MEDIATION ETHICS: AN EXPLORATION OF FOUR SEMINAL TEXTS

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INTRODUCTION

The subject of mediator ethics is often conflated with discussions about standards of practice, the appropriate wording of codes of conduct, or forms of practitioner regulation. These discussions sometimes also extend to debates about practice dilemmas, such as conflicts of interest, voluntariness, confidentiality and stakeholder issues. The main purpose of this paper is instead to discuss the importance and problems of the differing ethical principles which, I argue, underlie four seminal and popular Alternative Dispute Resolution (ADR) books. These texts are in current circulation, although some have been republished as later editions since first appearing. They are often used—either separately or combined—as reference materials in mediator training programs. They are also widely cited by other authors in a canon too extensive to cite here, and each book has, in its own way, achieved considerable status and practitioner influence. The selected texts are listed below, in order of their first edition publication dates.

Getting to Yes	Fisher & Ury (Ed. Patton)	1981	Orlando: Houghton Mifflin Harcourt
The Promise of Mediation	Baruch Bush & Folger	1994	San Francisco: Jossey-Bass
Narrative Mediation: A New Approach to Conflict Resolution	Winslade & Monk	2001	San Francisco: Jossey-Bass
Bringing Peace Into The Room: How the Personal Qualities of the Mediator Impact the Process of Conflict Resolution	Bowling & Hoffman (Eds.)	2003	San Francisco: Jossey-Bass

This is not a belated book review but instead an endeavour to understand the texts' core ethical principles; I accept that first edi-

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tions are not necessarily definitive of subsequent views, and that further work has been undertaken by at least some of the above writers. Further, this paper touches on arguments, ideologies and philosophical debates far beyond its immediate scope, some of which remain in strong contention and have generated extensive academic and practitioner literatures in their own right. My purpose in discussing these four books in their first edition formats is to try to treat the authors equally regarding the concepts and ideas promulgated at the time of publication, since these were arguably decisive elements in terms of the four books' initial dissemination and subsequent influence.

Some of my comments are tentative or even speculative in places, and are offered as such for further debate. I argue that at least some of the books' underlying values are not necessarily articulated, and are therefore open to interpretation. Further, some authors claim their views are incompatible with those of others. I contend that all four books' underlying values are formative of the principles, models and practices recommended or promoted by their respective authors. Even where not explicit, these values are not incidental, but are axiomatic to the ethos and worldview of each book. Given the books' differences, it is unsurprising that—paradoxically—they have given rise to considerable debate amongst ADR practitioners and academics.[1] The texts' fundamentally different ethical bases are themselves represented in practice across the ADR field, and these differences at the ground level help to explain why attempts to standardize conduct codes have been contentious, time-consuming and remained largely unresolved. The many codes now in place may consequently mask fundamental disparities of mediator beliefs and ethical positions, which themselves may be difficult to reconcile.

My decision to focus on books rather than certification and conduct codes does not imply that the latter are irrelevant, unimportant. The purpose of regulation is often understood as protective of the public interest and as providing some form of practitioner accountability, although—perhaps more pragmatically—such structures may serve also to foster mediation's professionalization project (a topic to which I shall return later). The problem with conduct codes is that they generally tell us little about their underlying values, nor the ethical thinking upon which

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[1] Carrie Menkel-Meadow, *Roots and Inspirations A Brief History of the Foundations of Dispute Resolution*, *in* THE HANDBOOK OF DISPUTE RESOLUTION 13–31 (Michael L. Moffitt & Robert C. Bordone eds., 2005).

they are recommended to (or, indeed, are binding upon) practitioners. Nor do they provide practical guidance for those struggling with the numerous problems encountered in everyday conflict resolution practice.

This shortcoming has already been eloquently pointed out by Julie Macfarlane[2], who contends that regulation is no substitute for ethical practice. I wholly support this view, especially as there is no coherence or agreement about codes of conduct in general, even within the same jurisdictions or contexts. Further, conduct codes may include contradictory injunctions, such as the need for mediators to treat the disputants equally while—confusingly—simultaneously balancing power between them and promoting the rights and welfare of any minors who are the subject of (or affected by) a dispute. Again, these issues have been extensively debated elsewhere and are not repeated here, and I shall not undertake a comparative analysis of any conduct codes in this paper.

In order to contextualize my comments, I shall first define some terms used below, and provide a brief outline of my own background and scope as a practitioner. The purpose of this is to provide both a setting and, later, a brief analysis of the ethical influences on my own practice. I shall then consider various concepts advanced by other academics and practitioners, that is, other than the four books' authors, and offer some possible ideas which might serve as a contribution to the debate. My rationale is my belief that the teaching and practice of mediation must go beyond the transmission of skill sets for managing conflict, and must instead operate from a transparent ethical basis (or bases). This paper will conclude that further work must be done on the complex and challenging area of ethical thinking as applied to mediation practice, as this guidance is not yet fully articulated in the literature.

I. DEFINITIONS

It can be difficult to agree on exact and acceptable terminology when trying to describe complex concepts, as meanings attributed to certain words can be highly problematic and open to challenge. Despite this, there is a need for at least some attempt at defining terms, although the terminology here touches on philo-

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[2] Julie Macfarlane, *Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model*, 40 OSGOODE HALL L.J. 49 (2002).

sophical debates far exceeding this paper's scope; the definitions given are also an amalgam from various sources. The word *ethics* as used below indicates customary virtuous behaviour in society, or the rules of conduct recognized in respect of a particular class of human actions or group. The word *morality* indicates the rights or wrongs of an action. I suggest that *values* include a set of principles which inform and guide our actions—although these values may not carry equal moral weight. For example, Robert Creo[3] opines that the espoused values of ADR practitioners are fairness, equality, predictability, consistency and symmetry, although he does not prioritise these, which suggests he may consider them of equal worth. While Creo's taxonomy may not be exhaustive, nor uncontentious, I suspect most mediators would broadly accept his core tenets.

