rigid "positions." (This occurs because of caucusing and more focused and less self-interested questioning by skilled third-party mediators.)

4. Mediation need not mean compromise of perceived mutually desired interests (see Davis and Carter profiles for examples). Mediation explores the complementary interests of parties that can facilitate trades and can also expand creative possibilities that do not require the parties to value the same items equivalently. (This insight has produced much of the "movement" in both family and international negotiations.)

5. Mediation, of certain kinds, permits multiparty dispute resolution and moves us away from less productive dyadic and bipolar forms of dispute resolution (see Susskind profile on multiple parties in community, policy, and siting disputes; Hobgood in union, management, and industry issues; Phear on intra-family disputing; Carter and Elder on multiple party international disputes).

6. Mediation is often more democratic and participatory than other forms of dispute resolution, rule making and other forms of social ordering (see profiles of Susskind, Elder, Colburn, and Bellman).

7. Problem solving with an optimistic, creative third-party facilitator can be proactive, creative, positive, synthetic and energizing, rather than argumentative, critical, negative and reactive, as when polarized parties confront each other directly over perceived scarce resources. (Many of the profiles reflect the essential energy and optimism of successful mediator personalities — can we train for this or is it an unalterable personality attribute?)

8. Solutions in mediation processes can be achieved without "defeating" the other side or conceiving of the other as "evil." As one mediator suggests, in mediation, we convert "I" needs to "We" needs and solutions (p. 352). Interests and needs of the other side can be understood and used as possible clues or incentives for solutions, rather than as demands to be ignored or resisted.

9. Mediation, unlike some other human problem-solving processes, can be inclusive of rights and responsibilities, as well as needs and interests. (The community and public policy disputes mediated by Lawrence Susskind reveal that mediation, as a more open process, can attempt to take account of legal, economic, and social rights and entitlements while also being sensitive to individual and community needs and interests which are articulated in formal legal entitlements. The "on-the-spot" mediation conducted by Linda Colburn also provides a clear example of how legal rights and claims for needs and interests can themselves be mediated to produce both "quick fix" violence reduction, as well as longer-term solutions to some difficult problems.)

Other readers will likely discern other patterns of facilitated problem solving that emerge deductively from reading these "case studies" of practice.

Innovative Techniques

Like the professionals described in Schon's *The Reflective Practitioner* (1983), the variety of professional paradigms that inform mediation is helping to create commonly agreed-upon practice routines for human problem solving (such as narrative claiming and story presentation, facilitated communication and empathy training, question-framing strategies, reframing, information sharing, brainstorming, reality testing). Many of these profiles offer suggestions for expanding the practice routines and interventions of experienced mediators. Some of the more interesting techniques explored in *When Talk Works* include:

1. Linda Colburn's use of surprise or "disorientation" (in confronting disputants) to shake parties out of their usual repertoires of behavior, to encourage their creativity or to get them to be more revealing (p. 414).

2. Patrick Phear's request that parties negotiate a hypothetical (rather than real) issue in their dispute to reveal negotiation patterns and to shake them out of polarized positions on more expected issues (p. 211) and his practice to keep all issues open (in a circle mode) rather than a linear agenda of one issue at a time to avoid split the difference solutions (pp. 223-224).

3. Albie Davis's communication models of encouraging the parties to treat each other with respect — an "as if you were equal" approach that can often help balance power and create greater appreciation of equality in a mediation (pp. 264-268).

4. William Hobgood's expansion of the issues brought to a highly structured labor grievance by focusing on the underlying problem of worker health and safety and suggesting joint management of the larger issue.

5. Lawrence Susskind's many innovative ideas to involve multiple parties in a joint decision-making process such as joint fact gathering and idea generation (e.g., acquiring pictures of many versions of a parking facility [p. 318]), pre-mediation training in negotiation for all parties, active recruitment of parties to the process in the beginning, and developing a "fund-resource kitty" contributed to by all parties to help finance aspects of the mediation process.

These examples illustrate just how much we need "thick description" of the mediation process to reveal what actually goes on in it. Although both of the other books under review here illustrate some mediation techniques (like the unusual tactic of the Community Boards' "surprise" visit to the second party in case development [see Merry and Milner, p. 276]) and a panel of mediators, rather than only one or two third-party neutrals, and the efforts of Bush and Folger [pp. 139-188] to illustrate what interventions are necessary for a transformative mediation practice), *When Talk Works* is most successful at illustrating particular techniques chosen by mediators with a particular view of what they are accomplishing.

Models of Mediation

The varieties of approaches to mediation described in *When Talk Works* help define several models of mediation that practitioners, rather than theorists, have developed for themselves. These models are instructive for demonstrating how simple practice routines must be altered depending on the context of the problem or the institution in which the dispute is situated. As the field has matured, we can see how varied the approaches are and how difficult it is to develop a single set of criteria for evaluation.

