

**Habermas's Theory of Communicative  
Action As a Theoretical Framework for  
Mediation Practice**

by

**Stephen Chilton**

and

**Maria Stalzer Wyant Cuzzo**

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## **ABSTRACT**

This article explores how Jürgen Habermas’s theory of communicative action provides a new theory for mediation and conflict resolution in general. Beginning from the assumption that all people are in relationship, the article articulates Habermas’s “presuppositions of argumentation”, which can help mediators focus on fundamental elements of conflict resolution. At impasse, mediators can assist the parties to prepare for litigation by a discussion that derives from Habermas’s ideas of the “conditions of communication”. Courts and legislatures can use these same ideas to constrain abuses of their authority, and ultimately mediators, in a new opportunity for the field, can help reestablish positive relationships post-outcome.

# Habermas's Theory of Communicative Action As a Theoretical Framework for Mediation Practice

## I. INTRODUCTION

There is a common human need for effective ways of relating to each other. This article explores how Jürgen Habermas's theory of communicative action can justify mediation as an aid to those ways of relating. Fundamental recognitions, including Habermas's *presuppositions of argumentation* and our derived *conditions of communication*, can show how mediation is a valuable alternative for people experiencing conflict in our society. Habermas's theory of communicative action provides criteria to evaluate ongoing debates within the field of mediation — such as the debate about transformative and transactional mediation practices — thereby improving the likelihood of the field resolving a division among practitioners that threatens the vulnerable community of practice. And finally, the theory of communicative action provides a way to build an effective bridge between the impasse experiences that sometimes occur in mediation and the handoff of those situations into the legal system for resolution. Mediation

can prepare parties to move into the legal system more humanely and assist the legal system to receive those cases with more sensitivity.

Mediation is a field still in search of an organizing theory, a theory defensible as theory within the field, useful in practice to the individual mediator, and ethically (normatively) acceptable to both the mediator and the parties in conflict. It is because those human beings are in conflict that such a theory must concern the fundamental nature of humans' relationship with one another.

In this paper we propose an organizing theory that focuses attention on the preservation of the underlying, inherent relationship among people. This focus has a number of specific consequences: it reconciles the debate between settlement (transactional mediation) and relationship (transformative mediation); the mediator need not give up one goal in pursuit of the other but can connect the two — even when the process of mediation calls on the mediator to focus realize each goal separately. This focus sharpens mediation practice in various ways by revealing the underlying assumptions that people need to honor for effective discussion (“presuppositions of argumentation”). It also flags new opportunities for mediators, first to assist the parties in navigating a transition from mediation to other post-impasse options by encouraging “conditions of communication” and then, upon rendering of decision, to assist the parties in reclaiming the original presuppositions so that relational life can proceed. Finally, it invites a new

relationship between the field of mediation and the justice system that would honor the power of relationship despite conflict.

## **II. MEDIATION IN LIGHT OF HABERMAS’S “PRESUPPOSITIONS OF ARGUMENTATION”**

People are relational creatures. People, even in conflict, possess a human relationship that makes mediation possible — a fundamental recognition of the other, regardless of any external manifestations in language or actions or even of any internal recognition. Even in conflict we are richly aware of each other, despite our judgments and emotions of the moment. In short, we are always already related. This basic relationship may be deepened and elaborated by culture, language, and people’s deliberate efforts, but the existence of the relationship does not depend on these contingencies — they simply express the relationship. In fact, culture, language, and people’s deliberate efforts are built on the presupposition that there is an other with whom we relate. This paper shows how this relationship is a reliable ground from which mediators can operate, even when conflict has called into question the parties’ more elaborated levels of relationship.

The concept of an underlying relationship is an old one, the subject of many different

accounts: as the mutual recognition by rational agents of the transcendental, *a priori* conditions of rationality (Kant); as the coordination of behavior through language (Habermas); as the automatic interaction of introjected representations of others (Chilton forthcoming); and many other accounts. These accounts are not about specific, contingent relationships of intimacy, partnership, friendship, acquaintance, and so on, but rather about the relationship that exists inherently among people.

Among these various accounts we will use Habermas's as the best suited for application to mediation – which is, after all, specifically concerned with talking things out, with “coordinating people's behavior”.<sup>1</sup> In Habermas's view, whenever we speak to each other we have always already accepted certain “presuppositions of argumentation” – that is, characteristics of speech oriented toward coordinating action. We are related to each other in our involuntary, implicit, prior, common acceptance of these conditions, even at the very moment that we use speech to deny any relationship with the other.

Here are the presuppositions of argumentation that Habermas (1983/1990:87-89) lists, taken from Alexy's (1978) extensive analysis.<sup>2</sup>

1. Logical and semantic rules of speech, that is, rules by which we know that the speech has

at least the form of a coherent argument:<sup>3</sup>

(1.1) No speaker may contradict himself.

- (1.2) Every speaker who applies predicate F to object A must be prepared to apply F to all other objects resembling A in all relevant aspects.
  - (1.3) Different speakers may not use the same expression with different meanings.
2. Procedural rules necessary for a search for truth organized in the form of an argument:
- (2.1) Every speaker may assert only what he really believes.
  - (2.2) A person who disputes a proposition or norm not under discussion must provide a reason for wanting to do so.
3. Rules governing any process having the goal of reaching a rationally motivated agreement:
- (3.1) Every subject with the competence to speak and act is allowed to take part in a discourse.
  - (3.2)
    - a. Everyone is allowed to question any assertion whatever.
    - b. Everyone is allowed to introduce any assertion whatever into the discourse.
    - c. Everyone is allowed to express his attitudes, desires, and needs.
  - (3.3) No speaker may be prevented, by internal or external coercion, from exercising his rights as laid down in (3.1) and (3.2).

The presuppositions of argumentation are “general symmetry conditions that every competent speaker who believes he is engaging in an argument must presuppose as adequately fulfilled”

(Habermas 1983/1990a: 88).<sup>4</sup> These presuppositions of argumentation bear on both the process of mediation and the responsibility of the mediator. In the process of mediation, these presuppositions offer a way to disentangle the complex and often hidden knots that bring people to impasse. The assumption is that the difficulty in solving a conflict and in repairing a relationship comes from some violation of these presupposition. The process of mediation then becomes, for mediators personally, a commitment to ensure that these presuppositions are established, fulfilled, and pursued. Knowing these presuppositions can provide the mediator a practical checklist of potential areas of breakdown in the process, thereby allowing him or her to suggest opportunities or different directions. In the remainder of this section we apply these presuppositions to mediation. In subsequent sections we take up the more difficult problem of what to do when, despite the parties' and mediator's best efforts, the parties remain at impasse.

***A. Presuppositions 1.1-1.3: Logical, Semantic Rules***

Presuppositions (1.1)-(1.3) posit the necessity of consistency in one's communication.

- (1.1) No speaker may contradict himself (self-contradiction).**
- (1.2) Every speaker who applies predicate F to object A must be prepared to apply F to all other objects resembling A in all relevant aspects (double standards).**
- (1.3) Different speakers may not use the same expression with different meanings (the equivocation fallacy).**

Agreements depend both on people having an understanding of what they themselves want and also having a shared understanding of what they are agreeing to. These three rules of consistency ensure that. The very crafting of an agreement requires that the real constraints of the situation be understood, and inconsistency conceals those constraints within overall confusion. Both the mediator and the parties have an interest in ensuring consistency.

