

NEUTRALITY, SELF-DETERMINATION, FAIRNESS AND DIFFERING MODELS OF MEDIATION

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ABSTRACT

Mediator neutrality and the self-determination of parties are important principles of mediation practice. Both are articulated in the National Mediator Accreditation System. In problem-solving models neutrality and self-determination are constructed according to the distinction between process, and content and outcome which in turn reflects a recognised distinction between procedural and substantive fairness. Transformative and narrative models do not separate the process of mediation from its content and hence differently construct the role of the mediator and optimal outcomes for parties. This paper examines critique of problem-solving models including critique of the mediator's limited role in ensuring substantive fairness. It compares constructions of the role of the mediator across models in relation to principles of neutrality, self-determination and fairness, both procedural and substantive fairness. It argues that none of the models examined satisfactorily addresses issues of substantive fairness in mediation. It further argues that this gap could and should be filled by critical examination and development of the principle of party self-determination.

I INTRODUCTION

Mediator neutrality and the self-determination of parties are important principles of mediation practice¹. Although the reality of mediator neutrality and its place as a theoretical cornerstone of practice has been repeatedly challenged,²

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¹ See L Boule, *Mediation: Principles, Process, Practice* (LexisNexis Butterworths, 2011) 71-80; 82-87.

² See H Astor, "Rethinking Neutrality: A Theory to Inform Practice - Parts 1 and 2" (2000) 11 *Australasian Dispute Resolution Journal* 73; 143; H Astor, 'Mediator Neutrality: Making Sense of Theory and Practice' (2007) 16(2) *Social and Legal Studies*. 221; D Bagshaw, 'Language, Power and Knowledge' (2003) 14

mediators continue to identify it as a central guiding principle.³ According to early definitions, neutrality was a core feature of mediation.⁴ However, in response to critique both in theory and practice,⁵ it has been omitted from more recent definitions of mediation. It has not, for example, been included in primary descriptions of mediation according to the National Mediator Accreditation System (NMAS).⁶ Nonetheless, according to that system, an understanding of neutrality continues to be important as a mediator competency. Mediators are expected to demonstrate an ethical understanding of neutrality and impartiality in order to gain accreditation.⁷

Party self-determination has been described as a primary objective⁸ and core

Australasian Dispute Resolution Journal 130; K Douglas and R Field, 'Looking for Answers to the Mediation Neutrality Dilemma in Therapeutic Jurisprudence' (2006) 13 (2) *Murdoch University E Law Journal* 177; S Douglas, 'Neutrality in mediation: A study of mediator perceptions' (2008) 8(1) *QUT Law and Justice Journal* 139; S Douglas, 'Constructions of Neutrality in Mediation' (2012) 23 *Australasian Dispute Resolution Journal* 80; R Field 'Neutrality and Power: Myths and Reality'" (2000) 3(1) *The ADR Bulletin* 16; R Field 'The Theory and Practice of Neutrality in Mediation' (2003) 22(1)*The Arbitrator & Mediator* 79. L Mulcahy, 'The Possibilities and Desirability of Mediator Neutrality – Towards an Ethic of Partiality?' (2001) 10 (4) *Social and Legal Studies* 505

³ For empirical evidence see S Douglas, *Mediator Neutrality: A Model for Understanding Practice* (unpublished PhD thesis, 2010) [5.2.3], <http://research.usc.edu.au/vital/access/manager/Index> viewed 26 March 2013; See Boule, above n 1, 76 where he comments that despite critique 'it makes no sense to jettison all aspects of neutrality...as long as the limitations of the concept are understood...'

⁴ See the definitions in J Folberg and A Taylor *Mediation: A Comprehensive Guide to Resolving Conflict without Litigation* (Jossey Bass, 1984) 7; C Moore, *The Mediation Process* (Jossey Bass, 1986) 6.