I also distinguish between the vexed terms *impartiality* and *neutrality*, and suggest that *impartiality* may be understood as not favouring (nor being biased against) individual disputants. I understand *neutrality* to mean that the mediator does not have a preferred outcome regarding the issues in dispute. Again, these terms have been extensively debated[4] elsewhere, and are often conflated or used interchangeably in the literature. I highlight these differences because I argue that, at least so far as the jurisdiction in which I work (England and Wales) is concerned, strict impartiality and neutrality are not possible where the dispute concerns minor or dependent children because the law considers children's welfare to be paramount.[5] Even in ancillary relief (finance and property) proceedings, judicial discretion is exercised in favour of minors affected by financial rulings, whose needs are given "first consideration" when judgments are handed down.[6] The primacy of minors' welfare considerations therefore also overshadows family mediation and other ADR practices, effectively making any relevant children process-stakeholders in disputes of this nature. This is so even where the minors do not participate or are not separately rep-

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[3] Robert A. Creo, *Mediation 2005: The Art and The Artist,* 13 The ADR Newsletter 1 (Mar. 2006), *available at* http://www.michbar.org/adr/pdfs/March06.pdf.

[4] Bernard S. Mayer, Beyond Neutrality Confronting the Crisis in Conflict Resolution 83–86 (2004).

[5] Children Act of 1989, ch. 4, §1 (UK), *available at* http://www.opsi.gov.uk/acts/acts1989/ukpga_19890041_en_2.

[6] Matrimonial Causes Act 1973, ch. §18 (UK), *available at* http://www.statutelaw.gov.uk/content.aspx?LegType=all&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&sortAlpha=0&PageNumber=0&NavFrom=0&parentActiveTextDocId=1476183&ActiveTextDocId=1476202&filesize=15299.

resented, as is usually the case. It is possible for children to be directly involved in family mediation (where appropriate, and with their parents' consent); however, this is again a topic beyond this paper's remit.

II.   Practice Background and Scope

It seems appropriate to set out my own background in order to contextualize this paper. I am a British citizen and live in the south of England, where I have been a family mediator since 1990. I am also an academic, trainer and teacher of ADR theory and practice, with views very much shaped by my background, personal and professional experiences and the legislation pertaining here.

Family breakdown and relationship conflicts are likely to share some common features across cultural divides in terms of human emotion and personal suffering, although there is no universal consensus as to how intimate interpersonal disputes should be addressed. This is especially true regarding matters relating to the welfare and care of minor or dependent children, and the distribution of the financial assets of those going through divorce, the dissolution of civil partnerships, or separation of former cohabitees. These matters vary not only across continents but between adjoining jurisdictions, states and communities. While divorce and separation have relative acceptance in liberal Western (or Westernized) societies, those experiencing such personal circumstances may encounter very different ramifications in cultures where social cohesion and unity are valued above individualism and self-actualisation.

Family mediation practice here is strictly regulated in respect of practitioners working with publicly-funded clients. The development of Legal Services Commission (LSC)[7] franchises and relevant legislation in this jurisdiction has been described elsewhere—for instance, by Marian Roberts[8]—and its evolution has been complex and somewhat disjointed. I am involved in both the for-profit and not-for-profit sectors, which—despite their differing financial and

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[7] Legal Services Commission, http://www.legalservices.gov.uk/ (last visited Oct. 16, 2010).

[8] Marian Roberts, *Family Mediation: The Development of the Regulatory Framework in the United Kingdom* 4 Conflict Resol. Q. 22, 509–26 (2002), *available at* http://onlinelibrary.wiley.com/doi/10.1002/crq.118/pdf.

management structures—adhere to like standards[9] and hold identical government contracts administered by the LSC. Mediators here are drawn from various disciplines, although they are not permitted to give clients legal, financial or other advice—irrespective of their discipline of origin. Clients' eligibility for public funding is strictly means-tested according to government guidelines, and is awarded on the basis of individual eligibility, even where clients are still married or co-habiting.

Only mediators who have undertaken an LSC-approved foundation training program and achieved Recognition[10] (a form of extended apprenticeship and assessment) may undertake LSC work. Achieving Recognition involves a foundation training course and then observing—and being observed and mentored by—at least one practitioner who is themselves already Recognised. The trainee must also submit a portfolio for assessment, which must include analyses of five anonymised cases which they have conducted under observation, as well as various other elements demonstrating their competence. Completing sufficient work to prepare a portfolio may take eighteen months or more, since there is no reliable advance method of identifying cases suitable for inclusion. The pool of Recognized practitioners is relatively small, although there is no prohibition against someone setting up a private mediation practice to serve members of the public who are not seeking public funding, or who are choosing to mediate outside of LSC franchises.

My own mediation practice has always been conducted away from Court premises. The process is entirely voluntary, although sometimes there is undoubtedly monetary and, occasionally, judicial pressure on clients to attempt mediation. The cost, delay and uncertainty of litigation also act as significant incentives for couples to try to reach a negotiated settlement. Mediation is offered regardless of marital status, gender, sexual orientation or ethnic/racial background. All clients are seen alone for an 'intake' (assessment) process during which they are screened for safety issues and assessed for financial eligibility. The majority of my caseload involves couples with 'mixed' funding—that is, where one client is publicly funded whereas their former partner pays a fixed private rate representing their share of the mediation fees. In

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9 *Mediation Quality Mark Standard*, LEGAL SERVICE COMMISSION, http://www.legalservices. gov.uk/docs/fains_and_mediation/mediation_qual_mark.pdf (last visited Oct. 25, 2010).

10 FAMILY MEDIATION COUNCIL, COMPETENCE ASSESSMENT FOR FAMILY MEDIATORS: PORTFOLIO GUIDELINES, SPECIFICATIONS AND TEMPLATES, ver. 1102, http://www.familymediationcouncil.org.uk/resources/FMC-PORTFOLIO.pdf.

these cases, the non-eligible client often chooses to mediate (despite not receiving funding) because mediation presents a far less expensive option than litigation. Some couples also mediate where both must pay the fees involved. In all cases the mediations are conducted in a similar fashion, regardless of funding sources.

