

THE CURIOUS CASE OF TRANSFORMATIVE DISPUTE RESOLUTION: AN UNFORTUNATE MARRIAGE OF INTRANSIGENCE, EXCLUSIVITY, AND HYPE

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I. INTRODUCTION

Why do proponents of Transformative Dispute Resolution (“TDR”) defend the Theory in such intransigent, exclusivist, and grandiose terms? TDR is a mature theory, and a relatively sophisticated one, and qualities of this sort usually go hand in hand with a balanced, refined, and well-modulated sense of self, but TDR proponents will have none of that. They make ambitious (some would say outlandish) assertions about the Theory’s capacity to develop moral and political character, reform deliberative government, and resolve ethno-political conflict, while simultaneously rejecting overtures from sympathetic outsiders to rein in the overstated aspects of these claims, and craft a more defensible view. While not the most popular theory in American dispute resolution scholarship,¹ TDR is the most self-assured, the most insular, and the most overblown. This combination of qualities, coupled with the The-

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¹ Kenneth Kressel finds five conceptually distinct dispute resolution styles (i.e., Integrative, Evaluative, Transformative, Facilitative, and Latent Cause), described in the mediation practitioner literature, but in the first “large sample, systematic, and multiple observer” empirical study of mediator behavior, he also finds that the five reduce to just two (i.e., settlement-oriented and relationship oriented) in actual practice. Kenneth Kressel, *A Multidimensional Analysis of Conflict Mediator Styles*, 29 CONFLICT RESOL. Q. 13-35 (manuscript) (2012) (on file with author). The Facilitative Style was the most widely observed in Kressel’s study and “a good fit for a majority of . . . mediators.” *Id.* at 31. The Integrative style was the “most popular mediator self-endorsed style,” *id.* at 28, though mediators in the study “endorsed in significant numbers all five of the stylistic vignettes.” *Id.* at 17. Almost a quarter of the mediators described themselves as transformative, though not everyone in this group used transformative methods consistently. *Id.* at 29–30. Professor Riskin conducted the original work on mediator style. Leonard L. Riskin, *Decisionmaking in Mediation: The Old Grid and the New Grid System*, 79 NOTRE DAME L. REV. 1, 22–23 (2003) (describing a revised and updated version of the Grid); Leonard L. Riskin, *Understanding Mediator’s Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1

ory's seeming ability to thrive in the face of withering criticism, makes it an interesting curiosity well worth re-visiting.²

TDR is confusing in ways one would not expect. At the most basic level, for example, it is equivocal about what it transforms. Is it the personal moral character of disputants and their representatives, the formal institutions and procedures of the dispute resolution system, the disputing practices of society in general, an understanding of the nature of disputing, the behavior of parties in individual disputes, all of the above,³ or something else? Similarly, over what time frame does this transformation take place? Is it the lifetimes of individuals and institutions using TDR methods and techniques, the duration of particular disputes resolved with TDR practices, or some other middle-ground period shorter than a lifetime but longer than a dispute? It is also not clear what counts as proof that transformation has occurred. Are party reports of changed behavior adequate? Is it enough, for example, that parties believe they have been transformed? Or is more objective data, such as quantitative evidence of changes in disputing patterns over time, or recordings, transcripts, and summaries of actual disputes in

HARV. NEGOT. L. REV. 7, 17 (1996) (describing "what mediators do" along both a process and substance axis of a grid).

² The version of TDR now in vogue is the second generation of the Theory. *See infra* note 4. The first generation was criticized, sometimes vociferously, *see infra* note 100, and TDR proponents responded by modifying both the Theory and the arguments used to defend it. Now theory building seems to have given way to training, certifying, and proselytizing. *See, e.g.*, Joseph P. Folger & Robert A. Baruch Bush, *Conclusion: The Development of Transformative Mediation - Past Challenges and Future Prospects*, in TRANSFORMATIVE MEDIATION: A SOURCEBOOK: RESOURCES FOR CONFLICT INTERVENTION PRACTITIONERS AND PROGRAMS 467-71 (Joseph P. Folger, Robert A. Baruch Bush & Dorothy J. Della Noce eds., 2010) [hereinafter SOURCEBOOK] (describing "Future Prospects and Opportunities" for TDR); *Overview and Mission*, INSTITUTE FOR THE STUDY OF CONFLICT TRANSFORMATION, INC., available at <http://www.transformative-mediation.org/mission> (last visited on Oct. 6, 2009) ("The mission of the Institute for the Study of Conflict Transformation is to study and promote the understanding of conflict processes and intervention from the transformative framework by: Conducting research; Developing publications; Developing and disseminating educational and training materials, resources and programs; Presenting education and training programs for educational institutions, agencies, corporations and other public or private organizations; Organizing conferences, workshops, and seminars; and Developing a network of researchers, mediators, trainers, and teachers who understand and promote the transformative framework for conflict intervention.").

³ This probably is the best answer. Think of TDR as the dispute resolution equivalent of choice (d) on a standardized test. "All of the above" seems to be the inevitable next category in scholarship when the individually distinctive perspectives in a field are taken. Sometimes this produces the best of all worlds rather than the worst. *See, e.g.*, WILLIAM N. ESKRIDGE JR., DYNAMIC STATUTORY INTERPRETATION (1994) (combining the interpretive theories of originalism, intentionalism, purposivism, consequentialism, and textualism into a single, all-purpose, "do the right thing" theory called Dynamic Statutory Interpretation).

which TDR practices can be shown to have transformative effects, needed as well?

It is not easy to judge the efficacy of TDR on the basis of the TDR literature alone. Reports of the Theory's successes often are speculative and exaggerated, descriptions of its substantive content often are ambiguous and contradictory, arguments for its effectiveness often are illogical and confused, and the empirical evidence on which these reports and arguments are based often is suspect or non-existent. Given this, it is difficult to understand why TDR proponents would cling so tenaciously to such an overdrawn conception of dispute resolution, defending it over and over again in increasingly louder tones (as if giving directions to a non-native speaker who did not understand the first time). There are substantial costs, both to TDR scholarship in particular, and to legal dispute resolution scholarship in general, in discussing the subject in this way.

II. TRANSFORMATIVE DISPUTE RESOLUTION THEORY

TDR began to take shape in the 1980s, was systematized and named in the 1990s, revamped in response to criticism in the decade that followed, and put in its present form a little over five years ago. Robert Baruch Bush and Joseph Folger ("B&F") gave the Theory its name, and wrote the definitive account of its objectives, techniques, principles, and effects (twice).⁴ Dispute Resolution scholars agree that B&F created TDR, and B&F say so as well.⁵

⁴ ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994) [hereinafter POM1] and ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (2004) [hereinafter POM2]. B&F limit their discussion of the Theory to mediation, but even on their own terms they have produced a general theory of dispute resolution, and I will discuss it as such.

⁵ Joseph P. Folger, Robert A. Baruch Bush & Dorothy J. Della Noce, *Introduction: Transformative Mediation in Theory and Practice*, in SOURCEBOOK, *supra* note 2, at 3 (describing how "[i]n the late 1990's, a group of mediation colleagues were discussing a vision for an organization that eventually would become the Institute for the Study of Conflict Transformation." The purpose of which would be to create a "clearing in the forest" for practitioners who want to work "within a relational framework and focus on the transformation of conflict interaction."); POM2, *supra* note 4, at book jacket ("Robert A. Baruch and Joseph P. Folger are the acknowledged originators of the transformative model of mediation and its best-known exponents."). Not all self-identified TDR practitioners adopt the B&F version of TDR verbatim, but all share a common commitment to transformation as the central objective of dispute resolution.

It is not easy to describe TDR. It has a shape shifting quality that permits it to change when questioned, and B&F have used this feature over the years to deflect criticism by modifying the Theory without acknowledging (and sometimes denying) that they were doing so.⁶ These several modifications notwithstanding, the Theory continues to be plagued by ambiguities, confusions, and exaggerations, and this makes it difficult to feel confident that it will not (need to) change again.⁷ This section will describe the components

⁶ Sometimes, if B&F are to be believed, it is not possible to criticize TDR, only misunderstand it. The best example is the change, from the first to second generation of the Theory, in the description of the type of transformation produced by TDR. In POM1, B&F described TDR as transforming the moral character of individuals, and in POM2 as transforming conflict. *Compare* POM1, *supra* note 4, at 84 (“The transformative approach . . . defines the objective as improving the parties themselves from what they were before. In transformative mediation, success is achieved when the parties as persons are changed for the better, to some degree, by what has occurred in the mediation process.”), *with* POM2, *supra* note 4, at 35 (the underlying premise of the Transformation Story is that “changing the quality of conflict interaction is more valuable than the other benefits that mediation can be used to produce . . .”). B&F deny that they made such a change and attribute the view that they did to a misreading of their earlier work. *Id.* at 73 (“our terminology might [have been] taken by some readers as suggesting that the mediator’s role in the transformative model is to improve the parties’ moral character . . . however . . . that is not at all the case.”). This misreading, they explain, “confuses and conflates the transformative theory’s claims about mediation’s potential effects with the theory’s suggestions about how the mediation process can and should be conducted.” *Id.* (quoting Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 *MEDIATION Q.* 263, 277 (1996)). B&F may not have intended to argue that TDR transforms personal character but there is little doubt that they did. The personal transformation claim is the central organizing theme of POM1, appearing on page after page of the chapters describing the “transformative story” and the goals of TDR. Even sympathetic readers still read their work in that way. *See, e.g.*, Lisa Blomgren Bingham, Cynthia J. Hallberlin, Denise A. Walker & Won-Tae Chung, *Dispute System Design and Justice in Employment Dispute Mediation: Mediation at the Workplace*, 14 *HARV. NEGOT. L. REV.* 1, 22 (2009) (“Transformative mediation views the most important aspect of mediation as its potential to transform the people who are in the very midst of conflict.”). I can understand why B&F would want to change their minds on this issue, but I do not understand why they are reluctant to admit it.

⁷ For example, B&F argue that a TDR mediator should not try to influence the outcome of a dispute but simply make sure that the outcome “remains in the parties’ hands.” POM1, *supra* note 4, at 87–89. Thus, the mediator would not intervene to correct a power imbalance, information deficit, practical constraint, or any other feature of a situation likely to permit one party to take advantage of the other. *Id.* Echoing Tom Lehrer (TOM LEHRER, WERNHER VON BRAUN (Shout! Factory 1965), the mediator would say: “That’s not my department,” and move on. How a resolution based on ignorance or power imbalance can be said to “remain in the hands of the parties,” however, as opposed to the hands of the party exploiting ignorance or wielding power, is not clear. B&F respond that empowerment produced by TDR would enable “weaker parties’ . . . to resist pressures to accept deals they consider unacceptable . . . [and permit them to] go elsewhere . . .” POM1, *supra* note 4, at 275. But this does not explain how a party who misunderstands the extent or nature of his options, or the strength of his claims, through no fault of his own, will overcome these limitations if someone does not help him. Their lack of concern for this issue is explained, in part, by their belief that the outcome of a dispute is less important than the

of first generation TDR to provide a baseline against which to compare the generation presently in effect. Much like a personal history in a medical diagnosis, the story of TDR's past will help to understand its present condition, and predict the problems it is likely to face in the future.⁸

A. *First Generation TDR: Origins, Objectives, Principles, and Techniques*

The original version of TDR was based on a so-called "Relational Worldview,"⁹ a value-based "orientation and approach to conflict"¹⁰ different from the other conceptions of dispute resolution that were then in popular use. Dispute resolution theory prior to TDR, according to B&F, existed in a kind of Manichean equilibrium, split between the polar perspectives of individualism and collectivism¹¹; one promoting personal satisfaction, and the other promoting group harmony, but neither promoting both.¹² B&F saw these views as locked interminably in a proverbial Kipling-Marx debate, each focusing on a different aspect of human nature, and each starting from a different understanding of what matters most to people. As partial conceptions, neither view offered a complete approach to disputing,¹³ just a partisan strategy for pursu-

process through which that outcome is reached. *See, e.g.,* POM2, *supra* note 4, at 71 ("even a 'poor outcome' produced by the party's own process of reflection and choice strengthens the self more than a 'good outcome' induced by the mediator's directiveness or imposition"), 35-36 ("changing the quality of conflict interaction is more valuable than . . . obtaining satisfying and fair outcomes"), 214 ("people in conflict are seeking interactional transformation as much or more than reaching settlement of concrete issues.") *See also* Kressel, *supra* note 1, at 26 ("Transformative mediators . . . reported the fewest in-session thoughts about agreement-making" of any of the different, style-based groups of mediators studied). *See infra* pp. 321-323 for my discussion of this exaggerated emphasis on empowerment and the difficulties it creates for the Theory.

⁸ Most of the changes in TDR from the first to the second generations are cosmetic, so a detailed examination of the first generation also will save time later in the article when describing the updated version.

⁹ POM1, *supra* note 4, at 242-44. A "Relational Worldview," as B&F use the term, is a conceptual framework consisting of a set of beliefs about the nature of the world, including the nature of human beings and their social processes, which individuals use within a culture or society to interpret and make sense of the surrounding world. *Id.* at 236.

¹⁰ *Id.* at 249.

¹¹ *Id.* at 236-41. B&F call these opposing perspectives the Individualist and Organic Worldviews.

¹² *Id.* at 245-48.

¹³ *Id.* at 245.

ing different ideological objectives.¹⁴ The Relational Worldview was supposed to provide a path out of this polarized universe by integrating the central features of the individualist and collectivist perspectives into an “all of the above” synthesis.¹⁵ It was said to embody a conception of society in which dispute resolution practices “help individuals strengthen themselves and show concern for each other [by] enact[ing] and integrat[ing] their highest capacities.”¹⁶

Within the Relational Worldview, disputes were seen as presenting opportunities for moral growth and transformation, enabling individuals to integrate individual autonomy and a concern for others, into a program for reaching full moral development.¹⁷ TDR was supposed to promote this opportunity for moral growth, not by solving “the problems”¹⁸ presented in disputes, or improv-

¹⁴ B&F believe that all dispute resolution theory is grounded in ideology. See *infra* note 225.

¹⁵ POM1, *supra* note 4, at 244.

¹⁶ *Id.* At first glance, the Relational Worldview seems to embody the essence of the human potential movement of the 1960s and 70s, and the related intellectual disciplines of existentialist philosophy and humanistic psychology. See Dorothy J. Della Noce & Hugo C.M. Prein, *The Case for Transformation: A Review of Theoretical and Empirical Support*, in SOURCEBOOK, *supra* note 2, at 106–16 (describing the connections between TDR, humanistic psychology, and the human potential movement). These various views share an almost unlimited faith in the ability of individuals, through conscious acts of the intellect and will, to understand and take control over the direction and meaning of their lives. *Id.* at 106 (quoting Eric Gill, *The Creative Dimension of Recovery*, in RECOVERY: A GUIDE FOR MENTAL HEALTH PRACTITIONERS, 134 (Peter N. Watkins ed., 2007) (“All individuals have within themselves the ability to guide their own lives in a manner that is both personally satisfying and socially constructive.”)). B&F refer to the human potential movement, but they do not link TDR to it intellectually. POM1, *supra* note 4, at 277. Instead, they describe their Relational Worldview as an original conception, not the embodiment of any present philosophy, and not associated with any “big names.” *Id.* at 244. To the extent it is part of any known intellectual tradition, they say, it is an offspring of feminism and constructivist social theory, as embodied in the work of Carol Gilligan, Robert Bellah, Alasdair MacIntyre, Michael Sandel, and others (*id.* at 255–56), and this connection, Folger argues, has implications for how the Theory should be evaluated. Joseph P. Folger, *Mediation Research: Studying Transformative Effects*, 18 HOFSTRA LAB. & EMP. L.J. 385, 389-93 (2001) (arguing that transformative mediation programs should be evaluated from an interpretive-qualitative point of view rather than an input/output-quantitative point of view because they are grounded in a social constructivist ideology). Whatever its provenance, TDR is based on a set of idealized beliefs about optimal human behavior more than an empirically grounded view of how humans actually behave. It is the work of moralists more than realists, and as such was invented more than discovered. See Brian Leiter, *In Praise of Realism (and Against “Nonsense” Jurisprudence)*, 100 GEO. L. J. 865, 867 (2012) (describing the “venerable and ancient” debate between “those whose starting point is a theory of how things (morally) ought to be versus those who begin with a theory of how things really are” as a “dispute between Moralists and Realists”). This has made it somewhat impervious to non-confirming empirical evidence.

¹⁷ POM1, *supra* note 4, at 82.

¹⁸ B&F go out of their way, time and time again, to differentiate TDR from the problem-solving (or “settlement oriented”) model of dispute resolution and to dismiss the latter as intrac-

ing the parties' "situations,"¹⁹ but rather by "transform[ing] the individuals involved"²⁰ to "bring out the intrinsic goodness that lies within the[m] . . . as human beings" and to change them from "fearful, defensive, or self-centered beings into confident, responsive, and caring ones."²¹ It enables individuals to "reach, at least momentarily, an almost exalted state of both dignity and decency"²² in which they turn on "a light" that illuminates "human goodness"²³ and achieve a moment of "transcendent importance."²⁴

TDR does all of this by promoting the "empowerment and recognition"²⁵ of disputing parties. Empowerment restores "individuals [to] a sense of their own value and strength and their own capacity to handle life's problems."²⁶ Once empowered, individuals "experience a strengthened awareness of . . . self-worth and . . . ability to deal with whatever difficulties they face, regardless of external constraints."²⁷ They become "calmer, clearer, more confident, more organized, and more decisive – and . . . establish or

tably inadequate. Problem solving can never be TDR's equal, they say, and anyone who claims to have integrated the two either is mistaken or has adopted TDR without knowing it. *See, e.g., id.* at 99–112, 245–54. *See also* POM2, *supra* note 4, at 228 (combining TDR with other dispute resolution models "is not possible."). B&F even attribute a version of this exclusivist view to proponents of other dispute resolution models. *Id.* at 229 ("mediator practices that are characteristic of the transformative model are viewed as inappropriate, inconsistent, or even dangerous by those who practice within a more settlement-oriented framework."). The last chapter of POM1 provides the best example of the intensity of B&F's views on this point. POM1, *supra* note 4, at 271–84. Written in a question and answer format for use in debates with proponents of the problem solving model, the chapter harps relentlessly on the superiority of TDR with a rhetorical flourish worthy of Cato the Elder, as if saying over and over, "Nodos solvere delenda est." ("Problem solving must be destroyed," echoing the classical anecdote of Cato repeatedly calling on the Roman Senate to destroy Carthage (PLUTARCH, LIVES, Cato the Elder, 27; PLINY THE ELDER, NATURAL HISTORY, 15.20), *see* Samuel Totten & Paul R. Batrtop, *Carthage, Genocide in and Carthago delenda est*, in *DICTIONARY OF GENOCIDE* 61–2 (2008)).

¹⁹ POM1, *supra* note 4, at 84. The POM1 chapter describing first generation TDR is entitled "Changing People, Not Just Situations." *Id.* at 81.

²⁰ *Id.* at 82.

²¹ *Id.* at 82–83.

²² POM1, *supra* note 4, at 83.

²³ *Id.*

²⁴ *Id.* at 24 ("Transformation does not mean institutional restructuring but rather a change or refinement in the consciousness and character of individual human beings. . . . [It] necessarily connotes individual moral development, although this kind of change will very likely lead to changes in social institutions as well.").

²⁵ POM1, *supra* note 4, 85–95. *See also* EDWARD W. SCHWERIN, *MEDIATION, CITIZEN EMPOWERMENT, & TRANSFORMATIONAL POLITICS* (1995) (describing the development of the conception of empowerment in the mediation literature).

²⁶ POM1, *supra* note 4, at 2.