Self-contradiction indicates the existence of unreconciled desires within someone.<sup>5</sup>

Double standards indicate a potential lack of clarity about how a standard is to be used; applying the standard to similar situations should result in similar judgments, and if it doesn't, the standard needs clarifying. Equivocation is similar to double standards, but in equivocation the confusion is between the parties about what is meant (for example, definition of terms), while double standards have to do with the clarification of one party's understanding.

***B. Presuppositions 2.1 and 2.2: The Search for Truth***

Presuppositions (2.1) and (2.2) concern authenticity and making visible one's intent. Both propositions invite the parties to be real with each other; both also remind the mediator of the essential nature of and importance of authenticity between the parties.

**(2.1) Every speaker may assert only what he really believes.**

Resolutions of disputes go beyond the parties' specific agreement, because true resolutions can exist only against a background of mutual understanding. Lacking such a background, no one can be sure what is really being agreed to. As every experienced mediator knows, it is impossible (except in very simple disputes) to write agreements that cannot be interpreted differently by the parties to it. The parties can discover that they disagree even about what seemed to be the plain meaning of the words, and the problem gets worse as these words come to be applied to specific, unanticipated situations. These problems are likely enough to arise even when the parties believe they have a good understanding of each other, and such problems become ever more likely to the degree that this background understanding is absent.

Furthermore, lacking such a background, no one can be confident that the other really intends to live up to the agreement. Unless I know your real interests and concerns, unless I know your true commitment to the agreement, I cannot be sure of your intention to live up to it. Lacking such assurance, I feel bound to take steps to guard myself against your violation of the

agreement — steps which can be misinterpreted by you as preparation for my betrayal.<sup>6</sup> And since one effective way to guard against betrayal is to betray the agreement first, the lack of mutual assurance becomes in practice the lack of an agreement.<sup>7</sup>

An agreement is really only as good as the mutual understanding within which it is situated. And to establish this mutual understanding the parties must say what they really believe, not just what they think will convince the other. The mediator's role, then, is to explain this, to set up an environment for mediation that is safe enough for the parties to speak honestly to one another, and to encourage the parties to do so. The mediator should also monitor the discourse to see whether this is occurring and to flag opportunities to the parties to examine potential lapses in a way that preserves the parties' sense of safety.

**(2.2) A person who disputes a proposition or norm not under discussion must provide a reason for wanting to do so.**

We clearly should discourage parties from tying up the proceedings with meaningless quibbles, objections unrelated to the current dispute, or references to unrelated events or people. Resolution could be infinitely delayed by one party engaging in an endless series of nonproductive discussions to consume time or to wear down the other party — this is a particular danger when lack of a decision favors one party over another.

However, there is a deeper reason for asking people to explain why a proposition is

relevant: to maintain discourse as a means of reaching a common understanding between the parties instead of an exercise of power by one over the other. This requirement should not be treated as a mere restriction. Demanding reasons from the parties implies that they are capable of providing such reasons — in other words, that they are reasonable people. This is the position from which the mediator should operate: not a condemnation of someone’s failure to provide reasons but rather encouragement and an elicitation of his or her reasons.

***C. Presuppositions 3.1-3.3: Rules of Inclusion and Rules of Engagement***

Presuppositions (3.1)-(3.3) are all concerned with the background rules that must be in place for safe, open, rationally motivated discussions and agreements to occur. The mediator has the essential responsibility to name and protect these “rules of engagement”.

As we said in our discussion of (2.1), true resolutions of a dispute must take place against a background of common understanding. Only the parties to the dispute can provide this; neither the mediator nor anyone else can do this for them. This means that the parties are in control of the mediation, that at the very least they are all allowed to participate.<sup>8</sup> The mediator’s role is to provide permission for this control and to invite the parties to take it. Though the mediator’s permission is not required, it does serve as encouragement and a sign of safety. Ensuring that all affected parties are included in the mediation is an understood, necessary practice.

**(3.1) Every subject with the competence to speak and act is allowed to take part in a**

**discourse.**

Though it is obvious that parties in mediation must be able to know, express, and act upon their sense of what they want and what they believe just treatment is, both the law and mediation have long recognized that children and vulnerable adults inherently lack competence to speak and act without assistance. Our systems provide assistance for these parties in the form of guardians *ad litem*, advocates, or lawyers. But there is another large group of people who may find themselves in a mediation without the benefit of these protections: the inarticulate, the ignorant, and some abused spouses. Our culture perpetuates assumptions that all people are competent to speak and act unless they fall into a prescribed category: those who lack the necessary skills (self-confidence, articulateness, self-awareness, or willingness to engage through speech, but are not labelled as one of the prescribed populations) may find themselves unable to participate in the process. This suggests a role for mediators both as a group and as individuals in specific mediation situations. Mediators as a group can publicly support more advocates deployed in more flexible ways. Individual mediators can check that the competence assumption is justified in all parties and, if not, deal with that issue right away. Even if little can be done, the mediator can deploy what resources are available and can look for creative alternatives when resources are not available.

The whole issue of competence is a treacherous one for the mediator in that it demands a

judgment that is always necessarily contaminated by the mediator's prior cultural assumptions — especially those arising from class background. Prejudices about speech are powerful (particularly among those who are most articulate); mediators are in particular danger here — speech is after all their bailiwick. Checking one's own assumptions about competence is as necessary as checking the competence of others in every mediation.

### **(3.2a-c) Rules of Engagement**

The presuppositions listed in 3.2 collectively specify rules of engagement for authentic, honest communication between parties. Each presupposition explores a different means of reaching an understanding and potentially generating agreements that become possible when real mutual communication exists. It is true that each of the three activities – (a) questioning, (b) asserting, and (c) expressing – can be used in strategic or tactical ways rather than to build authentic understanding and relationship, but Habermas's intention is that these are also — and should be — used to construct such relationship. The strategic or tactical use of these means is fostered in (for example) the litigation system, but mediation has a mandate to reclaim them for the purpose of relationship-building and authentic communication.

*3.2a. Everyone is allowed to question any assertion whatever.*

There are various ways questions function to build authentic relationships. The same ways apply to assertions and self-revealing statements. The power of questions within effective

communication is enormous, and there are reasons questions are among the first forms of communication to disappear when people experience conflict. Questions perform several functions:

1. Questions demand answers. When someone asks a question, people feel the necessity to respond and provide information or an accounting of a situation.
2. Questions stimulate thinking. Questions provoke new ideas and new possibilities in both the speaker and the listener; while a statement may invite consideration of alternatives, questions *demand* such consideration.
3. Questions give us valuable information. When people ask questions, they seek information or opinions from an other that are relevant, important, or necessary to meet some need or desire.
4. Questions allow the speaker control. Legal cross examination is a perfect example of the power of questions to control communication: the form of the question allows the questioner to control the space and places the recipient in a position of having to choose to respond, avoid, or question back.
5. Questions get people to open up. There is nothing more inviting than asking people to share their experiences, insight, views, or information about an issue of mutual concern. The question shows that the speaker is interested in something that the listener may know

and care about.