Mediation, as practiced within LSC franchises, is therefore oriented towards a solution-focused model, since most clients will subsequently seek judicial ratification of their decisions by obtaining a consent order in the terms negotiated. This model of practice may well prove cathartic for the parties, but the mediation's primary goal is the settlement of potential claims regarding children, money and property, rather than psychological or emotional change or growth. I shall now return to the four texts, which I shall discuss in order of publication.

III. The Four Texts

Of the four books under discussion, *Getting to Yes*, by Fisher & Ury is the earliest and probably best known. Originally published in 1981, this work has been widely adopted by conflict resolution practitioners and has secured a pivotal position as a foundational text for many ADR training courses. Its prescribed model of dealing with conflicts is widely cited across the literature, thereby further ensuring its place as a—if not *the*—seminal book for those involved in the management of disputes. As such, its contribution and influence cannot be underestimated. *Getting to Yes* established the concept of principled negotiation as a means of avoiding 'haggling' processes.[11] Its main recommendations are now well known: a deliberate attempt to separate the problem from the people involved; a focus on interests rather than positions; the development of options for mutual gain; and an insistence on objective criteria in order to test suggested outcomes.

From an ethical standpoint, *Getting to Yes* appears to apply essentially utilitarian principles to conflict management, although this claim is not advanced by the authors themselves. The concept of utilitarianism is credited to the English philosopher Jeremy Bentham (1748-1832) and essentially proposes that the rightness of an action should be evaluated by whether the action promotes the greatest happiness for the greatest number of people. Philosophi-

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[11] Roger Fisher & William L. Ury, Getting To Yes xvii (Bruce Patton 2d ed. 1991).

cal discussions of utilitarianism have since led to various, more sophisticated and ongoing debates and models, including act-utilitarianism and rule-utilitarianism. Act-utilitarianism tends to look only at the consequences of a particular act when determining whether or not it is right. Rule-utilitarianism first establishes a rule (or method); the rule generating the best consequences is the best rule, and right actions are those consistent with the use of the best rule. Utilitarian concepts continue to hold considerable influence in contemporary Western ethical thinking.

Getting to Yes is not unproblematic. It posits a worldview which, when applied to conflict situations, envisages the disputants as people who appear essentially more similar than dissimilar. Not only do the text's imagined actors seem able to negotiate as relative equals, but they also appear capable of testing and validating their respective proposals by reliance on objective criteria (should such things exist). The negotiation world conceived by *Getting to Yes* is one of individualism and rational choice. The authors envisage that those engaged in conflicts enjoy a form of existence generally free from oppression or restraint, although negotiations may be conducted on either a 'hard' or 'soft' basis. Applying the concept of 'soft' negotiations to family disputes, the authors first acknowledge the potentially high costs of positional (hard) bargaining. They observe that, in such situations, emphasis may need to be given by disputants to offers and concessions, trust, and yielding as a necessary way to avoid confrontation.[12] This can be problematic where there is embedded inequality, but there is no suggestion in *Getting to Yes* that gender, racial or other disparities might influence, or even dominate, family disputes or any other negotiations, including business or arms'–length dealings.

Utilitarian thinking is generally oblivious to the disenfranchised, and Rawls' concerns about its ethical shortcomings are addressed in his treatise *A Theory of Justice*.[13] If, as I suggest, a utilitarian ethos underpins *Getting to Yes,* then this text has limited relevance for those who feel themselves to be disempowered, or to be the disadvantaged parties in a dispute. This is not to suggest that the authors themselves are dismissive or unjust, but rather that the values which underpin this book are neo-liberal and individualistic in construct. Mediators are well aware that power dynamics shift within negotiations, and are not necessarily unilateral. However, this book's underlying but unexpressed values may not ade-

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[12] *Id.* at 8.

[13] *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971).

quately address the troubling concerns of conflicts where there are structural imbalances, inequalities or alternative views of the right conduct of humans in society.

The second book is Robert A. Baruch Bush & Joseph P. Folger's *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (hereafter *The Promise of Mediation*).[14] This is perhaps the most controversial of the four texts in terms of the critiques it has prompted.[15] In their analysis of what they term the four 'stories' of the mediation movement, Baruch Bush & Folger describe and designate the first three stories as those of 'Satisfaction', 'Social Justice' and 'Oppression'. The authors argue, however, that moral growth and transformation should instead be considered as the most important goal of mediation. This they term the 'Transformation Approach'.[16] In contrast to *Getting to Yes, The Promise of Mediation* goes to considerable lengths to expound its values. The authors specifically identify their model's underlying worldview as 'Relational', which they distinguish from an individualistic worldview—here correlated with the 'Satisfaction story'.[17] This relational worldview is located within the framework of social constructionism.[18] In support of their argument, Baruch Bush & Folger draw on the work of feminists such as psychologist Carol Gilligan[19] and legal theorist Robin West[20], among others. Whilst they make no direct criticism of *Getting to Yes,* mediation models seen as individualistic come under considerable criticism from Baruch Bush & Folger. The authors also argue firmly that the four 'stories' cannot be combined into a single prescription.[21] Transformative mediation is therefore promoted as a discrete mode of practice that is incompatible with other practices because its values, goals and processes are claimed by the authors to be axiomatically different from those of other models.

Underlying *The Promise of Mediation* appears to be a form of communitarianism. Tam argues that communitarianism evolved

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[14] Robert A. Baruch Bush & Joseph P. Folger, The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition 229 (1994).

[15] *See, e.g.*, Mayer, *supra* note 4, at 191.

[16] Baruch Bush & Folger, *supra* note 14, at 15.

[17] *Id.* at 229.

[18] *Id.* at 236.

[19] Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development (1982).

[20] Robin West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1, 1–72 (1988).

