

Mediator Settlement Strategies

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Settling cases poses a challenging task for the mediator. Most disputes are hotly contested by both parties or they would not have progressed to the point of entering the court arena or mediation. Yet, despite differences in the nature of their cases, the organization of each program we have studied, and the style of mediation predominating in each, striking similarities exist in the techniques used by the mediators to settle cases. Observation of over 40 different mediators in 175 mediation sessions in three programs suggests that in order to do the job which they are charged with accomplishing—bringing mediation cases to settlement—mediators develop a repertoire of strategies employing a variety of sources of power. Mediator strategies fall into four principal categories: presentation of self and the program, control of the process of mediation, control of the substantive issues in mediation, and activation of commitments and norms. Mediators empower themselves by claiming authority for themselves, their task, or the program based upon values external to the immediate situation, or manipulate the immediate situation so that settlement is more rather than less likely. Based upon their differential use of these strategies, mediator styles fall along a continuum between two types: bargaining and therapy. Mediation seems to range between a bargaining process conducted in the shadow of the court to a communication process which resembles therapy in its focus upon exploring and enunciating feelings.

Mediation is commonly defined as a process of settling conflict in which a third party oversees the negotiation between two parties but does not impose an agreement. As Gulliver observes, "In negotiations there may be, but not invariably is, a third party who, though he has no ability to give a judgment, acts in some ways as a facilitator in the process of trying to reach agreement. This is a mediator" (1977: 15). He has no socially legitimate authority to render a decision. Yet, the mandate for all mediators is to settle cases. The mediator thus faces a dilemma: to settle a case without imposing a decision. The process of mediation, and the role of the mediator in particular, is shaped by the strategies adopted to cope with this tension between the need to settle and the lack of power to do so.

Mediators have been described in different ways ranging from the passive facilitator to the active shaper of solutions (e.g., Gulliver, 1977; Nader and Todd, 1978; Merry, 1982; Kolb, 1983). This variation is caused by the differing compromises mediators make between paradoxical expectations. This

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paper explores the techniques and sources of power employed by mediators in three different settings in urban America. In each, mediators develop at least four strategies which rely upon authority or manipulation in order to settle cases. Based upon their differential use of these strategies, mediation styles fall along a continuum between two types: bargaining and therapy. Despite program variations, mediation seems to range between a bargaining process conducted in the shadow of the court and a communication process which resembles therapy in its focus on exploring and enunciating feelings.

This paper presents a way of conceptualizing the differences observed between mediators by means of a typology of mediation styles. It is not a quantitative description of mediator behavior, but a set of categories which make some sense of the range of variation in what mediators do. The patterns emerged as we observed a large number of mediation sessions and began to see regularities in the ways mediators settled cases. Although these categories could serve as the basis for future research focused on recording frequencies and correlating styles with other variables such as outcomes, gender, or problem, that is not the purpose of this paper. We are primarily interested in constructing a typology which offers conceptual categories for thinking about the mediation process.¹

I. THREE VERSIONS OF MEDIATION

During the last decade, there has been considerable interest in the use of mediation as an alternative to adjudication for minor disputes in many developed industrial societies. In the United States, there has been a proliferation of mediation programs sponsored by federal, state, and local governments, courts, private foundations, bar associations, and community groups which offer an alternative way of handling small claims, domestic, neighborhood, and family disputes.² Despite the diverse interests supporting mediation programs, there has been a singular unanimity with regard to the model of mediation adopted in these experiments: to settle disputes by providing mutually agreeable settlements constructed by the parties themselves; to arrive at settlements through discussion moderated by a third party who has no legitimate power to render a decision or enforce an agreement; to create agreements based upon shared obligations and behavioral change rather than legal rules; and to develop consensus rather than to articulate competing interests and rights (McGillis and Mullen, 1977; Tomasic and Feeley, 1982; Santos, 1982). In programs dealing with interpersonal and community conflicts, the mediators are expected to be members of the same community as the disputants and, therefore, to share their values. Mediator training varies slightly from one program to the next, although all programs use variants of a single method taught in a 30 to 40-hour course dominated by role play techniques based on models of labor mediation. The mediators are charged with reaching some kind of agreement which keeps the disputants from pursuing formal legal action.

The authors have spent three years studying two mediation programs intensively and have gathered comparative data on a third. One is a court-affiliated program which handles primarily criminal cases: 85 per cent of its referred cases are neighborhood, marital, family, and lover disputes and 15 per cent are landlord/tenant, employer/employee or consumer/merchant cases. The second is a community-based program, located in a local social service agency, which also receives both interpersonal (64 per cent) and small claims case referrals (37 per cent). The third is an agency-based program which handles only family conflicts involving parents and teenage children who are "status offenders": minors accused of truancy, running away from home, or rebelliousness.³

The court-based program has the longest history. Operating since 1979, it was developed as part of a reform effort designed to make the court and its resources more accessible, humane, and convenient. Part of the national movement to rationalize the legal system and provide "better" or "more" justice, the mediation program was organized to provide resolutions and outcomes more responsive to the underlying issues in some cases than formal court processes and responses allow.

Between 1980 and 1983, this office mediated 454 cases. Since it is located in the courthouse itself, its staff is in daily contact with probation officers, district attorneys, and judges. Cases are referred by this court to the program. Many are referred while the parties are in the courthouse, and the intake occurs immediately, with a mediation session scheduled one-to-two weeks away. Other referrals are elicited by perusing the complaint applications for appropriate cases, then contacting the parties by mail. The initial contact letter, on court stationery and signed by the clerk of the court, states that the parties have the opportunity to avoid a probable cause hearing and possible further court action by contacting the mediation program.

Mediation sessions are held in local churches and generally last two-to-three hours. Mediators in this program use a rather structured process in which the organization of the sessions, timing, roles and interactions follow a regular pattern from one case to the next with an emphasis upon caucusing and private discussions with the individual disputants. The process is designed to get at what a dispute is about in terms of concrete demands which can be realized or legitimate differences of interest which can be negotiated. Mediation sessions begin with an initial "public session" in which the complainant is invited to "tell his story," followed by the respondent's story. The mediators ask informational questions. Occasionally the parties begin to argue directly with each other during this session, but mediators generally break up arguments quickly. The seating arrangements position the parties side-by-side facing the mediators. After a period of 20-to-40 minutes, the mediators send the parties out of the room while they talk about what the case is "really" about and the kinds of settlements that might emerge. There is often some discussion about who is being reasonable or difficult. Then, each party is called in for an individual dis-

cussion, or "private" caucus with the mediators. The purpose of this session is to uncover issues that parties were reluctant to discuss in the public session. The mediators also probe for grounds for a settlement, i.e. what the parties want or will settle for. The session is used to uncover issues as well as the "bottom line" or last offer of each side. (The term "bottom line" is introduced in training sessions and frequently adopted by mediators.) The first party's offer is presented to the second party and if the second party agrees, the mediators then send both parties out of the room and privately write up the agreement.

Although the points of agreement reflect demands made by both parties about what they want, mediators generally rephrase them into stock statements. They pick up comments parties make which may not be phrased as explicit demands, but which point in the direction of a settlement and incorporate them as elements in the agreement. Statements such as "I just want him to leave me alone" may become "Parties A and B agree that there will be no further contact between them." All parties are then invited back into the room and presented with a written agreement on court stationery. They are asked to sign the form, with the mediators signing as "witnesses." Mediators tell the disputants that the agreement will be kept and monitored by the mediation program (which it is) and, sometimes, that it will be filed by the clerk, the court, or the judge (which it is not).