6. Questions lead to quality listening. Asking the right question at the right moment enables us to understand a situation better or open up new possibilities of options or solutions. Effective questions also enable both speaker and listener to become more focused on what is at issue between them.
7. Questions get people to persuade themselves about a situation. People are more likely to accept something they themselves formulate than something someone else formulates. Questioning is part of the potential for effective persuasion.<sup>9</sup>

The capacity of people in conflict to ask and answer questions is impaired; often, rather than serving the positive functions listed above, questions become tools of power and control or accusation. Yet precisely because there is no more effective way to interact in an active, engaged manner, it is essential that questions in discourse remain in fair territory. It is because questions are direct, ask for information, require an acknowledgment by the other (and the very act of acknowledgment also acknowledges the existence of all parties to the communication) that Habermas names questions as one of the important presuppositions of argumentation or discourse: to lose the question is to lose a powerful form of exchanging information, ideas, and possibilities. In situations of conflict, the mediator must reclaim the power of questions, not perfunctorily but explicitly and directly. Mediators can serve as guides to reinstate and reinforce

the inherent value of the question — not just by asking questions himself or herself but also by creating a zone of safety in which the parties can begin asking questions of each other. Note that Habermas explicitly states that *everyone* has the power to question. In this case, “everyone” significantly includes the mediator, who through impartiality can reintroduce the parties to questions as a constructive form of communication.

3.2b. *Everyone is allowed to introduce any assertion whatever into the discourse.*

Questions are paired with the power of assertion, a particular kind of statement. Assertions state something as true or claim something. Of course, making an assertion does not mean that something *is* true; it merely invites further dialogue to determine whether something is agreed between the parties *as* true. But without assertions, there is no ability in discourse to stake out ground that the participants are prepared to further explain and defend. Assertions reflect positions, arguments, and strategies to obtain needs and goals. However, assertions do not always invite a response; in that sense, they can become absolute claims that stop discourse rather than encourage it. When parties experience conflict, assertions often become stronger, more rigid, less inviting to continued dialogue and, therefore, more positional.

The role of the mediator here is to help the parties make not only strong statements of position but also assertions that are open to ongoing discussion. The mediator’s task is to give permission for everyone to make assertions with the caveat that everyone must be willing to

subject their assertions to continuing rational discussion by the other party. The mediator reminds the parties that their statements are merely assertions and not truth in themselves — a reality that the parties have often long since forgotten in the frustrations of conflict. The mediator can help the parties to regain the full range of the assertion as well as to recognize the inherent limitations that assertions have as invitations to discuss rather than absolute pronouncements of what is true.

*3.2c. Everyone is allowed to express his attitudes, desire, and needs.*

The presupposition of free expression is a critical piece effective communication. Expression is about the aesthetic of human experience – the full richness of who I am and who you are, demonstrates the composite of all that makes me uniquely me and you uniquely you. And the recognition of expression involves the perception that human beings need to be understood at some deep levels by an other in order to express their identity. Expression can be a solo affair, but most of the time full expression requires the presence of an other — whether an intimate or a stranger.

People in conflict often feel that the other does not have a clue about who they are. Because the safety to engage in authentic expression has been truncated, people often resort to dehumanizing and even demonizing the other in order to justify their own views of the conflict, preventing the kind of recognition that can produce meaningful breakthroughs. Most people do not do this intentionally; this self-absorption and loss of expressive potential is a consequence of

the vulnerability of conflict. Parties to conflict often will refuse to expose themselves in any real way for fear of what might happen to them — the rejection that may occur to their very identity. They refuse to express in order to self-protect.

The mediator's opportunity here is to give permission and remind the parties of the need for authenticity in the mediation space. By naming the inherent need for people to be understood, and then inviting the parties to do those acts of self-expression that reveal, the mediator calls forth the presupposition that people care about being expressive — being able to reveal their true attitudes, desires, and needs to the other. Those of us who do mediation know those moments when people “get real” with each other and are authentic. Those are often the powerful moments of recognition that Bush and Folger (1994) identify so clearly and which sometimes signal the critical moments of opportunity for the parties to both better understand each other and to move toward different ground for potential resolution.

**(3.3) No speaker may be prevented, by internal or external coercion, from exercising his rights as laid down in (3.1) and (3.2).**

In this presupposition, Habermas recognizes that the presence of coercion of any kind is detrimental, even lethal, to true communication between the parties. The invocation of noncoercion is the fundamental assumption that people, as autonomous free agents, have the right to engage or not engage. The presence of any coercion is inimical to communication that can lead

to understanding and agreement, whether the coercion is internal (fear that inhibits saying what is on your mind) or external (a system, like the law, that constrains your ability to participate on your own terms).

A rationally motivated agreement cannot exist in the presence of coercion. Practitioners in the field of mediation are divided over what constitutes coercion and when it can rightly be applied. This argument comprises several different issues; we need to disentangle these issues.

To our mediator – we’ll call her “Ruth” – coercion has been at work whenever an issue is decided without both parties freely and fully agreeing to it. To Ruth, a paper settlement is not a true settlement; a settlement has to come out of, rest upon, and be sustained by a positive relationship between the parties. Without such a foundation, the ink will not even be dry before the agreement is broken or otherwise distorted. And even if not broken, then immaterial relative to the continuing disputes that will arise when the parties have not truly reconciled. To Ruth, then, settlements can be reached in only one of two ways: (a) reconciliation between the parties or (b) coercion of at least one party. Two things follow from this perspective: Ruth sees the primary goal of mediation as being a transformation of the relationship; meaningful settlements can occur (and can endure) only within the context of such a relationship. Second, Ruth sees other forms of mediation as coercive, meaning bad – bad for moral reasons, since coercion is morally wrong, and bad for pragmatic reasons as well, since true settlements cannot be based on

coercion.

Let us look at another mediator, whom we will call “Henrietta”. Henrietta’s mediation efforts are devoted to finding a settlement, believing that in most situations, more people will be more hurt by the failure to reach any settlement than will be hurt by the settlement that goes against one party. While Henrietta recognizes the importance of relationship – recognizes all those things that Ruth emphasizes, the problems of an imposed resolution, the instability of the resulting agreement, the possibility of further conflict – and does all she can to create a relationship out of which a true resolution can flow, Henrietta is also aware of the problems of no settlement at all, of leaving the problem unresolved. To take one common example: a child is in foster care while his parents argue over custody rights. If our primary concern is the welfare of the child, then some resolution has to be reached, and reached quickly. To Henrietta, it is not coercive to push for and demand a settlement. If the parties can’t sustain a relationship that will permit a settlement of at least this issue, then it is imperative to seek one in other ways. (And after all, the alternative of a court settlement will be at least as coercive as any settlement reached in mediation.) The pressure on the parties for a settlement comes from the objective circumstances of the situation, not from the mediator, even if the mediator may be the conduit of that pressure. To Henrietta, calling this “coercion” does not reflect the true situation. (In fact, she thinks, if mediators are going to start calling each other names, then she will name Ruth as a

wimp, spineless in the face of real people and real conflicts.)

Despite their different perceptions of themselves and each other, both Ruth and Henrietta value noncoercion. The division within the field of mediation arises not out of a dispute over coercion but rather from the tension between two genuine, genuinely-held values: the value of relationship, and the value of settlement. In the next section we will discuss how to negotiate this tension; here, we simply want to note that coercion is not the issue, and that both of the values are real, important, and genuinely held.

#### ***D. Using the Presuppositions in Mediation***

These rules form a base that a theory of mediation — and more important mediators themselves — can rely on, regardless of whether the parties to the mediation explicitly consent to them. These rules can help mediators understand what their practice is about fundamentally and identify what most people take as givens when they enter into any communicative experience. Mediators can use these presuppositions as a way to frame the mediation experience and invite the parties back into practicing the very things that human beings presuppose in every communicative experience. By using this language of presuppositions, Habermas provides a way for the mediator to name what has often been violated between the parties, and even to challenge the parties' violations of these presuppositions. The beauty of these ideas is that the parties have already implicitly consented to them by virtue of being communicative beings — even if that

consent has yet to be recognized within the self or acknowledged to the other. And most important, these presuppositions also provide the basis for agreements about relationship that can occur *whether or not the parties can reach agreement on substantive issues*. In that sense, these presuppositions cut across any impasse situation as potential ground for agreement between the parties regardless of the particular substantive issues that they debate about.