[21] Baruch Bush & Folger *supra* note 14, at 28.

from Aristotlean philosophy, via various European thinkers, and identifies its core principles as *co-operative enquiry* (sic), *common values and moral responsibility* and *communitarian power relations*.[22] Communitarianism is essentially a rejection of liberal political thinking in favor of the promotion of an idealistic society, built on inclusive communities in which all three of the above principles are respected and upheld.[23] Henry Tam makes some very forceful proposals, including that the divorce of couples with children should involve a mediation period to consider the interests of the children, with their active involvement (that is, of the children).[24] Whilst I do not suggest that Baruch Bush and Folger's views are as directive and declamatory as those of Tam, their views do bear some similarity to his opinions, and there is a high moral tone to their work. Baruch Bush and Folger's claims in *The Promise of Mediation* raise concerns about the transparency of mediators' goals and values, including—from an ethical perspective—whether disputants considering taking part in this form of mediation should be made aware in advance of its moral tenor and purpose. Parties seeking simply to "cut a deal" might well reject any form of intervention with a different agenda, no matter how ennobling. I consider that disputants must be given a clear indication of *any* model's goals, and the opportunity to choose a different forum if they wish. Nina Meierding[25] has made the point that even a mediator's choice of primary practice model effectively makes her evaluative in any event, and the need for openness about goals must remain foremost if ADR practices are to be ethically grounded.

Winslade and Monk's *Narrative Mediation: A New Approach to Conflict Resolution* (hereafter *Narrative Mediation*) was published in 2000, and includes an early chapter devoted to theoretical and philosophical issues.[26] Narrative mediation eschews models of mediation which conceptualize conflict as stemming from the resolution of unmet needs, and is instead founded on the idea that people construct conflicts from their narrative descriptions of events.[27] Winslade and Monk reject simple problem-solving approaches[28]

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[22] Henry Tam, Communitarianism: A New Agenda for Politics and Citizenship 13–18 (1998).

[23] Baruch Bush & Folger, *supra* note 14, at 7.

[24] *Id.* at 75.

[25] Nina Meierding, *We Are All Evaluative Mediators,* Family Mediation News 10 (2002).

[26] John Winslade & Gerald D. Monk, Narrative Mediation: A New Approach to Conflict Resolution 31–56 (2000).

[27] *Id.* at xi.

[28] *Id.* at 35.

and also favor a social constructionist approach, although their model is distinguished from *The Promise of Mediation* because it claims to be within the postmodern philosophical movement and, in particular, relies on language as a "meaning-making activity."[29] Arguably, narrative mediation also depends on the concept of communicative action, and *discourse ethics* in particular.

The term *discourse ethics* is found in the work of the German philosopher Jürgen Habermas, who has exercised considerable influence on ethical thinking from the mid-20th century until the present. Habermas' relevance to mediation is his situation of the "moral point of view within the communication framework of a community of selves,"[30] that "form of social interaction in which the plans of action of different actors are co-ordinated through an exchange of communicative acts, that is, through a use of language orientated towards reaching understanding."[31] Aspects of Habermas' thinking appear particularly relevant to the concept of dialogic interaction, especially his 'Rules of Reason',[32] which state: "1. Every subject with the competence to speak and act is allowed to take part in a discourse; 2a. Everyone is allowed to question any assertion whatever; 2b. Everyone is allowed to introduce any assertion whatever into the discourse; 2c. Everyone is allowed to express his attitudes, desires, and needs; 3. No speaker may be prevented, by internal or external coercion, from exercising his rights as laid down in (1) and (2)."[33]

These rules correspond to some of the core generic tenets of mediation practice, thus giving them considerable appeal for the ADR field, and Habermas' work has been advanced as an appropriate normative theoretical construct for mediation practice.[34] According to the philosopher Johanna Meehan, Habermas holds that actual discourses are themselves always historically located, a feature which distinguishes them from "other cognitivist, universalist and formalist ethical theories. . .[they] are not thereby inviolate

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29 *Id.* at 39.

30 Robert Cavalier, *Introduction to* Habermas's Discourse Ethics (1996), *available at* http://caae.phil.cmu.edu/Cavalier/Forum/meta/background/HaberIntro.html.

31 Jürgen Habermas, The Theory of Communicative Action 44 (Beacon Press trans., 1981).

32 Cavalier, *supra* note 30 (citing Robert Alexy, *A Theory of Practical Discourse in* The Communicative Ethics Controversy 151–90 (Seyla Benhabib and Fred Dallmayr eds., 5th ed. 1995)).

33 *Id.*

34 Stephen Chilton, Maria Stalzer Wyant Luzzo, *Habermas's Theory of Communicative Action as a Theoretical Framework for Mediation Practice,* 22 Conflict Resol. Q. 3, 325–48 (2005).

from reconsideration, for their validation is always contingent upon the outcome of the next round of arguments."[35] This reading of Habermas is echoed in Antje Gimmler's (undated)[36] proposition that the principles of discourse can be applied in the form of argumentation rules for finding solutions for limited domains, concrete questions and different interests. Mediation involves a voluntary identification and limitation of the matters to be negotiated, and establishes contextual moral norms, such as maintaining mutual behaviours conducive to respect. Mediation also allows for constructive fallibism, the notion that one's views may not necessarily be the only legitimate way of seeing things, and that the other person's opinions may be equally valid. If mediators are to help the parties work towards outcomes which are both just and contextually appropriate, then discourse ethics may well offer them an appropriate moral framework.

Discourse ethics are by no means unproblematic, however, and may fail to satisfy their promise of occupying the tense ground between Kantian ethical universality and the contentious moral contextualisation advocated by Joseph Fletcher under the concept of situation ethics.[37] Discourse ethics has been attacked from various quarters, including accusations that it is an idealistic concept—as Bent Flyvbjerg[38] (approving Richard Bernstein)[39] observes, societies must have procedures (e.g., the courts) for dealing with conflicts that cannot be resolved by debate, "even when all the parties are committed to rational argumentation."[40] Feminists have also criticised Habermas for what has been seen by some as his sidelining of gender and power issues.[41] If this view is correct, then there is a danger that discourse ethics may further embed existing power imbalances in ways similar to *Getting to Yes*, notwithstanding the egalitarian nature of its claims.

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[35] Johanna Meehan, *Introduction* to Feminists Read Habermas: Gendering the Subject of Discourse 3 (Johanna Meehan ed., 1995).