⁵ See the seminal work of Astor (2000) above n 2

⁶ National Mediator Accreditation System (NMAS) (2008) available at http://www.nadrac.gov.au/what_is_adr/NationalMediatorAccreditationSystem/Pages/default.aspx (accessed 26 March 2013); see National Mediator Practice Standards (NMPS) (2008) available at http://www.nadrac.gov.au/what_is_adr/NationalMediatorAccreditationSystem/Documents/PracticeStandards.pdf (accessed 26 March 2013) and National Mediator Approval Standards (2008) http://www.nadrac.gov.au/what_is_adr/NationalMediatorAccreditationSystem/Documents/ApprovalStandardsCurrent.pdf (accessed 26 March 2013)

⁷ Ibid NMPS cl 7(3)(c)(iv).

⁸ J Coben, 'Gollum meet Smeagol: A Schizophrenic Rumination on Mediator Values Beyond Self-determination and Neutrality' (2004) 5 (2) *Cardoza Journal of Conflict Resolution* 65, 65.

value of mediation practice.⁹ It is a principle central to the NMAS, which describes the purpose of a mediation process to maximize participants' decision-making¹⁰ and mediation as 'essentially a process that maximises the self determination of the participants'.¹¹ The National Mediator Practice Standards (NMPS) also provide that the 'primary responsibility for the resolution of a dispute rests with the participants.'¹²

The following discussion considers these two principles within varying models of mediation, namely, problem-solving, transformative, and narrative models. Constructions of neutrality and self-determination in problem-solving models are tied to the distinction between process, and content and outcome as an organising principle for those models. Critique of that distinction calls attention to issues of substantive fairness in mediation. Critique has also contributed to the development of alternative models, namely, transformative and narrative models. These alternative models construct different roles for the mediator and goals for the parties. In so doing they move away from constructions of neutrality and self-determination as found in problem-solving models. Yet these models, it is argued, do not satisfactorily deal with questions of substantive fairness. Nonetheless these alternative models draw attention to different ways of constructing party self-determination and as such, it is argued, offer direction for future consideration of issues of substantive fairness.

II PROBLEM-SOLVING MODELS

For present purposes, problem-solving models of mediation are identified as those that ground practice in a distinction between the process of mediation and its content and outcome. The distinction between process and content or outcome has been identified as a basic tenet of mediation theory and practice.¹³ Although the distinction has been challenged,¹⁴ it remains an accepted and important guide for actual practice.¹⁵ Its particular relevance for this dis-

⁹ Boulle, n 7, 65-7; D Bagshaw, 'Mediating Family Disputes in Statutory Settings' (1995) *Australian Social Work* 48 (4) 4, 3; R Field, 'A Mediation Profession in Australia: An Improved Framework for Mediation Ethics' (2007) 18 *Australasian Dispute Resolution Journal* 178, 181.

¹⁰ NMPS, above n 6, cl 2.

¹¹ *Ibid* cl 2(5).

¹² *Ibid* cl 9(8).

¹³ H Astor and C Chinkin, *Dispute Resolution in Australia* (Butterworths, 2nd ed 2002) 146; See also Boulle above n 1, 35.

¹⁴ Boulle, above n 1, 35-37.

¹⁵ Douglas, above n 3, [5.2]

cussion is its significance for the early development of mediation models, its importance in understanding the concepts of neutrality and self-determination within those models, and its continued reflection in the NMAS. The NMPS provide that:

Mediation processes are primarily facilitative processes. The mediator provides assistance in managing a process which supports the participants to make decisions about future actions and outcomes.¹⁶

According to Della Noce, Bush and Folger, ‘the problem-solving model, while seldom going by that precise name, and seldom acknowledging or exposing its ideological roots, is the dominant model in the mediation field’.¹⁷ Problem-solving models of mediation include the facilitative model, which is recognised as the classic or orthodox model of mediation.¹⁸ Also included within this category are settlement and evaluative models¹⁹ and some therapeutic models which, while giving attention to improving relationships between parties, use the distinction between process, and content and outcome as an organising principle.²⁰ These models form what has been described as first generation mediation practice.²¹

Use of the distinction between process, and content or outcome in mediation is consistent with both principles of negotiation practice and problem-solving within counselling and social work traditions. Over time, a central focus in mediation practice has been to facilitate interest based, integrative bargaining following the model developed by Fisher and Ury.²² This model emphasises the central importance of process and ‘requires those involved in negotiations

¹⁶ NMPS, above n 6, cl 2.