²⁷ *Id.* at 84.

regain a sense of strength and control of their situation.”²⁸ They “[realize] more clearly what [their] goals and interests are,”²⁹ become “aware of the range of options available to secure [those] goals,”³⁰ “learn how better to listen, communicate, organize and analyze issues, present arguments, brainstorm and evaluate alternative solutions,”³¹ “[assess] fully the strengths and weaknesses of [their] arguments,” and “make conscious decisions for [themselves] about what . . . to do.”³²

TDR’s second foundational principle, recognition, evokes “in individuals [an] acknowledgement and empathy for the situations and problems of others.”³³ It enables individuals to be “more open, attentive, sympathetic, and responsive”³⁴ by encouraging them to “reflect about, consider, and acknowledge in some way the [others’] situations . . . not just as a strategy . . . but out of a genuine appreciation of the other human’s predicament.”³⁵ “The hallmark of recognition is letting go . . . of one’s focus on self and becoming interested in the perspective of the other party as such, concerned about the situation of the other as a fellow human being, not as an instrument of fulfilling one’s own needs.”³⁶

In giving and receiving recognition, individuals come to see each other “in a different and more favorable light than before,”³⁷ and they communicate this “changed understanding [to each other] . . . [and] make . . . concrete accommodation[s]” on the basis of it.³⁸ According to B&F, combining recognition and empowerment enables parties to “advance in . . . moral development”³⁹ by strengthening their sense of self, and actualizing their capacity for relating to others, transforming themselves “from a state of weakness and/

²⁸ *Id.* at 85. “Strength” is a recurring theme in B&F’s description of TDR. It is as if they wanted to neutralize an anticipated objection to the Theory (that TDR behavior will look weak to an experienced negotiator) by appropriating the terminology of the objection and claiming it as their own. This is a familiar rhetorical stratagem. Contemporary examples include Fox News calling itself “fair and balanced,” or the Communist Party of the Soviet Union calling its official newspaper Truth (Pravda, or Правда).

²⁹ *Id.*

³⁰ *Id.* at 86.

³¹ *Id.*

³² *Id.* at 87.

³³ *Id.* at 2.

³⁴ POM1, *supra* note 4, at 89.

³⁵ *Id.* at 89.

³⁶ *Id.* at 97.

³⁷ *Id.* at 90.

³⁸ POM1, *supra* note 4, at 91.

³⁹ *Id.* at 95.

or selfishness to one of strength and compassion.”⁴⁰ This “progressive shift in human consciousness,” in turn, moves them toward a state of “genuine goodness,” reflecting a “‘mature human morality.’”⁴¹

B & F say that “on yet a deeper level,” making moral growth the primary goal of conflict resolution leads to “the transformation of the society as a whole.”⁴² By changing people and the way they relate to one another, TDR will “inspire and legitimize new social forms and structures [that can be used to] construct a different type of social reality . . . preferable by far to the one that now exists.”⁴³ Put colloquially, TDR will “save the world.”⁴⁴

The wishful and grandiose nature of these claims might make them seem somewhat Panglossian, reminiscent of the arguments for Soviet and Chinese five year plans, designed societies, perfectible humans, and other utopian fantasies;⁴⁵ but B&F attempt to allay this concern by providing annotated case studies of TDR in operation, being used to resolve actual (or fictional—often it is unclear) disputes.⁴⁶ Perhaps not surprisingly, the Theory loses much

⁴⁰ *Id.* at 234.

⁴¹ *Id.* at 233. Most of the time, the terms Empowerment and Recognition fail to convey the complexity of the ideas that make up TDR. For example, “Recognize” often is an imprecise way to describe the different ideas of “take seriously” and “listen attentively,” and “Empower” often is an imprecise way to describe the different ideas of “think carefully about” and “take responsibility for.” It is not clear why B&F reduce their conceptual framework to a two-part construct.

⁴² POM1, *supra* note 4, at 251.

⁴³ *Id.* at 252.

⁴⁴ *Id.* at 29. (“Slowly, many in the mediation movement have begun to grasp how . . . mediation’s transformative dimensions are connected to an emerging, higher vision of self and society, one based on moral development and interpersonal relations rather than on satisfaction and individual autonomy.”). I do not discuss this “save the world” claim in any detail. It depends for its validity on the truth of the “change moral character” claim, and if the latter fails, as I believe it does, then the “save the world” claim fails *a fortiori*.

⁴⁵ B&F see the Relational Worldview as a new cultural paradigm for understanding conflict, the next logical step in the progression from the classical (“Organic” in B&F’s terminology) worldview of ancient Greece and the Middle Ages, to the Individualist worldview of the Renaissance and Enlightenment. POM1, *supra* note 4, at 253. “[M]ore and more,” they say, evidence indicates that a potential paradigm shift toward the Relational Worldview is underway. *Id.* at 256. See *infra* note 228 (describing the inapplicability of the concept of “paradigm shift” to the social sciences). They also reject the characterization of TDR as utopian, believing that many of the changes in mainstream dispute resolution practice over the last decade reflect the adoption of TDR principles. POM2, *supra* note 4, at 97-105.

⁴⁶ Most of the case studies described in POM1 are reconstructions of mediation sessions rather than verbatim transcriptions. POM1, *supra* note 4, at 113 (describing the case studies as examples of “how transformative mediation might be practiced”). B&F acknowledge that it “would be ideal to have actual transcripts of mediation sessions but [claim that] confidentiality restrictions prohibit the collection of that type of data.” Folger, *supra* note 16, at 395. They do not say why they could not make the transcripts anonymous (by changing the names of the

of its grandeur in this movement from idea to practice. The behavior described in the TDR case studies is a good deal more prosaic than the adjectives used to characterize it, and, at its best, it looks more like communitarian dispute resolution behavior generally than a distinctively transformative variation on the process. Like a lot of invented theory, TDR is more impressive at the espoused level than at the practiced one.⁴⁷ A close examination of the case studies will show how this is so.

B. *First Generation TDR – Illustrations*

1. The Case of the Sensitive Bully

The case of the Sensitive Bully involved the mediation of an assault complaint in a court-annexed mediation program in Queens, New York.⁴⁸ The complaint had been filed by Regis, the father of thirteen-year-old Jerome, against Charles, a person Regis thought had attacked Jerome and his friends in a park. The mediator began the session by asking Regis to explain why he had filed the complaint,⁴⁹ and Regis responded by describing the “attacks” on Jerome and his friends, and how he (Regis) was not going to put up with them any longer. The mediator then asked Charles to explain “how he saw the dispute.”⁵⁰ Charles admitted that he had

parties and the factual details of the disputes) in the manner of Carl Rogers, one of the intellectual ancestors of TDR, who based his theory of humanistic social psychology on transcripts of actual counseling sessions with patients. See Della Noce & Prein, *supra* note 16, at 106 (Carl Rogers “was the first person in history to record . . . transcribe, analyze, and publish complete cases of psychotherapy.”). B&F believe “that the transformative framework is best understood by studying transcripts and videos of a wide range of cases in their unedited, unscripted forms, . . . [that] a close familiarity with what ‘real-time’ conflict interaction is like is essential to an understanding and mastery of [the TDR] approach” but they do not seem to believe that the conflicts studied have to be real. POM2, *supra* note 4, at 215. Strangely, there has been very little direct observational study of actual mediation since a set of groundbreaking ethnographic studies in the 1980s. See Kressel, *supra* note 1, at 5 (“there have been, by our search, only five observational studies of this central phenomenon” since the 1980s). The concern here, of course, is that B&F’s understanding of reality may be shaped by their theory of disputing rather than the other way around. Starting with real world data would add credibility to their argument for TDR.

⁴⁷ See CHRIS ARGYRIS & DONALD A. SCHÖN, *THEORY IN PRACTICE: INCREASING PROFESSIONAL EFFECTIVENESS* 6-7, 174-80 (1992) (describing the difference between “espoused theory” and “theory in use”).

⁴⁸ POM1, *supra* note 4, at 5–11.

⁴⁹ *Id.* at 6.

⁵⁰ *Id.* at 6. It is difficult to know what Charles did to cause Jerome and his friends to feel “attacked.” The only physical event described in the story is Regis’s “pinn[ing] Charles to the street” after his last “attack” on Jerome.

chased Jerome and his friends,⁵¹ but he also expressed remorse for it, and made the story more complicated by describing how Jerome and his friends had provoked him by calling him names and mocking his limp.⁵²

After hearing Charles' more complete description of the events, and learning of his remorse, Regis agreed that "kids can be cruel," and changed his mind about the attack.⁵³ He and Charles then worked out an agreement in which Charles promised not to chase Jerome and his friends, if in return, they did not call him names. Charles also promised to avoid contact with Jerome and his friends (by using a different route to his girlfriend's house and his bus), and to deal directly with Regis in the future should any difficulties arise.⁵⁴ B&F do not say if Regis dropped the assault charge, but presumably he did. The story of the mediation in a nutshell then, is that two people, angry at one another over a series of incidents they understood differently, listened open-mindedly and fairly to one another's description of events, and changed their minds about who was at fault and for what. They did not agree to do lunch, go to the beach, or hang out together, so far as we know, but they did agree to resolve the assault complaint.

B&F characterize the mediation as an example of TDR at work;⁵⁵ an instance of something "much more powerful than the terms of the agreement the parties ultimately signed."⁵⁶ As they see it, "two men came to see each other differently, by recognizing that they were alike [and] that they both wanted and deserved each other's acknowledgement as fellow human beings."⁵⁷ They "found . . . capacities within themselves . . . they may never have learned in the streets of Queens, or in the court where the original assault

⁵¹ *Id.* at 6–7.

⁵² *Id.* at 7–8. One of Charles' legs was shorter than the other.

⁵³ *Id.* at 8.

⁵⁴ The mediator did not press Jerome for a more detailed account of events, accepting his perfunctory statement that Regis "told everything there was to say." *Id.* at 6. This is a little strange, given that Jerome and his friends were the primary instigators of the dispute, were present for all of its various incidents (neither of which was true of Regis), and presumably could have described what happened in greater detail than Regis. Compliance with the agreement also depended upon their future cooperation, yet the agreement contained no provisions for monitoring their behavior and assuring their compliance.

⁵⁵ *Id.* at 114 ("the Sensitive Bully case . . . illustrates how transformative possibilities can be . . . tapped by disputants and mediators.").

⁵⁶ POM1, *supra* note 4, at 9. B&F ridicule the agreement, calling it "almost an anticlimax" and "somewhat contrived." *Id.*

⁵⁷ *Id.* at 9–10.

charge was filed,”⁵⁸ and “made decisions and commitments that re-directed an escalation that easily might have ended up in the Queens’ homicide files.”⁵⁹ B&F say that this shows how a mediator “fostering empowerment and recognition”⁶⁰ can “realize[] the transformative potential of the mediation process.”⁶¹

Another take on the events, and one that avoids the overheated language of transformation and redeemed humanity, would go something like this: two people who thought they had a conflict listened open-mindedly to one another as each described his view of the events and discovered that they did not disagree after all. After learning the full story, they recognized that their first impressions were incomplete, acknowledged that fact publicly, and adjusted their views accordingly.⁶² They did this, not because of any personal transformation made during the mediation, but because they were honest, direct, open-minded, and fair people to begin with, and they approached conflict with those qualities in mind. Acting on an accurate understanding of events was as important to them, and as much a part of whom they were, as protecting their interests and asserting their views forcefully. They understood that stories about conflicts can be distorted, particularly when reported by children, and believed in getting all of the facts straight before taking action. During the course of their discussion they shifted perspective from aggrieved victim to good neighbor, changing their minds, but not their personalities.

One must believe in “Road to Damascus” moments,⁶³ and that a perfunctory mediator request to “describe how you see things” could provoke one. To shift gears and listen fairly to one another

⁵⁸ *Id.* at 10.

⁵⁹ POM1, *supra* note 4, at 10–11. They really do say homicide files.

⁶⁰ *Id.* at 12, 27.

⁶¹ *Id.* at 11.

⁶² As one of the parties in another of B&F’s stories put it, “Maybe [they] both just got lucky . . . [and] were surprised at who each other turned out to be.” POM2, *supra* note 4, at 57 (describing a post-accident interaction between a motorist and an uninsured driver).

⁶³ POM1, *supra* note 4, at 6. B&F might once have believed that such moments were commonplace, perhaps even inevitable. For example, in POM1 they claimed that “by the end of these cases [referring to the Sensitive Bully case and others] . . . parties themselves are changed” as a consequence of TDR based interventions. *Id.* at 5. But in POM2, they began to qualify their endorsement of the phenomenon, using verbs of possibility rather than certainty (e.g., “can,” “may,” “might”), so that, as with many of their most controversial views, it is difficult to know how deep their commitment to the idea now runs. *See e.g.*, POM2, *supra* note 4, at 221 (“When parties experience the transformation of conflict interaction in a difficult dispute of any kind, this experience—and the insights about conflict it provides—can be carried with them out of the mediation room and can influence their approaches to dealing with conflict in future situations.”).

so quickly, the two men must have come to the mediation already capable of, and predisposed to, doing that. Their short, introductory conversation, at the beginning of the mediation, did not last long enough to inculcate new values or skills. Their change in attitude was closer to a mood swing than a change in character, and the concept of mood swing lacks the gravitas needed to support a theory of disputing. For there to be character transformation in the Sensitive Bully story one must assume that Regis and Charles were close-minded and defensive people to begin with, but B&F offer no evidence that this was the case, and everything in the story suggests otherwise.⁶⁴ Characterizing the case as an illustration of TDR-induced personality transformation seems fanciful at best.⁶⁵

2. The Adjacent Gardens Case

B&F's second example of TDR at work (or not, as it turns out), illustrates the difficulties in their transformation argument in a different way. The Adjacent Gardens case involved the mediation of a dispute between C, a middle-aged black woman, and R, her thirty-year-old white male neighbor.⁶⁶ While working in her garden, C heard a gunshot and saw R walk into his house with a gun in his hand. A few minutes later she heard another shot and called the police. The police investigated but were unable to find a gun. In the mediation, R at first denied firing a gun, but as the meeting progressed, he changed his story, and admitted that he had done so, but claimed he fired it at a dog, to frighten it, and that he did not fire it randomly, and did not fire it at C.⁶⁷ R, it turned out, was involved in an ongoing dispute with W, another neighbor, over W's dog, and the gun incident was related to that dispute.⁶⁸ R had

⁶⁴ The fact that Regis came to the mediation angry is not evidence of close-mindedness. One would expect a parent who believed his thirteen-year-old son had been attacked by an adult to be angry about it. The real measure of a personality in such a situation is the way in which the parent reacts when he is told that the story is more complicated than he thinks. Regis backed away from his anger very quickly when the additional facts came out. So quickly in fact, that open-mindedness was probably a more representative feature of his character than anger. There is nothing in the mediator's behavior that appears to have had any effect on his shift in attitude.

⁶⁵ In a sense, even the title to the story is wrong. B&F call it the case of the "Sensitive Bully," presumably because Charles was willing to admit he had attacked Jerome and felt bad about it. However, in the end it turned out that Charles was not a bully, and that Regis was as sensitive as Charles.

⁶⁶ POM1, *supra* note 4, at 115-34.

⁶⁷ The story is a good deal more complicated than this, but the details of the shooting incident do not matter for purposes of this discussion.

⁶⁸ R also was under the care of a psychiatrist for an unspecified post-Vietnam war related condition, had been shot in another part of town about a year earlier, and might have been

no animosity for C and had not intended to frighten her. He wanted only to frighten W's dog. The dog dispute was not part of the mediation; however, and W was not a formal party to the proceeding (there was a disagreement over whether he should have been a witness).⁶⁹ The mediators feared that adding him could lead to a violent confrontation between R and W, so they decided not to expand the scope of the hearing beyond the incident described by C.

After a difficult session, in which the "mediators either ignore[d] or explicitly rejected as possible topics for consideration" most of the parties' suggested concerns,⁷⁰ the parties reached an agreement. R promised not to "threaten or assault anyone on the property of [C]," and "[n]ot to discharge any firearms within the vicinity of [C's property]," and C promised "not to verbally or physically provoke or incite R in any manner."⁷¹ R thought the last provision was unnecessary, but C wanted a statement in the agreement making it clear that she would not instigate a dispute.

B&F characterize the mediation as a series of missed opportunities to use TDR methods,⁷² and illustrate this characterization by providing examples of what a TDR mediator would have done. One could debate the "missed opportunities" characterization of the session, but there is little point in doing so. B&F admit that the case contains no evidence of the transformative effects of TDR, and that is the focus of this discussion. In the course of their analysis; however, B&F describe the importance of Empowerment in mediation in interesting, new detail, and that discussion brings another difficulty with the argument for TDR into sharper relief. While a TDR mediator must help parties explain their views to one another (this is the essence of providing Recognition), his most important duty, say B&F, is to insure that the parties take full responsibility for bringing their dispute to a resolution.⁷³ If the parties cannot reach an agreement on their own, the mediation should end without one, even when the mediator can identify an obvious and mutually satisfactory outcome not seen by the parties. Reaching

growing marijuana illegally in his garden. He had many issues, in other words, and this made him a complicated and difficult person to deal with. POM1, *supra* note 4, at 123–26.

⁶⁹ *Id.* at 13–33.

⁷⁰ *Id.* at 138.

⁷¹ *Id.* at 133.

⁷² *Id.* at 135–38.

⁷³ See Kressell, *supra* note 1, at 23 (the "most characteristic intervention [by transformative mediators] was frequent summarizing of the parties statements and a determined effort not to express an opinion to influence the agenda in any way").

an agreement is the work of the parties,⁷⁴ and delegating complete control over that task to the parties is the essence of Empowerment.⁷⁵

Of course, the basic principle of Empowerment is not controversial: all dispute resolution theories endorse it to some extent. Everyone believes it is good for parties to take personal responsibility for resolving disputes. The main objection to the TDR empowerment claim concerns the proposition that empowerment inevitably leads to character transformation. B&F seem to think that exercising power, even once, will cause a person to incorporate that behavior into his repertoire of interactional skills and values and make it a disposition,⁷⁶ but this is just a mistake. Character change is a complicated psychological, intellectual, and emotional process, involving a systematic and sustained effort of aided practice and reflection over an extended period of time, in a wide variety of contexts, and under a wide variety of circumstances and conditions. It requires the synergistic convergence of many different elements: an awareness of new behaviors and values to try out; an opportunity to experiment with those behaviors and act on those values on a recurring basis in situations where important interests are at stake; access to trustworthy data about these behavioral experiments and the help of exemplars, critics, and friends in understanding that data; time and opportunity to discover which of the new behaviors and values fit compatibly with one's sense of self; and reinforcement by colleagues, friends, and community institutions (economic, social, penal, religious, cultural, intellectual) of the changes that emerge from this process. The success of such

⁷⁴ A belief that parties, left to their own devices, will work out their differences fully, reflects the optimistic view of human capacity underlying the principle of "unconditional positive regard," probably the most widely known principle of humanistic psychology. See Della Noce & Prein, *supra* note 16, at 107–08 (describing the link between TDR and the Rogerian principle of unconditional positive regard); CARL R. ROGERS, ON BECOMING A PERSON: A THERAPIST'S VIEW OF PSYCHOTHERAPY 34 (1995) (describing the principle of unconditional positive regard); Carl R. Rogers, *The Interpersonal Relationship: The Core of Guidance*, 32 HARV. EDUC. REV. 416 (1962). Like B&F, Rogers also believed in personal epiphanies. CARL R. ROGERS, COUNSELING AND PSYCHOTHERAPY: NEWER CONCEPTS IN PRACTICE 30-31 (1942) (describing the "empowerment shift" that is possible in a counseling session).

⁷⁵ Ironically, empowering parties does not include responding to their requests for help, just as being empowered does not include the right to ask for help.

⁷⁶ POM1, *supra* note 4, at 135–36, 181. Others share this view, albeit in perhaps a more qualified or tentative way. See Bingham, et. al., *Dispute System*, *supra* note 6, at 38 ("By practicing these [TDR] communication skills and by having the mediator model conflict resolution behaviors when he or she paraphrases or highlights a moment of recognition between the parties, the participants in mediation may be learning conflict management skills to take back to the workroom.").

an undertaking requires the convergence of all of these elements and the absence of any one can jeopardize the entire venture.⁷⁷ Experimenting with new behaviors and values in a single mediation can start the process, but it can only start it.⁷⁸

B&F offer no evidence, impressionistic or otherwise, in either the Sensitive Bully or in Adjacent Gardens cases that TDR has such long-range, transformative effects on character. Each of the cases is a snapshot of a single event, fixed in time, and says nothing about the effects of the experience on the future behavior of the parties,⁷⁹ even though future behavior is the only evidence on which a transformation claim could be based. Without a subsequent event, it is not possible to tell whether the lessons of point one have had any lasting effect. The absence of such evidence is fatal to the TDR transformation claim, and without the transformation claim, TDR is just another (albeit interesting) variation of Communitarian Dispute Resolution. If the Sensitive Bully and Adjacent Gardens cases are representative of the case study evidence for the transformative power of TDR, as I believe they are, the argument that TDR transforms character must be seen as—at best—on hold, as conceptually confused and unsupported by evidence.⁸⁰ This Article returns to this issue in Section III.