Once again, *When Talk Works* reveals greater variety, flexibility, and plasticity of models than the other two works, which seem to pigeonhole mediation into categories that are too rigid. The profiles of the twelve mediators illustrate the following models or approaches to mediation which, in turn, may help us in the development of more focused analyses of how particular tactics or professional strategies need to be adapted to particular goals, contexts, and situations. I have discerned the following variations, which will also help us to evaluate the more narrow models offered by the Merry-Milner and Bush-Folger books:

1. In its "purest" form, mediation is facilitative — the third-party neutral helps the parties to arrive at their own solution. While this is the model most often articulated by mediators, the descriptions of mediation which appear in all three of the reviewed books demonstrate how rare it actually is for the mediator not to intrude somewhat in the process.

2. In its newest form, "evaluative" mediation is a hybrid of mediation and arbitration (see Freund 1994). Although the solution remains technically in the hands of the parties, the mediator may provide evaluative information on possible legal or legislative outcomes, offer financial data or advice or provide advocacy or negotiation training, as well as suggest possible outcomes or solutions.

3. As most cogently articulated by Bush and Folger (see below), transformative mediation seeks, on a number of different levels, to change either the dispute (mediator Eric Green talks of converting a legal dispute to a business decision [Kolb and Associates, p. 305]) or the disputants (altering their appraisal of each other and their place in the world, which Bush and Folger call empowerment and recognition). The most ambitious mediators of all (Ray Shonholtz and the San Francisco Community Boards mediators) seek to transform their community through conflict resolution and the reduction of violence. Others, like myself, have argued for a more modest claim of transformation through education in the mediation process (Menkel-Meadow 1991).

4. Bureaucratic mediations occur in court or other institutional settings (such as Patrick Davis's special education mediations) which control and limit both what processes may be used or what outcomes may be possible. In such mediations, the setting is the key influence on how mediation is conducted and greater rigidity, formalism, and replicability may be evident. (In some sense, the rigid four-stage model described in the Merry and Milner volume on the San Francisco Community Boards model illustrates how a highly innovative and potentially transformative model of mediation can become bureaucratized, often as a result of the need to standardize training and procedural protocols.)

5. Mediations can also be distinguished on the basis of how "open" or "closed" they are — by this I mean how much control the parties have over the process, rather than the outcome. Bush and Folger seek to describe a process in which the parties can choose what kinds of groundrules and other process choices they want. In other models, both bureaucratic mediators, as well as those in private practice, may have such set routines that, although they appear to give the parties control over the solutions and agreements they reach, the process rules and routines of practice are in fact quite closed and dictated by the mediator. As mediation becomes more standardized and practice routines common across different models, some have argued that the once flexible process of mediation has itself become transformed into a formal and ethnocentric practice of "oughts" and "shoulds." (For example, one should not interrupt another party, the parties should not attempt to resolve their dispute directly between the case development and hearing stages in Community Boards mediation.)

6. Activist or accountable mediation, as practiced by those like Lawrence Susskind, involve mediators in being responsible for orchestrating not only who will participate in the dispute resolution process but can actually involve the mediator in crafting the outcome. As long as the parties understand the roles and different approaches to mediation, an ideology of choice can be satisfied. What becomes problematic is when the parties do not understand or agree to what they actually receive.

7. Community mediation often connotes (as in the Community Boards program in San Francisco) a less professionalized, lay, community-controlled mediation process, often with more than one mediator. Here, the danger is that many programs have become co-opted by affiliation with courts or other governmental institutions and the question is often raised about how "real" the community is. As more fully explored later (in connection with the Merry-Milner volume), community mediation often harkens back to a nostalgic sense of homogenous communities of days past (Auerbach 1983) which modern urban or religious communities seek, somewhat unsuccessfully, to recreate.

8. In a final residual category, one can find articulation of a school of mediation called "pragmatic" by its practitioners. Thus, Linda Colburn distinguishes her "on-the-spot mediation" in a public housing project from "generic mediation" by describing it as on-the-spot "peacemaking" and violence reduction. Much of the international mediation described either in the more formal diplomatic literature or in the Carter and Elder profiles belongs here — mediators will do almost anything that works to craft whatever agreements will call off the hostilities. This is highly instrumentalist, agreement-oriented mediation. Mediators here often do not care much about observing particular procedural niceties.

I offer these categories not because they necessarily cover the universe, but because they reflect the diversities of practice revealed in *When Talk Works* and demonstrate that earlier typologies have had to yield to the more variegated areas in which mediation is currently practiced. Mediation models can be constructed and evaluated on many different dimensions, including both the internal (e.g., mediator characteristics) and the external (e.g., organizational setting criteria). This makes the creation of typologies complex. Note that the models described above are not all mutually exclusive.

Is Transformative Mediation Possible?

Unlike *When Talk Works*, the other two books fail to display the growing variety of mediation practice. Instead, in different ways, they cabin the practice of mediation by arguing on opposite sides of the same question about whether transformative mediation is possible. In my view, both of these books are less successful, precisely because they narrow their focus at a time when we should be expanding our notions of what mediation can do. The Merry-Milner collection of essays, in essence, proclaims the Community

Boards of San Francisco mediation program a failure at community development and transformation (some of the included essays find success in other things). Bush and Folger urge us to adopt a rather vague, but also rigid, conceptualization of a personalized transformation process for mediation that is indifferent to whether or not agreement is reached.