¹⁷ D Della Noce, R Baruch Bush and J Folger, ‘Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy’ (2002) 3(1) *Pepperdine Dispute Resolution Journal* 39,49.

¹⁸ Boule, above n 1, 43.

¹⁹ For a discussion of these models see Boule, above n 1, 43-48.

²⁰ See eg the discussion in A Taylor, ‘Concepts of Neutrality in Family Mediation: Context, Ethics, Influence, and Transformative Process’ 1997) 14 (3) *Mediation Quarterly* 215.

²¹ S Cobb, ‘Dialogue and the Practice of Law and Spiritual Values: Creating Sacred Space: Toward a Second-Generation Dispute Resolution Practice’ (2001) 28 *Fordham Urban Law Journal* 1017, 1029

²² R Fisher and W Ury, *Getting to Yes: Negotiating Agreement without Giving In* (Houghton Mifflin, 1981).

to distinguish between the process and the content of negotiations'.²³ The role of the mediator has traditionally been to facilitate that process by remaining neutral as to the content and outcome of a dispute.²⁴ As a therapeutic or counselling intervention, problem-solving emphasises client autonomy²⁵ in much the same way as problem-solving in mediation emphasises party self-determination. It similarly emphasises a process, dependent upon the exercise of therapeutic and communication skills, as distinct from expertise in the detailed content of clients' problems and the outcomes they are helped to achieve.²⁶

Constructions of neutrality and party self-determination in problem-solving models are intimately linked to the distinction between process and content or outcome. As Astor notes, mediator neutrality means, inter alia, that the mediator is neutral as to the content and outcome of mediation while in control of the process.²⁷ Excluding the mediator from intrusion into content and outcome is, theoretically at least, instrumental in furthering the self-determination of the parties. The parties' opportunity in mediation to delimit their own agendas and fashion their own agreements provides the self-determination that is contrasted with, and an alternative to, litigation and judicial decision-making.

The relationship between neutrality, self-determination and the distinction between process and content or outcome is reflected in the NMAS. It is implicit in clause 10 of the National Mediator Practice Standards (NMPS) which provides that:

The mediator has no advisory or determinative role in regard to the content of the matter being mediated or its outcome. The mediator can advise upon and determine the mediation process that is used.²⁸

The NMPS also provide that the 'principle of self-determination requires that mediation processes be non-directive as to content', and that mediators 'assist in managing the process of dispute and conflict resolution whereby the participants agree upon outcomes'.²⁹

²³ Astor and Chinkin, above n 13, 111.

²⁴ Astor, '*Mediator neutrality: Making sense of theory and practice*', above n 2, 222; Boule, above n 1, 36

²⁵ Egan, *The Skilled Helper: A Problem-Management and Opportunity-Development Approach to Helping* (Thomson Learning, 7th ed, 2002).

²⁶ *Ibid*, 7-9.

²⁷ Astor, '*Mediator Neutrality: Making sense of theory and practice*', above n 2, 222.

²⁸ NMPS, above n 6, cl 10.

²⁹ *Ibid*, cl 2(5).

As well as providing a basis for understanding neutrality and party self-determination, the distinction between process and content or outcome grounds an understanding of fairness and justice in mediation. The distinction between process and content is not unlike the legal distinction between procedural and substantive fairness. The concept of fairness within the NMAS reflects this legal distinction. The NMPS require mediators to demonstrate ethical understanding in relation to supporting fairness and equity in mediation.³⁰ Although fairness and equity are not explicitly defined in the Standards, considerable attention is given to procedural fairness under clause 9 which requires that mediators ‘conduct the process in a procedurally fair manner’.³¹

According to clause 9 of the Standards, procedural fairness in mediation requires the mediator to support the parties’ informed consent to any agreement, ensure parties’ opportunities to be heard, encourage and support balanced negotiations, ensure the parties’ opportunity for, and access to, relevant advice or information, encourage access to professional advice where appropriate, and terminate or suspend the process where a party indicates an inability or unwillingness to proceed. At the same time, the mediator is precluded from ‘making a substantive decision on behalf of any participant’.³²