⁷⁷ Seemingly without irony, B&F acknowledge that their own understanding and development of the TDR model itself took place over a decade. It “started with an awareness and expression of concerns about [their] current practices, followed by the adoption of new techniques and methods that attempt to address these problems. Then, because many of the adopted changes [were] incongruous with key elements of [their] former model and theoretical framework, the changes led to the eventual adoption of an alternative model or framework that better captured [their] underlying sense of purpose and objectives This evolution ended with the development and adoption of the transformative framework” POM2, *supra* note 4, at 231. This description of B&F’s personal scholarly transformation captures the slow, evolutionary nature of character change perfectly. B&F seem to understand, at least in their own case, that such change is not a spur of the moment thing, but instead the result of a systematic and sustained effort over time. Yet they expect parties in TDR mediations to change instantaneously. One should be skeptical of a “Do as I say, not as I do” set of instructions. Unlike Al Capp’s character General Bullmoose, B&F do not seem to believe that “What is good for B&F is good for the Country.” (Capp parodied G.M. president Charles Wilson’s statement - in his confirmation hearing for U.S. Secretary of Defense - that “what was good for the country is good for General Motors and vice-versa.”).

⁷⁸ I describe the moral and psychological dimensions of character change in greater detail in Robert J. Condlin, *The Moral Failure of Clinical Legal Education*, in *THE GOOD LAWYER: LAWYERS’ ROLES AND LAWYERS’ ETHICS* 319-32 (David Luban ed., 1983).

⁷⁹ Neal Milner, *Mediation and Political Theory: A Critique of Bush and Folger*, 21 L. & Soc. INQUIRY 737, 750 (1996) (reviewing POM1) (“Bush and Folger’s narratives . . . tell us little about the staying power for transformative mediation.”).

⁸⁰ There are other difficulties with the “empowerment and recognition beget transformation” argument. For example, B&F assume that the day-to-day problems that give rise to dis-

3. The Landlord-Tenant Case

Next, B&F turn to a landlord-tenant dispute to illustrate the transformative effects of TDR. While B&F do not consider it a perfect illustration, it is good enough in their view to show the differences between TDR and other types of dispute resolution.⁸¹ The case is a garden-variety landlord-tenant dispute of the sort fa-

putes usually are amenable to intellectual and linguistic resolutions. B&F seem to say that if people could just understand their disagreements, and talk them out, everything would be fine. But some disagreements, including many ordinary ones, are rooted in practical realities that parties cannot change or control. A person may, for example, not have enough money to meet basic needs, or be in an oppressive job he cannot leave, or have an intolerable living arrangement he cannot change, or be under the control of chemicals coursing through his veins (only some of which he put there himself); conditions like these can cause him to get into disputes with others on a regular basis. Learning how to discuss disagreement more skillfully is not likely to change the underlying social, chemical, or economic conditions that caused these conflicts to begin with, and thus is not likely to produce a lasting change in the person's ability to avoid or resolve such conflicts in the future. Therapy might do that (as might a change in the person's social, chemical, and economic conditions), but lawyers are not therapists.

B&F disagree with this last point and believe therapy should be one of the goals of TDR. See POM1, *supra* note 4, at 97–99; POM2, *supra* note 4, at 225–28. But the lawyer-as-therapist argument has been rejected consistently since the heyday of the law and psychiatry movement in the 1950s, and there is nothing in B&F's analysis that adds to that discussion. It makes sense for individual lawyers knowledgeable about therapeutic principles and skilled at therapeutic practices to use that knowledge and skill in particular circumstances. Michael L. Perlin, "You Have Discussed Lepers and Crooks": *Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683 (2003) (describing how therapeutic concerns can or should be used to reshape legal procedures and lawyer roles); Jane Honoroff, *Core Conflict Observations*, 29 TMG NEWSLETTER 3 (Spring 2012), available at http://www.themediationgroup.org/files/documentlibrary/31_Spring2012.pdf (describing the use of psychotherapeutic intervention in mediation). But it does not make sense for the profession as a whole to attempt to do this (the required skill and understanding are not that widely distributed), and the profession as a whole runs the legal dispute resolution system. See Kressel, *supra* note 1, at 34 ("While mediation is not the same thing as therapy, its practitioners share the similar challenge of exerting constructive influence under conditions of tension and uncertainty . . . the most successful practitioners of a therapeutic style are those who use it flexibly, adapting to the immediate reactions of the client, rather than pursuing their stylistic inclinations no matter what."). See also Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 98 (2002) ("I do not believe self-realization and self-empowerment are [not] appropriate goals for a public justice system. Parties who wish assistance in self-empowerment and in honing their communication skills should seek out professionals who are trained to provide this assistance; professionals who will more likely be found within the therapeutic community than in the bar."). But see Lisa B. Bingham, *Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 J. DISP. RESOL. 101, 112–13 (2002) (arguing that self-determination and self-empowerment can influence satisfaction rates in mediation and that satisfaction is an appropriate goal of a public justice system).

⁸¹ POM1, *supra* note 4, at 139 (the Landlord-Tenant case is "not offered here as an ideal or perfect illustration of transformative practice. It is, however, highly instructive in several regards . . ."). Elsewhere, B&F describe the case as an example of "successful" transformative practice. *Id.* at 200. They say that one of them was the mediator in the case, but they do not say which one.

miliar to anyone who has worked in a legal services housing practice. The landlord and tenant got along well at the beginning of the lease, but at some point the tenant defaulted on the rent. Each side interpreted the default in terms of latent stereotypes it had about the other (e.g., landlords try to squeeze every last dime out of you; tenants don't respect other peoples' property), and the relationship deteriorated as each person began to demonize everything the other did. After five months of nonpayment, the landlord decided to evict the tenant. Before going to court, however, the parties thought they would try out the new neighborhood mediation center, to see if something could be worked out informally (and less expensively).

If their language is any indication, the parties came to the mediation in a combative mood. They couched their views in the language of rights, obligations, fault, and blame. They threatened, argued, made demands, and took non-negotiable stands. They referred to code violations, property damage, gouging, ripping off, renegeing on promises, the practical impediments to eviction, and other such topics of adversarial posturing. They did not ask questions or listen attentively. They were not curious, confused, inquisitive, conciliatory, remorseful, or sad (at least not publicly). They did not mention, or perhaps even recall, their past history of positive dealing with one another. They were not bewildered about how things could have gotten so antagonistic.

Each side had information that put the rent default in a different light, but each was also committed to a casehardened view of events that made acknowledging such complication unacceptable, and admitting doubt, qualification, tentativeness, or uncertainty too risky. The dispute must have involved more than a simple factual misunderstanding gone viral; the intense distrust evident throughout the discussion seemed too deep-seated and too intense to be explained by that single event. The parties may have had fundamentally incompatible expectations about what mediation could achieve, and failed to understand that "winning big" was not an option for either of them. In retrospect, there may have been no common ground on which to base a voluntary resolution; the mediation may have been doomed from the outset, though it is difficult to be sure, given B&F's cryptic descriptions of the parties' financial situations, and the nature of their relationship.

At the beginning of the session the parties described their different versions of events in an excited and exaggerated fashion. When energy for this kind of conversation ran out, the mediator

caucused privately with each side to get a more realistic picture of their true feelings and objectives. During these caucuses, he learned about the rent default incident and the antagonism and distrust it had introduced into the relationship. When the parties reconvened in a group, he encouraged each of them to tell the other what it had said to him in private, as a way of showing that they had a common ground on which to construct an agreement.⁸² When both parties were unwilling to do this, however, he protected their privacy and revealed nothing of what he had been told. He tried suggesting additional ways of understanding the rent default incident, to reduce the mutual suspicion it had created, but these efforts also were unsuccessful.⁸³ He also encouraged the parties to recall past positive interactions with one another, and use the lessons from those experiences to help resolve the present disagreement. If they were able to work together in the past, he asked in effect, why was it not possible to do so now? But once again, his efforts were unsuccessful.

The remainder of the mediation took on a sort of bipolar character. The parties worked productively for short periods of time, only to “backslide” (in B&F’s terminology), and begin ridiculing

⁸² In this respect, the mediation resembled a judicial pre-trial conference. A trial judge might have been more aggressive than the mediator in pressing the parties to disclose their private information, but the underlying mechanism at work in the two proceedings—uncover the parties’ true wishes and capabilities in private and then find a way to make the information public when the parties re-assemble in a group—is identical. See Robert J. Condlin, *Bargaining With a Hugger: The Weaknesses and Limitations of a Communitarian Conception of Legal Dispute Bargaining, or Why We Can’t All Just Get Along*, 9 CARDOZO J. CONFLICT RESOL. 1, 20–69 (2007) (describing the same mechanism at work in a pre-trial conference.) In a sense, the Landlord-Tenant case is a passive aggressive version of a pre-trial conference. B&F even provide a catalogue of passive aggressive moves the mediator could have used. POM1, *supra* note 4, at 166–67.

⁸³ The mediator seemed to take sides in his comments but not in a heavy-handed manner, and the parties were free to reject his suggestions, which they did. B&F deny that the mediator was partisan. They underscored that “the mediator [did] not really argue . . . [he] simply open[ed] the possibility that C might want to consider other reasons why [the landlord’s] behavior changed.” POM1, *supra* note 4, at 165. The distinction between “arguing” and “open a possibility” is reminiscent of Principled Bargaining’s famous distinction between “warning” and “threat,” and equally mysterious. See Robert J. Condlin, “*Every Day and in Every Way We Are All Becoming Meta and Meta, or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)*,” 23 OHIO ST. J. ON DISP. RESOL. 231, 261–62 (2008) (describing the “warning/threat” distinction as “the proverbial distinction without a difference”). See also POM2, *supra* note 4, at 221 (“Mediators from the transformative orientation are not directive. However, they are proactive.”). Like other dispute resolution scholars, B&F seem to “want to have it both ways—free to use power when nothing else will work because consequences matter, but also free to deny that they ever resort to pure power, because image also counts.” See Condlin, “*Every Day,*” *supra*, at 262.

each other's views and calling one another names. At one point they worked out a tentative agreement involving another one of the landlord's apartments, and a one-time welfare office housing grant to pay for the costs involved in moving to it, only to reject the agreement when the mediator asked them to re-examine it once more to be sure it would work. Thereafter, the discussion became increasingly acrimonious and personal, and the mediation eventually ended without an agreement.⁸⁴ The mediator put the best light on this outcome, emphasizing how much the parties had learned about their dispute, themselves, and their relationship with one another; and invited them to return to the mediation center to work on the problem in the future if they thought it would help.⁸⁵ Given the tone of the conversation at the end of the meeting, however, it seemed unlikely that they would accept this invitation. B&F do not say whether they did.

There is much to like in the mediator's behavior in the Landlord-Tenant case. For short periods of time he was able to get the parties to look past their mutual antagonisms and work together toward a mutually acceptable resolution. The fact that they did not sustain this effort only illustrates once again the lack of any necessary connection between empowerment and recognition on the one hand, and character transformation on the other. Even B&F seem to acknowledge this. They describe the parties as needing periodic TDR "booster shots"⁸⁶ to stay on task, and describe the transformation that occurred as limited to specific behaviors, not personalities, and lasting for short periods of time, rather than indefinitely into the future, or even to the end of the mediation. B&F downplay the significance of this breakdown, arguing that the temporary experience of empowerment and recognition gave the parties a picture of a better way to settle disputes, and taught them how to create such a world for themselves in the future,⁸⁷ but it is difficult to understand the reason for this optimism. Only a teenage boy

⁸⁴ It is hard to tell whether the talks broke down because the draft agreement was too onerous for the tenant, or because she became greedy and overplayed her hand, trying to squeeze one last concession out of the landlord because she thought she could get one. B&F do not describe the tenant's financial situation and one would need to have this information to know whether she could have afforded the proposed rent.

⁸⁵ POM1, *supra* note 4, at 184, 186.

⁸⁶ *Id.* at 175, 177, 181-92 (maintaining recognition "is as hard as giving it in the first place.").

⁸⁷ *Id.* at 201 (the experience of new modes of behavior and interaction can be far more lasting than the terms of any agreement), 144 ("explaining the importance of ground rules begins to give the parties a sense of what is entailed, behaviorally, in developing effective conflict resolution skills for themselves"), and 192 ("The result, in our view, was that the parties left the session with greater capacities for addressing life's difficulties, stepping outside of themselves to

prefers an overt fight to a covert one, and taking the fight public was the only transformative event in the parties' behavior.⁸⁸ "Backsliding" seemed more representative of the parties' response to TDR than acceptance of it.⁸⁹

Its lack of TDR qualities notwithstanding, the Landlord-Tenant case illustrates another interesting difficulty with the principle of empowerment. B&F praise the mediator for permitting the meeting to end without a formal agreement, and yet this does not seem praiseworthy. No doubt it was a good idea for the mediator to ask the parties to test the agreement to be sure it would stand up under the pressure of future events, but to permit them to jettison a workable alternative (leasing another of the landlord's apartments) without considering what would happen if they did not agree to it, or without forcing them to consider whether their buyers' remorse was warranted, is hard to understand. The tenant was about to be evicted, and judging from the story, she had no place to go. She wanted a larger apartment, in a safe neighborhood, close to her work, and at below market rent, and not many places satisfied those conditions. The landlord's proposed new apartment was larger, in a safe neighborhood, close to the tenant's work, and available at below market rent (though not as far below market as the tenant would have liked). To let the parties dismiss this option without any extended consideration of whether a better deal could be found, simply for the sake of empowering them, seems irresponsible. Later on, when the tenant finds herself in a smaller apartment, in a more dangerous neighborhood, and farther from her work, her remorse will be real (and justified), but then she will not be able to do anything about it.

The parties almost certainly would have honored the alternative agreement—even if nudged into it—if later it became clear that it was their best option in a less than perfect world. Anything else would have been irrational. They might even have been grateful to the mediator for pushing them past their hesitations, suspicions, and the like, knowing that they could not have done so by

consider another's perspective, and realistically confronting their own (and each other's) options, resources, and limitations.").

⁸⁸ *Id.* at 192. B&F say that "although a settlement was not reached in this case, the parties moved much closer to constructing one than they did in the *Adjacent Gardens* case, in which an agreement was signed." POM1, *supra* note 4, at 192. *Id.* While it is clear that the landlord and tenant took more control over their dispute than the neighbors in the *Adjacent Gardens* case, it is not clear how one can get "much closer" to a settlement than an actual settlement.

⁸⁹ B&F say backsliding is to be expected in TDR, but they do not say how it contributes to transformation. *Id.* at 175.

themselves. When parties give in to pique, resentment, spite, or some other emotion of the moment, and overplay their bargaining hands as a result, mistakenly thinking they can force one more concession from the other side, as (at least one of) these parties seemed to, it is reasonable for them to expect a mediator to protect them against themselves.⁹⁰ To allow adversarial posturing and bad judgment to scuttle a good deal just to teach a lesson, and what is worse, to be proud of it, seems perverse.⁹¹ The parties always had the option of rejecting the deal, but if they decided to do that, it should have been on the basis of a full appreciation of what they were giving up. Trying to change a person's mind in such circumstances assumes that the person can learn from new information and ideas, and act on reason rather than emotion. Not trying to change his mind assumes just the opposite: that he is close-minded, inflexible, unreasonable and out of control.⁹² Empowerment

⁹⁰ Christopher Harper, *Mediation as Peacemaker: The Case for Activist Transformative-Narrative Mediation*, 2006 J. DISP. RESOL. 595, 600 (2006) (arguing that empowerment and mediator neutrality are a false conjunction and that under certain circumstances, mediators should take an active role in fostering transformational change); Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 665 and n.378 (2004) (“Conversations with real parents and school officials reveal that disputants enter mediation in order to achieve resolution and value mediators’ interventions that help them achieve that goal in a procedurally just manner” Thus, disputants seem to value mediation’s potential to improve their situation, even if such improvement is not accompanied by a personal transformation).

⁹¹ POM1, *supra* note 4, at 196 (describing how the mediator did not squelch the parties’ last minute doubts to save the agreement because to do so would have reversed the empowerment achieved in the session as a whole). B&F’s concern about mediators’ imposing value judgments on disputants is reminiscent of the 1970s debate among clinical law scholars over the issue of lawyers imposing value judgments on clients. *Id.* at 194. See, e.g., GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: NEGOTIATION* 223–36 (1978) (describing the “problem of values” in advising clients about negotiation choices), 265–73 (describing the role of “power, vulnerability, and regard for adversaries” in negotiation); DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* 148–53 (1977) (describing the role of values in clarifying client preferences in settlement negotiations); ANDREW S. WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS* (1976); DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO’S IN CHARGE* 168–77 (1974) (describing the role of values and professional ideological interests underlying the traditional and participatory models of client representation in personal injury disputes); HARROP ARTHUR FREEMAN & HENRY WEIHOFEN, *CLINICAL LAW TRAINING: INTERVIEWING AND COUNSELING* 89 (1972) (describing the values underlying the process through which lawyers can help clients “develop insight, work through problems, make decisions and effectuate solutions” in resolving disputes).

⁹² B&F are on both sides of this point. They list a number of questions the mediator could have asked the tenant to encourage her to think more carefully about the consequences of her decision, but they also seem to believe that it would have been possible to ask those questions without suggesting, even implicitly, that her decision was not the wisest one possible. POM1, *supra* note 4, at 156 (describing questions the mediator could have asked). Putting a judgment

should be seen as a means to an end, not an end in itself;⁹³ useful when it helps parties make good decisions, but destructive when it causes them to shoot themselves in the foot. Saying “it’s not my department” in such circumstances is an insult more than a sign of respect.⁹⁴

The Landlord-Tenant mediation is the longest and most fully annotated of the numerous case studies in the first edition of *The Promise of Mediation*, and there is a good deal more one could say about it, but the foregoing discussion should make it clear that there is no inevitable link between TDR practices on the one hand, and personal transformation or the development of moral character on the other. No one’s behavior in the foregoing cases was transformed from even one point in a dispute to another point in the same dispute, let alone into the future. Changing character by making new behavior disposition is a complicated process that involves more than just seeing the behavior in operation and practic-

into a question format does not change the character of the communication, however. “Are you sure?” is not a neutral response to “I’d like to do this.” It says, “Think again.” It is less explicitly judgmental than “That makes no sense,” but it communicates skepticism and perhaps disapproval, and that is disempowering in B&F’s scheme of things. B&F could loosen their definition of empowerment to avoid this problem, but that would add to the confusion surrounding the concept.

⁹³ B&F seem to say as much in another context when they distinguish TDR practices from “therapy [that] focuses on the process of learning how to handle problems.” POM2, *supra* note 4, at 227 (“in transformative mediation, supporting empowerment is never a sole objective; it is always linked to the possibility of recognition shifts as well. In therapy, empowerment is often an objective unto itself . . .”). *Id.*

⁹⁴ See Kressel, *supra* note 1, at 16 (finding that one of the major party complaints about mediators was that they were “too non-directive”). The mediator might have let the deal lapse because he felt a tacit sympathy for the tenant. Throughout the session he tried to express his ideas in neutral language, but he seemed to side with the tenant on most contested issues. The best example comes at the end of the mediation, when the tenant threw a tantrum and blew up the deal. She thought the landlord was charging more for rent than he needed to, simply because he could. She did not have much money, so her interest in the lowest possible rent was understandable, but there was no indication that the landlord was wealthy, or that he didn’t need money as well, and he had agreed to rent the new apartment at a below-market rate. This notwithstanding, the mediator characterized the tenant’s tantrum as an invitation to further dialogue, and suggested that the landlord might want to lower the rent one more time, pointing out that a market-rate tenant might be less responsible than the present one, and thus more costly in the long run (notwithstanding that the present tenant had not paid rent in five months). This is one of several instances sprinkled throughout the mediation in which the mediator seemed to translate the tenant’s views in a more detailed, forceful, and sympathetic manner than he translated the landlord’s views, and this tacit side taking might have encouraged the tenant to demand more than she otherwise would have. B&F say that the “mediator actually should have pushed somewhat harder with both the landlord and tenant before abandoning their tentative agreement,” but their examples of how he could have done this all involve pushing harder on the landlord. POM1, *supra* note 4, at 181–83, 195.

ing it for a short period of time. B&F seem to see the self as a plastic entity, capable of being overhauled in an instant, rather than a constant one, engaged in incremental learning and growth. Their idea of transformation involves a rupture with the past more than a continuation of it.