As an edited volume, the Merry-Milner work suffers from the opposite problem of the Kolb volume: Several single themes are reworked over and over again in what seems like too many repetitive essays all making the same point and repeating the same program description. While some essays put the Community Boards experiment in context (Harrington's essay on Community Boards as community organizing, DuBow and Currie's essay on intimate, non-stranger violence, Nader's and Fitzpatick's essays on the anthropological and political understandings of "popular" justice movements), most of the essays can be read to conclude that:

(1) conflict resolution ideology is not enough to forge a community out of modern heterogenous urban life;

(2) the community that was created was created by and for mediators, from their ongoing training and meetings, rather than mediation work;

(3) caseload remained relatively low and had no demonstrable effects on violence reduction or community empowerment; and

(4) mediation, through the Community Boards model, tended to individualize and transform disputes through a discourse of feelings rather than political action or social problem solving through collective action.

Though I may have stated these conclusions more starkly than the essayists (it seems as if no one dared speak too loudly or negatively out of great personal respect for both Community Boards' founder, Ray Shonholtz, or the now-deceased and well-respected sympathetic evaluator, Fred DuBow, as well as for the millions of foundation dollars poured into the effort), it is relatively clear that no viable alternative "popular justice" model has transformed San Francisco disputing. Instead, the Community Boards model has proved evocative and useful (particularly in its use of multiple lay mediators to conduct "hearings") in developing alternatives to traditional mediation paradigms. The evaluation effort has demonstrated, more clearly than most works on mediation, that the act of training for and discussing mediation has itself created a "community" of mediators. Thus, more than the parties in dispute, mediators themselves may be the most "transformed" by mediative processes and ideologies.

The intention of the Merry-Milner book, to assess the potential and viability of a "popular justice" model by a comprehensive evaluation and multidisciplinary analysis of the place of mediation in a modern urban community, is admirable. But there is a noticeable lack of real dialogue between the somewhat defensive descriptive and utopian chapter written by the Community Board's program founder and the sometimes overly academic critiques written

by social scientists who have studied, but not often practiced, the difficult art of mediation. (Exceptions include the chapters written by Shook and Milner and Lederach and Kraybill, both of which combine experiential understanding of mediative processes and keen critical eyes.)

The issues explored by the critics are larger than those that could realistically have been expressed by one program. For example, can a new institution of "popular justice" flourish at the interstices of state power and indigenous community? The truth is that San Francisco Community Boards was never really "popular" justice — its form, organization, and content were developed in a top-down manner and remained somewhat rigid over time. New "community members" (the specialized vocabulary definition of mediators) were socialized to the four-step process of Community Boards mediation "hearings." The process did not seem to change or adapt much to local conditions (except for some increase in the acceptance of multiparty disputes) over time.

Also, as several of the commentators point out, the highly diverse community of modern urban San Francisco, even within geo-spatial limits, can hardly be considered an "indigenous community" with integrated culture and particularistic problems. As several of the critics note, the disputes handled were mostly those of stranger-to-stranger and the only form of contact members and parties had with each other was over disputes — hardly the way to forge a community. Several of the critics suggest that a culture of feelings, communication, and catharsis, fostered by the mediation model used (which was highly formalistic and did not allow parties to speak directly to one another until they were "allowed," at a particular stage, to turn their chairs toward each other) contributed to the individualization of disputes destined to discourage any sense of collective engagement with the community.

Though I agree with this analysis — that an ideology of communication is hardly enough to transform a disorganized modern community — I also take issue with those critics (Sally Merry, Laura Nader, Barbara Yngvesson, and Judy Rothschild) who seem to trivialize this model by opposing it to a model of justice or rights that is somehow considered more efficacious than mediation. First, I object to the continuing polarized and dichotomous ways of conceiving of mediation as either rights or interests-based or individualized or collectivized or political or psychological. Good mediation, and some of the mediations described in the Kolb book, deal with these levels simultaneously. The one "thick description" of a Community Boards mediation in the Merry-Milner volume — Rothschild's description of the Promised Land dispute (pp. 265-327) — demonstrates that all of these elements were present in the dispute, even if they were not artfully handled. Other models of dispute resolution, presumed to be more "rights"-focused, are themselves more likely to look like a hybrid of "bureaucratized" discretionary justice, rather than rights-based adjudication.[5] If we are to take the hopes of "transformative mediation" seriously, we must stop the kinds of simplistic taxonomies that academic critics (including Bush [1984] and Bush and Folger) love to create that simply do

not ring true for many practitioners. (I make this claim both as an academic critic and as a practitioner who engages in "satisfaction-problem-solving" and transformative mediation at the same time.)

Second, and more significantly, for the development of a theory of transformative mediation, communication, if not sufficient, is clearly a necessary part of any socially and politically transformative process. For those interested in more fully developing and exploring mediation theory, we might go back to the works of Jurgen Habbermas (1985, 1987) and Paulo Friere (1970) to suggest that mediation is at least an integral part of a process of democratic speech and conversation, without which we cannot hope to achieve any of the progressive outcomes hoped for by the political critics of mediation.