How do these presuppositions affect the mediator's conduct in the mediation? Two potential applications are demonstrated in Tables I and II. In Table I we show how the mediator might open the mediation, explaining the presuppositions as parameters within which the mediation will occur. In Table II we briefly explore how each presupposition provides mediators with appropriate interventions within the mediation interaction. While we do intend these as concrete suggestions for mediators, we also note that they are the result of the theoretical analysis we proposed at the beginning: an analysis rooted in foundational relationship.

TABLE I ABOUT HERE

TABLE II ABOUT HERE

### **III. THE NATURE AND VALUE OF IMPASSE**

The presuppositions provide patterns of behavior and articulated assumptions that can serve as common ground to create a safe space for mediation. But mediators still need to face the

challenge of what to do when the parties choose to end mediation. Impasse is traditionally seen as that moment in the mediation when the parties and/or the mediator decide to end the process. Most mediators dread this moment. It represents both a failure to obtain settlement and an abandonment of the hope of creating a positive relationship – or at least a positive ending to the present relationship. Once impasse has been reached and mediation abandoned, the parties are thrown into another, quite different process – for example, litigation – in which the goals (and gains) of the mediation are at least minimized and perhaps destroyed altogether. Alternatively, the parties are cast into a limbo to simply muddle through the best they can; one wonders if anything positive about the experience survives.

One source of power of transformative mediation is its understanding that experiences of empowerment and recognition are inherently important and can affect the parties and the dispute positively in the future, regardless of what happens after mediation. There are at least three possibilities for the parties and the mediator beyond retaining their memories of empowerment and recognition experiences. First, the mediator can assist the parties to identify those aspects of relationship that can be honored even during ongoing dispute and the increasingly imperative need for settlement. Second, he or she can help the parties recognize how they can accomplish this even during the most confrontational moments in the future, in court or other settings. Third, he or she can help the parties recover, insofar as possible, a communicative relationship after the final

decision is handed down; this preparation can occur in advance of the trial or can even be done after the decision – a new but useful role for mediators. Mediators can achieve these three objectives by explaining the *conditions* for stopping the erosion of relationship in the midst of ongoing conflict. The effect, then, of examining conflict in Habermasian terms is to expand the scope of mediation in keeping with the most general charge to mediators of helping people preserve, fix, and renew their underlying communicative relationship with each other.

#### **IV. PREPARATION FOR LITIGATION: STOPPING THE EROSION OF RELATIONSHIP IN THE CONTEXT OF ONGOING CONFLICT**

At the moment of impasse, parties often feel overwhelmed by the recognition that the mediation will generate no settlement. When conflict seems inevitable, parties regard the situation as anarchic, and they find it difficult to remember and practice basic relationship-sustaining behaviors. But impasse contains the possibility for the mediator to assist the parties in remembering and daring to practice such behaviors despite their uneasiness at conflict and their fear of loss. We call these relationship-sustaining behaviors *conditions* of conflict, minimal requirements to maintain the interpersonal environment we desire, even if the existence of the conflict and its outcome are beyond our control.

These conditions are of a different nature than the Habermasian presuppositions, which describe various aspects of a communicative relationship, assuming that parties are still searching

for a mutually agreeable solution to the conflict, such that the mediator can restore the communicative relationship simply by recalling these aspects to it. The conditions, however, describe the psychosocial origins of the erosion of the presuppositions of argumentation in the parties' relationship. By identifying and directly confronting the reasons for the erosion, the mediator can help the parties stop further erosion and perhaps even restore a communicative relationship. This is not meant to achieve a settlement but rather to show the parties how their relationship can be maintained even during the pain of the approaching, final settlement phase of the conflict. Whether the parties choose to do so is, of course, up to them. However, these conditions can be remembered by any of the parties involved, as well as the mediator — in fact, they can be practiced unilaterally without loss and with the promise of long-term benefit to all.

While either party can maintain these conditions unilaterally, certainly they are better served when discussed explicitly; this creates a shared space in which each party is better able to understand the other's actions. Even if only one of the parties wants to create and maintain these conditions, discussing them is nevertheless worthwhile, because it makes that party's subsequent behavior comprehensible and also invites the other party to join later.

These conditions extend the traditional mediator's role in two ways. First, the mediator can transform the moment of impasse into a new opportunity for the parties to experience empowerment and recognition, discussing how they intend to relate to each other during the

subsequent, ongoing conflict. Second, the discussion necessarily concerns events and situations that will occur in the future and probably outside the mediation framework. This reclaims for mediators ground that should not be abandoned. As we shall see in later sections, mediators have a role in all aspects of conflict, since all aspects involve, in varying ways, the preservation of the underlying communicative relationship.

#### ***A. Condition of Centeredness***

Within the perceived anarchy of conflict, parties feel lack of clarity, confusion, and nonempowerment of the self, quite independent of the actions of the other.

However, the possibility is there for the parties to each deliberately create conditions in which they can remain calm, clear, and focused, empowered to deal with whatever comes their way despite the conflict (Bush & Folger 1994). Each party will have his or her own ways in which he or she can recover his or her center (breathing, meditation, praying, spending time in nature, and so on) regardless of the other party's actions or other circumstances. It is, of course, easier to remain centered when both parties share that goal, but it is possible to remain centered despite the other's actions.

#### ***B. Condition of Acknowledgment / Apology***

Within the perceived anarchy of conflict, the parties' feelings of vulnerability inhibit them from acknowledging the other and apologizing when appropriate, often instead choosing self-

protective denial in order to avoid feeling vulnerable. Further, each assumes that the other party doesn't care what damage he or she has inflicted during the conflict and the mediation process.

However, it is possible for one or both parties to acknowledge what has occurred and offer apologies when appropriate. This kind of act creates space for parties to distinguish between accidental harms and harms which, even though intended, were not intended to be hurtful; and to distinguish these, in turn, from deliberately hurtful acts that are now regretted. Such acknowledgments and apologies make the parties' subsequent interactions easier during the final decision phase by forestalling the propagation of earlier misunderstandings and actions.

### ***C. Condition of Reassurance***

Within the perceived anarchy of conflict, parties tend to become self-absorbed, self-protective and judgmental of the other (Bush & Folger 1994).

However, the possibility is there for the parties to look for moments of recognition of the human other and to give the other the benefit of the doubt as much as possible. Whenever possible, parties can also continue the practice of offering authentic and sincere reassurances of good intention to each other. Both parties can overtly agree to signal each other, when sincere, and to watch for signals during the future process.

### ***D. Condition of Limiting the Bad***

Within the perceived anarchy of conflict, parties tend to see the world as a universally

dangerous place; they tend to overgeneralize previous bad experiences, trying to protect themselves.

However, it is possible for the parties to agree that although each believes the other untrustworthy, they do not have to conclude that all people similar to the other are untrustworthy, or even that the other is untrustworthy in all circumstances. Rather, they can conclude that some are untrustworthy and some are not, that people are trustworthy in some situations but not in others, and each party has to judge each particular case as it comes. This helps stop the lateral spreading of negative judgment beyond the parameters of the existing conflict and current parties.

#### ***E. Condition of Impersonal Process***

Within the perceived anarchy of conflict, the parties tend to personalize the forthcoming process of decision (litigation, arbitration, and so on) – to believe that one party will somehow be able to use (abuse) the process to the serious disadvantage of the other.