Character development is a never-ending process, not a momentary one, and legal disputes do not provide a particularly good setting for pursuing it. Most legal disputes are infrequent, discontinuous, and isolated events, involving different people with different personal histories, behavioral styles, interactional dynamics, relationship expectations, economic and social conditions, and cultural beliefs. They occur at unpredictable intervals and are about different substantive issues. When they include third party representatives, as they often do, those representatives are not always the same from one dispute to another, so that there is no necessary consistency between the guidance provided for navigating one dispute and the guidance provided for navigating another. Legal disputes also make people angry, impatient, distracted, and fearful, and these concerns cause them to focus on the immediate objective of ending the unpleasantness, rather than the long-term task of developing moral character.⁹⁵ Therapy may be able to change character, and legal disputes sometimes may provide a fruitful context for providing therapy, but therapy is not the work of most lawyers or an objective of most dispute settlements.⁹⁶

At the level of abstract theory, first generation TDR was pretty heady stuff. By its proponents' own accounts, it was a sure-fire path to illumination and goodness, a method for realizing one's highest and best use as a human being, and for achieving a state of ultimate moral development.⁹⁷ It was criticized extensively for making these claims,⁹⁸ and its proponents backed away from some

⁹⁵ B&F agree with many of these factual assertions but draw a different conclusion from them. POM1, *supra* note 4, at 191 (disputing parties typically are "defensive, suspicious, and hostile to the other party, and almost incapable of looking beyond their own needs It is the experience of conflict itself, whatever the context, that creates transformative opportunities for empowerment and recognition.").

⁹⁶ Legal disputes involving longstanding, continuous, and stable relationships (family disputes are a good example) may be an exception to this general rule. B&F argue that one should not be concerned about an overlap between TDR and therapy. Preserving strict divisions between the two, they claim, will hold dispute resolution theory back from realizing its transformative objectives. *Id.* at 97-9; POM2, *supra* note 4, at 225-28. *See supra* note 80.

⁹⁷ If dispute resolution theory came in categories of paint finish, one suspects that first generation TDR would be available only in "luminous, transcendent gloss."

⁹⁸ *See, e.g.,* Dorothy J. Della Noce, *From Practice to Theory to Practice: A Brief Retrospective on the Transformative Mediation Model*, 19 OHIO ST. J. ON DISP. RESOL. 925, 929 n.20 (2004)

of them, trimming their sails somewhat in a second generation of the Theory. Now, we turn to that second generation.

III. TRANSFORMATIVE DISPUTE RESOLUTION THEORY REFINED

The second edition of *The Promise of Mediation* continues to describe conflict as an ideal context in which to “shift to a new moral and social vision,”⁹⁹ one that frees people from the “vicious circle of disempowerment, disconnection, demonization, and alienation from self and others” that characterizes disputing in modern social life. It also continues to tout TDR as the best expression of that new social vision.¹⁰⁰ B&F organize their description of the

(summarizing the themes in the criticism of first generation TDR); Michael Williams, *Can't I Get No Satisfaction? Thoughts on The Promise of Mediation*, 15 MEDIATION Q. 143, 145, 149 (1997) (reviewing POM1) (arguing that problem solving and transformative mediation are not mutually exclusive, that the elements of transformative mediation have always been present in the problem solving approach); Milner, *supra* note 79, at 750-51 (“Bush and Folger’s narratives about these cases tell us little about the staying power for transformative mediation.” For example, to really see if transformative mediation meets its goal, the longer term impact on the participants in the mediation should be measured); DEBORAH M. KOLB & ASSOCIATES, *WHEN TALK WORKS: PROFILES OF MEDIATORS* (1994); Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms and Practices*, 11 NEGOT. J. 217, 236-41 (1994) (reviewing POM1); *THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES* (Sally Engle Merry & Neal Milner eds., 1993) (criticizing TDR for its failure to define transformative change) [hereinafter Merry & Milner].

The most interesting criticism came from Professors Merry and Milner in their study of the San Francisco Community Board Program, one of the first large-scale, dispute resolution programs based on the TDR model. Merry & Milner, *supra*; Robert A. Baruch Bush, *The Unexplored Possibilities of Community Mediation: A Comment on Merry and Milner*, 21 LAW & SOC. INQUIRY 715, 717 and n.5 (1996) (reviewing Merry & Milner, *supra* note 98) (describing the San Francisco Program as based on the TDR model). Merry and Milner concluded that the principal community created by the San Francisco Program was the group of young lawyers, new to town and volunteering to mediate disputes in the Program, and not neighborhood residents coming to the Program for help in resolving their disputes. In a sense, the Program functioned as a kind of dating bar for young lawyers, a kind of dispute resolution eHarmony. Merry & Milner, *supra* note 98 at 319 (concluding that the volunteers who ran the program were empowered but not the disputants who participated in it). This is not surprising. In dispute resolution, as in almost everything else, repeat players benefit the most. See Geoffrey A. Drucker, *The Postal Service's Decision to Use Transformative Mediation*, in CPR INSTITUTE'S RESOURCE BOOK FOR MANAGING EMPLOYMENT DISPUTES 59 (2004) (describing how people who participate in mediation multiple times are more likely to report a change in their approach to disputes than those whose participation is more limited). See also James R. Antes & Judith A. Saul, *What Works in Transformative Mediator Coaching: Field Test Findings*, 3 PEPP. DISP. RESOL. L.J. 97 (2002) (describing how the transformative effects of TDR training are limited to the mediators' understanding of transformative practice more than to the practice of TDR itself).

⁹⁹ POM2, *supra* note 4, at 24.

¹⁰⁰ *Id.* at 25.

Theory a little differently this second time out, changing the emphasis they gave to its different parts, and modifying the arguments they make to support it. With one notable exception,¹⁰¹ they do not alter the content of the Theory itself in any substantial way. Empowerment and Recognition remain the Theory's central elements, and transformation remains its principal goal. B&F also do not give up on the "save the world" claim,¹⁰² though now they describe it as a potential, rather than necessary, effect of TDR. They continue to maintain an exclusivist stance on the nature of dispute resolution, describing TDR as the one, true approach, with unique contributions to make to the field. They bolster the empirical argument for TDR by providing new case studies of the method in operation, and new empirical research documenting its effectiveness. I will discuss each of these topics in the sections that follow.

A. *Second Generation TDR: Conceptual Tweaking*

First generation TDR was based on a political and philosophical Weltanschauung B&F called the Relational Worldview,¹⁰³ but philosophy and politics do not have the same primacy of place in second generation TDR. B&F continue to ground the Theory in a Relational Worldview, but this time around they reconstitute it in psychological terms, as a "relational theory of human nature,"¹⁰⁴ a

¹⁰¹ See *supra* note 6 (change in type of transformation produced by TDR from POM1 to POM2).

¹⁰² Folger & Bush, *Conclusion*, *supra* note 2, at 463 ("parties who have worked within the transformative framework often come to see . . . that when inequities are challenged, supporting recognition between the parties can alter the character of these challenges in a way that sustains human connection and understanding. . . . A particularly good example of the importance of this insight . . . is found in the arena of ethno-political conflicts . . . [where] the belligerents themselves must do the heavy lifting . . . to step back from vengeance"). In some ways, the "save the world" claim makes more sense than the "transform moral character" claim. Ethno-political conflicts often involve continuous interactions among the same parties over time, and it is reasonable to expect more learning and growth in continuous relationships than in the one-shot interactions that make up the dockets of conventional dispute resolution programs. That said, it is difficult to think of many recent examples of ethno-political conflict in which the participants have "stepped back from vengeance" for any extended period of time.

¹⁰³ See *supra* note 9.

¹⁰⁴ POM2, *supra* note 4, at 54. The dividing line between psychology and philosophy is not hard and fast, of course, as a "theory of human nature" can express a philosophical vision as much as a psychological one. Universalizing theories of human rights are a good example. But B&F seem to have shifted the basis of their argument from first to second generation TDR, a conception of human goodness in the abstract (POM1) to an empirical belief in the most natural way to act (POM2).

belief in “a basic human nature or identity, common to all people, the core of which is a dual sense of both individual autonomy and social connection.”¹⁰⁵ This conception of human nature, they say, assumes that people have “inherent capacities for strength (agency or autonomy) and responsiveness (connection or understanding), and an inherent social or moral impulse that activates these capacities [and works] to counteract tendencies [toward] weakness and self-absorption.”¹⁰⁶ TDR reflects this worldview better than other dispute resolution theories, B&F argue, because it is uniquely capable of helping people “achieve a full integration of individual freedom and social conscience,” enabling them to adjust to a “social order . . . [that goes beyond] the individualistic ethic of modern Western culture.”¹⁰⁷ Conflict continues to be an optimal environment for developing moral character as B&F see it, but now for psychological more than philosophical or political reasons.¹⁰⁸

Though Empowerment and Recognition continue to play the central roles in second generation TDR,¹⁰⁹ Empowerment now receives the greater emphasis. Waiting for (as opposed to helping) parties to take control over their disputes is the most frequently repeated message of POM2.¹¹⁰ However dispute conversation pro-

¹⁰⁵ *Id.* at 60.

¹⁰⁶ *Id.* at 54.

¹⁰⁷ *Id.* at 24.

¹⁰⁸ This shift from politics to psychology does not represent an about-face for B&F so much as a change in emphasis. They relied on both types of arguments in POM1. Why they reconfigure the basis for their theory in this way is unclear. Perhaps they are just more at home with psychology than politics. Whatever the reason, the change is ill-advised. The argument for TDR failed the first time around because it was psychologically unrealistic, not because it was morally or philosophically unattractive, and reconstituting it around a “theory of human nature” calls attention to this problem more than it solves it.

¹⁰⁹ B&F define the two concepts in much the same way in both versions of TDR. In second generation TDR, Empowerment is “the restoration to individuals of a sense of their value and strength and their own capacity to make decisions and handle life’s problems,” and Recognition is the “evocation in individuals of acknowledgement, understanding, or empathy for the situation and the views of the other.” POM2, *supra* note 4, at 22. *But see* discussion of POM1’s use of Empowerment & Recognition *supra* at notes 26-44 and accompanying text.

¹¹⁰ *E.g.*, POM2, *supra* note 4, at 66 (summarizing the “mediator’s primary goals” as “(1) support empowerment shifts, by supporting—but never supplanting- each party’s deliberation and decision making at every point in the session where choices arise . . . and (2) to support recognition shifts, by encouraging and supporting—but never forcing—each party’s freely chosen efforts to achieve new understandings of the other’s perspective.”). The “Pontius Pilate” philosophy at the heart of the concept of Empowerment is illustrated nicely by a transformative mediation joke. Question: “How many [TDR] mediators does it take to change a light bulb? . . . [A]nswer: None. Mediators empower light bulbs to change themselves.” *Symposium, Addressing the “Redress:” A Discussion of the Status of the United States Postal Service’s Transformative Mediation Program*, 2 CARDOZO J. CONFLICT RESOL. 3 (2001), <http://cojcr.org/vol2no2/symposia01.html>. Even this does not capture the full force of TDR’s non-interventionist commitment. The punch

ceeds, and whatever agreements are reached, are for parties to decide. It is not a mediator's job to "get" the parties to settle. At first glance, this directive seems to express a deep respect for party autonomy, but demanding that parties take the initiative as a precondition of mediator assistance will be counterproductive in many instances. If parties to a dispute understand one another's points of view accurately, and are able to identify a mutually satisfactory resolution by themselves, usually they will do that; they will not bring the dispute to a mediator. On the other hand, if they do not know how to give recognition and exercise power, and someone does not show them how to do it, they are likely to remain trapped in their dysfunctional, uninformed states, and find it difficult to resolve their differences. Expecting someone to do something he does not know how to do will prove unavailing most of the time.

When parties bring a dispute to a mediator, therefore, usually it is because they are unable to resolve it on their own, and need help. A TDR mediator cannot respond to this request; however, because doing so would take control over the dispute out of the parties' hands. Instead, he must wait for behavioral mutations to occur (i.e., spontaneous and out-of-character empowerment and recognition moves by the parties), and act to reinforce them when they do. He cannot provide unilateral direction in any way.¹¹¹ This approach might work when the parties have an open-ended and

line should read: "None. Light bulbs change themselves." See POM2, *supra* note 4, at 224–25 ("The transformative approach assumes that the mediator does not have to impose a structure on the parties; parties are capable of structuring and ordering their conversation as they need to").

¹¹¹ It is virtually impossible to empower parties without being directive about it to some extent. TDR "mediators intervene to support party deliberation and decision making, and interparty understanding, rather than to shape any particular settlement, impose common ground, or encourage unsupported closure of issues." POM2, *supra* note 4, at 217. To do this, the mediators "listen intently for cues that offer opportunities to work with empowerment and recognition, highlight those opportunities for the parties, and constantly invite and encourage the parties to engage in a constructive dialogue, to consider new information and alternative points of view, to gain clarity, to deliberate or 'think out loud,' and to make decisions for themselves." *Id.* at 221–22. Interventions of this sort require individual judgments, however, about which party comments to explain, which to ignore, which to probe, which to challenge, which to accept at face value, and the like, and these judgments inevitably "impose process structure on the conversation." *Id.* at 224. In fact, as B&F acknowledge, even "to choose an approach to mediation is to choose a set of values; and to enact those values in practice is, in a sense, to 'impose' those values on the parties through the process that the mediator engages them in." *Id.* at 232–33. In making and acting on judgments of this sort, therefore, TDR mediators cannot avoid influencing the direction and nature of mediation. Even sitting quietly and saying nothing sends a tacit (although often ambiguous) message about how well things are going. A mediator's real choice is between being directive in a helpful or harmful manner; not between being directive or non-directive in the first instance.

unlimited amount of time to resolve the dispute, and can wait for behavioral mutations, but most of the time dispute resolution must work faster than natural selection.¹¹² The only other option, permitting a mediator to suggest resolutions to parties under some circumstances, and only to some limited extent (or to respond to party entreaties in that regard), would cost TDR most of its distinctiveness, and B&F seem almost phobic about that.

B&F try to avoid this problem by changing the focus of TDR from “party transformation,” to “conflict transformation,” but this does not help.¹¹³ There are only two ways to transform conflict: indirectly, by waiting for parties to learn new skills and values on their own and reinforce them when they use those skills and values in future disputes (i.e., wait for people to transform themselves and rely on them to transform conflict), or directly, by intervening in actual disputes to tell people what to do when they cannot figure it out on their own. B&F disavow the first strategy, as they should, but they must also disavow the second if they are to remain faithful to the principle of party Empowerment, and this leaves them with no principled way to describe TDR-induced transformation, of either people or conflict, over the long or short term.

¹¹² POM2, *supra* note 4, at 67. An anonymous reader of a draft of this article captured the spirit of TDR in movie promo format. He said: “Stay tuned for *POM3 The Movie*, in which people sit in a darkened theater until someone finally shouts, ‘Start the movie, already.’ A TDR mediator sitting in the booth recognizes the importance of this insight, transformation ensues, and the movie begins.” Even here, however, it is hard to know who or what was transformed, and whether the transformation, whatever it was, will carry over to darkened movie theaters in the future.

¹¹³ B&F may have mixed feelings about abandoning the personal transformation claim. The effects they ascribe to second generation TDR often include permanent changes in party motor skills, values, attitudes, and beliefs and collectively, these changes add up to changes in moral character. *Id.* at 35 (“When people can talk through difficult issues—making clear choices with greater understanding of those with whom they differ or disagree—they learn how to live in a world where difference is inevitable.”), 37 (“When parties are helped to change the quality of conflict interaction . . . it is possible to imagine fuller and fairer satisfaction of needs becoming a permanent condition.”), 233 (“But this is not to say that there aren’t potentially useful psychological impacts on parties who participate in transformative mediation. One possible effect of experiencing conflict transformation firsthand is that parties themselves may be changed in various ways.”). Reluctance to abandon the claim also may be evident in B&F’s commingling of different types of transformative effects in their arguments for second generation TDR. *Id.* at 35–36 (describing “conflict transformation” in terms of helping parties “recognize and exploit the opportunities for balancing strength of self and connection to others . . . [to] move outside themselves in attempting to understand and connect with others while remaining true to their own decisions and choices.”). Not wanting to let the claim go is understandable. Even Professors Fisher & Ury eventually came to accept the fact that it is not always possible to “separate the people from the problem” (the first step in their method). ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981).

Second generation TDR also no longer seems as fully committed to the “reform deliberative government” and “resolve ethno-political conflict” claims as the first generation of the Theory.¹¹⁴ B&F do not retract the claims, so much as discuss them in a less enthusiastic and more qualified manner,¹¹⁵ describing social change as a potential consequence of the adoption of TDR methods, rather than an inevitable one.¹¹⁶ Ironically, as the argument for TDR is narrowed in this way (i.e., is transformed), it also becomes stronger (because it has less to prove). However, narrowing the argument also causes TDR to lose much of its distinctiveness and makes it little more than a variation of communitarian dispute resolution. TDR proponents have two unacceptable options it would seem: define their theory to be distinctive but unbelievable, or define it to be believable but indistinctive. It is perhaps understandable that they have equivocated somewhat in making that choice.

B. *Second Generation TDR: Illustrations*

B&F respond to the empirical criticism of first generation TDR in two ways: by providing new case studies illustrating the transformative effects of TDR,¹¹⁷ and by pointing to new empirical

¹¹⁴ See e.g., Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1, 11–12 (1989) (“going through this mediation [is] for both parties, a direct education and growth experience, as to self-determination on the one hand and consideration for other on the other. . . . Simply put, it is the value of providing a moral and political education for citizens, in responsibility for themselves and respect for others. In a democracy . . . that must be considered a crucial public value and it must be considered a public function. . . . [T]he experience of the mediation process and the kind of results it produces serve the public value of civic education in self-determination and respect for others.”). The “change the world” argument remains popular with communitarian dispute resolution theorists generally.

¹¹⁵ See e.g., POM2, *supra* note 4, at 13 (according to the transformation story, the “unique promise of mediation lies in its capacity to transform the quality of conflict interaction itself [to] strengthen both the parties themselves and the society they are part of.”), 14 (giving empowerment and recognition a wider emphasis in conflict interaction would “help to transform society as a whole from a truce between enemies into a network of allies.”), 80 (“conflict transformation . . . has important public benefits, effects that advance the goals of society generally.”), 81 (“the public benefits of conflict transformation are quite important . . .”), 83 (“conflict transformation benefits not only private parties but society as a whole.”).

¹¹⁶ B&F also reaffirm their belief in the therapeutic potential of dispute resolution behavior and in their conviction that TDR is unique. *Id.* at 44–45, 87–89, 131.

¹¹⁷ None of the first generation case studies make it into the second edition of POM, but the new cases differ from the old ones mostly in the names of the parties and the nature of the substantive issues involved. Structurally and thematically, the stories all look pretty much the

studies of TDR programs in operation.¹¹⁸ Most of the new empirical research is based on exit surveys of participants in TDR programs asking them to describe their impressions of the experience.¹¹⁹ Did TDR experiences change the way they understood and analyzed disputes, the strategies they used to resolve them, and the satisfaction they felt with their outcomes?¹²⁰ I will

same. And as before, the cases are fictionalized summaries of reconstructed and imagined conversations rather than verbatim transcriptions of actual mediations.

¹¹⁸ Joseph P. Folger & Robert A. Baruch Bush, *A Response to Gaynier's "Transformative Mediation in Search of a Theory of Practice,"* 23 CONFLICT RESOL. Q. 123 (2005) (objecting to the criticism that TDR is not empirically grounded, and arguing that the Post Office REDRESS program has been studied more than any other dispute resolution program in the last ten years).