In my view, Laura Nader's otherwise superb anthropological work outside of the United States seems somewhat shadowed, in the United States (in the Merry-Milner volume), by a devotion to the "litigation romanticism" of her consumer activist brother, Ralph Nader. Litigation has its place — but how often has the "little consumer" really had an empowering democratic encounter in a courtroom with one of the three major car companies? The few exceptions do not illustrate the conditions for "ideal speech conditions" in a society of either formal legal participation or more local "popular justice." Individualized communication may not be the only way to empower communities. But, if we cannot learn to have conversations with one another, to define issues, discuss problems, express needs and rights at the individual level, I do not understand how either mass movements or professionalized (lawyer-led) litigation will fare any better.

There are some useful insights and chapters in the Merry-Milner book that could help us begin to examine how we might link issues of mediative-communication practice with more community empowerment or political concerns — thus, I see interesting questions embedded in the volume, even if they are not directly addressed. First, if we are to take seriously the notion of a transformative process in mediation (either at the individual or group level), we must unpack more critically the practices by which we get there. (Bush and Folger attempt to do this with their in-depth analysis of several representative mediations in Chapters 5 and 6 of their book.) Judy Rothschild's perceptive analysis of the Promised Land dispute (a dispute about a nonconforming business use in a residential neighborhood with class and race undertones) reveals how many levels the dispute exists on, and how inadequate the Community Boards "model" was to deal with the multiple levels of disputing. If there are many mediation models (and I believe there are), we must examine them critically, changing and expanding our mediation repertoires as we learn. Consider, for instance, how you as a mediator might have dealt with the racial and class issues implicated in the Promised Land dispute (pp. 265-327).

Vicki Shook and Neal Milner's chapter (which complements Linda Colburn's profile of Hawaiian dispute intervention in the Kolb volume) exposes

how we must come to terms with the ethnocentrism of our mediation prac-
tice routines or "schemas." Does an exhortation to "express your feelings"
privilege certain classes, races, ethnicities, and genders in particular
processes? (Consider my own personal favorite paradox: With all of the
claims that women are disadvantaged in mediation, we also claim that
women are "better" at verbalizing and expressing their feelings than men
are.) Does the practical "problem-solving" brainstorming mode privilege cer-
tain kinds of thinkers? (If one takes Deborah Tannen's [1990] work seriously,
women will express their feelings, but men will solve the problem. Who
then is advantaged in a "transformative" cross-gender mediation?)

I used to think that mediation modes (of various kinds) offered the
promise of a "meta-cross-cultural process," least infected by the ethnocen-
trism of formalistic legal or paternalistic "popular" justice modes. I now
more realistically see the ethnocentric biases in our increasingly formalized
mediation routines as well. What the Community Boards study has not
revealed, though I am sure it is embedded in the data, is how diverse dis-
putants responded to efforts to "impose" a particular form of process on
them — a process with which some must have been more comfortable than
others. For example, in a community model, are disputants happier with a
"neutral and impartial" third party (conventional western mediation ideol-
ogy) or with a "trusted" third party who is familiar with the community and
embedded in the problem? The mixed evidence presented in the stories of
actual mediations in San Francisco demonstrates that some "panel members"
try to establish "trust" by empathetically telling parties they have shared sim-
ilar experiences or the same neighborhood. But what happens when the
models are mixed? To the extent that the highly formalistic model of Com-
munity Boards as codified in the training materials (Shook and Milner)
reveals a particular form of mediation, one wonders what new forms of eth-
nocentric imperialism are developing when such models are "shipped off"
to other countries and cultures, such as in Ray Shonholtz's current work in
Eastern Europe. Will the transformation consist of a new form of "process
imperialism?"

If, as some critics suggest, the mediation model, by its structure,
demands "equivalences" of disclosures, concessions, and apologies, then we
must also examine when it is inappropriately used and how such individual
concessions may thwart the other goals of a transformative model. Is there a
danger of too much reciprocal transformation? In other words, "I'll agree to
change but only if you do!" (a result that Bush and Folger, with their concern
for interpersonal transformation might find pleasing, but which I doubt the
political critics in Merry and Milner would necessarily endorse).

The Merry and Milner volume asks us to consider what "popular" jus-
tice or transformative justice can be in a country where most people are
descendants of (or are themselves) immigrant "leavers," and have a legacy of
individualism and only limited communitarian concerns (Bellah et al. 1986).
The essays, read together, suggest that mediation ideology is not enough to

make a community. But for me, these essays do not offer enough in the way of useful comparisons or other baseline measures or suggestions of what else in our society might better accomplish their preferred ends. Kolb and Kessel's concluding essay in *When Talk Works* and the final section of the Merry-Milner volume suggest we must rachet down our "mythology" or expectations of mediation as a process for effective political or social change. But no one tells us what else might work better.