[36] Dr. Antje Gimmler, *The Discourse Ethics of Jürgen Habermas, available at* http://caae.phil.cmu.edu/Cavalier/Forum/meta/background/agimmler.html (last visited Nov. 15, 2010).

[37] Joseph Fletcher, Situation Ethics: The New Morality (1966).

[38] *See generally* Bent Flyvberg, *Ideal Theory, Real Rationality: Habermas Versus Foucault and Nietzsche* (Apr. 2000), *available at* http://flyvbjerg.plan.aau.dk/IdealTheory.pdf.

[39] *See* Richard J. Bernstein, The New Constellation: The Ethical-Political Horizons of Modernity/Postmodernity 220 (MIT Press 1992).

[40] Flyvberg, *supra* note 38, at 13.

[41] *See* Jean L. Cohen, *Critical Social Theory and Feminist Critiques: The Debate with Jürgen Habermas reprinted in* Feminists Read Habermas: Gendering the Subject of Discourse 57 (Johanna Meehan ed. 1995).

The final text, *Bringing Peace into the Room: How the Personal Qualities of the Mediator Impact the Process of Conflict Resolution* discusses the personal influence of the mediator, rather than the relative values of competing mediation models or processes.[42] In a chapter by the editors, Bowling and Hoffman's emphasis is on the mediator's "presence"—how this might be defined and accessed and its potential impact on the parties and process. Bowling and Hoffman describe "presence" as the mediator's physical attendance, as well as the personal qualities the practitioner herself brings to the room.[43] Bowling and Hoffman consider the mutual influence that the parties and the mediator exert on each other, contrasted with the prevailing conceptual norms in the mediation field, which (they claim) tend to emphasize the need for mediators to assert and maintain independence and separateness from the parties in order to demonstrate their lack of bias and sustained impartiality.[44] Bowling and Hoffman's work is also further influenced by their application to mediation of the theory of practitioner charisma, as described by Jeffrey Kottler[45] and other authorities.

There is almost a metaphysical aspect to Bowling and Hoffman's argument—their reach for metaphors descriptive of positive mediator influence mentions certain aspects of ADR thinking which increasingly advocate a spiritual approach to conflict or, indeed, the development of personal spirituality.[46] Although not specifically mentioned, the authors appear to advocate mediator qualities which align with what is often termed *virtue ethics*—the construct which considers that moral actions are guided by positive inner traits (virtues), which rightly inform and guide a person's behaviour. Virtue ethics concern strengths of character and what it is to be a good person, rather than simply which precepts one should follow in order to lead a good life (usually known as following the Golden Rule).[47] Virtue ethics as a framework for identifying opti-

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[42] *See generally* BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION (Daniel Bowling & David Hoffman eds., 2003).

[43] Daniel Bowling & David A. Hoffman, *Bringing Peace Into the Room: The Personal Qualities of the Mediator and Their Impact On the Mediation*, *in* BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION 21 (2003) [hereinafter Bowling & Hoffman].

[44] *Id.* at 22.

[45] JEFFREY A. KOTTLER, THE COMPLEAT THERAPIST (1991).

[46] Bowling & Hoffman, *supra* note 43, at 43.

[47] The Golden Rule is found in most major faiths and in Christianity as "Therefore all things whatsoever ye would that men should do to you, do ye even so to them." *Matthew* 7:12 (King James).

mal individual qualities is located in classical Greek philosophy, notably Platonic and Aristotelian thinking, and perhaps can be simplistically summarised as: 'who you are is as important as what you do'. Historically, the four virtues were identified as prudence, justice, fortitude, temperance, although Christian and other religious thinkers have subsequently critiqued and reviewed these. Secular philosophers have also examined and extended the virtue taxonomy, including attempts to synthesize within it a variety of cultural and religious ethical constructs. Virtue ethics may also be understood as evolutionarily predisposed and based on functional utility.[48]

I was originally trained in the belief that mediators were 'outside' the mediation process, and thus above the fray. This idea was well-meant, as its purpose was to ensure the protection of the mediating parties from possible practitioner bias and partiality. Of course, suppositions regarding the mediator's distance from the disputants fail to reflect the reality of conflict resolution encounters, which, by their very nature, are always systemic and reflexive. I have since learned that it is impossible *not* to influence the parties, even if one genuinely does not have a particular outcome in view. Critics of mediation have sometimes seen mediator influence as something inherently dangerous to the process and the parties, but I argue that mediator influence is not necessarily a negative factor, or even something to be discouraged. On the contrary, practitioners attempt to contribute positively to the mediation process through modelling constructive and respectful behaviours, and can set the tone of any meetings through their use of moderated language and their equitable behaviour towards those present. As a mediator, I can indeed endeavour to bring a sense of calm and peace 'into the room' deliberately. I therefore accept in principle the possibility that those we seek to assist will experience greater benefits if we are trying to *be* virtuous people, as well as attempting to lead virtuous lives.

The concept of virtue ethics is promising, but does pose problems regarding whether it offers the prospect of universal applicability to the mediation process. Further, virtue ethics as applied to mediation may also generate debates as to which personal qualities (if any) mediators must possess in the first place, and how

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[48] *See generally* Katherine Dahlsgaard, Christopher Peterson & Martin E.P. Seligman, *Shared Virtue: The Convergence of Valued Human Strengths Across Culture and History,* 9 Rev. Gen. Psychol. 203, 203–13 (2005), *available at* http://education.ucsb.edu/janeconoley/ed197/documents/dahlsgaardSharedVirtue.pdf.

these might be identified and then nurtured. Bowling and Hoffman's work is persuasive and even inspiring, but practitioners might not believe it is necessary to possess a virtuous character in order to assist people in conflict. For example, does Bowling and Hoffman's argument mean that mediators not possessing such laudable personal qualities—or even significantly lacking them— cannot deliver optimal outcomes for disputants? I do not think the authors go this far, but their approach does seem to suggest that mediators need to be at peace with themselves and others before they are at their very best in terms of helping other people. In arguing against virtue ethics as an absolute prerequisite for mediators, I should emphasise that this does not mean I believe that practitioners should not pursue self-improvement, or greater personal and professional integrity. Importantly, the concept of virtue ethics for mediators certainly opens up ideas that contradict the conventions of affective and cognitive impartiality and neutrality. Virtue ethics may be aspirational rather than axiomatic as normative ethical thinking for mediators, but I think Bowling and Hoffman have raised important ideas about what actually happens in the mediation encounter.