While a mediator is charged with ensuring procedural fairness in mediation, substantive fairness is furthered by the parties’ control of content and outcome, in other words, their opportunity for self-determination. In principle, mediators ensure substantive fairness by remaining neutral as to the content and outcome of a dispute. Rock describes this as justice in mediation:

In mediation, justice can be understood as the justice that the parties themselves experience, articulate, and embody in their resolution. It is the decision-making power of the parties which allows parties the freedom to craft solutions that best comport with their individual understanding of a just outcome. Mediator neutrality is necessary for the parties’ retention of decision-making power.³³

³⁰ Ibid, cl 7(3)(c)(vi).

³¹ Ibid, cl 9.

³² Ibid, cl 9(8).

³³ E Rock, ‘Mindfulness Mediation, the Cultivation of Awareness, Mediator Neutrality, and the Possibility of Justice’ (2006) 6(2) *Cardozo Journal of Conflict Resolution* 347, 347-8.

III CRITIQUE OF PROBLEM-SOLVING MODELS

Like mediator neutrality, the distinction between process and content or outcome has met with significant scholarly criticism. There are at least three key challenges to the distinction. One is that mediators can never be absolutely neutral by limiting their interventions to process. It is contended that mediators will inevitably impact upon content and outcomes due to their very presence in mediation³⁴ and their personal, cultural and professional situatedness.³⁵ Furthermore it is argued that mediators' control of the process necessarily impacts upon the content and outcome of disputes³⁶ and that the process itself can create a settlement bias.³⁷ According to Boule:

It is now conventional wisdom that mediators do influence the substantive content of mediated negotiations and settlement outcomes. All mediator interventions are based on mediators' perceptions and judgments which are never fully independent and disinterested in any absolute sense. Mediators have power, their own standpoints and some degree of interest in outcomes. These are the realities of clinical practice as opposed to abstract theory.³⁸

A second challenge is that mediators 'should' intervene as to content and outcome where imbalances of bargaining power between parties will lead to inequitable outcomes.³⁹ This issue questions the validity of limiting of the

³⁴ D Gorrie, 'Mediator Neutrality: High Ideal or Scared Cow?' in L. Fisher (ed.) *Conference Proceedings, Famcon '95*, Third National Mediation Conference, Sydney, 30, 34-5; T Fisher, 'Advice by Any Other Name...'", *Conflict Resolution Journal*, (2001) 19 (2) 197, 201.

³⁵ Astor, 'Mediator neutrality: Making sense of theory and practice', above n 2, 225-6;

³⁶ B Wolski, "Mediator Settlement Strategies: Winning Friends and Influencing People" (2001) 12 *Australasian Dispute Resolution Journal* 248.

³⁷ R Bush and J Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (Jossey-Bass, 1994) 74-75.

³⁸ Boule, above n 1, 76.

³⁹ See for example H Astor, 'Some Contemporary Theories of Power in Mediation: A Primer for the Puzzled Practitioner' 2005 (16) *Australasian Dispute Resolution Journal* 30; C Bayliss and R Carroll 'Power Issues in Mediation' (2005) *ADR Bulletin*, 7(8) 134.; R Charlton, 'Practical Realities in Dispute Resolution' (2009) 20 *Australasian Dispute Resolution Journal* 10; R Field, 'Mediation and the Art of Power (Im)balancing' (1996) 12 *QUT Law and Justice Journal* 264; Astor (2000) above n 2, 77 has argued unequivocally that treating unequal parties equally results in inequality.

mediator's role to ensuring procedural fairness in the face of evident substantive inequity. In an empirical study of mediators' perceptions of neutrality, the author found that participants were uncomfortable in limiting their interventions to process where an imbalance of power was evident. The study included interviews with mediators from two community based mediation services. Participants expressed considerable doubt and dissatisfaction with an imperative to limit their interventions to those of process in the face of apparent disadvantage suffered by one party.⁴⁰ Moore succinctly highlights this dilemma in his early work:

The mediator because of his or her commitment to neutrality or impartiality, is ethically barred from direct advocacy for the weaker party, yet is also ethically obligated to assist the parties in reaching an acceptable agreement.⁴¹

This has been considerable recognition of this issue in the mediation literature over time,⁴² which is reflected in the NMAS. Clause 9 (7) of the NMPS imposes upon the mediator:

...a duty to support the participants in assessing the feasibility and practicality of any proposed agreement in both the long and short term, in accordance with the participants' own subjective criteria of fairness, taking cultural differences and where appropriate, the interests of any vulnerable stakeholders into account.⁴³

This clause reflects the 'reality testing' of practice by calling attention to the mediator's role in helping parties to assess the 'feasibility and practicality of

⁴⁰ Douglas, above n 3, [5.2.3].

⁴¹ Moore, above n 4, 281-2.

⁴² See above n 39; J Boskey, 'The Proper Role of the Mediator: Rational Assessment, Not Pressure' (1994) 10 (4) *Negotiation Journal* 367, 367; R McKay, 'Ethical Considerations in Alternative Dispute Resolution', (1989) 45 (1) *The Arbitration Journal* 15, 22; C Moore, 'Why do we Mediate?' in J Folger and T Jones (eds), *New Directions in Mediation: Communication, Research and Perspectives* (Sage, 1994) 281-2; Haynes and S Charlesworth, *The Fundamentals of Family Mediation* (The Federation Press, 1996); J Kelly, 'The Best Interests of the Child: A Concept in Search of Meaning' (1997) 35 (4) *Family and Conciliation Courts Review* 377; D Neumann, 'How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce' (1992) 9 (3) *Mediation Quarterly* 227; J Wade, 'Forms of Power in Family Mediation and Negotiation' (1994) 6 *Australian Journal of Family Law* 40.

⁴³ NMPS above n 6, cl 9(7).

any proposed agreement'. The clause gives clear emphasis to the parties' subjective assessment of the fairness of their agreement, and thereby, equates substantive fairness with the parties' self-determined outcomes. At the same time the clause appears to give mediators a role in assessing the substantive interests of a vulnerable party. The extent to which the clause gives an actual mandate to intervene beyond process in order to further the interests of a vulnerable party is not clear on the face of the clause. The clause might contain implicit recognition that interventions as to process can have an impact on the substance of the dispute and its outcome. It might therefore point to a limited mandate to do as much as is practicable to ensure procedural fairness in order to encourage opportunities for the substantive fairness determined by the parties.

Vulnerable parties are evidently contemplated in clause 4 of the NMPS which provides that:

Mediators shall have completed training that assists them to recognise power imbalance and issues relating to control and intimidation and take appropriate steps to manage the mediation process accordingly.⁴⁴

This clause recognises that imbalances of power between parties can impact the mediation in such a way as to require mediators to intervene 'to manage the mediation process.' However, it is not clear whether the scope of the clause contemplates 'appropriate steps' which could impact the substance of the dispute, such as pointing to the possibility of other options, advice or entitlements without naming them. What is more clearly contemplated by clause 4 are interventions that accord with procedural fairness, such as making sure that both parties are heard despite one party's attempt to control the process and /or intimidate the other party. Clause 9 (4) reinforces the mediator's role in facilitating a level playing field. It provides that:

The mediator should encourage and support balanced negotiations and should understand how manipulative or intimidating negotiating tactics can be employed by participants.⁴⁵

Questions of the impact of imbalances of power on mediated outcomes point to a need to carefully consider what self-determination in mediation means. Lichtenstein defines it as 'the individual's right and ability to make decisions and take actions to follow those decisions through.'⁴⁶ This understanding is

⁴⁴ Ibid cl 4.

⁴⁵ Ibid cl 9(4).