A Particular Vision of Mediation

In contrast, Bush and Folger want to rachet up our expectations and practice of transformative mediation, as long as we "transform" in their image. In what has to be one of the most astonishing statements ever made about human beings (at least most psychologists would probably think so), Bush and Folger promote transformative mediation because, they suggest, people are easier to change than situations (see Chapter 4). In a critique of more conventional mediation, Bush and Folger suggest that too much mediation is focused on "problem solving" or as they label it, the "Satisfaction Story." The goal, they write, is "for satisfying the genuine human needs of the parties to individual disputes," through more directive and manipulative action by mediators to reach agreements and settlements between the parties to concrete problems (p. 16).

In the four-fold taxonomy they present, Bush and Folger contrast this model with three others. The "Social Justice" model, including community mediation programs like San Francisco's Community Boards and environmental and consumer mediations, seeks to resolve problems at the group level. The "Transformation[6] Story," with which the rest of the book is concerned, focuses, not on agreements and settlements, but on "the capacity of mediation to transform the character of both individual disputants and society as a whole" (p. 20) to become "morally better persons" (p. 12), through what the authors call "empowerment" and "recognition."

Finally, a more critical story of "Oppression" is told, in which mediation is described as a deceptive process which has enhanced the power of the strong over the weak (in family, landlord-tenant, consumer, employment, and business disputes) and privatized dispute resolution (pp. 22-24). Many of the critics in the Merry-Milner volume can be found associated with the "Oppression Story" (i.e., Harrington, Merry, Nader).

In delineating their "Transformation Story," Bush and Folger tell us they are not concerned with "the restructuring of social institutions in a way that redistributes power and eliminates class privilege"; rather they are concerned with "a change or refinement in the consciousness and character of individual human beings. . .connoting individual moral development." (p. 24). Thus, Bush and Folger proudly take on what the critics of Community Boards mediation most fear — the individualization and internalization of problems and disputes. They have "psychologized or moralized" exactly what the Merry-Milner authors claim should remain political.

Bush and Folger acknowledge several important points, consistent with views expressed in this review: Mediation is pluralistic and, in essence, no one taxonomy can fully capture the varieties of visions and practices that inform it. Second, they acknowledge that mediation literature and practice abound with differences and inconsistencies in descriptive and prescriptive propositions. Third, the current patterns of practice in most mediation emphasize practical problem solving and settlements over other goals of social justice, promotion of equality or "the improvement of human character."

The authors honestly and forthrightly state their goals. They offer their "Transformation Story" in a hope of redirecting mediation practice toward "engendering moral growth and transformation of human character toward both greater strength and greater compassion" (p. 27). They believe these goals are "sounder, more coherent and more justifiable" than other mediation ideologies or justifications.

How then can someone who, like the current reviewer, supports use of mediation for the creation of more human compassion, understanding, and moral decision making, find herself so critical of this effort? In part, any serious reading of the other books considered in this review makes clear that mediation does not necessarily fit into one small, neat little box. If the Kolb and Associates and Merry and Milner authors have shown us anything, it is that mediation is deeply contextual and, when situated in different environments and institutions, it will perform different social tasks. Bush and Folger attempt a meta-level explanation for mediation that simply will not work. Transformative mediation is a concept that is both vague and, at the same time, presumptuous; it is insensitive to social conditions and — dare I say? — too ethnocentric to reach all mediations. One can imagine the mediators profiled in *When Talk Works* engaging in a dialogue with Bush and Folger, questioning their descriptions of mediation desiderata. Do William Hobgood (in labor grievances) or Lawrence Susskind (in environmental siting cases), or Eric Green (in business disputes) see their goals as *individual moral character development* in the cases they mediate?

Bush and Folger argue that mediation is uniquely adapted to engage individuals in moral growth and change, and that human growth is, after all, more important than material wealth (see p. 30). They posit that solving problems will not change the world so only by changing people (to focus more on their moral potential than their appetites) will we achieve a "better world."

Bush and Folger's book, though an interesting effort, exposes the difficulties of articulating what "transformative mediation" should be. What goals should any process serve? From what to what are we seeking to transform people? Who are the "we's" that preside over this transformation? Though I support the basic precepts of building party competence (empowerment) and mutual understanding across difference (recognition and empathy), Bush and Folger's descriptions of these processes reveal that their model is no less manipulative or content-based than the problem-solving model they

critique. Their claim for "process neutrality" seems potentially more danger-ous for the almost New Age-human potential movement-religious fervor which seems to inspire it. If conflict is the matériel of mediation, why should process always trump outcome? Why is individual growth process privileged over other processes? In mediation, isn't relationship process as important as individual process? And also, can't relationships of people *to* their conflict be changed in mediation, without necessarily changing the relationship between the people (e.g., in divorce mediation)?

If we cannot clearly articulate what it is we are transforming, how can we evaluate what we have done? In an interesting correspondence in the Shonholtz description of Community Boards mediation and Bush and Fol-ger's stated goals, both sets of mediators suggest that agreements and settle-ments should not be the only measure of success; rather, success can be judged by whether the parties have come to some new understandings or learning about themselves and the other disputants. While I agree that too much evaluative research is focused exclusively on settlement rates, one wonders how one could go to a mediation and learn absolutely nothing about oneself or the other? In short, does a more "human transformation" goal conveniently avoid evaluation measures?