To summarise this section, the above discussion suggests that four discrete ethical constructs are in play in the models advocated by the four books. The texts are certainly very different in their approaches to the problems and challenges of conflict resolution practice, though I believe that none offers a unique basis for mediation practice. The books' competing arguments (and certain claims of exclusivity, such as those found in *The Promise of Mediation*) have, unsurprisingly, themselves caused division and contention in a field dedicated to the resolution of conflict. So far as the adoption of models is concerned, I speculate that mediators may well draw on all four approaches to inform their complex activities. I further suggest that adherence to a strictly purist model may be not be desirable for the parties—even if this were possible. A single approach may well end up as a straightjacket rather than a constructive framework. I also suspect that most everyday mediation practice is eclectic, although I realize this is a contentious view which contradicts the claims of discrete practice and privileged models found in some of the literature. Practitioners may be fiercely loyal to their preferred belief system; however, such loyalty risks the espoused model becoming an ideology, which may in turn obfuscate the potential benefits of other ways of understanding and action.

IV. Applying the Four Models; Ethics In Practice

It is interesting to note that Morton Deutsch[49] observes that both cooperative and competing behaviors are found in ADR practice. Deutsch advocates bringing into play a mosaic of theories,[50] although he does not explore which theories should be represented in such a mosaic, nor does he identify on which ethical basis (or bases) the mosaic should rest. Returning briefly to the description of my own work above, I contend that I rely, in practice, on all four of the ethical constructs as identified in the literature (and, possibly, others as well), and that none seems exclusively relevant for all circumstances.

A utilitarian ethical approach is typically the most feasible for property and finance cases, especially where the parties have insufficient means for everyone's aspirations to be fully satisfied. Most cases settle on the basis of what can best be devised in the circumstances, and against a potential background of matrimonial litigation (essentially individualistic in ethos) if mediation breaks down. In family mediation, however, many parents also adopt a communitarian view of their children's needs when negotiating the allocation of matrimonial property, despite their relationship breakdown. They use mediation as a means of dealing with matters on behalf of the whole family, rather than for themselves as individuals. It is also true that the courts here adopt a similarly holistic position when it comes to adjudicating family matters involving children and dependents.

Although I do not consider my work transformative, I do witness moments of transcendence, recognition, empowerment and catharsis in practice, although these are not my goals in the process. Even clients who are adamant that they only want to negotiate a settlement can demonstrate affective change and growth through mediation. To impose on such disputants a transformative model aimed at moral growth would, however, risk violating the solution-focused outcome for which they originally entered the mediation process.

I am very aware of the role of language in shaping the mediation sessions, and the many occasions when an appropriate choice of words can critically affect a mediation's progress. Discourse ethics offers a model of understanding communication and interac-

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[49] Morton Deutsch, *Co-operation and Competition, in* The Handbook of Conflict Resolution 23, 23–42 (Morton Deutsch, Peter T. Coleman & Eric C. Marcus eds., 2006).

[50] *Id.* at 33.

tion, although in reality there are often inequalities at play which it would be wrong to disregard. I also realize that it is sometimes hard to leave one's own preoccupations and conflicts outside the room, and here virtue ethics presents a great challenge for me. I nevertheless believe it is possible to practice well (rather than just adequately) despite the vicissitudes of one's own life, while simultaneously aspiring to virtue ethics and attempting to lead what is known philosophically as "the good life."

This begs the question of whether the four books' ethical bases really are mutually incompatible, or whether one ethical construct only should be adhered to, and, if so, which this should be. Can a synthesis of the four—utilitarianism, communitarianism, discourse ethics and virtue ethics (or even an alternative ethical construct)—better fit the work of mediators? It is also conceivable that an activity as complex, varied and demanding as mediation might need to look further for a normative ethical platform from which to operate, and to morally justify and inform its practices.

V. Other Ethical Approaches

As already discussed, the ethical bases of mediation are often expressed in deontological terms within localized codes of practice, which set out what mediators should or should not do. These represent a largely unarticulated but recognizable range of familiar professional ethical principles, including autonomy and respect for persons, beneficence, non-malfeasance and social justice,[51] although some of mediation's harsher critics do not accept forms of ADR as social justice mechanisms.[52] When considering which ethical precepts might best suit mediation practice, it is critical to focus first on the intrinsic nature of conflict resolution, and on the mediator's role in particular.

Mediators always operate from the position of having divided loyalties. This factor inevitably raises ethical problems which conduct codes fail to address specifically.[53] I suggest this is especially

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[51] *See generally* Anne Hudson Jones, *Narrative in Medical Ethics, in* Narrative Based Medicine: Dialogue and Discourse in Clinical Practice 217, 217–24 (Trisha Greenhalgh & Brian Hurwitz eds., 1998).

[52] *See generally* Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 Ohio St. J. on Disp. Resol. 1, 1–25 (1993).

[53] Larissa A. Fast, Reina C. Neufeldt & Lisa Schirch, *Toward Ethically Grounded Conflict Interventions: Re-evaluating Challenges in the 21st Century*, 7 Int'l Negot. 185*,* 186 (2002); *see*

true if conduct codes assume an essentially atomistic position, reflecting a form of moral principlism premised on the belief that the disputants make rational choices only from narrow individualistic positions and act as free, equal and autonomous participants—assumptions arguably evident in certain early ADR texts.[54] In contrast to the conventional lawyerly position of having a client, "one person in all the world,"[55] mediators by definition always have at least *two* (if not many more) clients, to all of whom they are usually equally accountable. There are often other unavoidable stakeholder matters to consider, such as the interests of funders, legislators, and the legal system itself. These factors suggest the need for an ethical model which can properly meet the needs of interveners, and provide a moral basis from which they can legitimately and authoritatively handle the disputes in which they are involved. Further, any parties undertaking mediation have enduring conflicts of interests—that is, enduring until such time as all the matters in dispute are resolved to their satisfaction, or otherwise dealt with. That mediation is a multi-layered and many-factored activity is an essential and unavoidable fact; dealing with conflict is messy, ambiguous and contextual. Mediation's complexity therefore makes simplistic approaches to practitioners' moral dilemmas unhelpful, and perhaps even counter-productive.