However, the possibility is there to recognize that while the process may be used strategically used to obtain a particular goal, it will not be used for revenge, intimidation, or to gain more advantage in general than is necessary. The parties can state to each other what they intend to obtain through the process and that they do not intend to use their gain for any issue beyond that. In addition to limiting the spread of the conflict, these mutual assurances also help the parties to avoid seeing every gain or loss in the later process as personal aggression. They can

then interpret all things that occur in future processes — even including a sense of violation — as a reflection of the complexity of the conflict rather than as personal gains or losses directly attributable to the bad intentions of the parties. We think this is what Fisher and others (1991) were referring to when recommending separating the person from the problem. In this instance, the problem is acknowledged to have a reality and effect of its own that are related to, but also independent of, the parties. This acknowledgment can allow the parties to approach future interactions with each other from a posture of relative neutrality rather than complete adversarial engagement.

#### ***F. Condition of Renewing Opportunities***

Within the perceived anarchy of conflict, the parties tend to see conflict as entrenched and unchanging.

However, circumstances are in fact changing all the time. Nothing, including the conflict and its circumstances, ever remains the same from moment to moment. New opportunities for the parties to mediate with each other can emerge at any moment. The possibility exists for the parties to agree that they will continually watch for and, when possible, participate in any mediative moments that may appear, being willing to step out of adversarial space to do this.

#### ***G. Condition of the Unknowable Right***

Within the perceived anarchy of conflict, each party tends to see his or her own sense of

the Right as the only valid standard. The conflict takes on the additional valence of Right versus Wrong, so it involves not just each party putting forward his or her own best sense of the situation and his or her own needs, but rather each party maintaining a universe with moral meaning.

However, in circumstances of impasse, no one has a privileged position vis-à-vis others in determining what is right. People leave behind in the failed mediation the chance to make and support those claims. As the situation changes from mediation to decision, people may recognize that although they may still be convinced that they are right, there is no longer any way to press those feelings and convictions on the others, who feel similarly about their own views. They remain entitled to hold and press for their preferences, but they also must accept that they can claim no more right to those preferences than anyone else can for theirs. The effect of this acceptance is to reduce the emotional valence of the conflict and thus to limit the fear of each party that a loss in this conflict means a loss in all conflicts — or, indeed, a loss of Good to Evil.

#### ***H. Condition of Safety***

Within the perceived anarchy of conflict, the parties become uncertain of the rules of the game and thus uncertain about their safety with each other. This loss of safety, the imminent onset of continued adversarial relationship, and the self-protective reaction to it, are central reasons for the breakdown of communication in the final outcome phase.

However, it is possible for the parties to create zones of potential safety by taking some concrete actions: 1. Each party acknowledges to the other, without accusation, that he or she feels unsafe. This simple statement of fear acknowledges both that there may be something genuinely to be afraid of and that, in this reaching toward the other, there is space for potential relationship. Even if this is done unilaterally, it invites mutuality. It represents if nothing else the grief one feels at separation. The naming of fear is an essential first step in overcoming it. By acknowledging it exists, the parties have the potential to switch their emphasis from the endless psychological game of trust to a focus on the common problem(s) that must be addressed. Once that step is taken, other steps become possible.

2. Either or both of the parties could go on to disclose what is feared and what it would take for him or her to feel safer.

3. A party could disclose in advance what steps he or she is planning to take – not in the service of intimidation or other threat, but rather to demonstrate the sincerity of one's position. This kind of disclosure also obviates the strategic reality of surprise as a tactic. These disclosures need go no further than either party feels willing to go; they need involve neither risk to any central interests nor feelings of vulnerability. But these disclosures can serve to open a space for preserving parts of the relationship that would otherwise be at risk of being destroyed in the conflict.

In summary, these conditions offer the possibility for the parties to restrict the relationship-destroying aspects of the final resolution phase. They also provide mediators with another opportunity to help the parties find common ground even in the midst of adversarial engagement. We do not see this list of conditions as absolute or all-inclusive, but it does make clear our perception that impasse is not necessarily an ending of mediative action. Indeed, by exercising these conditions, impasse can open up new vistas for the parties and the mediator to explore in their ongoing journey with each other.

## **V. WELCOME TO LITIGATION: PRESERVING RELATIONSHIP WHILE MAKING THE TRANSITION BETWEEN MEDIATION AND THE COURT**

The legal system can receive the disputants and their dispute after impasse by respectfully acknowledging the parties' mediative experience and recognizing the impact of the mediative conditions on the parties. It is reasonable to expect judges to adapt their customary procedures in some manner, given the growth of legislatively and judicially mandated mediation / ADR prior to trial. As courts are currently constituted, the discoveries and results of the mediation process are often left behind at the courtroom door. Many times judges either say nothing about the previous mediation experience or dismiss it as a failure because no agreement was reached. It is true that

the courts do not have the same function as mediations, but the judicial process can be strengthened if courts help the parties transition into the court process in a way that preserves the parties' perception of mediation's benefits. If the court knows the Habermasian presuppositions and derived conditions, it can honor the relationship-preserving aspects of mediation while still performing its decision-making function.

One way that this can happen is with an opening statement by the court to the parties when the case enters (or reenters) the legal system. At the start of every trial, judges might usefully attempt to establish or reaffirm the proper orientation to the dispute and the role of the court by making a statement like that in Table III. These comments are derived from the conditions of Section IV and apply those concepts to the courts in an ongoing effort to create a seamless connection between the mediation and litigation process.

TABLE III ABOUT HERE

Even more than mediators do in the mediation process, judges, by exercising their authority in relationship-preserving ways, have the power in the court process to humanize the tone and parameters of legal action.

## **VI. ENABLING COURTS TO SUSTAIN RELATIONSHIP:**

### **PARAMETERS OF JUSTICE FOR LEGISLATURES AND COURTS**

We have been tracing how the Habermasian assumption of communicative relationship

changes our understanding of the conflict process. Our focus has been on mediators, whose role already makes them the natural stewards of relationship, and on judges. However, the actions of these participants are regulated by larger institutions and traditions – the laws themselves, the legislatures’ mandates for decisions, and the strictures of legal precedent and procedure. The choices or actions of these larger institutions directly affect the ability of mediators and judges to preserve relationship in the midst of conflict. In this section we suggest three limitations to the decision-making authority of these larger institutions – limitations designed to prevent those institutions from causing unnecessary harm to parties’ relationships.

These limitations are necessarily theoretical; we are not prepared to assert whether or how they could be instituted. They apply to the kind of practice we believe court systems and legislatures should attempt to institute, but it is not yet clear how or to what extent these considerations are compatible with the courts’ responsibilities as protectors of clear legislation and legal precedent.

#### ***A. No Silencing***

Parties must be free to disagree with the outcome (distinguishing here between disagreement meant to sabotage the decision, which is not acceptable, and disagreement meant to continue fundamental inquiry into what is right, which is to be encouraged). Even if an outcome to an existing conflict has been established by judicial decision, the parties’ senses of the nature of

justice, the nature of reality, and their own senses of the Good may change under continued scrutiny. We are not talking about the parties badgering or whining each other into submission. Critical, thoughtful scrutiny can only serve to advance everyone's interests (or at least not harm them). Preventing people from discussing the issues would be a claim that we know the truth of the situation, and in most circumstances it would also be a form of consolidating the victor's position.