At the same time that Bush and Folger are vague about standards for measuring their own model of mediation, they are remarkably judgmental and conclusionary about what they say about other models of mediation. They argue that problem-solving mediation inevitably leads to over-directive practices by mediators (a theme echoed in both other books) but the empiri-cal support for this claim is very weak and supported by mostly anecdotal observations and selected stories. How does this jibe with the stories told by Community Boards critics that, in fact, too much time is spent on expressing feelings (empowerment and recognition) and not enough on settling cases or solving community and group problems? That Bush and Folger should cri-tique mediators for globalizing and narrowly diagnosing problems seems highly ironic, given their own globalizing and conclusionary statements about mediation practice with little empirical rigor. They suggest, somewhat naively, that problem-solving mediators have an "interest" in conflict resolu-tion and mediation (p. 70) and then seem to ignore the fact that their own transformative mediators will also have agendas and interests that may not be the parties' own.

Both the most interesting and the most infuriating chapter of the Bush and Folger book is Chapter Four, where the authors attempt to set out and define their transformative model. Here they specify what they are seeking to achieve — a strengthening of the self — an increase in human capability and capacity to deal with life and its problems by reaching out to and under-standing others. Like Ray Shonholtz, Bush and Folger invest conflict, as an ideology, with the power of individual, as well as social, change. Conflict provides an opportunity for growth, rather than something we should fear. The goal of mediation becomes not solving problems, but transforming indi-

viduals for moral growth toward being more "responsive, confident and caring" individuals (p. 83).

Why have Bush and Folger shifted the focus entirely away from the group or community to the individual? In conflict resolution, isn't the relationship often the key unit of analysis, standing between the individual and group process? On pages 85-91, the authors provide a useful catalogue of how empowerment and recognition can be articulated. They assert, however, that empowerment "is independent of any particular outcome of the mediation" (p. 87). How anyone could feel empowered if they did not get at least some of what they needed or expected from a mediation seems a bit much to ask. Similarly, if recognition is the achievement of understanding of the other, one wonders whether there are never limits on mediation: Should we have tried to understand Hitler?

In their attempt to distinguish transformative mediation from directive problem solving, the authors exhort mediators not to frame issues and prematurely diagnose problems. But at the same time, they encourage mediators to facilitate perspective taking by "reframing, reinterpreting and translating. . .to make the parties more intelligible to each other" (p. 101). Thus, seemingly without realizing it, the authors have created a model which simply relocates the directiveness of mediators; instead of solving the problem, they will orchestrate the communication.

In two case studies, the authors attempt to illustrate how their interventions in a transformative mode would contrast with the much criticized problem-solving method. Unlike the useful mediator interventions I gleaned from *When Talk Works*, this reader could find nothing new in the mediator strategies suggested (with the possible exception that it may be important to talk about the past, in order to encourage recognition and understanding, a countercultural mediation strategy and one that is responsive to feminist critiques of mediation (Grillo 1990). Perhaps other readers will find new techniques here.[7]

Finally, in the authors' attempt to redefine neutrality as "keeping the outcome in the parties' hands" (this is new?), one does wonder what, if anything, is the mediator responsible for? All three of these books do, in fact, generally sidestep issues about mediator responsibility or accountability. Only those few mediators who speak to us directly about this issue through the Kolb and Associates profiles inform us about how we should be judged. Bush and Folger urge mediators to be more passive with respect to outcome (advice that would be useful, in some contexts, for the more directive and controlling mediators, but one wonders how Frances Butler and Linda Colburn would make use of this advice in the institutional settings in which they serve), but perhaps more aggressive when it comes to empowerment and recognition.

Why is one form of intervention "better" than another? In rather simplistic terms, the authors conclude that their vision of transformative mediation is informed by Relational Values (better) and Problem Solving is informed by

Individualist Values (worse).[8] In their efforts to attach their approach to a larger *weltanschauung*, Bush and Folger serve up (pp. 229-259) a simplistic and polarized philosophy derived from combinations of New Age aphorisms ("forging compassionate strength," "organic worldview") and feminist (Gilligan's [1982] "mature human morality") and critical legal theory (anti-marketplace aspirations). The persistence of a dualistic and polarized view of worldviews makes me wonder whether such mediators can escape the "either-or" thinking that must be transcended for artful mediation practice.

Transformation of What? Can We (Should We?) Ask Mediation to Do More than Settle Disputes?

As one who has often advocated some form of "transformative" mediation, my critique of Bush and Folger may seem unduly harsh. After reading these books, one is still left with the question — mediation for what? Is mediation intended to do anything more than help facilitate solutions to disputes or problems? Both the Kolb and Associates and Merry-Milner volumes suggest we have created a mythology and false expectations for mediation as a process, while Bush and Folger urge mediators to choose a "paradigm shift" by "aiming higher" in mediation practice.

I propose a reconciliation here by suggesting that "transformative mediation" is possible (and indeed desirable) — but only if we define our terms more clearly, state our goals more modestly and inclusively, and remain sensitive to the social and political situations and institutions in which we do our work. Mediation does, after all, occur in a material world, with parties who seek particular ends and mediators who must make a living, as well as live out their theoretical and political fantasies. Transformative mediation can occur anywhere, but is it less likely in particular settings, just as some medical delivery systems may limit the provision of medical care?