Brad Honoroff and Susan Opotow suggest it might be fruitful for mediators to look to medical ethics for moral guidance.[56] Although Honoroff and Opotow do not further develop their proposal, it is perhaps informed by the need for an ethical model which adequately addresses conundrums such as those found in health care. According to Singer, medical ethics is currently the most developed species of applied ethics.[57] As well as medicine's grounding in classical philosophical ethical thinking, medical ethics is constantly evolving in response to increasingly sophisticated scientific developments and their consequent dilemmas. Medical ethics

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also CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 15, 49, 381–89, 449 (3rd ed. 2003).

[54] *See, e.g.*, Oran R. Young, *Intermediaries: Additional Thoughts on Third Parties*, 16 THE J. CONFLICT RESOL. 15, 52 (1972).

[55] Richard H.S. Tur, *The Lawyer's Client: One Person in All the World?*, 6 LEGAL ETHICS 152, 152 (2003).

[56] *See* Brad Honoroff & Susan Opotow, *Mediation Ethics: A Grounded Approach*, 23 NEGOT. J. 155, 170 (2007) (citing John D. Arras & Bonnie Steinbock, *Introduction: Moral Reasoning in the Medical Context, in* ETHICAL ISSUES IN MODERN MEDICINE (John D. Arras & Bonnie Steinbrook eds., 4th ed. 1995)).

[57] M.A. Singer, *Ethics, Science and Moral Philosophy, in* NEW DIRECTIONS IN ETHICS: THE CHALLENGE OF APPLIED ETHICS 282, 295 (Joseph P. DeMarco & Richard M. Fox eds., 1986).

often engages debates about competing interests and the costs/benefits of critical courses of action, which are both generic to the population and specific to individual patients. These features of medical ethics bear a somewhat tenuous relationship to the challenges of conflict resolution (although analogies are possible), and the attractions of medical ethics for mediation practice are certainly obvious. Singer, however, suggests that there needs to be further exploration and a better grasp of the underlying structure of ethical or moral problems in the varied areas of human endeavour before medical ethics can be transferred to other disciplines without vital shifts in emphasis, meaning and probative force.[58] Following Singer's argument, the direct application of medical ethics to mediation may be difficult; however, because of the considerable development in medical moral thinking, I believe there is merit in considering what this literature has to offer mediators—a topic to which I shall return below.

Another source of ethical guidance can be found in the social science literature. For example, in the United Kingdom the British Association of Social Workers' Code of Ethics[59] emphasizes a commitment by workers to human dignity and worth, social justice, service to humanity, integrity and competence, which the code identifies as the five basic values of social work practice. In my view these values also apply to mediators, although they do not address the fundamental difficulties of how ADR practitioners can find guidance for working with the numerous conflicts of interest and process choices they face each time they mediate. Social workers undoubtedly have to deal with conflict, and conflicts of interest, but I argue that their code's primary focus is not the resolution of disputes.

A further promising area of ethical guidance appears in both the medical[60] and social science literature,[61] namely the concept of *ethics of care*. Ethics of care is typically linked with the work of Gilligan,[62] whose seminal book was earlier mentioned in relation to Baruch Bush and Folger's *The Promise of Mediation*.[63] Several

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58 *Id.* at 295.

59 Introducing Social Work Practice, http://openlearn.open.ac.uk/course/view.php?id=3499 (last visited Oct. 25, 2010).

60 *See generally* Medicine and the Ethics of Care (Diana Fritz Cates & Paul Lauritzen, eds., 2001).

61 Gabrielle Meagher & Nigel Parton, *Modernising Social Work and the Ethics of Care, in* 2 Soc. Work & Soc'y 1, 10–27 (2004).

62 C. Gillegan, Psychological Theory and Women's Development (1982).

63 Baruch Bush & Folger, *supra* note 14.

feminist authorities have expressed concerns about the possibility of caring being conflated with the stereotypical role of women as carers, although the model offers distinct possibilities for mediators in terms of their care for the parties in conflict. As Chip Rose puts it, "The indirect message [of mediation] is: I care about your well being and I am committed to helping you achieve your goals."[64] Here, Rose aligns with Pearl Oliner & Samuel Oliner's earlier assertion that the "central moral framework of conflict resolution—one that we believe best describes its moral orientation—is care,"[65] concurring with Banks' opinion that peace is managed conflict rather than tranquillity.[66] The debate about ethics of care is also found in the legal literature, for instance in the writings of Richard O'Dair.[67]

Ethics of care, as an appropriate construct for mediators, brings me to the final framework, namely the French philosopher Paul Ricoeur's concept of the *caring conversation*.[68] Ricoeur's work is founded on classical Greek philosophy, in particular the concept of "Aristotelian *phronesis*" (or "practical wisdom").[69] According to Ricoeur, "practical wisdom consists in inventing conduct that will best satisfy the exception required by solicitude. . .";[70] that is, "the exception on behalf of others."[71]

In his erudite and theoretically complex paper on this topic, philosopher John Wall[72] expands on Ricoeur's ideas:

> While 'naive' phronesis grounds narrative identity in past or existing narratives alone, critical phronesis would demand in addition the creation of new narrative identity that is ever more radically other–inclusive. Like in a story, such inclusiveness is not already given at the start but instead unfolds uncertainly

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64 Chip Rose, *A Sense of Caring,* Family Mediation News 5 (Winter 2003).

65 Pearl M. Oliner & Samuel P. Oliner, Toward a Caring Society 172 (1995).

66 *See generally* Michael Banks, *Four Conceptions of Peace*, *in* Conflict Management and Problem Solving: Interpersonal to International Applications 259 (S. Sandole & I. Sandole eds., 1987).