The second program in this study is based in a community action agency and was originally developed by a local anti-crime group. Its ideology is community action and empowerment. The staff was attracted by the idea of furthering social change by providing a way of handling disputes that locates social control within the community. Although the original intention was to serve a local neighborhood of only 15,000 people, the need to generate cases quickly led to an expansion to the entire city of 95,000 and a reluctant reliance on justice system referrals for cases. The caseload is still a great deal smaller than the court-based program: in its first year-and-a-half of operation, it mediated 41 cases, then lost funding support for its community action focus and was incorporated into a legal services agency.

The mediator training here is generally similar but emphasizes open communication between the two parties, a non-directive mediator role, and less caucusing. The underlying ideology is not bargaining and uncovering the bottom line of each side, but achieving full and open communication between the parties, on the assumption that this will lead to mutual understanding and a resolution of the conflict. The program staff and mediators assume that the barrier to settlement is difficulty in communication, not an underlying conflict of interest between the parties which somehow needs to be compromised or negotiated.

The process of mediation is designed to facilitate this communication. The parties are seated facing each other at a rectangular table and a single mediator sits at one end and a staff person at the other. Instead of asking the complainant to begin, the mediator invites either party to start. There

is little caucusing and no private discussion between the mediator and the staff person. Sessions usually last longer than two hours, and many run to five. When an agreement is clear, the mediator writes it while the parties are in the room, constantly checking to make sure this is what they want. Mediators frequently stress that enforcement of the agreement is up to the parties themselves and that there will be no court monitoring of the agreement. Nor is program monitoring stressed. The parties then sign the form, under a letterhead of the mediation program, and the mediator and staff person sign as "witnesses." In content, agreements are similar to those of the court-based program and contain prescriptions for behavioral change, promises of money payments, and rules about future communication between the parties.

The third program handles family conflicts concerning adolescents who are truant, runaway, or rebellious. The sponsoring agency is a social action, child-advocacy program whose staff and mediators are particularly concerned with the rights of adolescent children. The program was set up to offer an alternative to the court through a non-adversarial and non-legal way of handling these problems. As is typical of many court mediation programs, it started with a small catchment area and expanded to increase its caseload (cf. Harrington, 1984). It has now been institutionalized statewide. Its office is located several blocks away from the courthouse, as is that of the community-based program, but it also routinely sends representatives to the court to pick up cases. Over half the cases (56%) come through the court system. In the first two years of operation, it held 108 mediation sessions for 93 families.

The process of mediation used is similar to that of the first program, with an emphasis on caucusing and uncovering the bottom line of the parties. Two or three mediators conduct the session with lengthy mediator caucuses. The parties sit beside one another, facing the mediators. The average session lasts three-and-a-half hours, and the mode is four hours. Mediation is directed toward constructing an agreement with specific rules of behavioral change; most focus on rules about curfews, chores, privileges for children, and ways to handle conflict in the future. The mediators work toward agreements which are clearly balanced, not focused on a one-sided change in child behavior. Discussions emphasize the problems and responsibilities of parents as well as children. All cases for which a formal complaint has been filed are returned to the court if a continuance date has already been set. The court will not waive the continuance date. The program staff often request dismissal of the case when it is returned to court, but the court may or may not dismiss it. Usually, it keeps cases open for further supervision by the court (Merry and Rocheleau, 1985).

II. SETTLEMENT STRATEGIES

Settling cases in all three programs poses a challenging task for the mediator. Most disputes are hotly contested by both parties or they would not

have progressed to the point of entering the court arena. Yet, despite differences in the nature of their cases and the organization of each program, there are notable similarities in the techniques and strategies used by mediators to settle cases.

Observation of over 40 different mediators in 175 mediation sessions in the three programs suggests that in order to do the job which they are charged with accomplishing—bringing mediation cases to settlement—mediators develop a repertoire of strategies employing a variety of sources of power (cf. Wrong, 1979). The strategies fall into four principal categories: presentation of self and program, control of mediation process, control of substantive issues in mediation, and activation of commitments. Mediators empower themselves by claiming authority for themselves, their task, or the program based upon values external to the immediate situation. They may also manipulate the immediate situation to make settlements more likely.

These settlement strategies tend to coalesce into two distinct styles, bargaining and therapy, representing the poles of a continuum of mediation possibilities. Each strategy can be employed with a bargaining or a therapeutic style. After describing each strategy, we will outline the bargaining and therapeutic styles.

A. PRESENTATION OF SELF AND PROGRAM

Mediators nudge parties toward settlement by the way in which they describe themselves and their role as mediators. They claim authority based upon either expert knowledge or legal authority.⁴ Claims to authority, and by implication deference, are made as the mediators present themselves in their introductions and intermittently throughout the mediation session when they may offer advice, give information about alternatives and factual matters, or brandish language and symbols associated with the law or helping professions.

First, mediators emphasize their expertise as dispute settlers; they describe and present themselves as people who are trained, in the same sense as other experts, and command a store of experience and knowledge that they can bring to the present case. Second, they claim additional sources of authority. In the court-related program, mediators stress their linkage to the court by emphasizing that the court has administered an oath of confidentiality to them; occasionally mediators will claim that they are actually working for the court. In the community-based program, they stress that they are trained to help people reach an understanding of one another. This explanation makes claims to the expert authority associated with helping professionals who employ a communication/therapy frame of reference. In the family program, mediators also present themselves as trained to work with families. Despite the ideology of the mediation movement and orientations of each program, mediators rarely stress their common-

ality with the disputants or their shared values and norms. Thus they eschew a claim to authority based upon traditional sources of legitimacy.

When parties resist settling, mediators often make statements about the parties' alternatives. Since most cases were referred by the court, it is the logical alternative to a mediation settlement. Mediators in the court-based program stress that going to court is time-consuming and expensive, and that outcomes may be serious. They emphasize the loss of control and possible arbitrariness of the court so that "one just can't predict what may happen." The characterization of the "anarchic" court is offered at the same time that the mediators seek to legitimize themselves and the outcomes of mediation through association with the court. Mediators do not stress that the court process is inherently bad, but that access to its better services is difficult. In contrast, mediators in the community-based program emphasize that the court process is adversarial, perfunctory, and inappropriate to the disputants' problem. They stress that the adjudicative process itself is unhelpful. They are also much less likely to make statements about what a court outcome would look like. Mediators in both programs describe mediation as an alternative to court but an alternative in very different senses. In the first program, they present themselves as people who know the court better than the parties and as agents of the court, and in the second, as people who know how to manage relationships and therefore know what is best for the parties.

Discussion of alternatives is not a series of threats, although mediators suggest that things will go badly in court, and that the disputant is bound to lose and may even go to jail. The allusions to the awful things that could happen in court are neither threats nor coercion in the sense used in the analytic literature because the mediators do not control the outcomes they are describing; the mediators cannot in fact make the situation worse for the participants if they choose not to settle in mediation (cf. Wrong, 1979: 41; Taylor, 1982: 15). Nor are these statements about alternatives a form of persuasion. Although mediators attempt to change the parties' attitude toward the court alternative by emphasizing the inappropriateness of the process, the loss of control, the dichotomous win/lose outcomes, the costs in time and expense, and the unfairness and perhaps even corruptness of the court, it is a covert process. Because the argumentation about alternatives is subtle and implicit, because the mediators do not state outright their intent to the parties, and because it is not a free exchange of communication and argument, it cannot be persuasion in the technical sense of the term, but rather constitutes a form of manipulation (Wrong, 1979: 28).