***B. Only Levels of Violation That Maximize Relationship***

When we are unsure what is just or what goals the parties ought to pursue, we cannot know which of the parties should be left feeling violated by the outcome. When there are only two parties involved, and only one would be hurt by a decision, it is obvious that (unless there are other considerations) we should adopt the decision that hurts the least. The decision becomes more complicated when there are several parties and a variety of decisions. There are two traditional approaches to this decision: the utilitarian and the Rawlsian. Utilitarianism dictates that we adopt the decision that results in the least total violation to all the parties; Rawlsianism advocates the decision that minimizes the violation of the person hurt the most. An ocean of ink has been spilled over these methods, but from our point of view both seem appropriate in different circumstances.

TABLES IV AND V ABOUT HERE, BUT SET TOGETHER AND BEFORE “C. NO PERSON ...”

In the conflict shown in Table IV, decision A would cost both Mary and Paige \$99, while decision B would cost Mary \$100 and Paige \$0. The utilitarian criterion would support decision B, which has a total violation of \$100, over decision A, which has a total violation of \$198. The Rawlsian criterion, on the other hand, would lead one to choose decision A, where the worst violation is only \$99, over decision B, where the worst violation is \$100. In these circumstances it seems that Paige could justly complain about the Rawlsian criterion, holding that Mary’s advocacy of decision A is costing Paige \$99 in order that Mary may save herself \$1.

On the other hand, one can easily imagine a situation in which the utilitarian option would also seem unjust. In Table V, utilitarianism gives decision B as the preferable one, while Rawls’s criterion names A as preferable. It seems clear that the Rawlsian alternative is preferable. Decision A penalizes both Mary and Paige \$100 equally; decision B, on the other hand, decreases the total penalty slightly by shifting almost all of Paige’s cost from her onto Mary. In essence, option B reduces the overall cost slightly but only at the moral cost of introducing a large inequality. In this circumstance, Mary could rightly complain that Paige’s attempt to shift the decision from A to B was treating her badly for a very minor collective benefit.

If we think in terms of preservation of an underlying relationship, then neither the

utilitarian nor the Rawlsian criterion is a universal guide. In Tables IV and V, we have shown that the use of either criterion can be abusive, even if it can be justified by formal logic. Neither criterion should be relied upon exclusively. The final decision must depend on the nature of the situation and how alternatives can preserve the underlying relationship of the parties. We are aware that this is not a clear-cut, quantifiable criterion, as the utilitarian and Rawlsian criteria are, but we believe it is better to have a hazy correct answer than a specific wrong answer. Any decision should be put through the filter of considering what its long-term effects will be on the relationship between the parties.

***C. No Person or Identifiable Group Can Be Subject to Greater Violation***

If we are unsure who is right, then we have no reason to think that the actual outcomes should favor one person or group more than another on a consistent basis. If such favoritism is apparent, something is wrong – most probably, that some form of prejudice or structural inequality exists in the conflict resolution process. A consistent pattern of violation against any particular person or definable group is *ipso facto* alarming, calling for immediate examination and correction. Such a pattern can be revealed only over a large number of cases; it cannot be recognized in any single case. Therefore the examination and correction it called for must happen at the level of the collective decision system — constitutions, legislatures, laws, administrative and judicial structures, and so on, including the culture within which these are embedded.

## **VII. MEDIATION’S ROLE AFTER THE OUTCOME IS DECIDED: REESTABLISHING RELATIONSHIP**

As the parties move from impasse to final outcome, their relationship is strained not just by the conflict itself and its outcome but also by the feelings that may arise after decision. Some attention needs to be paid to this strain; we cannot assume the relationship will continue without attention. Mediation can assist the parties during the post-decision time as they decide under what conditions they will continue relationship. This opportunity for mediators represents a new direction for the field – post-outcome mediation, repairing the harms to relationship caused by the experience of litigation. Mediators can become adjuncts to the court to provide these services to parties leaving the courtroom and reentering post-litigation life.

In the guidelines presented below we assume that the final outcome has favored one party, the “victor”, and has left the other party, the “loser”, feeling violated.<sup>10</sup> A basic problem in U.S. dispute resolution is that our culture provides little support for losers and little restraint on victors. In the United States, parties in conflict tend to characterize themselves as opponents in a battle between the Right and the Wrong, between the Good and the Evil, instead of a search for a decision in which any outcome will be painful to some. When the battle is over, the victors claim that the Right has been served and the Wrong defeated, that Good has triumphed over Evil; they thus dismiss the pain felt by the losers as merely the just penalty for their having been wrong. The

victors hold that since the Right has prevailed, no further examination of any broader or underlying issue is needed. The losers, on the other hand, are left with the continued conviction of being right, the taste of defeat, impotent anger at their inability to have their perceptions understood and engaged, and resentment at forced compliance with the final decision. All of this divides the parties from one another, regardless of the issue, and breeds continuing conflict.

There are several concrete ways to reduce this strain. By delineating the fundamental attitude that both the victor and the loser need to adopt toward the final decision, and four ways to accomplish this, mediators can assist the parties to maintain or restore Habermas's communicative relationship — thus completing the relationship cycle.

If conflict and its resolution involve winners and losers, post-judgment reconciliation is extremely difficult. However, the parties can instead view conflict as a result of the common human challenge: to find ways we can all sustain ourselves in a world that, despite its infinite possibility, presents us with limited immediate possibility. In such a world, a judgment cannot be seen as a final truth, or even the best temporary truth, but only as our best guess as to what is right within the limits of the possible. We cannot be certain in advance about the judgment's effects.<sup>11</sup> We cannot even be certain in advance what the parties' long-term responses to the judgment will be. Will the loser continue to believe it unjust? Will the winner continue to believe it just? Or will it come to appear reasonable to all?

The only attitude the parties can reasonably take toward the judgment is that it sets an experiment in motion. The parties know that they don't know enough to be sure they've made a perfect decision, so the best they can do is gather more information: to see the outcomes, to think about their own desires, and to understand the other more clearly. They hope the experiment works, in the sense that the judgment results in an outcome acceptable to all, but the parties can blame neither each other nor the judge for what happens afterwards. No one can say, "I told you so", even if he or she *did* say so, because no one can really know in advance what will happen. This perspective eases the tension between the parties. It does not remove the tension of one party not getting what he or she sees as fair, but it does remove the sting of seeing the outcome as defeat.

This new conception of the relationship between victor and loser appears unrealistic, counter to our culture's "common sense". U.S. culture is based on an oppositional-conflictual model of human relations (Cuzzo 1995); we generally fail to see that opposition creates its own consequences and how that happens. We must come to see that *both* victors and losers have simultaneous and reciprocally-related roles and duties in their ongoing experiment. The nature of this unity is not well understood in our society, and until it is, every mediation will have the additional challenge of teaching it.

There are four perspectives post-outcome mediation process can explore:

### ***1. Graciousness in Victory***

One kind of recognition that could be discussed would be an explicit, public statement that the outcome is not the triumph of the victors but only the beginning of an experiment assessing its value. Since there is still no universal acceptance of the outcome, the parties' uncertainty about its rightness continues even when the conflict is decided. The specific implication for the victors is that they do not attempt to claim that their victory ends the continued consideration of what the right decision would be. For example, if Sue were awarded custody of little Billy, she would not attempt to turn Billy against John, because she recognizes that she does not in fact know whether the custody decision was the right one. Granted, reconsideration of the question cannot turn the clock back; it will always be the case that Billy will have lived with Sue during the period following the decision. But the underlying issue of what the right outcome is continues and is not easily settled. Accepting this reality can invite parties to keep an open mind.