In short, transformative mediation, like all processes, must be contextualized. No process can do all things, or any one thing for all people. History is replete with too many examples of processes being distorted to accomplish particular substantive and political ends (Germany's legal system during Hitler's regime and mediation during Mao's regime) for us to ask too much of any process.

These books reveal the richness of our practices and suggest some problems we need to work on (disparities between what we say we do and what we actually do, overdirectedness, overly instrumentalist evaluations of outcomes and perhaps some grandiosity of claims of our collective usefulness). Yet these books (even the overly strident Bush and Folger volume and the critical essays in Merry and Milner) suggest new strategies and interventions and midcourse corrections for some of these problems. I would invite over-directive problem solvers to read Bush and Folger not to urge a substitution of method, but to become more self-critical of the distortions of any process and to consider other techniques (open-ended questions, empathy training, etc.). Similarly, I would ask anyone who has sought to solve all of the problems of a

community, organization, or public housing project through an internal grievance system to read Merry and Milner to learn that conflict resolution alone is not enough to forge organizational culture into a peaceable kingdom or deal with scarce resources to satisfy human needs and wants. There must be some commitment to broader social and human purposes.

Nevertheless, I persist in trying to do my own form of transformative mediation (and I think others should continue to do so as well). For me, mediation is transformative because it is educational. At its best, we learn about other people, other ways to conceptualize problems, ways to turn crises into opportunities, creative new ways to resolve complex issues and interact with each other. And we learn about ourselves and, perhaps, new ways to negotiate our next problem. But mediation has not solved racial and class inequalities in the world (neither has anything else so far), nor the violence in Bosnia, nor the food shortage in Somalia, nor the drug trafficking in Colombia and on the streets of our inner cities. Mediation cannot transform all people — neither can intensive therapy. So we must consider what we can realistically do.

If mediation is transformative because it is educational, then we can read these books to teach and examine ourselves and consider whether our theories, ideologies, paradigms and practices need to be revised in light of a first generation of "thick descriptions" and evaluations of our work. Are we working to transform ourselves into a new profession, or are we really working to empower parties and assist them in developing their own skills for problem solving *and* mutual human understanding? Have we learned enough about our limitations and the contexts in which we work so that we do not do harm by doing either too much or not enough? What can a court-based mediator, subject to settlement-based statistical evaluations, transform? What can an environmental mediator in a siting or reg-neg dispute accomplish? Should we be unlimited in what we do or should our "transformations" be bounded by rules or routines of practice for protection of our clients, as well as ourselves?

Like Lawrence Susskind, I continue to think of mediation as an important democratic process. At its best, it allows parties to talk directly to each other and arrive at solutions to problems that would not be possible in other fora. At its worst, it recapitulates the power inequalities of our society and achieves unfair results for parties who don't know what happened to them or whom to blame.

All three of these books suggest that mediation has become almost as variable as the other human processes it was designed to replace or supplement. These books should cause us to ask under what conditions do we do our work, and under what conditions can we do better work. The grandiose claims made on behalf of mediation have had to be more modestly stated as the analyses and evaluations of our work have demonstrated that parties do not always share the transformative visions of the mediators — they just want their problems solved.[9]

I do want to suggest, however, that the time is also ripe for new conceptualizations and theoretical attention to the role of mediation in our society. Mediation is not only a supplement to court processes or a locus of community action; it also operates in many different places where people interact with each other (such as in families or the workplace), as well as with the government, corporations, and other institutions. Mediation may be a new site of personal, as well as political, interaction. As an "intermediate" process operating at the boundaries of other more formal or personal systems, we may learn about new kinds of communication, human interaction and problem solving that may challenge, transform, and supplement — as well as supplant — older ways of conflict resolution and political change.

NOTES

The author would like to thank Howard Gadlin and J. William Breslin for their helpful comments and suggestions.