In general, however, the ability of the mediators to forge agreements between disputants by statements about alternatives rests upon the mediators' claims to knowing more than the parties about either the court or the appropriate ways to settle disputes. This claim of authority on the part of the mediators can be challenged when the parties claim equal expertise by virtue of their own experiences. Those disputants who have knowledge of

the court and are familiar with its workings are more likely to ignore the mediators' statements.

Mediators are often confronted with parties who will go along with the preparation of a written agreement, then in the last minute will ask, "But how do I know that this will be enforced?" In the court-based program, mediators will stress that the mediation program will monitor the agreement for 90 days, implying the same kind of supervision accorded probation decisions, and repeat the right to return to court if things do not work out. The mediators in the community-based program will stress that any enforcement is up to the parties, and that they both have to be willing to go along with it. The family dispute program stresses both, but the agreements are made available to any judge who asks to see them for those cases in which a formal complaint has already been filed and in which the case has not been dismissed. Here, the court oversight actually exists, although judges do not often ask to see the agreements. In fact, the agreements are technically not legally binding; nevertheless, in follow-up interviews, close to a third of the disputants in each program say either that they think the agreements are legally binding or that they are unsure.

B. CONTROL OF MEDIATION PROCESS

Mediators work towards settlement of cases by controlling interaction and communication in the mediation session (cf. Kolb, 1983). This is an important function for mediators in general and a critical aspect of their ability to settle cases. Because mediators help direct the parties toward settlement by focusing discussion, procedurally and substantively, toward a settlement, their actions constitute a form of manipulation.⁵ Mediators control the speakers, the audience, the topic, and the length of the discussion. Management of the shape of the discussion is interconnected with manipulating the substance of discussion so that disputants attend to what can be agreed upon and ignore or give up on issues where there is not consensus.

Mediators control the communication flow between the parties by determining the extent to which they speak directly to each other rather than through the mediators. They can control who speaks, allow or disallow interruptions, and encourage and regulate the amount of participation by all parties. The mediators can interrupt and cut off discussion in order to focus it on grounds of settlement. The control of the communication flow is most direct and powerful when mediators caucus frequently. Quite simply, mediators determine when public and private sessions begin and end, the types of information to be exchanged, and the point at which it will be cut off. With more extensive caucusing, the parties speak most often to the mediators, much of the time without the other party present. Thus control over the flow of information creates extended control over the substance of

communication as well since the mediators decide what information to pass between the parties.

When the agreement is written without the presence of the parties, it limits further communication and interchange about the exact wording of clauses. In the caucusing model, mediators control almost completely the information that is passed between the parties and thus gently move the parties closer together by slight changes in wording and phrasing, and more forcefully by simply not telling all that was said. At the point of writing an agreement, the mediators pull together the threads of ideas and suggestions made by the parties, rephrase them into more euphemistic, morally neutral terms, often associated with legalistic language, and present the parties with a written document which is designed not to offend. For example, in one dispute in which a family accused a neighbor of throwing eggs at their house and the neighbor denied doing so, after two hours they produced an agreement which read, "X, while not admitting responsibility for the egging, regrets that it occurred and will avoid such actions in the future." As Mather and Yngvesson's (1980-1981) model of dispute transformation suggests, the process of rephrasing a dispute is an important part of the power exercised by a third party.

Holding problems constant, mediation sessions are consistently shorter when the process is more structured and relies more extensively on caucusing. The two mediation programs which handle adult conflicts reflect this difference. The family mediation program, which uses a structured process, tends to have longer sessions, an average of three hours and twenty minutes. Here, the problems—the dynamics of family relationships—are sufficiently complex, [and the parties are cognitively and experientially unequal, so] that the sessions are extended despite the control the mediators can exert over the process.

C. CONTROL OF SUBSTANTIVE ISSUES IN MEDIATION

In addition to the flow of communication, mediators manage the substance of communication by controlling, through direct statements, the construction of an account that both parties will accept.⁶ Mather and Yngvesson describe this process as the "rephrasing" of a dispute. In essence, the rephrasing process "presents a formulation which disputants and others might accept, and at the same time satisfies the interests of a third party" (1980-1981: 778). Control of the substantive issues seems to involve four distinct steps: broadening, selecting, concretizing, and finally, postponing issues.

1. *Broadening the Dispute*

In general, mediators regulate the account that is being developed by interpretation and reinterpretation of disputants' statements, determinations of relevance and irrelevance of statements, and styles of discourse. Mediators

usually begin by asking questions that will elicit discussion and explanation of what has occurred to bring the parties to mediation. They are looking for a starting narrative and will ask disputants to expand upon simple statements such as "he struck me" to the circumstances and history of the blow. They will then broaden the discussion to encompass other events and circumstances, seeking areas of agreement, shared values, and shared experiences that could be emphasized and built upon for a settlement. "Tell me about how things were before all this started" is a common way of beginning this search. Although there is no single set of questions that can guarantee discovering commonalities, the broadening and searching process is indicated by such statements as: "Did you ever like each other?"; "Do you belong to the same church?"; "Do the children play together?"; "Had anything like this ever happened before the new neighbors moved in?"; and "Was there a time when you were friends or had good relations in the past?"

2. Selecting Issues

Through this process mediators uncover a broad range of problems to discuss and acknowledge. From this range of issues, mediators select the ones most likely to be settled. In one case, for example, in which lovers quarreled about the damage the man caused to the woman's apartment in a fit of jealousy, the mediators explored at some length the history of the relationship, their interest in continuing to see each other and the prospects for a future together. Unable to achieve consensus on these issues, the mediators returned to and focused upon the particular damages and losses sustained in the quarrel.

Mediators also establish an appropriate discourse by eliminating issues or people from the discussion. For example, some parties arrive with an extensive apparatus of legalistic "evidence" of past offenses such as logs of harassing phone calls, pictures of offensively parked cars, and bills and receipts from transactions. When this evidence points to fundamental conflicts or irresolvable issues of fact, the mediators define this legalistic, evidentiary mode of discourse as irrelevant and shift the discussion to feelings, morality, and an examination of how future relations should be ordered. Most of the discussion then deals with moral justifications of behavior, of character, and of being reasonable. There is very little explicit discussion of norms. Parties and mediators clearly assume that they share the same "paradigm of argument" (Comaroff and Roberts, 1977), and therefore leave norms unstated and implicit.

On the other hand, mediators will seek to narrow disputes, not by defining and eschewing legalistic discourse as irrelevant, but by turning directly to the law and legal charges as means of eliminating other unmanageable issues. They will frequently say that they cannot deal with all the issues presented at this time, but are here to deal with a specific criminal complaint. Thus the legal mode of discourse, which previously may have been irrel-

evant, is pulled back into the discussion as a means of eliminating other troublesome issues, some of which the mediators may have dredged up themselves.

In addition to eliminating issues, mediators will attempt to eliminate parties from the dispute. Parties will be told that the agreement deals only with the person who signed the original complaint and the person accused, so that the interests and concerns of others present at the session or involved in the dispute are eliminated.