### ***2. Graciousness in Defeat***

If the victor is gracious in victory, so also must the loser be gracious in defeat. Since the loser does not agree with the outcome, he or she cannot regard it as anything more than a pragmatic settlement of a situation requiring settlement. By viewing the outcome as an experiment, the parties can agree to gather more information about the situation and their own understanding of the right. Just as the victor must allow the experiment to remain no more than

an experiment, so the loser must give it a fair chance. He or she doesn't attempt to sabotage the experiment, actively or passively, even while his or her disagreement with it may continue.

***3. Appreciation by the Victor for the Loser's Willingness to Accept the Outcome***

The victors need to resist their sense (or at least mute their huzzahs) that since their sense of the Right has been victorious, they need not acknowledge those they believe were Wrong, that is, the losers. Instead, the victors need to publicly, explicitly recognize that the losers, in being willing to endure the sense of violation, are contributing to the experiment that is advantaging the victors. If we see ourselves as sharing the same moral universe – that is to say, if we regard the other(s) to be full participants in our shared moral order – then we are not victorious over the other parties but are instead jointly choosing a trial solution. That this trial solution can operate at all is due as much or more to the loser(s) in the situation as it is to the victor(s).

It would also be appropriate and helpful for the victor to express sympathy for the violation experienced by the loser. Even if that sympathy is rejected in the heat of the moment, the offer affirms the basic understanding of the situation as a problem of our human finiteness, not a problem of one party against the other.

***4. Appreciation by the Loser for the Victor Not Securing His or Her Position***

Just as the loser has contributed something to the experiment – the rejection of sabotage as a response to it – and deserves appreciation from the victor, so also the victor contributes

something – the refusal to take advantage of the victory by consolidating and extending it – and deserves appreciation from the loser for that. Both the loser’s and the victor’s appreciation for the other serve to acknowledge and thus to maintain the relationship between them despite the sense of violation.

## **VIII. CONCLUSION**

The journey of conflict is a long and difficult one for many parties. While they seek settlement and resolution of their issues, parties also struggle with the questions of meaning and relationship that inevitably arise. Many mediators and decision-makers prefer to avoid wrestling with the conundrum of relationship issues and focus their energies on generating settlements. This paper argues that relationship preservation is always an issue between parties – whether strangers or intimates. Habermas’s theory of communicative action properly asserts that parties can recognize, acknowledge, and preserve a communicative connection between themselves based on the presuppositions of argumentation inherent in the human experience of trying to coordinate behavior. All human beings assume the posture of relationship with each other. Mediation creates a unique space for people to explore that fundamental recognition, and protect it even in the midst of conflict.

We have followed the journey of conflict and suggested, at each of its stages, ways to preserve relationship. We have argued that mediators should be especially sensitive to the

presuppositions of argumentation and that knowledge of them can assist mediators in practical ways. Indeed, given that parties often lose the willingness and desire — though never the capacity — to preserve relationship, mediators are responsible for articulating the presuppositions and creating safe space for the parties to act upon them.

Even when facing impasse, mediators can help parties discuss the conditions under which they can preserve human relationship as they agree to disagree and submit to some compulsory resolution process, such as trial. This recognition affirms the powerful contribution that transformative mediation makes to our understanding of and respect for relationship, while simultaneously acknowledging that transactional mediators pursue the worthy goal – essential to many parties – of settlement. The two goals need not be exclusive, and if mediators look at conflict in the light of Habermas’s theory of communication, they can reconcile settlement with relationship-building.

This perspective leads us into the interface between mediation and the legal system. The court’s role can extend beyond simple conflict resolution; the courts can enable the preservation of relationship – in how they receive the parties, in how they conduct the trial, and in the kinds of decisions they hand down.

All these implications and applications are drawn from a consistent theoretical orientation. The theory of communicative action is abstract, dealing with the grounds of how people get along

together, but it still shows us how people actually do seek to relate to each other. Mediators can take advantage of this to remain centered and proactive through the conflict resolution process. By weaving together this theory with mediation practice, both theory and practice are enriched and enlivened.

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## **Endnotes**

1. We believe that the ways of relating perspective offers a more comprehensive and defensible account of the underlying relationship. However, Habermas's theory is the better known, requires less explanation, and suits the linguistically based practice of mediation.
2. It is important to recognize, as Habermas does, that these rules may be incomplete and/or inaccurately phrased. There is no help for this in an imperfect world, where we can only operate on our best information until experience reveals its limitations. Habermas's general theory does provide a specific means for testing and revising the list of conditions in light of our experience.
3. Note that "coherence" is not the same as "correct" or "valid". It simply means that the argument can be rationally discussed.
4. Habermas (1983/1990:98-102) does consider whether a person can avoid the relationship by

simply refusing to speak with others. Do the presuppositions of argumentation still have force when no argument is being advanced? This is of course an important question for mediators, who regularly encounter parties who want nothing to do with each other. Habermas's answer is that we are so embedded in a life formed by speech and the consequent presuppositions of argumentation that we cannot remove ourselves from those presuppositions and remain sane. While we believe better reasons could be advanced for the omnipresence of the presuppositions of argumentation, we agree that they *are* omnipresent, and this work is not the place to pursue the issue.

5. There is of course the possibility that self-contradiction is simply being used for strategic purposes, but we believe that the problem of consistency goes deeper than bad faith. For example, one may simply have failed to prioritize various desires, or one may have failed to recognize the existence of multiple, potentially conflicting desires.

6. If we are talking about an agreement among neighboring countries, for example, then my massing of my troops along the border to guard against invasion will, however innocent my intentions, be taken as a threat of invasion.

7. To return to the previous example, the best defense against an invasion is to invade first. Do unto others what they're going to do to you — and do it first.

8. If a party is not competent to do so, we do the best we can for him or her, perhaps appointing someone guardian *ad litem*. But this is not an exception to our basic orientation to conflict resolution but only special case of the basic principle that everyone gets to express their understandings and develop the background of mutual understanding as much as possible.
9. Adapted from Leeds (2000:9-10).
10. “Victor” and “loser” are in quotes because neither one knows whether the outcome is right (or wrong) or even whether it is good (or bad) for him or her. Note also that it is perfectly possible for the outcome to leave both parties feeling violated, for example, when a child custody case results in the child being sent to foster care.
11. Even later, after the effects are observed, no control group exists to assess whether the judgment was the best choice.

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## **Author Identification**

Stephen Chilton is Associate Professor of Political Science at the University of Minnesota Duluth.

He is the author of *Defining Political Development* and *Grounding Political Development*

(Lynne Rienner 1988, 1991), as well as numerous articles on the conceptual foundations of social science. Dr. Chilton acknowledges the following people for support and intelligent commentary:

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Department of Political Science / University of Minnesota Duluth / Duluth, MN 55812-2496.

Tel: 218-726-8162 (o); 218-724-6833 (h); 218-726-6386 (FAX). Email: [schilton@d.umn.edu](mailto:schilton@d.umn.edu).

WWW: [www.d.umn.edu/~schilton/](http://www.d.umn.edu/~schilton/).