¹¹⁹ E.g., Lisa B. Bingham, *Employment Dispute Resolution*, 22 CONFLICT RESOL. Q. 145 (2004); Lisa B. Bingham et al., *Exploring the Role of Representation in Employment Mediation at the USPS*, 17 OHIO ST. J. ON DISP. RESOL. 341 (2002); Lisa B. Bingham & David W. Pitts, *Research Report: Highlights of Mediation at Work: Studies of the National REDRESS® Evaluation Project*, 18 NEGOT. J. 135 (2002); James R. Antes et al., *Transforming Conflict Interactions in the Workplace: Documented Effects of the USPS REDRESS™ Program*, 18 HOFSTRA LAB. & EMP. L.J. 429 (2001); Lisa B. Bingham & Mikaela Cristina Novac, *Mediation's Impact on Formal Discrimination Complaint Filing: Before and After the REDRESS™ Program at the U.S. Postal Service*, 21 REV. OF PUB. PERSONNEL ADMIN. 308 (2001); Cynthia J. Hallberlin, *Transforming Workplace Culture Through Mediation: Lessons Learned from Swimming Upstream*, 18 HOFSTRA LAB. & EMP. L.J. 375 (2001); Linda Morton & Floralynn Einesman, *The Effects of Mediation in a Juvenile Incarceration Facility: Reduction of Violence Through Transformation*, 49 CLEV. ST. L. REV. 255 (2001); Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in the USPS REDRESS™ Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L.J. 399 (2001); Jonathan F. Anderson & Lisa Bingham, *Upstream Effects from Mediation of Workplace Disputes: Some Preliminary Evidence from the USPS*, 48 LAB. L.J. 601 (1997); Lisa Bingham, *Mediating Employment Disputes: Perceptions of REDRESS at the United States Postal Service*, 17 REV. OF PUB. PERSONNEL ADMIN. 20 (1997). There have been several additional studies subsequent to the publication of POM2. See e.g., Tina Nabatchi, Lisa Blomgren Bingham & Yuseok Moon, *Evaluating Transformative Practice in the U.S. Postal Service REDRESS Program*, 27 CONFLICT RESOL. Q. 257 (2010); Robert A. Baruch Bush et al., *Supporting Family Strength: The Use of Transformative Mediation in a PINS Mediation Clinic*, 47 FAM. CT. REV. 148 (2009); Bingham et al., *supra* note 6. Other studies are summarized in SOURCEBOOK, *supra* note 2.

¹²⁰ The surveys do an excellent job of documenting the subjective impressions of TDR program participants, but they do not provide much direct evidence of the behavior on which those impressions are based. Given the accuracy problems in self-reporting, this is a serious omission. See Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231, 255 (1977) (people have "little or no direct introspective access to higher order cognitive processes," but do have direct access to the "focus of [their] attention," "[their] current sensations," and "[their] emotions, evaluations and plans"). The surveys do not control for party self-interest in aligning post-hoc impressions with ex-ante hopes, expectations, and intentions, or attempt to measure the effects of this factor on the responses received, so that frequently, it is not clear whether the research tests the subjective impressions of the respondents, or simply confirms them. In this regard, mediators are as unreliable reporters as the parties themselves. See Kressel, *supra* note 1, at 4 ("mediators are only partially in touch with their actual stylistic proclivities . . . the well springs of behavior are typically lost to conscious awareness for any oft repeated activity"), 31 (mediators' accounts of their

examine the new case studies and survey research results in that order.

1. The The Mark-Louis-Gwen Case

The Mark-Louis-Gwen case involved the mediation of an employment discrimination dispute in the Post Office REDRESS (Resolve Employment Disputes Reach Equitable Solutions Swiftly) program.¹²¹ Mark had filed a discrimination complaint against Louis and Gwen (principally Louis), his supervisors at the Post Office, for reasons B&F do not disclose. In a thirty minute soliloquy at the opening of the mediation, Mark described his work experience as a mail carrier (including his long-standing history of speaking up for employee rights), his understanding of his relationship with Louis (unfriendly), his general view of the relationship between labor and management (antagonistic), and his wish to do more with his life than simply deliver mail.¹²² He spoke uninterrupted during this opening statement, while the mediator, Louis and Gwen, listened attentively, not participating in any way.¹²³ When given the opportunity to speak, Louis explained his unfriendliness to Mark by saying that Mark had “made a career of opposing everything I try to do. [He believes there is] a war between management and employees, [that management] is the enemy, and [that his job is] to do everything [he] can to resist [it].”¹²⁴ Louis admitted that Mark did good work, but that he (Louis) did not want to “extend himself to someone who has spent years trying to make everything I do harder by being a ‘jailhouse lawyer[.]’”¹²⁵ Louis became visibly agitated as he spoke, and his comments grew harsh and pointed. When he finished, Gwen agreed with everything he had said, adding only that it was up to Mark to “take seriously what [management] does and want to do more.”¹²⁶ Mark listened attentively to Louis and Gwen, occasionally interjecting “I think I could do that,” when they described what they meant by

stylistic leanings “not very accurate”). See also DANIEL KAHNEMAN, *THINKING FAST AND SLOW* (2011).

¹²¹ POM2, *supra* note 4, at 27–31. See *infra* notes 204–22 and accompanying text for a description of the REDRESS Program.

¹²² Mark also expressed the concern that Louis would stand in his way if he applied for supervisor training. He was worried that Louis “had it in for him,” and that he (Louis) would “never, under any circumstances train [him] to do anything.” *Id.* at 28.

¹²³ *Id.* at 29.

¹²⁴ *Id.* at 29.

¹²⁵ POM2, *supra* note 4, at 29.

¹²⁶ *Id.* at 30.

“do more,” and over time the parties’ mutual antagonism and suspicion visibly began to subside. Whether it subsided because the parties began to understand one another more clearly, or simply because venting was therapeutic, is not clear. At the end of the conversation, Louis encouraged Mark to apply for supervisor training, Mark agreed to do so, and also to drop his discrimination complaint. Louis and Gwen extended their hands (presumably everyone shook hands—B&F do not say), and Louis said, “[i]t will be a privilege to train you.”¹²⁷

B&F characterize the case as illustrating the transformation of a potentially destructive conflict into a successful working relationship, made possible by the parties’ ability to move beyond defensive and self-absorbed posturing, and to acknowledge one another as people. In being honest about their deepest concerns (e.g., Mark’s fear of betraying his labor loyalties and jeopardizing his relationships with co-workers; Louis and Gwen’s objection to Mark as obstructionist and unsupportive), they found common ground on which to forge a new working relationship. As B&F put it, “as a result of this experience of their own power to redirect events, [the parties] left the session with a firmer connection with each other and a greater awareness of their own potential resources—resources they could draw from when confronted with other workplace conflicts.”¹²⁸

If B&F’s take on the events is correct, the Mark-Louis-Gwen story is heartwarming. Drawing on insight, courage, and honesty, ostensible adversaries beat swords into ploughshares and built a future together. Unfortunately, there is reason to be skeptical of that account, or at least curious about whether it captures all that was going on.

B&F’s recapitulation of the conversation in brief, dramatic, end-state vignettes, each with a fully described TDR lesson embedded prominently therein, makes it difficult to be sure, for example, whether Mark’s opening soliloquy told a continuous, coherent story, leading to an accurate (and perhaps surprising) disclosure of true wants and needs, conflicts and all; or whether it stumbled serendipitously and inarticulately through a series of half thoughts, grievances, admissions, free associations, accusations, and the like, all of which B&F organized into a self-serving retelling. Some de-

¹²⁷ *Id.* at 31.

¹²⁸ *Id.* at 34. This is another instance in which B&F imply that TDR changes personal character (“resources they could draw from when confronted with other workplace conflicts”) without actually saying it.

tail must have been lost, for example, when Mark's thirty minute statement was reduced to a single paragraph. Were there no dead ends, accusations, expressions of anger, retractions, qualifications, arguments, and other imperfect moments of the sort one expects to find in a verbal confrontation with an adversary?¹²⁹ Thirty minutes also is a long time for Louis and Gwen to sit impassively, not objecting to comments they think are mistaken, one-sided, incomplete, or offensive—they must have felt this way about some of what Mark said. Did the mediator do something to create an atmosphere in which this was possible, or did events not occur quite this way? A transcript would help answer these and other such questions, but B&F provide only summaries and encapsulations of what was said. Empowerment and Recognition might have been at work in the mediation, but without better evidence of what happened we have only B&F's word for it.¹³⁰

Consider this alternative take on events equally consistent with the limited facts B&F provide. Mark opened with a few well-considered sentences voicing the grievance that caused him to file the discrimination complaint. When no one interrupted, objected, or responded, he found himself “beyond his preparation,” so to speak, and started to think out loud, filling up the silence with the kinds of discontinuous and unconnected comments people turn to when their prepared remarks run out.

¹²⁹ POM2, *supra* note 4, at 27. TDR proponents are not above airbrushing such imperfections out of their mediation stories. See e.g., Antes et al., *supra* note 119, at 434 (describing how “non-fluencies and ellipses that often exist in conversational data” were removed in reconstructing the TDR case studies of the Post Office REDRESS Program). Janet Malcolm is the most prominent proponent of this questionable empirical reporting practice, having been found to have deliberately altered the content of statements attributed to Jeffrey Masson in a *NEW YORKER* magazine article to make the statement say what Malcolm thought they should. *Masson v. New Yorker Mag. Inc.*, 895 F.2d 1535, 1537–46 (9th Cir. 1989); *Masson v. New Yorker Mag. Inc.*, 501 U.S. 496, 502-08 (1991). See also Robert J. Condlin, “What’s Love Got To Do With It?” – “It’s Not Like They’re Your Friends For Christ’s Sake”: *The Complicated Relationship Between Lawyer and Client*, 82 *NEB. L. REV.* 211, 289 n.391 (2003) (describing Janet Malcolm’s empirical method of “paraphrased quotation.”).

¹³⁰ B&F use “take my word for it” arguments to support their analysis at several points in their defense of second generation TDR. See e.g., POM2, *supra* note 4, at 23-25 (“many in the mediation field have begun to grasp . . . the broader significance of these phenomena is becoming clearer”), 54 (“as we have seen with hundreds of parties in all of the different contexts that we’ve worked”), 59 (“substantial evidence supports both the view that what people dislike most about conflict are its impacts of disempowerment and disconnection, as well as the view that people have the capacities to reverse the cycle that produces them.”), 83 (“from the parties, groups, and mediators that we have worked with and studied over many years, we have learned that [what TDR] can offer is real.”), 218 (the eighty-percent case closure rate in the REDRESS program “has been generally interpreted to mean that parties have dealt with their conflict satisfactorily”).

Louis and Gwen might have been intrigued by Mark's comments, particularly if the comments were not perfectly consistent or fully formed. They might have thought his interest in being given more responsibility was incompatible with his single-minded loyalty to the worker class, for example; or seen him as struggling with a major dilemma of modern man (without putting it that way): wanting both to blend in and stand out, to be an equal part of a tightly knit community and a leader of that community at the same time, and not fully aware of how those interests work at cross-purposes.¹³¹ Louis and Gwen might have had similar feelings earlier in their careers, particularly if they worked their way up to management from the ranks, and were interested in what Mark had to say because he was telling their story as much as his own. There is no character or conflict transformation in such a scenario, of course, just an increase in mutual understanding as spontaneous and uncalculated comments make each party more transparent and understandable to the others. As in the Sensitive Bully case, the parties might simply have discovered that they did not have a conflict.¹³² Any communitarian method would have taken them as far.

The full story of the dispute is likely to be a good deal more complicated than either of these retellings. Mark had to return to the workplace after the mediation, and if he decided to drop his discrimination complaint he would have had to explain that decision to his friends and co-workers. They might have wondered what he had received in return, and if the answer was an opportunity to become a supervisor, they might have thought he had sold them and himself out. The story had only just begun with the mediation, in other words, but B&F do not tell us what happened next and without this information it is hard to know what, if anything, was transformed. Dropping the discrimination complaint might

¹³¹ Robert Post credits Erving Goffman with identifying this dilemma. Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CAL. L. REV. 379, 387-89 (1987) (describing how Goffman's conception of social life as a "series of performances" helps us understand "the tension we all experience between the desire for an embracing and common community and the urge toward individual independence and self-assertion; between the need for a stable, coherent, and sincerely presented self and the fragmented and disassociated roles we are forced to play in the theater of modern life."). B&F describe this insight as "a matter of basic human consciousness." POM2, *supra* note 4, at 60 ("every person senses that he or she is a separate, autonomous agent, authorizing his or her [sic] own life, and at the same time senses that he or she is an inherently social being, connected to other people in an essential and not just instrumental fashion.").

¹³² See *supra* text accompanying note 48, describing the Sensitive Bully Case ("Two people who thought they had a conflict listened open-mindedly to one another as each described his view of events and discovered that they did not disagree after all.").

have been the only tangible consequence of the mediation, and even that might not have happened. Even in its best light, it is not clear whether the mediation was a warm and fuzzy moment in an otherwise tense working relationship, or a harbinger of a new relationship to come. B&F suggest that the relationship was changed, but they offer no evidence of this and the claim is a little implausible. Long-time antagonists usually do not overcome principled differences simply by disclosing unresolved grievances, accumulated antagonisms, and perceived slights. If venting were that therapeutic, one would expect to find more signs of mental health in blog comments. Stylized stories of this sort do not do much to support the claim that TDR transforms anything.¹³³

2. The Jim and Susan Ellis Story

The Jim and Susan Ellis story is B&F's best illustration of the role imagination can play in constructing the empirical argument for TDR. The story involved a dispute between a brother and sister over the control of a family business. Jim and Susan's father, the founder of the business, was about to die. Susan had been his principal caretaker (she thought Jim should have helped more in that regard) and had played only a minor role in running the business. She wanted to change that division of labor and (together with her out-of-work husband) take "a larger role" in managing the business. Jim, on the other hand, preferred that she "stay out of the way."¹³⁴ The dispute was complicated by the set of assumptions and expectations the parties had developed over time as a result of their respective responsibilities and also probably by the role male and female stereotypes played in the creation of those responsibilities (B&F do not mention this last issue and the parties do not discuss it). Jim and Susan brought the dispute to a mediator for help in clarifying and resolving their differences.

B&F tell the story of the mediation in three short excerpts, each describing a key point of disagreement between Jim and Susan, and the corresponding background beliefs and emotions these points of disagreement triggered. The first excerpt lays out the basic facts of the dispute, while the second and third describe "paired

¹³³ Robert J. Condlin, *Learning From Colleagues: A Case Study in the Relationship Between "Academic" and "Ecological" Clinical Legal Education*, 3 CLINICAL L. REV. 337, 349–50 n.29 (1997) (describing how the use of "stories [in scholarship] . . . is always an advocacy move, used as much to make a point as discover one, even if the storyteller does not think so."). TDR may have had more of a transformative effect on dispute resolution scholarship than dispute resolution practice itself.

¹³⁴ POM2, *supra* note 4, at 42.

in the voting” colloquies between Jim and Susan that make up the core of their discussion. Interestingly, Jim and Susan’s individual statements in these colloquies have the same rhetorical structure. Each begins with the expression of an admirable personal belief, followed by an attribution of a less admirable belief to the other person, followed by an expression of anger at the other person for holding this (attributed) belief, and followed finally by an admission of guilt for feeling angry at the other person for holding this (attributed) belief.¹³⁵ In effect, Jim and Susan tell the same story, in the same way, but from opposite perspectives, as if they were archetypes rather than real people. Perhaps unsurprisingly, their statements also embody the theories of conflict resolution B&F find persuasive.¹³⁶ Their “conversation” turns out to be a dialogic recapitulation of the analytical points B&F make discursively in their text (even to the point of using some of the same technical language). Given these qualities, it is strange that B&F characterize the colloquies as “evidence” of TDR’s effectiveness,¹³⁷ treating them as real conversations rather than words put into Jim and Susan’s mouths.¹³⁸

B&F analyze Jim and Susan’s comments in much the same manner that they construct the comments’ content. They begin by stating a conclusion about the meaning of the comments,¹³⁹ and then attribute a motivating attitude, feeling, or idea to Susan¹⁴⁰ or Jim,¹⁴¹ which they then offer as evidence to support their conclusion about the meaning of the exchange.¹⁴² They prove their points with their assumptions, in other words, covering themselves a little by describing the conversations as illustrations of how Jim and Susan “might respond” to one another, not how they actually re-

¹³⁵ There is no indication in the story that Jim and Susan were identical twins.

¹³⁶ POM2, *supra* note 4, at 48 (listing the scholarship).

¹³⁷ They equivocate a little in doing this, saying “the evidence confirms the premise of the transformative theory, as reflected in the voices of Jim and Susan . . .” *Id.* at 49.

¹³⁸ *Id.* at 64–5 (“as Jim and Susan describe it,” “as suggested in Jim and Susan’s comments,” “Jim and Susan’s descriptions of their experience”).

¹³⁹ *Id.* at 46 (the “crisis of deterioration in interaction is what parties find most affecting, significant—and disturbing—about the experience of conflict.”).

¹⁴⁰ POM2, *supra* note 4, at 47 (“I didn’t like myself . . . for seeing him this way. But I just couldn’t help it. The helplessness and the hostility.”).

¹⁴¹ *Id.* (“I just didn’t know how to respond to that. . . . I was stunned . . . confused, I didn’t know what to do!”).

¹⁴² *Id.* at 49 (“The voices of Jim and Susan [confirm that] what affects and concerns people most about conflict is precisely the crisis in human interaction that it engenders.”).

sponded.¹⁴³ The colloquies would not have much evidentiary force described as “fictionalized accounts of an ideal TDR conversation,” and presumably that is why B&F chose not to describe them as such.¹⁴⁴ Like B&F’s other case studies, the Jim and Susan Ellis story seems designed to make a point rather than prove one.

3. The NPR Automobile Accident Story

The shape-shifting nature of B&F’s conception of transformation is on its best display in a story they report hearing on National Public Radio following the September 11th tragedy. A woman whose car was hit from behind by a middle-aged man, described as “obviously in some financial need,” chose to let the man pay for the damage directly (in small increments over several weeks) rather than “take legal action” against him.¹⁴⁵ She feared that turning the incident into a lawsuit would cause the man to “become a frequent recipient of steady threatening phone calls, winding up in court, and getting his wages garnished.”¹⁴⁶ This seems a little overly dramatic; property damage collisions usually do not generate front-page news stories, anonymous telephone calls, or lawsuits.¹⁴⁷ The woman also was concerned that “dump[ing] another load of terror, fear of the future, stress, and financial hardship on this guy,” would make her a “terrorist.”¹⁴⁸ But again, even in the special linguistic world of post 9/11, predicting that a fender-bender will cause post-traumatic stress disorder, and characterizing the act of reporting an accident to an insurance company as terrorism, seems a little over the (even metaphorical) top.

So be it. More important for present purposes is the fact that B&F describe the story as an illustration of TDR at work, a case in which “empowerment and recognition shifts are clearly visible . . . and the transformative impact is clear.”¹⁴⁹ Drawing on the inher-

¹⁴³ *Id.* at 46. B&F acknowledge that they have “altered details [of the dialogue] to preserve confidentiality[.]” but do not say what details were changed, or to what extent. POM2, *supra* note 4, at 41.

¹⁴⁴ In an earlier article Baruch Bush and a colleague described the conversation as a “fictional” “composite of the parties we’ve seen [in mediation].” Robert A. Baruch Bush & Sally Ganong Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 PEPP. DISP. RESOL. L.J. 67, 69 (2002). Yet, three years later, B&F describe it as “based on a real case mediated by one of our colleagues.” POM2, *supra* note 4, at 41.

¹⁴⁵ POM2, *supra* note 4, at 57.

¹⁴⁶ *Id.*

¹⁴⁷ The woman’s insurance company would decide whether to file a lawsuit, and almost certainly it would not.

¹⁴⁸ POM2, *supra* note 4, at 57.

¹⁴⁹ *Id.*

ent human “potential for conflict transformation, no matter what type of case is involved,” says B&F, the woman was able to reverse the “negative cycle [that] is almost always a part of the human experience of conflict”¹⁵⁰ and turn the accident into an opportunity for personal growth. B&F do not tell us the extent of the damage to the woman’s car, the cost to repair it, whether the woman had insurance, whether the state had an uninsured motorist program, or a number of other things one would need to know before deciding whether having the man pay directly was the woman’s best practical option, as well as her most sociable one.¹⁵¹ The woman characterized her motives as social, but there are reasons people are not asked to write their own letters of recommendation.¹⁵²

Giving B&F the benefit of the doubt in their characterization of the woman’s motives, however, there still is no evidence of conflict transformation at work in the story. The two parties came to the accident with the skills to cooperate and the disposition to do so (B&F acknowledge this), otherwise they would have behaved differently from the outset. Under stress people revert to type rather than invent new personalities.¹⁵³ Once involved in the dispute, they used these skills and dispositions to avoid a conflict, not transform one. Had either been a different person, or in a different mood, the conversation might have gone off in a different direction, but a mood state is just a mood state, not a conception of dispute resolution.

The story has an additional intriguing feature not present in the cases we have seen until now, and one that raises interesting questions about the scope of B&F’s conception of transformation. The man and woman did not start their interaction by acting badly and then make a mid-course correction. The woman (the only party whose behavior is described in detail) thought for a moment about suing the man, but she did not express that sentiment publicly, nor seriously consider filing a lawsuit. To the extent she transformed anything, she transformed a fleeting, private, negative thought into a positive, public behavior, making an internal intellectual and emotional transformation more than an external behavioral one.