3. Concretizing Issues

Once the dispute has been broadened and issues amenable for settlement or more appropriate for discussion have been selected, the next step is to concretize the issues. Mediators will often push for agreements by asking directly, "What is it you are looking for in an agreement?", thereby casting aside all issues but those that constitute a "bottom line." Mediators reshape general complaints and demands into specific behavioral requests. They will make concrete demands for respect between neighbors, more care between spouses, and better service by business people, focusing on a few specific points rather than general attitudinal orientations. For example, a man furious at the loud music next door might be urged to accept a promise that the music will be turned down at 10:00 p.m. every weekday night and 12:00 p.m. on the weekends. Parents quarreling with children about their friends, their social life, and their lack of respect may end up agreeing to have the child phone in nightly at 11:00 p.m. At first glance, this may seem to be a major redefinition of the family problem; however, it is possible to regard this agreement as a behavioral acknowledgement of parental authority and self-control on the part of the child, which was a substantial part of the original disagreement.

Insofar as possible, issues of insult and injury are transformed into property demands. The conversion of interpersonal injuries into property exchanges is the essence of tort law and has a long history in small-scale societies; the same approach is pursued here. For example, a man who was continually harassed by a neighbor's teenage son, which included a barrage of chocolate donuts at his door, reluctantly accepted the price of a gallon of paint to repaint the door as a settlement. Similarly, mediators will rephrase demands and accounts in order to eliminate emotionally loaded language which might connote moral blame or liability.

4. Postponing Issues

Finally, when problems seem too difficult to resolve in one session, or simply unresolvable, mediators postpone them. They suggest a future mediation session or a limited time to a present agreement; although only 6 per cent of the cases in the court-affiliated program and 13 per cent of the cases in the community program were postponed, 44 per cent of the agreements in the family program called for a second session. Typically, such

agreements read, "X agrees not to drink for three weeks and to pay his wife \$80 a week until the next mediation session, scheduled in three weeks." Or, they might read, "X agrees to talk to Mrs. Jones about the placement of the fence while Y agrees to talk to his tenant about his working hours. They will return to mediation in two weeks to discuss the results of their inquiries."

Sometimes, issues which are not easily resolved are sent to counseling, thus suggesting that they belong in a therapeutic arena and not in a process designed to settle "disputes" of legitimate differences. Alcoholics, spouse-abusers, parents who cannot control their children, and husbands and wives who continually fight are routinely sent to counseling. The family mediation program increased the use of social services for almost half the families.

D. ACTIVATION OF COMMITMENTS

Mediators try to activate existing commitments and sentiments which would encourage settlement. Here, mediators point out the behaviors which conform to announced norms and values and are required of the parties in order to fulfill their verbalized commitments. "Getting someone to do something by 'activating a commitment'," according to Brian Barry (1976: 68), "is a matter of cashing in on some norm that he already has to the effect that he *ought* to act in accord with a demand from a certain source." Taylor suggests that activation of commitments, a concept borrowed from Talcott Parsons (1937), need not necessarily oblige an agent to follow the demands of a certain source. "It is perfectly possible to 'cash in' on a norm which is without an identifiable source" (Taylor, 1982: 21). Although mediators cannot demand compliance with norms, they refer specifically to the norms and values which the parties can be assumed to share or have already articulated in the initial discussion of the past history of the relationship. Mediators will probe disputants in order to identify these commitments. They may draw attention to the behavioral expectations that are encompassed within generally shared social values. "Children have to grow up sooner or later." "Neighbors have to live with each other and learn to get along." After encouraging disputants to reveal their values and assumptions about behavior, mediators build on these to construct an agreement. "Don't you think agreeing to certain quiet hours is a way to get along?" Or, they may seek assent to more specific sorts of values attached to individual roles, such as the responsibilities of husbands. "Do you think that is a way for a husband to behave?" Or, they will ask parents, "What are your rules for your children playing in the street?"

Mediators will ask factual questions such as "Where do you live?", "What is family life like?", or "How many children do you have?" in order to locate the parties in a common experience. They are looking for the unarticulated and hopefully shared structure of values and beliefs of the

parties. This searching process is part of the broadening strategy discussed above; however, activation of commitments requires not simply the revelation of the features of the disputant's life, but an active behavioral demonstration of commitment to the values underlying the life which was revealed through broadening. Thus the mediators encourage the parties to expose themselves so that they can draw upon these revelations in order to construct a settlement.

This process is most explicit in rules on how to manage conflict. Mediators rarely volunteer moral norms which have not previously been articulated by the parties, except in this area. The values of negotiation, rational discussion, and compromise are frequently enunciated by mediators, particularly when someone resists settling. They say, for example, "Why did you come to mediation? Don't you think it is better to talk out problems?"

III. MEDIATION STYLES: BARGAINING AND THERAPY

As we observed mediation sessions, we began to notice consistent patterns in the settlement strategies. From these observations we constructed two ideal types of mediation styles: the bargaining and the therapeutic.⁷

These mediation styles are modal/ideal types constructed by synthesizing and typifying the characteristics of over forty mediators. They do not categorize mediators, but describe instead regular patterns of dealing with problems. A single mediator usually uses both styles to some extent, and a single mediation session has some elements of each style.⁸ Any particular mediator may adopt one or another strategy, depending upon the particular problem or case, and strategies may change within the duration of any mediation session. Neither the relationship of the parties, nor the type of case (small claims, spouse abuse, neighborhood dispute), nor the sex of the mediator seems to determine which style eventually predominates. Mediation strategies develop through interaction with the parties who come to mediation with sets of expectations, wants and skills with which they endeavor to impose their view of things upon the situation. Thus the degree to which a mediation session is a bargaining or therapeutic event is constructed by implicit negotiation between the parties. Nevertheless, where the parties are known to have longstanding relations, or the issues are emotional ones, mediators often begin with the therapeutic approach. Mediators who are known to adopt one style more than the other may be assigned to cases on this basis. Moreover, mediator strategies seem to become more pronounced and stylized toward one or the other mode with increased experience.⁹

In the bargaining mode, mediators claim authority as professionals with expertise in process, law, and the court system, which is described as costly, slow and inaccessible. The purpose of mediation is to reach settlement. The bargaining style tends toward more structured process, and toward more overt control of the proceedings. In the bargaining style,

mediators use more private caucuses with disputants, direct discussion more, and encourage less direct disputant communication than in the therapeutic style. Moreover, in the bargaining style the mediators tend to write agreements without the parties present, summarizing and synthesizing what they have heard from the parties. The job of the mediator is to look for bottom lines, to narrow the issues, to promote exchanges, and to sidestep intractable differences of interest. Typically disputants will be asked directly "What do you want?", ignoring emotional demands and concentrating on demands that can be traded off. Following this bargaining mode, mediators seem to assume that conflict is caused by differences of interest and that the parties can reach settlement by exchanging benefits. When parties resist, the role of the mediator is to become an "agent of reality" and to point to the inadequacy of the alternatives, the difficulty of the present situation and the benefits of a settlement of any kind.