Maria Stalzer Wyant Cuzzo is Associate Professor of Legal Studies at the University of Wisconsin - Superior and Coordinator of the CEE Mediation Certificate Program. She is a former litigator and a practicing mediator in Minnesota and Wisconsin. She conducts trainings and seminars regionally on transformative mediation principles and practices. Dr. Cuzzo thanks Dr. Mary G. Dietz, Dr. James Farr, The Honorable Clinton W. Wyant and Sophia Stalzer Wyant, the Legal Studies students at UW-Superior, and, as always, Dr. Steve Chilton for their valuable comments, input and interest, and encouragement in the ongoing project. Associate Professor of Legal Studies / Department of History and Political Science / University of Wisconsin-Superior / Superior, WI 54880. Tel: 715-394-8482 (o); 715-394-8454 (FAX). Email: [mcuzzo@staff.uwsuper.edu](mailto:mcuzzo@staff.uwsuper.edu). WWW: [polsci.uwsuper.edu/CUZZO.htm](http://polsci.uwsuper.edu/CUZZO.htm).

## **TABLE I**

### **MEDIATOR'S OPENING REMARKS ON THE PRESUPPOSITIONS OF ARGUMENTATION**

“Welcome to the mediation. I want you to know some of the things that I assume coming into this experience as your mediator and I invite you to respond and offer me feedback, especially if I say anything that you disagree with.

“I assume that both of you are going to be trying to be consistent in your words and actions in this room. Part of what I can do to help this happen is to point out any contradictions or inconsistencies that I hear (1.1) and you should feel free to do the same for each other. When you point out a contradiction, however, be sure that you can explain why there is inconsistency by talking about a past event or comment or referencing something that the other person can understand. I assume that you are going to apply similar thinking to similar situations (1.2) unless there is a good reason not to, in which case, you can explain the reason. I assume that you are both going to do your best to use words that have the same meanings and to not use the same word in several different ways, something that can generate a lot of confusion (1.3). I want you to know that if I see any of those challenges, I will respectfully flag them for you and invite you to address them. It can keep the communication clear.

“I would also suggest that we are here in this mediation to have an organized, reasonable discussion about your situation. To achieve that, two additional things are useful. First, when you speak, you should do your very best to say only things that you really believe. (2.1) This is not the space or place to try to strategize or manipulate each other. This may be one of the only spaces you have to honestly and authentically talk about this problem. Second, if you want to raise other issues, you should be prepared to explain why they are relevant and important to the reasons we are here. (2.2).

“Finally, I have assumptions about how this conversation can best proceed. Every person here is presumed to be competent to speak and act. That means you all have a right to participate in this conversation. (3.1) Everyone is allowed to ask questions about anything that is said. Questions are necessary and useful and should not be used to attack but rather to inquire and find out what you need to know. (3.2.a). Everyone is allowed to make new assertions or offer different points of view on the things we are talking about. You can discuss the value or merit of those points of view, but everyone has the right to offer them without criticism for trying. (3.2.b) Everyone is allowed to express his or her attitudes, desires and needs. In other words, to the best of your ability, you should feel free to be honest and reveal who you are in this situation. It will help you understand each other better. (3.2.c). And finally, I will do my level best to do nothing that prevents any of you from being able to do all these things during the time that we have together. (3.3). I hope that you do your best to honor that for each other as well.”

## TABLE II

### HOW TO APPLY THE PRESUPPOSITIONS DURING MEDIATION

#### Presupposition      Question/Response

1.1 Noncontradiction “That comment seemed inconsistent with your earlier comment about “x”.

Earlier you said “y”. Would you mind explaining that a little bit more?”

1.2 Similarity “I thought I heard you say “x” about that same subject a few moments ago and

now you are saying “y” about that subject. Could you explain why that is?”

1.3 Same Meaning “You’ve now used that same word “x” to mean two things. The first

meaning I heard was “a”. The second meaning I heard was “b”. It is

important that we get this straight because of “c”. Could you please

explain what you mean when you use the word “x”?

2.1 Authenticity “Do you really believe what you just said? Why or why not?”

2.2 Addition of Topics “Could you explain why you think topic “q” is relevant or important

to the present conversation?”

3.1 Competence “Everyone’s voice needs to be heard on this question. You are all competent to speak and act. Could we make sure that everyone’s voice gets heard here?”

3.2.a. Questioning Assertions “Does anyone have a question about that comment?” or (in the affirmation form) “All questions are good questions. Questions help us all better understand unless you are using them as a weapon.”

3.2.b Introducing Assertions “Does anyone have a different assertion or view on that issue?” or (in the affirmation form) “Everyone has the right to introduce new assertions or statements during this mediation.”

3.2.c Expressing Self “What do you really think or feel or need on that subject?” or (in the affirmation form) “It’s ok in this mediation for everyone here to reveal who they really are.”

3.3 No Coercion “Does anyone feel afraid or unsafe to express their views? Why?” or (in the affirmation form) “I am committed to providing you a safe space to discuss these issues free of coercion.”

**TABLE III**  
**JUDGE'S STATEMENT**

"We're here because the parties to this conflict have different goals.

"Let's all acknowledge that it is simply the human condition for us to have different goals, to want different things. It may be that one person might, upon reflection, choose to adopt another's goals — a change that occurs only as a result of invitation or of example. But since none of us can be certain in advance whose goals are right, none of us is justified in forcing our goals onto others.

"Right now, your goals appear mutually exclusive. You are here because you haven't been able to figure out a way that both sets of goals can be satisfied, and because you haven't been able to agree what would be a fair resolution – one that might leave you unsatisfied but would at least not leave you feeling violated.

"I earlier asked you both to attempt to reach some agreement with the help of a mediator. My hope – our hope – was that you could find a creative way of meeting your goals or that your sense of what is just could shift to the point that some mutually agreed-on resolution could emerge. During that mediation, your differences did lessen somewhat, and you did gain some understanding of each other's points of view. The fact that you are here, however, means that you still haven't been able to reach full agreement.

"Further mediation with independent neutrals may not be useful—it may indeed be that

you have no emotional energy left for it. The time to decide is now, because some decision must be made so that lack of decision does not become the decision.

"In these circumstances (unless something extremely lucky takes place in the coming trial — and please recognize that trials cannot be organized to depend on luck ) at least one and maybe all of you will feel violated by the outcome. Let us recognize that this unfortunate outcome arises from the human condition, not from each other. At one level, certainly, you are in each other's way and are understandably irritated with each other. But you recognize at a deeper level that conflicts are inevitable and decisions do need to be made. It is important that you want these decisions to be made in a way that, while imperfect, at least respects our common desire to get along with each other in this as-yet-imperfect world.

"The trial we're about to begin will not be a perfect process. Its goal is to produce a decision, we hope a fair one, but one that nonetheless may be disagreeable to one or all of you.

"The law is simply a lens through which this court will view the dispute and reach a decision. The law does not —and cannot—*define* how people are to relate to each other. But it is the best tool we have to settle disagreements such as we have here, and we respect it for that purpose.

"So look at each other now. Recognize that you are here because you want to live with each other, and that the bitterness of the medicine that has to be swallowed at the end arises from our human limits. And that our relationship to each other – our desire to live together in peace

and justice – will continue.”

**TABLE IV**

**A CONFLICT WITH A UTILITARIAN SETTLEMENT PREFERABLE**

DECISION	INDIVIDUAL COST TO:		TOTAL COST	MAXIMUM COST
	Mary	Paige	(Utilitarianism)	(Rawlsianism)
A	\$99	\$99	\$198	<b>\$99</b>
B	\$100	\$0	<b>\$100</b>	\$100

**TABLE V**

**A CONFLICT WITH A RAWLSIAN SOLUTION PREFERABLE**

DECISION	INDIVIDUAL COST TO:		TOTAL COST	MAXIMUM COST
	Mary	Paige	(Utilitarianism)	(Rawlsianism)
A	\$100	\$100	\$200	<b>\$100</b>
B	\$180	\$10	<b>\$190</b>	\$180