¹⁵⁰ *Id.* at 58.

¹⁵¹ If the man truly were penniless it would not make any difference which option the woman chose.

¹⁵² See Merry & Milner, *supra* note 98, at 163 (“[C]omparisons of self-ratings in a variety of skills before training and after a year of experience showed no pattern increase in self-rated skill level. This finding was inconsistent with the volunteer’s perceptions of personal growth.”).

¹⁵³ There is no mention of a brain injury in the story.

If every internal change of heart is a TDR transformation, however, it is hard to know what is not. Is a private decision not to act on every bad thought one has in a dispute a transformative act? What about every bad thought suggested by someone observing the dispute? Or, broader yet, what about the worst possible way a person could act (or think of acting), whether thought of or not? Moreover, if not acting on a private, negative thought is transformative, is a second party, or even an actual dispute, necessary for transformation? Can there be one-party transformations, transformations within oneself, wholly independent of an actual dispute? Is TDR transformation just having second thoughts or changing one's mind about an issue? If yes, does that mean that the only people not regularly engaged in TDR transformation are those who never have had mixed views on any subject? B&F do not discuss these issues, of course, but it might help clarify their understanding of transformation if they did.

4. The Purple House Mediation

It is hard to know what to make of the Purple House mediation. It is the longest of the POM2 case studies,¹⁵⁴ the only one presented in a verbatim transcript, the one most extensively analyzed,¹⁵⁵ and the case B&F seem to hold up as the best example of TDR in operation.¹⁵⁶ Yet, in many ways, it is the hardest case to take seriously. The ostensible issue in dispute, whether a black homeowner (Elizabeth), violated the architectural covenants of her neighborhood association by painting her house purple (or mauve; the name of the color also was the subject of a mild dispute),¹⁵⁷ without permission from the association's architectural re-

¹⁵⁴ The transcript of the mediation and its accompanying analysis take up over seventy-five pages in the book. POM2, *supra* note 4, at 131–216.

¹⁵⁵ Each of the mediation's six segments is followed by three to six pages of analysis.

¹⁵⁶ See POM2, *supra* note 4, at 132 (describing the case as "a good example of [the] thoughtful, well-crafted practice of the transformative model . . . [It] conveys very effectively how transformative mediation is practiced."). B&F also see the case as an "important [example of] how transformative mediation supports parties as they address deep-seated and controversial issues." Folger & Baruch Bush, Conclusion, *supra* note 2, at 467 (the Purple House Mediation "demonstrated how parties' interaction can be changed constructively when mediators are skilled at working with . . . the expression of difficult identity conflicts," and makes clear to "many practitioners that transformative mediation is an approach to practice that enables mediators to be comfortable when parties want to address 'the tough stuff.'"). *Id.*

¹⁵⁷ POM2, *supra* note 4, at 137. Mauve was the name Elizabeth's art-student daughter gave to the color. Perhaps taking Shug's advice, Elizabeth embraced the beauty in purple, however, and used the term unapologetically. ALICE WALKER, *THE COLOR PURPLE* 191 (2006) ("I think it pisses God off if you walk by the color purple in a field somewhere and don't notice it.").

view committee,¹⁵⁸ is trivial taken literally.¹⁵⁹ The parties' discussion of the "deep" issue in dispute—whether the architectural review committee's objection to the purple color was racist¹⁶⁰—is little more than a Sixties set piece¹⁶¹ of the sort Tom Wolfe mocked in his depiction of the San Francisco OEO office in *RADICAL CHIC & MAU-MAUING THE FLAK CATCHERS*.¹⁶²

The basic story is easily told. Elizabeth, an angry black woman, and her assimilated daughter Bernice,¹⁶³ disagreed with Julie, the smug, clueless white head of the architectural review committee of Elizabeth and Julie's tony neighborhood over the appropriateness of the color Elizabeth and Bernice used to repaint their house.¹⁶⁴ Elizabeth attributed Julie's (and the committee's) objec-

¹⁵⁸ The committee might have been offended by Elizabeth's failure to follow association procedures for obtaining approval of a change in paint color as much as by her choice of color. Its decision did not emphasize this issue, but the issue seemed to linger just below the surface throughout the discussion.

¹⁵⁹ So it seemed to Elizabeth. POM2, *supra* note 4, at 172 ("ELIZABETH: And the more we talk about it, the more trivial it becomes, really. I mean it's so ridiculous, the color of our house—come on!").

¹⁶⁰ *Id.* at 173 ("ELIZABETH: I really don't want to go into [the racism issue]. It's just too deep"), 193 (B&F describing the racism issue as "too deep"), 209 (describing the discussion of the racism issue as at the "deepest level").

¹⁶¹ The movie *Guess Who's Coming to Dinner* is perhaps the most well-known popular example of this set piece. Interestingly, Elizabeth listed not being invited to dinner as evidence of the neighborhood's tacit racism. POM2, *supra* note 4, at 151 (Elizabeth described how "Every other person on her [Julie's] block, I was told, when they moved in, got baskets of welcoming. Our family did not. . . . We were the only blacks on her block"), 190 (criticizing the neighborhood for not "[r]eaching out . . . [and] inviting us to the table"). Elizabeth also gave examples of being excluded from neighborhood governance activities. *See id.* at 151 ("I have tried to get on several of the, uh, committees myself, and Julie ha[d] said, 'Well, I don't think so, maybe not at this time.'").

¹⁶² TOM WOLFE, *RADICAL CHIC & MAU-MAUING THE FLAK CATCHERS* (1970). Wolfe's use of *Mau Mau* as a derogatory verb was unfair. The *Mau Mau Uprising* was a complicated event in which all sides were responsible for atrocities to different extents. In fact, if the absolute number of people killed is the standard, the British were more blameworthy than the *Mau Mau*. *See* CAROLINE ELKINS, *IMPERIAL RECKONING: THE UNTOLD STORY OF BRITAIN'S GULAG IN KENYA* (2005); Fikru Gebrekidan, *Inside the Empire's Closet: Skeletons of War Crime, Mayhem and Murder* (April 2006) (review of ELKINS, *IMPERIAL RECKONING*), available at <http://h-net.msu.edu/cgi-bin/logbrowse.pl?trx=vx&list=h-west-africa&month=0606&week=d&msg=LNePktMpgUBP9RjuRg6n6g&user=&pw=>; Travils Kavulla, *With Study of Mau Mau, Prof Creates Masterpiece*, *THE HARVARD CRIMSON* (Feb. 24, 2005) (review of ELKINS, *IMPERIAL RECKONING*), available at <http://www.thecrimson.com/article/2005/2/24/with-study-of-mau-mau-prof/>.

¹⁶³ Pairing an understanding and docile daughter with an angry and unforgiving mother created a "good cop-bad cop" team, though it is not clear why B&F thought the homeowner side needed this additional tool. As a rule, Bernice's contributions to the conversation relieved tension more than they added substantive points, and in this sense she functioned more like a "porter at the gates of Hell" than a real party in interest.

¹⁶⁴ Elizabeth and Bernice thought they were being treated differently from white homeowners in the neighborhood who also had painted their houses unusual, or bright colors. *See* POM2,

tion to the color to an entrenched but unacknowledged racism,¹⁶⁵ the accusation brought Julie to tears,¹⁶⁶ the parties danced around the race issue for a period of time, eventually confronted it, albeit reluctantly, and then, when all hope of a reconciliation appeared lost, the sun came out, and a new day dawned.¹⁶⁷ Elizabeth did an about-face, and she and Julie joined forces¹⁶⁸ to lead a biracial effort to integrate the neighborhood association.¹⁶⁹ All was not forgiven, of course,¹⁷⁰ but now there was reason to hope that someday it might be. The characters are overdrawn with such an equal opportunity enthusiasm that neither race had a disproportionate reason to feel insulted.¹⁷¹

The mediation was based on a real-life dispute, according to B&F, and was conducted in an unrehearsed and unscripted fashion by professional actors given “basic information about their charac-

supra note 4, at 138 (“ELIZABETH: I could name you at least five to seven other members of the community who have painted their homes other colors than gray, tan, or yellow, that . . . is so typical of the architectural control committee.”), 147 (“ELIZABETH: [O]n a vendetta! Now four doors or five doors down, Mr. Wataski painted his house what, that salmon color, or blue with salmon color. Nobody objected to him!”).

¹⁶⁵ *Id.* at 203-04 (“ELIZABETH: Julie, I’m really not only addressing the committee and the board. I’m not holding you accountable for the committee and the board totally. There are several incidents in the community, some of which I have named, that you have been doing, I feel, that have been racist.”). B&F see blaming Julie for the neighborhood racism as Elizabeth’s attempt to “connect” with her. *Id.* at 195. This is reminiscent of their characterization of the tenant’s tantrum at the end of the Landlord-Tenant case in POM1 as an invitation to “further dialogue.” See *supra* note 94.

¹⁶⁶ After all, she has a black son-in-law. *Id.* at 152, 173. One gets the sense that the “professional actors” re-enacting the mediation (see *infra* note 172 and accompanying text) were having fun with their roles in moments like this.

¹⁶⁷ POM2, *supra* note 4, at 208 (“ELIZABETH: [her voice lighter than at any time during the session] Well, we’ve started the healing of four hundred years of racism – but we still have a purple [she corrects herself] . . . mauve house!”).

¹⁶⁸ *Id.* at 187 (“JULIE: . . . There are no African Americans, Asians—she’s right—on the board. And I think that’s very unfortunate. And I’d like to see if maybe there isn’t something we can do to work on that, independent of this, because it is a matter of election, and elections are coming up soon, and there might be something that we could do to work on that.”).

¹⁶⁹ Earlier, they had agreed to resolve the paint color issue by asking the board to determine whether a change in color qualified as a “structural change” within the meaning of the association covenants. *Id.* at 176-77 (“ELIZABETH: . . . If you want to take it to the board with a neutral presenter, fine, . . . [pause] . . . fine.”) Julie offered to draft a letter to the board that Elizabeth could edit “in any way [she] wanted to.” *Id.* at 179.

¹⁷⁰ POM2, *supra* note 4, at 190 (ELIZABETH: We cannot heal four hundred years of racism in one day.), 210 (“ELIZABETH: [doing] something to make the committees and the board more diverse . . . will *not* suddenly make all these feelings . . . suddenly disappear.”).

¹⁷¹ It would have been a nice twist, for example, to depict the black character as calm, rational, well mannered, and reasonable (Bernice was depicted in this way but she was not a major player in the dispute), and the white character as loud, belligerent, overbearing, and emotional.

ters and the facts of the dispute.”¹⁷² A “private practitioner” played the role of the mediator.¹⁷³ Discussion consisted principally of posturing,¹⁷⁴ pontificating,¹⁷⁵ name-calling,¹⁷⁶ sarcasm,¹⁷⁷ condescension,¹⁷⁸ threat,¹⁷⁹ ridicule,¹⁸⁰ hyperbole,¹⁸¹ belligerence,¹⁸² and

¹⁷² *Id.* at 132. It would be useful to know when the case was developed and what the actors were told about their characters.

¹⁷³ *Id.* at 133.

¹⁷⁴ *Id.* at 170 (“ELIZABETH: Oh, don’t, please, don’t do that, just don’t do that.”).

¹⁷⁵ POM2, *supra* note 4, at 191 (“ELIZABETH: [ignores Julie and continues, very forcefully, again addressing the room at large and not looking at Julie directly] And first of all, somebody has to admit – not deny, but admit. That’s the first, that’s when the healing begins. I heal if I say, ‘I have a problem.’ Then I can face the problem. But to deny that I have a problem? To deny that – if I’m an alcoholic, and I say, ‘I’m not an alcoholic?’ The first step is when you stand up and you say, ‘I am an alcoholic!’ That’s when the healing begins. ‘Yes, I am a racist!’ [clapping her palm to her chest, and then slapping it against her other hand, for emphasis] That’s when the healing begins.”).

¹⁷⁶ Elizabeth’s charge that Julie was a racist is the most prominent example. *Id.* at 141, 146–48, 151, 158, 163, 171, 175 (“JULIE: [to Elizabeth] You brought it up. You did, you started it. To me, this was an issue of homeowners and colors and covenants, and you threw the racism into this.”).

¹⁷⁷ *Id.* at 139 (“JULIE: [with some sarcasm] Actually, polka dots would not be acceptable either.”), 175 (“ELIZABETH: Any racist I know says, ‘I’m not a racist. My best friend is black. I’m not a racist.’”), 189 (“ELIZABETH: [A]nd after that, she goes into ooh, very conciliatory, ‘We can make the board diverse.’ [suddenly almost spits out her words, contemptuously] D-d-d-duuhhhhhh!!! Is this news?”), 190 (“ELIZABETH: . . . But then you say ‘Ooh, I feel so bad, somebody called me a racist. I’ve got a son-in-law who’s black . . . You’ve taken the little ‘teeny tiny step,’ OK? You’ve taken it. Now feel good. You’ve taken the tiny little step. Thank you, thank you!!!” [putting her hands together and ‘bowing’ in mock appreciation]), 197 (“JULIE: [also ironic and bitter] God forbid we should try.”).

¹⁷⁸ POM2, *supra* note 4, at 137 (“JULIE: And, uh, honestly, if you could see it, it stands out in – my apologies [Julie glances at Elizabeth here, then turns back to mediator] – but in a way that is just not really, not in keeping with the rest of the community.”).

¹⁷⁹ *Id.* at 159. (“ELIZABETH: . . . OK, now what? We’re not going to change it.”), 161 (“ELIZABETH: [to Bernice] No, honey; no, honey. Honey, we’re not going to repaint it.”), 163 (“ELIZABETH: I think we have gone as far as we can go. I believe you’re talking about seeing a lawyer. . . . so perhaps we should let some legal minds really settle it from here.”), 176 (“ELIZABETH: I want you to know that, irregardless [sic], we are not changing the color of our house. So if you feel it will assuage you to take it to the board, fine”), 178 (“ELIZABETH: We [will] have our day in court.”).

¹⁸⁰ *Id.* at 152 (ELIZABETH: [mocking Julie’s statement that her son-in-law is African American]: [dismissive and impatient] “Oh please! Listen, Julie, that is like saying, ‘My best friend is black.’ Please!”); 172 (“ELIZABETH: And the more we talk about it, the more trivial it becomes, really. I mean it’s so ridiculous, the color of our house – come on! [shakes her head as if in disbelief]”), 204 (“ELIZABETH: And I’m saying to you, the reason I haven’t turned on a dime and said, ‘Oh, thank you, thank you, great!’ is because you’ve been here eight years, and what has it taken for you to make those steps?”).

¹⁸¹ *Id.* at 210 (“ELIZABETH: The fact that you sit at this round table today and say to my daughter and myself, ‘Let us now open up the committees. Let’s do something to make the committees and the board more diverse’ – that’s fine. It will not suddenly make all these feelings – make your eight-year history of action, or the twenty-some-odd-year history of this community – suddenly disappear! [suddenly raises her voice dramatically] If the Ku Klux Klan came and

general diva-like behavior,¹⁸³ of the sort professional actors might think characteristic of the lives of ordinary folks. Notwithstanding its detours, impasses, asides, and dead ends, the mediation played out pretty much the way TDR proponents say it should have, right up to the predictable happy ending.¹⁸⁴ For all of B&F's efforts at verisimilitude, the story looks like all of their other stories, just a lot longer, and with a lot more drama. Think of it as a mediation opera without the music.

There were legal issues in the case, and the possibility of litigation in the background, but those factors did not play a significant role in shaping the discussion (notwithstanding that each party made it clear that she had consulted a lawyer before coming to the meeting).¹⁸⁵ Occasionally, Elizabeth made a "legal" argument (e.g., that a change in paint color was not a "structural change" within the meaning of the association covenants),¹⁸⁶ and periodically she threatened to "see you in court,"¹⁸⁷ but she spent most of her time challenging Julie's (and the association's) motives in making an issue of the paint color to begin with, and vowing not to give in to the move. The case appears to have been developed for a

hung, God forbid, lynched somebody – uh, uh, uh [struggling for words, gesturing] – and then today they want to say, 'I'm sorry' . . . it's not going to erase the horror, the hurt and the ugliness of that period!").

¹⁸² POM2, *supra* note 4, at 139 ("ELIZABETH: [gesturing to Bernice to stop, and responding sharply to Julie] She [Julie] doesn't have to define it. We like the color! We have paid, what, \$650,000 for this house, and I think we can paint it any color we want to – polka dots – if it's our choice! We don't have to defend our taste to you! [almost spitting out her words at Julie]").

¹⁸³ *Id.* at 175 ("ELIZABETH: [to the mediator] Please, can we end this torment?"), 190 ("ELIZABETH: I'm sorry, but I just . . . This is too much!").

¹⁸⁴ B&F describe the happy ending as evidence that empowered parties, when left to their own devices, consider all relevant issues in a dispute and resolve each one fairly and reasonably. *Id.* at 209–14.

¹⁸⁵ *Id.* at 163 ("ELIZABETH: I believe you're talking about seeing a lawyer. . . . We certainly have consulted with ours . . .").

¹⁸⁶ POM2, *supra* note 4, at 148 ("ELIZABETH: We did not change the structure. To put paint on a surface is not changing the structure!"), 138, 157–59, 162 (various arguments by Elizabeth to the effect that paint color is not covered by the neighborhood covenants). Julie also made such an argument. *Id.* at 162 ("JULIE: It is true that in the covenant there is nothing about painting. . . . That is absolutely true; you're right. It has been the interpretation of this committee that the language that I've referred to included what we perceived as, uh, color choices that are not in line with the color choices on other houses in the community . . . but we're just one committee . . . I would certainly be willing to take this conversation to the board and see if they have another interpretation."). Ironically, the decision to take the issue to the association board meant that it would be decided on legal grounds, in much the same fashion as if it had been litigated in court. When all is said and done, the paint color issue might have ended where it began, still in dispute, awaiting an imposed resolution, the parties' efforts at mediation notwithstanding.

¹⁸⁷ *Id.* at 173, 179.

general audience, perhaps for dispute resolution courses in high school or college, more so than for lawyers or law students, and B&F's principle purpose in using it seems to be to illustrate the usefulness of non-directive intervention techniques ("reflection," "summary," and "check-in," in their terminology)¹⁸⁸ in helping parties resolve conflicts on their own.¹⁸⁹

The major "transformation" in the story was Elizabeth's decision to stop accusing Julie of being a racist and agreeing to work with her to integrate the neighborhood association. Julie made a similar shift, from being oblivious to the neighborhood's latent racism, to recognizing the need for a greater sharing of power in association governance, but her about-face was almost lifeless compared to Elizabeth's. The race issue had simmered just below the surface from the beginning of the session, but the mediator had been careful not to call attention to it. Julie raised it directly only after the parties reached a provisional agreement on what to do about the paint color issue, and only then was it discussed at length.¹⁹⁰ At first, Elizabeth resisted discussing race directly,¹⁹¹ notwithstanding that she had introduced the issue earlier in the mediation,¹⁹² and was the only one to refer to it on a regular basis

¹⁸⁸ It seems to gild the lily a little to use three terms to describe what, in effect, are variations of the question, "Is this what you would like to do?" See Kressell, *supra* note 1, at 23 (the "most characteristic intervention [by transformative mediators] was frequent summarizing of the parties statements and a determined effort not to express an opinion or influence the agenda in any way.").

¹⁸⁹ POM2, *supra* note 4, at 143-46 (describing the use of reflection); 154-56 (describing the use of summary), 157 (describing the use of check-in). See also POM1, *supra* note 4, at 154, 156 (describing the technique of following someone around linguistically and "mirror[ing] her statements"). See *supra* note 16 (describing how TDR borrows non-directional intervention technique from social psychology). This laissez-faire approach to intervention reminds one of an old joke about the technique of reflection. The joke is told in the form of an exchange between a patient and counselor.

PATIENT: I'm going to jump out of that window and commit suicide.

COUNSELOR: You're telling me that you're going to jump out of that window and commit suicide.

PATIENT: [runs over to the window and jumps out]

COUNSELOR: You just ran over to the window and jumped out.

PATIENT: [Screams on the way to the ground] "Aaaarrrrgghhh." [Hits the ground and goes "splat!"]

COUNSELOR: You're telling me "Aaaarrrrgghhh – splat!"

Sometimes, empowerment is not the overriding value and intervening actively is unavoidable.