By contrast, the therapeutic style of mediation is a form of communication in which the parties are encouraged to engage in a full expression of their feelings and attitudes. Here, mediators claim authority based on expertise in managing personal relationships and describe the purpose of mediation as an effort to help people reach mutual understanding through collective agreements. Like the bargaining style, the therapeutic mode also takes a negative view of the legal system; but, instead of emphasizing institutional values and inadequacies, the therapeutic style emphasizes emotional concerns, faulting the legal system for worsening personal relationships. In this mode, agreement writing becomes a collective activity, with mediators generally maximizing direct contact between the parties wherever it may lead. Following the therapeutic style, mediators will typically ask, "How did this situation start?", or, "What was your relationship beforehand?" They rely more heavily upon expanding the discussion, exploring past relations, and going into issues not raised by the immediate situation, complaint or charge. There is less discussion of legal norms than within the bargaining mode, and statements about alternatives tend to focus upon appropriateness of process rather than particular outcomes. In addition, the therapeutic mode tends to emphasize the mutuality, reciprocity, and self-enforcement of the agreement in contrast to court or program monitoring.

Figure 1. Mediation Styles

	Bargaining	Therapeutic
I. PRESENTATION OF SELF, PROCESS, AND PROGRAM		
Claim to authority	Training and expertise in law and court system Neutrality Knows what will happen in court	Training and expertise in managing inter-personal relationships Neutrality Knows what is best way for parties to handle conflict

	Bargaining	Therapeutic
Role of mediator	To reach a settlement	to help parties communicate, identify areas of agreement
Statements about alternatives	Legal system is costly, slow, access is difficult	Legal system inappropriate, worsens relationships
Statements about enforcement	Judicial oversight, or program monitoring	Up to the parties to enforce
II. CONTROL OF THE PROCESS OF MEDIATION		
	More time in private sessions	Less time in private sessions
	Less direct communication between parties	More direct communication between parties
	More direction of discussion by mediators	Less direction of discussion by mediators
	Parties seated facing mediators	Parties seated facing each other
	Mediators construct agreement without parties	Mediators write agreement with parties
III. CONTROL OVER SUBSTANTIVE ISSUES IN MEDIATION		
Broaden	Seek range of demands parties offer; ask "What do you want?"	Seek range of demands plus history and nature of relationship between parties; seek feelings, underlying issues, peripheral concerns; ask "How did this start?" "What was your relationship like before?"
Select and eliminate	Eliminate non-specific, more emotional demands. Focus on those subject to trading	Eliminate where parties refuse to budge and change is unlikely, based on experience Retain some emotional, less specific demands
Refine demands and issues: narrow and concretize	Convert behavioral demands into specific rules or monetary demands Ask parties to declare what they really want; assume they know When settlement difficult, seek exchanges	Convert behavioral demands into specific rules or monetary demands Help parties to define what they really want; assume they do not always know When settlement difficult, seek expression of underlying feelings
Postpone	Little. Seek final exchange. Monitoring mostly to enforce	More. Use of future mediation sessions, monitoring, counseling, time to think it over.

	Bargaining	Therapeutic
IV. ACTIVATION OF COMMITMENTS; STATEMENTS ABOUT NORMS		
Assumed cause of conflict	Differences of interest	Misunderstandings and failures in communication; assume shared normative order
How parties can reach settlement	Trading benefits	Recognizing underlying shared interests, desire for reconciliation, maintenance of good relationship
Why parties should settle	Need to get along and live together	Value of peace and handling conflict through rational discussion and compromise

The communication approach assumes that misunderstandings or failures of communication, rather than fundamental differences of interest, are the source of conflict, and that with sufficient "sharing" of feelings and history the empathy required for consensus and harmony will be achieved. It assumes that the expression of conflict will help resolve it and that the recognition of shared norms and underlying shared interests will lead to the maintenance of good relationships. Questions typical of the therapeutic approach are generally open, yet probing: "Tell me how you feel about that," or "Are there other things you want to talk about?" It is assumed that parties do not always know what they want and that the job of mediation is to help them define their real wants by exploring their lives and values. Mediators who are more typically therapeutic are often stymied in a way that mediators who are typically bargaining are not, when direct conflicts of interest emerge. Moreover, because of the length of sessions in the therapeutic mode (often four hours or more) there is a sense of wearing the parties down. The mandate for the mediator is clear: to facilitate conversation, not to bargain. Bargaining mediation takes a pragmatic view that parties should settle because they must and because they need to live together, while therapeutic mediation emphasizes the value of handling conflict through rational discourse.

Two cases can serve as examples of mediation style. The first is a case in which the dominant mediator style was bargaining; the second is a case in which the mediator style was essentially therapeutic.

The first case concerns a dispute between a married couple and their teenage daughter over her defiance, overuse of the family's telephone, unwillingness to help with chores, and her spending patterns. The parents filed an application for a complaint against their daughter in juvenile court. In the mediation session, the two mediators begin by asking the family (mother, father, daughter) to describe the situation. After a half-hour discussion, the mediators meet privately, decide that the phone is the major issue and

begin to talk about what an agreement might look like. In a private caucus with the child, they ask her to discuss further what is bothering her and whether she thinks it is getting worse. They soon begin asking for suggestions: "What would be a reasonable arrangement for the phone?"; "Is your sister old enough to clean up after herself, and would she be willing to help?"; "If we were going to work out some rules for everyone in the house, what could we work out that might work?" After forty minutes of exploring specific options, the mediators again hold a private discussion, then invite the mother in by herself.

In the private session with the mother, they ask her who does the chores, how the children are punished for failure to do them, and if there is a curfew. They ask the mother what she sees as the problem with the phone, chores, and friends and what she would like to see changed in the family. The mediators then summarize the three major issues: the phone, going out, and how the members of the family deal with one another. They ask the mother to be specific about the chores her daughter is expected to do and when she is to do them. Together, they hammer out a list of rules for chores, phone use, and curfews.

One hour later, the father is called in for a brief (20-minute) session with the mother and the mediators. The mediators again stress that they are working out an arrangement in which the daughter knows what she has to do. In a final private discussion with the daughter, the mediators ask her if she had any other thoughts or concerns. They present the specific proposals and ask if she agrees to them. Their proposals include a promise that her father will talk to her calmly instead of yelling at her. These provisions are incorporated into a formal written document which parents and daughter sign, with the mediators serving as witnesses. The session lasts three hours and fifteen minutes, and the family members seem satisfied.

In this session, the mediators structured the discussion around specific issues through questions which narrowed rather than expanded the dispute. The extensive use of caucusing enabled them to control the exchange of information and to develop and transfer acceptable arrangements. They took an active role in working out the details, rather than encouraging the parties to talk directly to one another or to formulate arrangements entirely on their own. They typically asked clarifying or informational questions or ones which invited the parties to narrow the problem. As this example shows, the extensive use of private sessions with individual parties maximizes the control of the mediators. The parents, searching for guidance and help, did not seem unhappy with this level of intervention by the mediators.

A therapeutic mediation session is a contrast in many ways. One example also concerns a family conflict, but the style of the mediator (there was only one in the session) was quite different. Instead of closing down the emotional issues, the mediator constantly sought to open them up and to expand the frame of the discussion.

The dispute concerns debts which a young man, in his late 20s, had acquired during his marriage. The couple are now living separately and in the process of filing for a divorce. He wants his ex-wife to help him bear the burden of these consumer debts, while she claims that he spent money irresponsibly and she is not liable. He sued her for \$750 in small claims court, and the mediation program invited the couple to try mediation. The couple has a hearing in probate court about their divorce in two months, where they expect to settle financial issues and the contested custody of their 10-year-old child. This couple married interracially but found the racial barriers increasingly difficult to handle. The man drank and was violent to his wife, which persuaded her to leave him. He blames the stress of the interracial marriage and her lack of support for his behavior. She wants the divorce and he is resisting it strongly.