67 Richard O'Dair, Legal Ethics Text and Materials 56–63 (2001).

68 *See* Paul Ricoeur, Oneself as Another (Kathleen Blamey trans., U. Chicago Press 1992).

69 Paul Ricoeur, *Stanford Encyclopaedia of Psychology* (Nov. 11, 2001), *available at* http://plato.stanford.edu/entries/ricoeur/.

70 Ricoeur, *supra* note 68, at 269.

71 *Id.*

72 *See generally* John Wall, *Phronesis, Poetics and Moral Creativity*, 6 Ethical Theory and Moral Prac. 317 (2003).

over time; unlike in a story, it is the endless moral responsibility, in relation to others, of actual self-creative selves as such.[73]

Wall then takes his extended argument into detailed areas of philosophical debate, but the basic idea of mediators as creators of a caring conversation is perhaps one that best addresses the "singular tragic conflict with others in this world in an ever more particularlizing and mutually inclusive social dialectics."[74]

In considering the relevance of Ricoeur's concepts for mediation, I return to Honoroff and Opotow's suggestion that medical ethics might inform practitioners.[75] Although I accept Singer's caution regarding the direct importation of current medical ethics into other endeavours,[76] it is nevertheless useful to look at how medical ethicists have engaged with Ricoeur. In their paper on the topic of caring conversations in nursing, Fredriksson and Eriksson address both the virtue ethics of the professional and the asymmetry of their relationship to the lay person (in this case, the patient).[77] Ethical problems are understood as being addressed within this relationship, rather than from an unachievable distance. Although the authors' topic is not conflict resolution, I believe that the concept of the caring conversation is potentially an ethical construct for mediators. The authors write openly of dealing with the issues of power between professionals and the people they are seeking to help, an approach which might provide a potential moral platform from which mediators can legitimately justify their interventions with disputants.

I consider that it is entirely possible for the caring conversation to serve both justice and communitarian ends, since within the mediation discourse the mediator is able to address (with care) the positions of the disputants, and legitimately balance power between them. Instead of the highly problematic claims of neutrality and impartiality, an openly Ricoeurian position would enable the mediator to state their positions frankly with regard to each of the parties, and to adapt and shift this in relation to the progress of their negotiations. I argue that this would not automatically make the mediator evaluative, biased, or determinative of the outcome of the dispute. As Ricoeur himself observes, "[t]he idea of justice

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[73] *Id.* at 334.

[74] *Id.* at 337.

[75] Honoroff & Opotow, *supra* note 56.

[76] Singer, *supra* note 57.

[77] *See generally* Lennart Fredriksson & Katie Eriksson, *The Ethics of the Caring Conversation*, 10 Nursing Ethics 138 (2003).

suffers from essentially . . . juridical atomism," or as Ricoeur notes that Kant points out, "separating what is mine from what is yours."[78] Thus, in disputes where children or minors are concerned, the caring conversation fully fits with the need to uphold their welfare and move away from their objectification. In disputes relating solely to adults, it allows the mediator to engage with the dispute as it actually is, rather than trying to adhere to the problematic and probably untenable concept of supposedly equal parties on a level playing field (as, I argue, is the assumption of *Getting to Yes*).

Lastly, Ricoeur's caring conversation is communitarian in construct, and thus commensurate with the values of *The Promise of Mediation*.[79] It is also discursive by nature and compatible with Habermas' discourse ethics, and thus compatible with the ethical foundation of *Narrative Mediation*.[80] Further, and according to Fredriksson and Eriksson,[81] the caring conversation anticipates virtue ethics on the part of the practitioner, and is thus in step with the argument of *Bringing Peace Into the Room*.[82]

Conclusion

Mediation is a longstanding practice that has lately found itself promoted as a structured alternative to formal justice processes. As such, it has needed to develop from its earlier informal procedures and reliance on individual authority (such as that of community elders or religious leaders) to adopt behaviours and structures which have identifiable ethical precepts. Mediation's professionalization project demands that it should have an ethical foundation—as an "alternative" process it can hardly rely on the established moral norms of other disciplines, such as those found in conventional legal practice, since its discrete purpose is the management of conflicts and resolution of competing claims and viewpoints. The role of the mediator must also be transparent and flexible, and requires a moral foundation that anticipates uncertainty, complexity, competing claims and, of course, the dynamics of conflict itself. Within the literature discussed above, the authors have addressed

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[78] Ricoeur, *supra* note 68, at 254.
[79] Baruch Bush & Folger, *supra* note 14.
[80] Winslade & Monk, *supra* note 26.
[81] Fredrikkson & Eriksson, *supra* note 77, at 144.
[82] Bowling & Hoffman, *supra* note 43.

the mediator's ethical dilemmas by adopting differing moral stand-points and, in some instances, claiming superior or exclusive positions for their views. While respecting their authority, I have instead looked to other discourses, namely certain examples from the law, social sciences, and Ricoeur's philosophy as applied to medical practice.

In summary, I argue that ADR practitioners, and mediators in particular, need to revisit their ethical foundations and discover a more apposite moral discourse for their work. In tentatively suggesting the potential value of Ricoeur's *caring conversation*, I understand that this is only one of a range of ethical concepts now available to us. I am also aware that it may not necessarily be best suited for this work. In my view, however, there is now an urgent need for serious reflection on and reconsideration of mediation's moral basis. Part of such an exercise might well involve a greater engagement with classical philosophical thinking, rather than the continued expression of a sequence of differing arguments within the ever-growing ADR literature.

Whether or not we agree with the professionalization of mediation, it comes at a price. Part of this is that we should accept our responsibility as moral actors who are asked (or, in some cases, even ordered by a court) to engage in others' disputes. As such, we are neither neutral nor impartial, but are automatically engaged in a constructed relationship with *all* the parties—and they in turn with us. We must articulate our moral convictions and embed our work in a much clearer ethical framework. We must do so in order to better inform our belief systems, help our decision-making in terms of practice quandaries, and ultimately justify our actions as conflict interveners.