¹⁹⁰ POM2, *supra* note 4, at 187-88, 197-207.

¹⁹¹ *Id.* at 153, 173, 175, 188, 197.

¹⁹² *Id.* at 141.

throughout.¹⁹³ But then, with all of the panache (and reality) of a Dan Brown ending, she reversed course, turned her feelings “on a dime,” and marched off with Julie, reluctant hand in reluctant hand, to reform their small corner of the world.¹⁹⁴ She said things immediately before this transformation that were as accusatory as anything she had said earlier in the mediation, but then, in an instant, she did an about-face and embraced Julie as a newfound compatriot. The change was instantaneous, almost magical, as if some extra-terrestrial force had struck Elizabeth; no one could have seen it coming.

B&F characterize Elizabeth’s change of attitude as “neither sudden nor unbelievable . . . but rather a natural outgrowth of the way the conversation had progressed.”¹⁹⁵ The change may have been “natural”—the story does not provide enough background information about Elizabeth to know for sure—but it was undeniably sudden, and at least a little implausible. Perhaps venting helped Elizabeth let go of her anger, and freed her to turn her attention to more positive purposes; almost no one stays angry forever.¹⁹⁶ Or perhaps she stopped berating Julie because Julie did not fight back, at least not with an equal level of energy and enthusiasm, and at some point she decided that it was unfair to beat relentlessly on a defenseless person.¹⁹⁷ Or perhaps Elizabeth realized that she was angry at the neighborhood in general, not Julie in particular, and that punishing Julie missed her proper retributive target.¹⁹⁸ Trans-

¹⁹³ *Id.* at 146, 147, 151 & 173.

¹⁹⁴ POM2, *supra* note 4, at 207 (“JULIE: Would you work with me? Will you help me to work with you? ELIZABETH: [smiles and nods at Julie] I will. Julie, I would like you to help me to work with you. I will work with you. I will do my best. I will do my best.”).

¹⁹⁵ *Id.* at 213.

¹⁹⁶ Except perhaps Stephen J. Field, a former Chief Justice of the United States Supreme Court and author of the well-known personal jurisdiction opinion of *Pennoyer v. Neff*. Field’s biographer wrote of Field that “[w]hen Field hates, he hates for keeps.” G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 94 (1988).

¹⁹⁷ Unless, of course, it was a strategy. Julie may have intended to exhaust Elizabeth, causing her to punch herself out linguistically, so to speak, using a mediation version of Muhammad Ali’s well-known rope-a-dope defense. As a rule, Julie did not attack Elizabeth directly. *But see* POM2, *supra* note 4, at 174 (“JULIE: [to Elizabeth] You brought it up. You did, you started it. To me, this was an issue of homeowners and colors and covenants, and you threw the racism into this.”), 202 (“JULIE: I just think you think everybody who’s white is racist.”). Snide and condescending comment was more her conversational weapon of choice. *See id.* at 139 (“JULIE: [with some sarcasm] Actually, polka dots would not be acceptable either.”), 197 (“JULIE: [also ironic and bitter] God forbid we should try.”).

¹⁹⁸ Elizabeth explained her change of heart by saying God would not want her to hurt Julie. *Id.* at 207 (“ELIZABETH: Julie, . . . I am a woman of God. . . . And I don’t want to hurt anyone. And as much as I may disagree with you, I don’t want to leave you hurt! I am extending my hand. I don’t want to hurt you.”). One wonders why God took so long to speak. Perhaps He was

formational epiphanies of this sort are a defining feature of B&F's stories; however, so Elizabeth's change of heart did not come as a complete surprise. The only unusual feature of the story is that B&F chose to rely on professional actors to provide their most compelling example of transformation.

It is difficult to find anything in the mediator's behavior responsible for either party's change of heart. He ignored the racism issue throughout the early stages of the mediation, and when finally forced to confront it, talked around the issue in long, rambling, incoherent, repetitive statements that seem designed to dampen emotion more than clarify what was being said.¹⁹⁹ He spoke more frequently during this part of the mediation than at any other time, almost as if he was trying to keep a lid on the discussion and prevent it from getting out of hand. B&F characterize his participation as an attempt to empower the parties, but it is difficult to understand how talking a subject to death creates more of an opportunity for parties to take control.

Due to the fact that the Purple House Mediation was theater and not real life, there is no way to know whether it produced the transformations the story seems to imply. Elizabeth and Julie, at least the Elizabeth and Julie portrayed by actors, never prepared a proposal to take to the neighborhood association board, Elizabeth never ran for a position on the board, and Julie never invited Elizabeth and Bernice to dinner.²⁰⁰ Elizabeth's decision to stop accusing Julie of racism might simply have been a move to end the mediation on a dramatic note, and Julie's acknowledgement that black residents had been marginalized and disrespected by the neighborhood association might have been just her way of exiting gracefully from the drama of the situation. Many hurtful things were said during the mediation, and if the scenario had been real, Elizabeth and Julie would have had much to sort out, both individually and together, before they could have become friends or even

undergoing a transformation of His own, from avenging angel to forgiving patriarch, and as with human transformations, it took Him a while to make the adjustment.

¹⁹⁹ POM2, *supra* note 4, at 198–99. “MEDIATOR: It might be just worthwhile to, in terms of what sort of someone sitting over here hears you saying . . . that in terms of this larger issue of, of racism, relations between white and black, black and white, that—apart from the feelings, apart from the feelings, not that that isn't a major part of it—but in terms of your word healing, Elizabeth, that you may have different ideas about what that takes, what that means, what that would take. Your comment was first you have to admit to what the situation is and, . . . or, for example, you were saying, reaching out means coming over and knocking on the door. It means” At this point Elizabeth interrupted, thankfully. It is hard to find a coherent theory of intervention even tacitly present in these comments.

²⁰⁰ B&F do not say what happened in the actual mediation on which the story was based.

colleagues.²⁰¹ B&F's faith in the transformative power of TDR makes an examination of these issues unnecessary, however, and thus removes the need to provide the rest of the story.²⁰² In the end, the Purple House Mediation is an exuberant if somewhat overdone dramatization of the difficulties involved in discussing race in this country, and not evidence, compelling or otherwise, of TDR's power to transform anything, whether people or conflict.

5. Empirical Research on TDR

In the thirty-plus years since TDR first emerged as a distinctive dispute resolution theory, a number of large-scale organizations have adopted the model for their in-house employee grievance systems. The United States Post Office, the Transportation Security Administration, and the Raytheon Corporation, are the most well-known examples.²⁰³ As the use of the TDR model has increased, so too has the body of empirical research on its effectiveness. There have been attempts to document TDR produced transformations in statistical reports, participant exit surveys, reconstructed case studies, focus group interviews, natural experiments, transcript discourse analyses, and meta-analyses of published and unpublished studies.²⁰⁴ Participant exit surveys make up the largest single subdivision of this work, and provide the basis for most of the empirical claims made for TDR.²⁰⁵ Survey

²⁰¹ B&F say that "the actors . . . were so affected [by the discussion of the racism issue] that they took several hours to discuss what had occurred and its implications for their own lives." POM2, *supra* note 4, at 208. There is no reason to doubt this, of course, though it may say more about the actors than the mediation.

²⁰² There is nothing wrong with trusting one's assumptions and beliefs as long as one also occasionally verifies them. Ronald Reagan made the "trust but verify" expression popular in this country in the 1980s, but Vladimir Ilyich Lenin used it long before Reagan, and it is a rough translation of the much older Russian proverb *doveryai, no proveryai* (Доверяй, но проверяй). SEAN WILENTZ, *THE AGE OF REAGAN: A HISTORY, 1974-2008* 261 (2009).

²⁰³ Della Noce & Prein, *supra* note 16, at 93-94.

²⁰⁴ *Id.* at 93-105 (describing the "Direct Research on Transformative Mediation").

²⁰⁵ TDR proponents also ground empirical arguments on case studies constructed from focus group discussions with people associated with the REDRESS Program. In the most extensive example, forty-five mediators and eleven mediation specialists involved with the REDRESS Program were asked to describe "significant moments [in REDRESS mediations they had conducted or observed] where [they thought] important positive changes in the parties' behavior occurred" as a result of the use of TDR methods. Antes, et. al., *supra* note 119, at 430-33. These interviews were audio-recorded, the recordings were transcribed, and thirty-four case studies were constructed from the transcripts. *Id.* at 431. The case studies then were rewritten in narrative form and used as a "quantitative measures of participants' assessments of the [Program]." *Id.* at 429. On the basis of the cases, Antes and his colleagues concluded that "parties who have participated in the REDRESS mediations—both managers and employees—are highly satisfied with the program and believe it offers a constructive approach to addressing employment dis-

research, however, can be problematic, even when done well, and the survey research on TDR is no exception. Often, it raises or leaves unresolved as many questions as it answers, and the questions it answers often have little or no relationship to the transformation claims at the heart of TDR theory. Studies of the Post Office REDRESS program provide perhaps the best example of both the sophistication of this research and the weaknesses in it.²⁰⁶

The Post Office adopted the TDR model for its internal Equal Employment Opportunity (EEO) grievance system in 1994. There had been an alarming increase in the number of employee EEO complaints over the years and nothing the Post Office tried had been able to stop it. The Office wanted a grievance mechanism that would address the root causes of conflict between labor and management, one that not only would resolve individual grievances in a lasting and satisfying manner, but also that would teach supervisors and employees how to “improve the way [they] handle conflict and ultimately to empower [them] to more efficiently manage their conflicts for themselves.”²⁰⁷ The Post Office hired the Indiana University Conflict Resolution Institute (“ICRI”) to track and evaluate the development of the Program.²⁰⁸ ICRI collected data on the program using several different types of research instruments,²⁰⁹ but its primary tool was the participant exit survey.²¹⁰

Responses to the REDRESS exit surveys documented a distinct shift in employee perceptions of the Post Office workplace

putes in the workplace.” *Id.* at 429. This is a strange way to prove a point empirically. In effect, purposely-created TDR success stories are offered as evidence of TDR’s success, without any discussion of the stories’ representativeness, or consideration of the argument’s circularity. *See also* POM2, *supra* note 4, at 223–24 (describing how a TDR mediator makes correct intervention decisions seemingly because a TDR mediator makes correct intervention decisions). Arguments of this sort remind one of the empirical case for flat earth cosmology: that the earth is a dish, resting on the back of an elephant, standing on the back of a turtle, and after that it is turtles all the way down.

²⁰⁶ The REDRESS program is the largest TDR based dispute resolution program in operation anywhere in the country; it also the most long-standing, and the most extensively examined. Bingham, et al., *Dispute System*, *supra* note 6, at 47 (“The REDRESS program is the most extensive, and most extensively studied, field test of employment mediation to date.”). REDRESS studies are the gold standard for empirical research on TDR. If they do not support the Theory’s Transformation claims, nothing does.

²⁰⁷ *Id.* at 42.

²⁰⁸ *Id.* at 27. ICRI monitored the REDRESS program from its initial pilot project in 1994, through its national implementation in 1998, until 2006.

²⁰⁹ *Id.* n.125 (describing the “systems for continuous, contemporaneous, distributed data collection” developed by the ICRI).

²¹⁰ Bingham, et al., *Dispute System*, *supra* note 6, at 31-32 (“A primary feature of the REDRESS evaluation design was exit surveys that mediators distributed to the disputants at the close of the mediation session.”).

climate after the implementation of the TDR model.²¹¹ There was a significant increase, for example, in the number of employees and supervisors who thought “communicating openly,” “not giving direct orders,” and “listening” attentively, were useful behaviors for resolving disputes.²¹² The surveys also showed a substantial increase in the number of employees and supervisors who thought “doors were [more] open” to discussing problems; “yelling, arguing, disciplining, or intimidating . . . [were] drastically less common;” communication was greatly improved; and office “relationships were better or much better”²¹³ after the adoption of the TDR model. Accompanying this change in the perception of workplace climate was a statistically significant decline in the number of formal EEO complaints filed by postal employees.²¹⁴ TDR proponents attribute the decline to the REDRESS Program’s instructional effects, arguing that experience with the Program taught employees and supervisors how to resolve disputes more effectively on their own, transforming the parties into more mature individuals with a greater capacity for dealing with conflict.²¹⁵ The reports on workplace climate can be taken at face value to the extent that the reports describe perceptions, sensations, and emotions rather than decision processes,²¹⁶ but the conclusion that employees learned to manage conflict more effectively on their own is open to debate.

²¹¹ *Id.* at 44–46 (describing workplace climate before and after REDRESS).

²¹² *Id.* at 43. These transformations, while important, are changes in espoused theory, not behavior, and thus may or may not be evidence of employee practices in future disputes. To treat a change in beliefs as a change in behavior is to assume that the thought (including the prompted thought) is always father to the deed, but as Chris Argyris and Donald Schön showed many years ago, that is not always (or even typically) the case. *See* ARGYRIS & SCHÖN, *supra* note 47, at 6–7, 174–80 (describing the difference between “espoused theory” and “theory in use”). It is not surprising that employees would espouse things they had been trained to say, but it does not follow from this that they would act in accordance with those statements.

²¹³ Bingham et al., *Dispute System*, *supra* note 6, at 44–45. (finding that other results were more mixed; Survey respondents also reported “an increase in firing as a disciplinary method” and an increase in supervisors “respond[ing] to conflict by telling [employees] to ‘go file a complaint’” after the introduction of the TDR model).

²¹⁴ Over a six-year period the number of formal complaints filed dropped from 14,000 to 8,500. *Id.* at 46.

²¹⁵ Antes et al., *supra* note 119, at 430 (“The drop in EEO complaints suggests that the program positively alters co-worker and supervisor/employee relationships by strengthening people’s ability to handle conflicts on their own . . .”).

²¹⁶ *See* Nisbett & Wilson, *supra* note 120, at 255 (finding that parties are able to report accurately on “current sensations . . . emotions, evaluations, and plans[.]” but not on “mental processes”).

The REDRESS surveys measured satisfaction, not transformation, and there is not necessarily a connection between the two. Participants were asked to evaluate their experiences in particular disputes in the past, not to describe the effects of those experiences on their behavior in future disputes.²¹⁷ TDR proponents connect the two ideas with a tacit transitivity argument, first equating satisfaction with empowerment and recognition, and then equating empowerment and recognition with transformation,²¹⁸ but this rhetorical move is no stronger in two steps than it was in one, when B&F used it to analyze the TDR case studies discussed earlier in this article. Evidence for real (as opposed to possible or hoped for) personal transformation must come from future behavior, from instances of Post Office employees using TDR practices in REDRESS and non-REDRESS settings in subsequent disputes, and the REDRESS studies did not collect this type of evidence.²¹⁹

There are additional difficulties with the REDRESS survey data. Many of the things participants in the studies reported liking about their experiences in the Program are features of communitarian dispute resolution generally. For example, survey participants praised REDRESS mediators for helping them (the participants) clarify goals, explaining the other person's point of view, and not using "strong-arm tactics" to force settlements,²²⁰ but these are practices every communitarian dispute resolution theory would endorse. Even adversarial theories encourage parties to take personal responsibility for resolving disputes, understand each other's point of view accurately, and treat one another with respect. In a sense, these are features of adult conversation gener-

²¹⁷ Bingham et al., *Dispute System*, *supra* note 6, at 31–33.

²¹⁸ *Id.* at 32–33.

²¹⁹ While a decline in formal complaint filings might signify a change in the type of institutions Post Office employees looked to for help in resolving disputes, it does not say anything about the employees' behavior when actually engaged in resolving disputes. Any mediation (as opposed to adjudicatory) program might have produced the same or a similar decline, as Bingham and her colleagues acknowledge. *Id.* at 46 n.188. The decline also might be explained by the fact that Post Office employees gave up on the REDRESS program after its conversion to a TDR format, concluding that it now was a public relations program more than a dispute resolution one, and less satisfactory than the program previously in place. The REDRESS studies do not consider this possibility, and attempt to rule it out indirectly using "satisfaction" evidence is subject to the criticisms Nisbett and Wilson make of self-reports on decision processes. Nisbett & Wilson, *supra* note 120, at 255.

²²⁰ See Bingham, et al., *Dispute System*, *supra* note 6, at 33–34. There is no necessary causal connection between the absence of certain behaviors and the presence of others. One cannot prove a positive with a negative.

ally.²²¹ When participants in the REDRESS Program praised the Program for the presence of these practices, therefore, they were not talking about something particular to TDR. Only the “transformation” claim makes TDR distinctive, and the REDRESS survey responses do not tell one anything about the accuracy of that claim, one way or the other.

Dispute resolution programs in tight-knit, organizational settings, where participants share a common culture, have stable, ongoing relationships, and interact with the same people on a recurring basis, also do not necessarily have lessons for programs whose dockets consist mostly of one-time disputes between strangers, acquaintances, neighbors, and litigants. This is even more so in the case of a top-down program like REDRESS, strongly and publicly supported by those in authority,²²² with a tacit message that “this is the way we do things around here.” A program of this sort exerts strong social pressure on people within the organization to think carefully before criticizing the program, particularly to outsiders.²²³ Even when employees buy into the program voluntarily, it is not always possible to determine whether they have done so simply at the level of espoused theory, or on the basis of an understanding of the program’s actual effects. They may like the ideas associated with the program for their own sake, but have no idea of the consequences the program produces. When participants say TDR works in the Post Office, therefore, this does not necessarily mean that the Program actually works in the Post Office, or that it would work in the neighborhood.²²⁴

²²¹ *Id.* at 35 (“Showing regard for people’s concerns, giving apologies or showing empathy, sensitivity, truthfulness, respect, propriety of questions, and justification are clearly connected to the transformative model of mediation.”). This may be true, but they also are clearly connected to just about every other communitarian model as well.

²²² B&F attribute the success of the REDRESS program, in major part, to the support of Cynthia Hallberlin, the Former Chief Counsel of Alternative Dispute Resolution at the United States Postal Service and National Program Manager for the REDRESS Program. See Folger & Bush, *Conclusion*, *supra* note 2, at 464 (describing Hallberlin as a “visionary stakeholder within the organization” who was primarily responsible for the design and implementation of the Program); Cynthia J. Hallberlin, *Transforming Workplace Conflict: Why Transformative Mediation*, 18 *HOFSTRA LAB. & EMP. L. J.* 375 (2001) (for Hallberlin’s account of her role in the program).

²²³ Institutional context also can affect mediator behavior, so that even if a mediator starts committed to using TDR methods he might adjust that commitment, as context requires. See Kressel, *supra* note 1, at 37 (“mediator style is also likely to be shaped in important ways by contextual forces such as the type of conflict, the amount of time available, the degree to which consultation with other mediators is available, and whether or not the mediator is embedded in the institutional context from which cases are referred . . . ‘all mediation is local.’”).

²²⁴ The REDRESS studies also may not have tested a pure TDR model. Practices vary among self-described TDR mediators and not everyone who claims to be an adherent of the

It is difficult to measure the empirical effects of a dispute resolution method as amorphous as TDR. Given its central tenets, any observable success the method has in transforming people or conflict is as likely to be attributable to the personal qualities parties bring to disputes as it is to the TDR method itself. Ethnological studies might be able to separate these causes from one another, but the practical difficulties involved in following parties around waiting for them to get into disputes make such studies unlikely. Ironically, the inability to evaluate TDR empirically may be one of the Theory's greatest advantages. It is essentially unfalsifiable.

The claim that TDR transforms people and conflict is a self-inflicted wound. One could remove it from the overall argument for TDR without losing anything important of substance. Empowerment and Recognition, and everything B&F pack into them, have all of the qualities needed to make TDR a complete dispute resolution theory. The Transformation claim is one about accomplishment, not method, and measuring accomplishment is best left to those who do not have a stake in the game. B&F are not content to treat TDR as just another interesting variation on communitarian dispute resolution theory; however, they want it to be special, original, distinctive, and grand. Now it is time to ask why?

method understands and implements it in the same way. The REDRESS Program drew from a national roster of approximately 1500 experienced mediators, not all of whom were lawyers or who had substantive employment law expertise. “[T]he roster included mediators from psychology, counseling, and social work, as well as teachers, academics, human resource professionals, and retirees from these professions.” Bingham, et al., *supra* note 6, at 27 n.123. A program as large and diverse as this is likely to contain quite a bit of variation in mediator style as a matter of ordinary probabilities, and several commentators have found such variation in the REDRESS Program. See Lorig Charkoudian, Cristian De Ritis, Ramona Buck & Carrie L. Wilson, *Mediation by Any Other Name Would Smell as Sweet – Or Would it? The Struggle to Define Mediation and its Various Approaches*, 26 CONFLICT RESOL. Q. 293 (2009); See also Kressel, *supra* note 1, at 29 (“serious training in a formal mode of professional practice may nonetheless express itself in strikingly different stylistic behavior”), 31 (mediators’ accounts of their stylistic leanings were “not very accurate”), 32 (“Serious training in a formal mode of professional practice may nonetheless express itself in strikingly different stylistic behavior”), at 31 (finding that mediators’ accounts of their stylistic leanings were “not very accurate”), at 32 (“Studies . . . have found mediator self-descriptions to be unreliable guides to mediator behavior.”); Dean G. Pruitt, Neil B. McGillicuddy, Gary L. Welton & William R. Fry, *Process of Mediation in Dispute Settlement Centers*, in *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION* 368 (Kenneth Kressel & Dean G. Pruitt, eds. 1989).