The mediator begins this session by allowing the parties to inspect the bills and argue over the amount of the debt and the degree of liability of each. After 35 minutes of mutual accusations about money and past poor behavior, the mediator caucuses with the woman and asks her about the bills and how much she is willing to pay. He then inquires what, besides the bills, she would like to see in an agreement. She replies that she would like the agreement to be final so that he would not come back and go over the incidents between them over and over again. At this point, the mediator asks her to tell him about the incidents and anything else that is bothering her, promising not to convey this to her husband. She responds that, if it is helpful, she will give her version of the incidents, but she is not sure that it is relevant. One hour and ten minutes later, she has thoroughly reviewed the reasons for the breakup of the marriage, her feelings about the divorce, and the nature of the divorce settlement.

In the next caucus, with the man, the mediator spends one hour hearing the husband's version of the conflict and his feelings about the divorce. The mediator then brings them back together and asks the man what he would like from the woman. They renew discussion of the unpaid bills and again try to decide who is responsible for each bill; this is the point at which they began two-and-one-quarter hours earlier. They cannot agree upon responsibility, but finally settle on a plan in which the wife would make a regular, monthly small contribution for one year, at which time the agreement would be renegotiated. Although unwilling to acknowledge responsibility for the bills, the wife is willing to agree to this payment schedule because she expects that the upcoming divorce decision will eventually change this agreement, as well as their relationship. The final discussion of a payment schedule lasts forty-five minutes, and the entire mediation session takes three-and-one-half hours. The woman leaves feeling angry that she has made a concession she does not like, while the man is pleased. Both say they want another session, although they do not come again, nor does the woman make all the payments she promised.

In this session, the mediator began with a narrow financial problem,

expanded it into far broader and more emotional areas, even when the parties resisted slightly, then returned at the end to the narrower problem of negotiating the money. Behind his strategy was the theory that the expression of feelings is a necessary precondition to reaching a resolution. As a result, he pursued a strategy we have labeled therapeutic. He constantly invited them to expand the arena of discussion and to move into other facets of their conflict. It is impossible to say if a mediator could have produced the same or a better settlement through focused bargaining, but it is clear that this approach differs a great deal from the bargaining approach. This mediation was unusual for a therapeutic session in its use of private sessions for the bulk of the mediation process, but not unusual in the scope of issues considered and the role of the mediator in probing into feelings.

Comments from mediators about the techniques they use to settle cases further illustrate the differences between the two mediation styles. As these statements suggest, mediator strategies grow out of assumptions about the nature of conflict, conflict resolution, and their own particular capacities and skills. When asked how they settle cases, for example, several mediators expressed a view of their work which leads them to adopt a bargaining mode:

- a) I get people talking, then focus on some issues to get to agreement points. You can't just keep talking.
- b) I take a ball of broad issues and expand it by breaking it down into concrete ones. I see what issues really matter to them and I work on those.
- c) As a mediator, your job is to convince one or the other party to give up something; to negotiate together. The essence of the process is negotiation. You don't accept blame from others of each other, and you also don't accept their version of the facts. I am firm with a loudmouth. In small claims cases, I say that when a person won't settle, I will give it back to the judge and the judge will give him only 30 days to pay.

Here, mediators express a view which leads them to adopt the more therapeutic approach:

- a) My strategy is to try to get the recalcitrant person to see the other's view. If the other person doesn't do it, I do it in caucus myself. It usually works to point out how the other person sees things—that usually produces an agreement.
- b) I look for people's concerns, the reasons why this issue is important to each of them, and try to create an environment where they feel safe enough to articulate that concern. I do this by being open and non-judgmental and by listening to their feelings.
- c) I try just to get people talking, to get them to explain their side fully so that the other side really understands them. The problem is that people don't understand each other's thinking. I try to help them look for solutions.

IV. MEDIATION: A THIRD LANGUAGE¹⁰

One can view the range of dispute resolution processes, including adjudication and mediation, as competing languages and discourse. Each process

provides a different structure for negotiating the meanings of particular events (Silbey and Merry, 1982). From this perspective, mediators are engaged in an activity intended to settle cases by reconstructing the experience and languages of contending parties, and the language of the surrounding legal order, into a third, possibly new language—that of the mediator, with its own logic and implication.

Disputants commonly begin mediation by describing their problems in the terms of everyday experience as a sequence of personal exchanges; they may also describe their problem in the language of claims and rights typical of legal discourse. The aim of mediators is to convert these accounts into a language of relationships. The polar types of mediation styles represent alternative understandings of how relationships frame and structure disputes. The bargaining style converts the experience and claims of the disputants into the language of negotiation and exchange because it recognizes that the parties are bound together in relationships they cannot escape; they settle by compromising their differences because they must live together, for example, as neighbors or business associates. The therapeutic style of mediation attempts to recast disputants' individual experiences into terms of mutually valued relationships; it urges settlement based upon a recognition of shared experience and values. Although the two styles of mediation can be distinguished by the different visions of relationship they encompass, they share an orientation toward relationship and interdependence as the basis of settlement. From this perspective, settlement means that the parties have developed a new understanding of what happened between them, an understanding that acknowledges either interdependence based upon structural constraints or interdependence based upon consensus.

Nevertheless, the conversion of competing accounts and interests into a third dialect involves the exercise of authority because neither of the contending parties is familiar with the languages of mediation, and would not adopt them unilaterally even if they could learn them independently. If the parties could negotiate and bargain independently, or recognize shared interests by themselves, they would not be in mediation. Negotiation requires the recognition that the parties are connected, and that the differences between the parties are better conceived as compromisable interests or miscommunication rather than matters of right and justice. This is difficult to achieve, perhaps calling for exercises of power and authority by mediators, because disputants often come to third parties only after they have exhausted bilateral options and often when they have formulated the dispute into a matter of right or justice (Merry and Silbey, 1984). Mediators do not ask the parties to accept the validity of the language of relationships for representing disputants' grievances. It is not consensually achieved nor the result of full disclosure but, instead, is imposed upon them. Although the parties engage in the mediator's language, this says nothing about the parties' acceptance of it as the best way to express their differences; rather, their

acquiescence represents an expression of their inability to construct and impose their own solution. Nevertheless, final agreement in a mediation session provides tacit legitimation of the languages and the techniques of mediation.

One practice of mediation, the bargaining style, attempts to convert the parties' stories into the categories and rules of exchange and bargaining, but manages, nevertheless, to reproduce in miniature the relations and outcomes, if not the language, of the legal process. That is, the differences between contending parties are elicited, narrowed to acceptable boundaries for discussion and examination by a disinterested observer, and then settled through the exercise of power by a third party who presents him/herself as a representative of some larger authority. The mediator wraps him or herself in the same mystical cloth as the jurist, the rabbi, or the priest; and, while not proclaiming openly that he is the embodiment of the law or of God, he nevertheless proclaims access to knowledge and wisdom derived from a special school of trained neutrality. He dispenses decisions, which from the perspective of the contending parties carry the same kind of authoritative weight as the law or God. Viewed from the perspective of the bargainer, the process is not any less mystifying than law or religion; the mediator's exercise of power goes largely unnoticed by the bargainer. It appears instead as a simple extension of an accepted logic and practice. Moreover, it is expedient in light of the complex and often confusing stories. In this sense, bargaining mediation parallels the situation of many intermediaries, including police, social workers, nurses, and teachers, who are supposed to represent an institution, interpret its rules, and dispense its rewards and punishments. In order to accomplish their task, bargainers convert the mediation process into an activity and the process of investigation into a form of communication over which they have maximal control.