1. I am, like many of the authors represented in these books, a theorist, researcher, and practitioner in the field.
2. Most of these efforts at categorization owe their initial cuts to the dichotomous and somewhat polarized role and task conceptions of "bargainers" vs. therapeutic models initially described by Silbey and Merry (1986). As a practicing mediator who draws from an eclectic set of strategies, as well as tactics, I have often found these attempts at typologies somewhat rigid and simplistic and directly contradictory to the flexibility and art of mediation intervention activities.
3. See Schon (1983) for an excellent elaboration of professional practice routines in a number of different professions.
4. I can't resist expressing my personal admiration for all of the mediators profiled, whatever particular differences I might have with their professional interventions. The Susskind essay, in particular, revealed to me the dark side of the academy. Critical and analytic disciplines have their virtues but they can paralyze those who must act and create, rather than criticize. All of the profiled mediators are leading pro-active lives in which they are seeking, for different but related reasons, to make the world a better place, no matter how imperfect their practices. This is a very important contribution, and those approaching this work from more critical traditions (like many of the critics in the Merry and Milner volume) would do well to ask whose contributions are greater — the activists or the critics?
5. I thank Gary Bellow for an, as always, insightful observation, based on our similar experiences in local courts in two widely different cities.
6. As I discuss further later, I should disclose that the authors include me in a small group of those who have articulated the goals of the transformative model. I do not disclaim this attribution, but it is a partial description of my own work and I do not necessarily endorse the description of transformative mediation provided by Bush and Folger.
7. I feel compelled to add that I probably did not see anything new here because I do not see facilitating empathetic communication as "new" or separate from problem-solving mediation. For me, the authors have set up a false dichotomy. Some use communication techniques instrumentally to solve the problem, and their mediations would be indistinguishable to the observer from Bush and Folger's; others more explicitly focus on communication and human empathy as an end itself, but by doing so may facilitate a solution arrived at by the parties — the differences may not be so easy to observe. I disagree heartily with the authors' analysis (pp. 108-112) that these two models are so different they cannot be integrated.
8. As one of the originators of the "problem-solving" framework (Menkel-Meadow 1984), I find this characterization somewhat bizarre. It was precisely because of my relational approach to negotiation that I suggested one can only effectively solve problems by considering, taking account of, and caring about "the others" in negotiation.
9. Procedural research tells us that parties may often seek different things than the researchers or dispute resolvers think they value (Tyler and Lind 1986).

REFERENCES

Auerbach, J. 1983. *Justice without law?* New York: Oxford University Press.

Bellah, R.H. and others. 1985. *Habits of the heart: Individualism and commitment in American life*. Berkeley: University of California Press.

Bush, R.A. 1984. Dispute resolution alternatives and the goals of civil justice: Jurisdictional principles for process choices. *Wisconsin Law Review* 1984: 893-1034.

Cobb, S. and J. Rifkin. 1991. Practice and paradox: Deconstructing neutrality in mediation. *Law & Social Inquiry* 16: 35-62.

Christie, N. 1977. Conflicts as property. *British Journal of Criminology* 17: 1-15.

Freund, J. 1994. *The neutral negotiator: Why and how mediation can work to resolve dollar disputes*. New York: Prentice Hall Law & Business.

Friedman, G. 1993. *A guide to divorce mediation*. New York: Workman.

Friere, P. 1970. *The pedagogy of the oppressed*. New York: The Seabury Press.

Gilligan, C. 1982. *In a different voice: Psychological theory and women's development*. Cambridge, Mass.: Harvard University Press.

Greatbatch, D. and R. Dingwall. 1989. Selective facilitation: Some preliminary observations on a strategy used by divorce mediators. *Law and Society Review* 23: 613-641.

Grillo, T. 1991. The mediation alternative: Process dangers for women. *Yale Law Journal* 100: 1545-1610.

Haynes, J. 1992. Mediation and therapy: An alternative view. *Mediation Quarterly* 10(1): 21-33.

Habbermas, J. 1987. *The theory of communicative action, Vol. 2*. Boston: Beacon Press.

———. 1985. *The theory of communicative action, Vol. 1*. Boston: Beacon Press.

Kohn, A. 1990. *The brighter side of human nature: Altruism & empathy in everyday life*. New York: Basic Books.

Menkel-Meadow, C. Forthcoming. Whose dispute is it, anyway? A philosophical and democratic defense of settlement (in some cases). *Georgetown Law Journal*.

———. 1992. Is altruism possible in lawyering? *Georgia State University Law Review* 8: 385-419.

———. 1991. Pursuing settlement in an adversary culture: A tale of innovation co-opted or "The Law of ADR." *Florida State Law Review* 19: 1-46.

———. 1985. The transformation of disputes by lawyers: What the dispute paradigm does and does not tell us. *Missouri Journal of Dispute Resolution* 1985: 1-34.

———. 1984. Toward another view of legal negotiation: The structure of problem-solving. *UCLA Law Review* 31: 754-842.

Raiffa, H. 1991. Post-settlement settlements. In *Negotiation theory and practice*, edited by J.W. Breslin and J.Z. Rubin. Cambridge, Mass.: PON Books (Program on Negotiation at Harvard Law School).

Schon, Donald A. 1983. *The reflective practitioner: How professionals think in action*. New York: Basic Books.

Silbey, S. and S. Merry. 1986. Mediator settlement strategies. *Law & Policy Quarterly* 8: 7-32.

Smith, W. 1994. Power, ripeness and intervention in international conflict. *Negotiation Journal* 10: 147-160.

Stulberg, J. 1981. The theory and practice of mediation: A reply to Professor Susskind. *Vermont Law Review* 6: 85-117.

Susskind, L. 1981. Environmental mediation and the accountability problem. *Vermont Law Review* 6: 1-47.

Tannen, D. 1990. *You just don't understand: Men and women in conversation*. New York: William Morrow.

Tyler, T. and A. Lind. 1988. *The social psychology of procedural justice*. New York: Plenum.

Weber, M. 1988. *On Charisma and Institution Building*, edited by S.N. Eisenstadt. Chicago: The University of Chicago Press.