IV. THE CAUSES AND COSTS OF INTRANSIGENCE,
EXCLUSIVITY, AND HYPE

The claims that TDR can transform character, reform deliberative government, and resolve ethno-political conflict seem more fanciful than real to most in the dispute resolution community, yet TDR proponents are reluctant to modify them. They have trimmed the claims some from the early days, and no longer advance them with the same unqualified enthusiasm, but they continue to act as if some day they will be proven true. Similarly, dispute resolution scholars generally have difficulty understanding why TDR proponents refuse to accept the widely held belief that TDR, at its core, is a modest variation of the communitarian model of dispute resolution, sharing most of the same values and incorporating most of the same techniques. Why, they ask, is it necessary that TDR be unique? Isn't it enough that it is interesting? It is difficult to understand why the discussion has played out in this polarized fashion, but a couple of factors might be at work. The perception of TDR as exaggerated and exclusivist might be mistaken, for example, based on an over-interpretation of the fulsome language used to defend the Theory or on a lack of familiarity with the intellectual traditions out of which it grows. Or the perception might be accurate, and the Theory's overblown defense may be explained as a response to the incentives of the academic world within which TDR scholars operate. I will take up these possibilities in order.

TDR proponents may overstate the benefits of the Theory for reasons of personal history, aesthetic preferences, or political ideology, and arguments based on these types of considerations will have little force with those who have different personal histories, aesthetic preferences, and political ideologies.²²⁵ However, principled beliefs and technical vocabularies derived from different theo-

²²⁵ B&F argue, not unreasonably, that all dispute resolution theory is grounded in ideology. POM2, *supra* note 4, at 232 (“all forms of mediation practice are based in a set of core values and premises”) (describing the ideologies underlying the various theories of social connection and conflict resolution); Folger & Bush, *Conclusion*, *supra* note 2, at 458–61 (describing how TDR challenged the pre-existing ideological framework of the world of dispute resolution scholarship). *See also* Folger, *Mediation Research*, *supra* note 16, at 396–97 (arguing that different research methods are needed to study different approaches to mediation because different approaches are grounded in different ideologies); Dorothy J. Della Noce, Robert A. Baruch Bush & Joseph Folger, *Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy*, 3 PEPP. DISP. RESOL. L.J. 39, 58 (2002) (arguing that many scholars find it threatening that mediation theory is grounded in ideology).

retical orientations and intellectual traditions are another matter. Some of the most prominent TDR proponents are social psychologists reared in the terminology and conceptual frameworks of constructivist social theory, existentialist philosophy, and humanistic psychology, and those backgrounds may predispose them to argue the case for TDR differently from persons trained in law.²²⁶ They may use language and ideas in a more sweeping and grand manner than legal scholars (i.e., they may argue more like lawyers than scholars); for example, emphasizing the most far-reaching, expressivist extensions of their ideas rather than the guaranteed minimums, expecting their work to be read metaphorically as well as literally, and effacing distinctions and qualifications made by more technical disciplines (e.g., economics, game theory).

The choice of a rhetorical and intellectual style can have untoward consequences in scholarly discourse, however, whether intended or not. In law, for example, the tacit challenge in overstated argument can trigger automatic reactions more than considered ones, causing people to think and speak in axioms rather than hypotheses, and making modulated responses (such as skepticism, curiosity, confusion and the like) seem not fully up to the situation. Creating a distinctive and self-sealing linguistic and conceptual world also can signal an interest in converting others more than learning from them, and this in turn can generate suspicion and intellectual division beyond what is inevitable in the introduction of an ambitious new theoretical synthesis. Even sympathetic readers forced to choose between discipleship and antagonistic opposition may decide to sit out the discussion until it becomes less fevered. Concerns of this nature may explain the lack of extensive engagement by mainstream dispute resolution scholars with the TDR literature. After some early back and forth, conver-

²²⁶ There might be something about social science that loves a transformation. The most well known example of the discipline's affection for the concept is the so-called "L'affaire Sokal." New York University physicist Alan Sokal submitted a paper to a post-modern, cultural-studies journal located at Duke University. The paper was accepted and published without prior review by a physicist. Alan Sokal, *Transgressing the Boundaries: Toward a Transformative Hermeneutics of Quantum Gravity*, 46/47 SOCIAL TEXT 217 (1996), available at http://physics.nyu.edu/sokal/transgress_v2/transgress_v2_singlefile.html. On the day of its publication, Sokal announced in LINGUA FRANCA that the paper had been "structured around the silliest quotations I could find about mathematics and physics" made by humanities scholars, and was a hoax. Alan Sokal, *A Physicist Experiments With Cultural Studies*, LINGUA FRANCA (1996), available at http://physics.nyu.edu/sokal/#debate_linguafranca. The prank ignited a firestorm of controversy, as one might expect, and Sokal provides links to all of its various manifestations on a webpage at NYU. See Alan Sokal, Professor of Physics, New York University, available at <http://physics.nyu.edu/sokal/> (last visited Feb. 10, 2013).

sation among the various schools of thought virtually has ended. The ultimate effect, of course, is that everyone's views remain simpler and less sophisticated than they otherwise could be, as neither side learns from the other.

The overdrawn nature of the scholarly argument for TDR also may be a function of tacit intellectual hierarchies within the academic legal culture. Within academia, reconceptualizing a field of study is regarded as a more significant accomplishment than fleshing out the details of an inherited conceptualization.²²⁷ This belief is almost hardwired into the psyche of scholars (and even more so into the psyche of journal editors), so that even the colloquialisms used to describe these different tasks—"paradigm creation" versus "puzzle solving"²²⁸—give it away. It is too late in the game to write a groundbreaking bestseller about legal dispute resolution theory. Timing usually matters more than substance in such things and sev-

²²⁷ The first move in reconceptualizing an academic field often consists of clearing the field of theories already in place. B&F, *Introduction*, *supra* note 5, at 3 (describing the purpose behind their early theorizing in strikingly similar terms, as creating a "clearing in the field.")

²²⁸ When Thomas Kuhn introduced the concept of paradigm shift into the sociology of science fifty years ago, the terms "paradigm" and "puzzle solving" had relatively precise meanings. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 35–51 (2d ed. 1970) (describing "The Priority of Paradigms" and "Normal Science as Puzzle Solving"). However, Kuhn sometimes used these terms in different ways. See Margaret Masterman, *The Nature of a Paradigm*, in *CRITICISM AND THE GROWTH OF KNOWLEDGE* 59 (Imre Lakatos & Alan Musgrave eds., 1970) (concluding that Kuhn used "paradigm" in at least twenty-two different ways in his *STRUCTURE OF SCIENTIFIC REVOLUTIONS*); Dudley Shapere, *The Structure of Scientific Revolutions*, 73 *THE PHIL. REV.* 383 (1964). See also Alexander Bird, *Thomas Kuhn: 3. The Concept of a Paradigm*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., Winter 2011 edition 2011), available at <http://plato.stanford.edu/entries/thomas-kuhn/#3>. Kuhn never intended his terminology to apply to the social sciences, however. "Struck by the number and extent of overt disagreements between social scientists about the nature of legitimate scientific problems and methods," he saw the social sciences as in a "pre-paradigm" state, lacking the kind of consensus necessary for the presence of true paradigms. KUHN, *STRUCTURE*, *supra*. He created the new terminology specifically to distinguish between the natural and social sciences. *Id.* See also Mattei Dogan, *Paradigms in the Social Sciences*, in 16 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES* 11023 (Neil J. Smelser & Paul B. Baltes eds., 2001) (arguing that the proliferation of schools of thought in the social sciences, and the deliberate mutual ignorance of these schools by scholars, make social science paradigms impossible). As "paradigm" became a fashionable term in academic circles, however, it lost much of its original precision and began to be used somewhat indiscriminately by social scientists, humanists, and others, to describe almost any set of substantively connected problems, laws, principles, theories, methods, or patterns of thought, that provided an intellectual framework for understanding a field of work. Some even developed the idea of a "social paradigm" to describe the circumstances that precipitate any major shift in social, political, or moral perceptions. See Maitreya L. Handa, Paper presented at the International Symposium on Science, Technology and Development, New Delhi, India: Peace Paradigm: Transcending Liberal and Marxian Paradigms (March 20-25, 1987) (mimeographed by author at O.I.S.E., University of Toronto, Canada, 1986). B&F use the term in this latter, more relaxed sense.

eral candidates for that honor are long since out of the blocks. If distinctiveness is the goal, therefore, creating an “original” and “unique” theory is the next best option, and this lesson may not have been lost on TDR scholars.²²⁹

Other academic values and hierarchies also may be at work. In academia, politics and morality are regarded more highly than technique. Political and moral questions are seen as profound, timeless, and fundamental; technical questions as thin, transitory, and situational. Political and moral theory is the work of intellectuals; technique is the work of practitioners. Beliefs of this sort encourage scholars to shape their work in moral and political terms whenever possible, to improve their chances of having it accepted by the field. The almost obsessive effort by TDR proponents to distance themselves from (what they see as) technique driven models of dispute resolution may be a response to that encouragement.²³⁰ If so, this excess of anti-technique enthusiasm is unwarranted. TDR proponents do not need to talk exclusively about the political and moral dimensions of dispute resolution to be regarded as important contributors to the field; having new and interesting things of any kind to say is enough. Perhaps they over-emphasize politics and morality to remove all doubt about their place at the table.²³¹

²²⁹ See Brian Jarrett, *The Future of Mediation: A Sociological Perspective*, 2009 J. DISP. RESOL. 49, 50 (2009) (arguing that competitive pressures within the field of mediation are causing schools of thought to differentiate themselves from one another even when their approaches overlap or are identical).

²³⁰ For example, B&F say they introduced the factor of ideology into the “toolbox” world of legal dispute resolution theory, adding a layer of intellectual sophistication and normative honesty to the subject in the process. Folger & Bush, *Conclusion, supra* note 2, at 458–61 (“Our open discussion of how ideological premises shaped specific practice choices challenged practitioners who had not considered what values shaped their own practice decisions.”). This will surprise participants in the debate over client-centered lawyering that pre-occupied clinical legal scholars, among others, in the 1970s and 1980s. Issues of politics, ideology, and morality were major parts of that debate, including the issue of how to divide responsibility for making the choices involved in resolving disputes. See references *supra* note 91. B&F object to oversimplification in the criticism of their “emerging view” because rhetoric of that sort “goes beyond clarification of differences or argument about legitimate value preferences . . . [and] strives to marginalize the emerging practice by framing it as insignificant and out of the realm of accepted traditions.” Folger & Bush, *Conclusion, supra* note 2, at 459–60. Given this objection, it seems reasonable to expect that they would avoid similar oversimplification in their criticism of already emerged views.

²³¹ In an empirical age it also is better to be more scientific than literary; to ground theory on studies and experiments rather than narratives, memories, and impressions; to reach conclusions that are objective rather than subjective; and to make predictions that have universal rather than local applicability. TDR proponents may overstate the strength of the empirical case for TDR in an attempt to satisfy the demands of this tacit scientism underlying the academic culture of law.

Legal scholars, like scholars generally, are almost reflexively suspicious of overheated language, axiomatic thinking, protectionist perspectives, and defensive reactions to criticism, and the argument for TDR seems to have stirred those suspicions. TDR proponents are not the first to claim to have reinvented the intellectual world anew, of course, but claims of this sort are inherently implausible, usually because they represent a faith-based allegiance to fixed truths more than a reasoned commitment to contingent beliefs, and non-disciples usually wait for less heated forms of the work to come to the fore before taking the work seriously. This may explain why TDR scholarship is still somewhat of an outlier in the ADR canon.

There is a lot to like in TDR, of course, but the grandiose transformation claims at the heart of the Theory, and the exaggerated arguments made in their defense, raise eyebrows and produce objections. One might think over-exaggerating the benefits of a dispute resolution theory was no longer possible after the publication of *Getting to Yes*.²³² That book raised the hoopla standard so high it seemed it would not be equaled within twenty-one years of a life-in-being in 1981, but *Getting to Yes* brought sophisticated scholarship in low-visibility fields²³³ to the attention of a wider audience, and its authors' adjectival excesses were forgiven for that reason. Sadly, TDR has no such saving grace. It builds on work that is outdated more than obscure, and the refinements it makes in that work often are less sophisticated than the original ideas it appropriates. Sadly, TDR is neither social science nor news.

TDR might have been a provocative first cut on dispute resolution theory thirty-five years ago, when the field was in its infancy and all kinds of trial balloons were being launched; now its overextended claims and strained arguments come across as historical anomalies more than breakthrough insights, attempts to resuscitate a world long since passed rather than map a path through a brave new world. The Theory is popular within certain circles, to be sure, but this popularity, like that of the T-Group in the 1960s and

See Robert J. Condlin, *Legal Bargaining Theory's New "Prospecting" Agenda: It May Be Social Science, But Is It News*, 10 PEPP. DISP. RESOL. L.J. 215, 217–20 (2010) (describing the scientism underlying the legal academic culture).

²³² FISHER & URY, *supra* note 113.

²³³ The first edition of *Getting to Yes* seemed to borrow extensively from RICHARD E. WALTON & ROBERT B. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS: AN ANALYSIS OF A SOCIAL INTERACTION SYSTEM* (1965)—the two books share striking similarities—at a time when Walton and McKersie's book was largely unknown outside of labor law circles, though *Getting to Yes* does not mention the Walton and McKersie book.

1970s,²³⁴ seems based more on the allure of a simple, one-size-fits-all, psychological template for personal learning and growth, and the opportunity to participate in an evangelical, intellectualist movement of the moment, than it does on the discovery of a definitive new account of disputing.²³⁵ It is a popularity based on optimism, fashion, and hope more than on critical judgment, and popularity of this sort tends to be ephemeral. The T-Group movement died of its own weight, as the lessons of the laboratory did not transfer lastingly to day-to-day life, and TDR seems likely to suffer a similar fate. Somewhere, the ghosts of Santayana and Marx must be chuckling.²³⁶

V. CONCLUSION

The argument for TDR fails both for a lack of evidence and a lack of substance. Evidence for the argument consists mostly of

²³⁴ For representative descriptions of the work of the National Training Laboratory and the T-Group movement, see e.g., Poppy Laurretta McLeod & Richard Kettner-Polley, *Psychodynamic Perspectives on Small Groups*, in THEORIES OF SMALL GROUPS: INTERDISCIPLINARY PERSPECTIVES 73-79 (Marshall Scott Poole & Andrea B. Hollingshead eds., 2004); WILLIAM C. SCHUTZ, ELEMENTS OF ENCOUNTER: A BODYMIND APPROACH (1973); CARL R. ROGERS, CARL ROGERS ON ENCOUNTER GROUPS (1970); WILLIAM EDGAR H. SCHEIN & WARREN G. BENNIS, PERSONAL AND ORGANIZATIONAL CHANGE THROUGH GROUP METHODS (1965); *But see* CARRIE MENKEL-MEADOW, DISPUTE PROCESSING AND CONFLICT RESOLUTION: THEORY, PRACTICE AND POLICY (2003); LEE G. BOLMAN & TERENCE E. DEAL, MODERN APPROACHES TO UNDERSTANDING AND MANAGING ORGANIZATIONS (1984); Lee G. Bolman, *Some Effects of Trainers on Their T-Groups*, 7 J. APPLIED BEHAV. SCI. 309 (1971); CHRIS ARGYRIS, INTERPERSONAL COMPETENCE AND ORGANIZATIONAL EFFECTIVENESS (1962). Professor Menkel Meadow also makes this point in her critique of first generation TDR. See Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms and Practices*, 11 NEGOT. J. 217, 236-41 (1995) (reviewing POM1).

²³⁵ POM2, *supra* note 4, at 234 (denying that TDR is a spiritually or religiously driven enterprise, the authors admit that “the premises underlying [the] model are consistent with some beliefs and worldviews of religious individuals or larger communities of faith”). B&F argue that TDR is grounded in an ideology-based view of human nature and not in any particular religious tradition that may share this view. This seems correct. When I describe the movement as evangelical, I have in mind the revivalist-rhetorical properties of evangelism and not its doctrinal ones. Like Chautauqua preachers, TDR proponents speak in loud, certain terms, admit no qualification or questioning, reject non-conforming views out of hand, and proselytize with the enthusiasm of a carnival barker. These qualities can be found in academic movements as readily as religious ones.

²³⁶ See KARL MARX, THE 18TH BRUMAIRE OF LOUIS BONAPARTE 15 (2008) (“Hegel remarks somewhere that facts and personages of great importance in world history occur, as it were, twice. He forgot to add: the first time as tragedy, the second as farce.”); GEORGE SANTAYANA, THE LIFE OF REASON 1 (1905) (“Those who cannot remember the past are condemned to repeat it”).

case studies of single events fixed in time and transformation cannot be described from the perspective of a single point in time. The case studies also are fictionalized depictions of ideal dispute resolution behavior rather than factual representations of actual disputing, and theory cannot be grounded in fiction. Empirical studies purporting to document TDR-produced-transformation—the Post Office REDRESS studies are the best example—may not report on TDR practices at all, but if they do, their findings can be explained in non-transformation terms. At the end of the day, nothing in the vast TDR literature establishes the eye-catching claim at the heart of the Theory: that people and conflicts are (or can be) transformed using TDR methods. That claim has the metaphysical status of wishful thinking.

The argument for TDR also is substantively confusing. After all these years it still is not clear, for example, whether TDR is supposed to transform character, or conflict, or both. In the beginning, proponents argued that it changed character, but they were criticized for this and seemed to back away from the claim, shifting their focus from people to conflict. The argument for second generation TDR continued to rely on the character transformation claim; however, sometimes explicitly so, but more often by implication, and TDR proponents still may be committed to it. If so, they have yet to explain how character can be changed in discrete, isolated, and unconnected experiences that are too irregular, sporadic, and context-specific to permit a systematic and sustained effort at modifying habits, values, and beliefs. Learning to resolve disputes, even with the help of others, is not the same as learning to become a better person, even if the two processes sometimes overlap.

The argument that TDR transforms conflict, moreover, cannot explain how this is done consistently with TDR's other principled commitments. Conflict is not a freestanding, sentient, willful, and purposive being: it is the collective behavior of people confronting and resolving disputes. To transform conflict one must transform the behavior of people. This can be done slowly over time, by reinforcing new habits, values, and beliefs individuals learn on their own, or immediately, by suggesting, encouraging, and sometimes even coercing parties to behave in specific ways in the present. The "slowly over time" option is not available to TDR, as we have seen, because disputes do not provide the conditions for long-term character change; nor is the "immediate" option, since telling people how to behave, either expressly or implicitly, violates TDR's commitment to party empowerment.

TDR proponents have a difficult choice of whether to be principled or effective. Do they remain faithful to the principle of party empowerment, and thereby restrict TDR's potential for producing transformative effects; or do they maximize the Theory's potential for transformation, but thereby violate the principle of Empowerment? Doing both at the same time is not an option. Given the first-among-equals status accorded the Empowerment principle, and the fear of imposing value judgments on disputants, one suspects that TDR proponents would choose the "slowly over time" strategy for transforming parties and conflict.²³⁷ But if that were the case, TDR works like natural selection, waiting for parties to discover effective dispute resolution practices on their own in random personal epiphanies and reinforcing those discoveries if and when they occur. Such an approach might be fast enough for evolution in general—the evidence is mixed—but dispute resolution works under a shorter time frame. TDR seems not yet to have reached a state of reflective equilibrium. There must be more to come.

²³⁷ POM2, *supra* note 4, at 228–29 (“It is impossible . . . for a mediator to simultaneously support autonomous party decision making and substitute the mediator’s judgment for that of the parties.”).