The second practice of mediation, underlying the therapeutic style, suggests that rather than limit the scope of communication between the parties to a manageable or acceptable terrain, the mediator should engage the contending parties in a process of expanding the terrain in search of a language or a set of common values which dictate a solution. Here, therapeutic mediation employs the language of neither the law nor the bargainer, nor the daily experience familiar to the disputants; instead it seeks to cultivate a language of mutual recognition of the importance of their relationship, shared rather than individual interests, and collective values rather than competitive demands. Just as negotiation is not the typical language disputants begin with, neither is the language of mutuality and consensus. Again, settlements are not so easily reached. Direct conflicts of interest defy immediate resolution and require considerable time in negotiation; and there is some expectation that commitments to resolve a problem will be far broader than a simple restitution of property or temporary modification of behavior.

Up to this point the therapeutic and bargaining mediator have much in common. They both attempt to construct an account of the parties' relationship that goes beyond the object of contention or precipitant event. The language they adopt transcends the dispute and locates it in a framework which extends far beyond the two parties (cf. Mather and Yngvesson, 1980-1981). The therapeutic style may draw upon incidents, past experiences, hypothetical cases, or broader values in order to shed light on the origins and consequences of contention. The bargaining style may point to the necessity of settling and living peaceably. In the process, however, both styles of mediation provide a means by which things taken-for-granted are revealed in a new and different way. It is an activity whose object is revelation; as one mediator put it, "an activity of acknowledgement," not an activity of restriction. It is self-instruction rather than imposed knowledge, the construction of a joint worldview of relationships, albeit of different types of relationships, rather than the arbitrary and individualistic constriction or imposition of worldviews.

An example of the construction of a new perspective, or language, appears in the family mediation program. Here, family members do not report that they have changed their minds about what the problem is, but a large proportion (59%) say that they have come to better understand the other person's point of view. Parents and children seem to see one another's behavior in a larger social context. Parents begin to appreciate the pressures their children experience at school; children begin to see their parents' financial and work-related struggles. Each party is likely to learn that the other loves him/her despite angry battles. In this context, mediation leads family members to see annoying or irritating behavior in terms of the conditions which produce it. This perspective is basic to the helping professions. In this framework, behavior is understood as socially caused, not condemned as bad. Thus the mediation process teaches family members the professional, contextualized view of the behavior of other family members. Sessions typically begin with a broad exploration of relationships and questions about the nature of interactions, although most agreements are reached through negotiation over a narrow slice of the issues. In other words, mediation of family disputes typically begins with a therapeutic style and closes with a bargaining style.

This suggests that although mediation may offer a new language of relationships, the two styles of mediation differ in the way they construct a third language and reach an agreement. The practice of therapeutic mediation is somewhat anarchic; one cannot tell where it may lead. It creates the possibility of expanded understanding of the contextualized nature of social relationships without offering any particular explanation for this world. Therapeutic mediation may less often produce settlements because it lacks theoretical guidance for identifying where the grounds of consensus may lie beyond the fact of relationship.¹¹

It is important to recall that the styles of mediation are ideal types devel-

oped to suggest the maximal differentiation within the new discourse of dispute resolution. By comparing the bargaining and therapeutic styles in this way, the outcomes become a bit more meaningful. That is, confronted by a system which demands closure, it is not surprising that the bargaining approach is more likely to be sustained organizationally. Bargaining mediation offers a means for resolving disputes that might otherwise be relegated to self-help or litigation; it does so by acknowledging the constraints of situations and suggesting that continuing relationships require give and take through compromise. It eschews the language of individual rights in favor of the language of interdependent relationships; reasonableness and compromise rather than moral victories provide the basis for peaceful co-existence. This form of mediation does precisely what it is intended to do without challenging the prevailing norms or praxis of the legal system. It provides a means through which judges and lawyers can dispense with what is inconvenient, time-consuming and unprofitable. In that respect it does for lawyers what nurses, paramedics and dental hygienists do for doctors, lawyers, and dentists.

On the other hand, to the extent that therapeutic mediators follow through on what we describe as the practice of their profession, they cannot even begin to compete with bargaining mediators. They attempt (with varying degrees of consciousness) to engage contending parties in the recognition, if not construction, of a language of shared values. If not watched carefully, this process carries with it an implicit critique of the broader circumstances which "cause" the object of contention to appear or give rise to disputes (e.g. poverty, inequalities in political power, etc.). To the extent that the therapists actively engage disputing parties in the search for a common language for understanding and explaining their dispute and for exploring its origins and consequences (apart from psychological problems and the like), they may actually be participating in creating a critical language which may not lead to convenient, expedient or legitimate solutions. Thus whatever standard accounting device or measure of efficiency is employed—number of resolutions, dollars invested per case, or rate of relitigation—the therapeutic alternative in mediation will lose every time. Moreover, to the extent that the therapeutic alternative is itself informed by a theory of social change, it will not meet the criteria established for efficiency.

We end with a note of irony. The movements which supported the creation of mediation as an alternative to law for interpersonal dispute resolution claimed that a continuing relationship would provide a firmer and more just foundation for settlements than legal considerations. However, little attention was devoted to distinguishing the types of continuing relationships. The polar types of mediation—bargaining and therapy—seem nevertheless to respond to these differences in types of relationship, differences which have been typified in the classical distinctions between traditional (*gemeinschaft*) and modern society (*gesellschaft*). Although society

means that we are bound in relationships, not all relationships, not even all continuing relationships, are based upon shared values, shared interests, or a concern with the quality of that relationship. In fact, in modern society most relationships are functional, not intimate, and settlement of differences or avoidance of disputes is based simply upon a desire not to fight. Therefore, to the extent that therapeutic mediation is anarchic, to the extent that therapeutic mediators are forced by the exigencies of some institutional umbrella to produce results competitive with some other yardstick of efficiency, and to the extent that relationships are effective rather than affective, therapists will become bargainers.

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NOTES

1. See note 8 below.
2. At least five sets of goals, some with clearly identified institutional supporters, have been claimed for the development of informal dispute resolution (Sarat, 1983): (1) The establishment bar and legal elites have sought wholesale removal of classes of cases to alleviate congestion and delay, to promote more efficient handling of and attention to "important" legal matters, and to bolster the sagging legitimacy of the courts. (2) Legal rationalists advocate channeling problems into different but appropriate dispute-resolution processes in order to promote efficiency in general. (3) Some proponents urge alternatives in order to broaden access to legal remedies and further democratize the legal system. (4) Another group argues that alternative processes provide a "qualitatively superior form of justice beyond that supplied by formal legal institutions" (Sarat, 1983: 1223). Freed of formal legal categories and procedures, informal alternatives can get at the heart of problems and actually solve them, thus rendering "true" or "better" justice contributing to social harmony and stability. (5) Finally, community organizers and action groups suggest that alternative dispute resolution is a means of empowering local communities by removing community conflict from the centralized legal institutions.
3. Massachusetts law recognizes three categories of "status offender": children truant from school, children who have run away from home, and minors whose parents claim they are beyond parental control, i.e. stubborn.
4. We are following Wrong's conception of authority, which in turn follows Weber (1968) and Easton (1958). According to Wrong (1979: 36-39) Authority is the ability to successfully command or forbid, a "theirs not to reason why"

affair (Wrong, 1979: 35) based upon either of five forms of relationship and resources: coercive sanction, induced reward, legitimacy on the basis of a larger system of shared norms, competence or expertise, and force of sheer personality. The more common practice is to refer to authority as legitimacy, but Wrong argues that legitimacy, authority based upon a "right" to command and "obligation" to obey, is really a subset of authority in general. Weber identified three principal forms of authority: patrimonial, charismatic, and bureaucratic/legal rational. Wrong's usage allows a broader range of resources and relationships to be included under the concept of authority yet retains Weber's three principal categories. Traditional patrimonial authority would be included under legitimate authority, charismatic under personality, and bureaucratic/legal rational authority would be further distinguished and subsumed under either legitimate authority based upon a larger network of shared norms, in this case the legal system, or competent or expert authority.

5. "Manipulation is the process whereby a person is got to behave or think otherwise than he would have done, in such a way that he is unaware of the source and causes of his new thought and actions (so is unaware that he has been manipulated)" (Taylor, 1982: 24). Wrong states that "when the power holder conceals his intent from the power subject—that is, the intended effect he wishes to produce, he is attempting to manipulate the latter" (1979: 28). It may seem that the mediator cannot manipulate disputants because the mediator's role is clear and explicit—to bring the parties to settlement. However, the distinguishing feature of manipulation is its covert nature. Mediation is not covert, but the organization of the conversation may be. Despite claims by the mediators that the process involves an open and unrestricted exploration of issues, they are actually structuring the conversation to focus upon settlement. This is not always apparent to the disputants.
6. Scott and Lyman use "account" to refer to statements made to explain untoward behavior and bridge the gap between actions and expectations (1968).
7. Kolb (1983) describes similar variation in styles of labor mediation. For example, labor mediators vary the structure of discussion; control of communication, and time spent in joint or private caucus. Cf. Bercovitch (1983).
8. Max Weber defined an ideal-type construct as a "one-sided *accentuation* . . . by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent *concrete individual* phenomena, which are arranged . . . into a unified *analytical* construct. In its conceptual purity, this mental construct . . . cannot be found empirically anywhere in reality" (Weber, 1949: 90, 93). See Lofland and Lofland (1971, 1984: 93ff.) for a description of the steps involved in creating typologies for social analysis.
9. There is some evidence that mediator strategies may correlate with a program's definition of its mission, but this is more predictive of the ways in which mediators describe their activities than it is predictive of individual mediator behavior.
10. We are particularly indebted to Robert Thomas for this formulation and for his help in analyzing mediation discourse.
11. If, in fact, one were talking about a relatively disciplined and coherent theory of social change underlying therapeutic mediation, as might be found in certain political parties, then therapeutic mediators would not so easily be distinguished from bargainers. In fact they would become bargainers of sorts, working to achieve agreement between the parties on a particular bottom line informed by a particular social theory; here, the bottom line would consist of a defined and articulated vision of society and social justice. Mediation would consist of narrowing discussion to a terrain legitimated by the mediator's particular social theory.

REFERENCES

- BARRY, B. (1976) "Power: An Economic Analysis" in B. Barry (ed.) *Power and Political Theory: Some European Perspectives*. London: Wiley.
- BERCOVITCH, J. (1983) *Social Conflicts and Third Parties: Strategies of Conflict Resolution*. Boulder, Colo.: Westview Press.
- COMAROFF, J. L. and S. A. ROBERTS (1977) "The Invocation of Norms in Dispute Settlement: The Tswana Case" in I. Hamnett (ed.) *Social Anthropology and Law*. London: Academic Press (Association of Social Anthropologists Monograph No. 14).
- EASTON, D. (1958) "The Perception of Authority and Political Change," pp. 170-196 in C. Friedrich (ed.) *Authority*. Cambridge, Mass: Harvard University Press.
- GULLIVER, P. H. (1977) "On Mediators," pp. 15-52, in I. Hamnett (ed.) *Social Anthropology and Law*. London: Academic Press (Association of Social Anthropologists Monograph No. 14).
- HARRINGTON, C. (1984) "The Politics of Participation and Nonparticipation in Dispute Processes," *Law & Policy* 6(2): 203-230.
- KOLB, D. M. (1983) *The Mediators*. Cambridge: M.I.T. Press.
- LOFLAND, J. and L. LOFLAND (1971, 1984) *Analyzing Social Settings: A Guide to Qualitative Observation and Analysis*. Belmont, California: Wadsworth Publishing Co.
- MATHER, L. and B. YNGVESSON (1980-1981) "Language, Audience and The Transformation of Disputes," *Law and Society Review* 15: 775-821.
- MCGILLIS, D. and J. MULLEN (1977) *Neighborhood Justice Centers: An Analysis of Potential Models*. Washington, D.C.: U.S. Department of Justice.
- MERRY, S. E. (1982) "The Social Organization of Mediation in Non-industrial Societies: Implications for Informal Community Justice in America," pp. 17-45, in R. Abel (ed.) *The Politics of Informal Justice*, Vol. II. New York: Academic Press.
- MERRY, S. E. and A. M. ROCHELEAU (1985) *Mediating in Families: A Study of the Children's Hearings Project*. Cambridge, Mass: Children's Hearings Project.
- MERRY, S. E. and S. S. SILBEY (1984) "What Do Plaintiffs Want?: Re-examining the Concept of Dispute," *Justice System Journal* 9(2): 151-178.
- NADER, L. and H. F. TODD, JR. (1978) *The Disputing Process—Law in Ten Societies*. New York: Columbia University Press.
- PARSONS, T. (1937) *The Structure of Social Action: A Study in Social Theory with Special Reference to a Group of Recent European Writers*. New York: McGraw-Hill.
- SANTOS, B. (1982) "Law and Community: The Changing Nature of State Power in Late Capitalism," in R. Abel (ed.) *The Politics of Informal Justice* Vol. I. New York: Academic Press.
- SARAT, A. (1983) Review of R. Abel (ed.): *The Politics of Informal Justice*. *Stanford Law Review* 35: 1217-1235.
- SCOTT, M. B. and S. M. LYMAN (1968) "Accounts," *American Sociological Review* 33(1): 46-62.
- SILBEY, S. S. and S. MERRY (1982) "The Problems Shape the Process: Managing Disputes in Mediation and Court." Presented at the annual meeting of the Law and Society Association, June 3-6, Toronto.
- TAYLOR, M. (1982) *Community, Anarchy and Liberty*. Cambridge: Cambridge University Press.
- TOMASIC, R. and M. FEELEY (eds.) (1982) *Neighborhood Justice: Assessment of an Emerging Idea*. New York: Longman.
- WEBER, M. (1949) *The Methodology of the Social Sciences*. Glencoe, Ill.: Free Press.
- (1968) *Economy and Society: An Outline of Interpretive Sociology*. New York: Bedminster Press.
- WRONG, D. (1979) *Power: Its Forms, Bases and Uses*. New York: Harper and Row.