⁴⁶ M Lichtenstein, 'Mediation and Feminism: Common Values and Challenges' *Mediation Quarterly* (2000) 18 (1) 19, 21.

consistent with a modernist world view said to underlie problem-solving models. According to this view, problem-solving models emphasise the importance of the individual, consistent with modernist conceptions and a liberal legal ideology.⁴⁷ They assume that the parties are ‘autonomous, self-contained, atomistic individuals, each motivated by the pursuit of satisfaction of his or her own separate self-interests.’⁴⁸ An evident difficulty for practice is in facilitating the self-determination of both parties where one party is operating at an evident disadvantage. Self-determination in the context of mediation, or indeed any social context, cannot (like mediator neutrality) represent an absolute. Each party’s capacity to be self-determining must be to some extent circumscribed by the needs and interests of the other party.⁴⁹ It is where a balance or compromise favours one party due to a disadvantage experienced by the other that the potential for substantive inequity clearly arises.

In an argument for a contextual ethical paradigm for practice, Field centralises ‘relational party self-determination’ as the normative and categorical aim of practice.⁵⁰ Drawing on the work of Welsh in the United States, Cooper and Field identify mediation as furthering self-determination by providing opportunities for parties to a) actively and directly participate in the communication and negotiation processes; b) choose and control the substantive norms that will guide their decision-making; c) create the options for settlement; and d) control the final decision regarding whether or not to settle and the terms of settlement.⁵¹ Field further identifies parties’ informed consent to any agreement⁵² as the indicator or measure of efficacy in achieving party self-determination. She asserts: ‘How will mediators know that their practice has supported self-determination? They will know this if the parties consent in an informed way to the outcome of the dispute.’⁵³ Field proposes a framework for informed

⁴⁷ D Della Noce, ‘Seeing Theory in Practice: An Analysis of Empathy in Mediation’ (1999) 15 (3) *Negotiation Journal* 271, 277-8; Della Noce, Bush and Folger, above n 2, 49.

⁴⁸ Della Noce, Bush and Folger, above n 17, 49.

⁴⁹ Boule, n1, 86; Douglas (2008) n 2, 151.

⁵⁰ R Field, ‘Rethinking mediation ethics: A contextual method to support part self-determination’ (2011) 22 *Australasian Dispute Resolution Journal* 8, 9.

⁵¹ D Cooper and R Field, ‘The Family Dispute Resolution of Parenting Matters in Australia: An Analysis of the Notion of an “Independent” Practitioner’ (2008) 8(1) *QUT Law and Justice Journal* 158.165 citing N Welsh, ‘The Thinning Vision of Self-determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?’ (2001) 6 *Harvard Negotiation Law Review* 1,3.

⁵² For a discussion of consensuality in mediation see Boule, above n 1, 87-89.

⁵³ Field, above n 50, 12.

consent consisting of a) preliminary steps through intake to screen the parties for suitability for mediation and the best model for their dispute; b) taking action during the process to target informed consent; and c) ensuring access to external supports.

Field prefaces her ethical paradigm with recognition of the process and content and outcome distinction as integral to the facilitative model of practice. As one impetus for her ethical paradigm, Field raises the dilemma in practice of the more powerful party imposing its interests on the weaker party.⁵⁴ It is not clear, however, how informed consent alone answers this dilemma and ensures that both parties achieve a self-determined outcome. One party may consent to an agreement imposed by the other despite attempts to adequately inform both parties. It is this issue that participants in the author's study of mediator's perceptions of neutrality found the most difficult. Participants described a number of examples where despite the use of intake procedures generally considered to be appropriate, attempting to reality test around contentious issues during the mediation and encouraging an apparently disadvantaged party to seek expert advice, that party has consented to an agreement that the mediators believed was unfair.⁵⁵

A third critique of the distinction between process and content or outcome is that it is theoretically unsound according to postmodern theory, and hence untenable as a principle upon which to ground practice. This view is inherent in transformative and narrative models of mediation, which models reject the distinction between process and content.⁵⁶ A central proposition of a social constructionist ontology is that knowledge is not discovered but rather created by human beings in interaction with one another. Meaning creation and hence discourse is seen as the foundation of understanding and replaces attempts to reduce human interaction into artificial components such as process and content.⁵⁷ Cobb describes the adoption of this perspective as 'second-generation' mediation practice and argues that:

This is a radical departure from what could be called "first-generation" mediation practice, where the mandate not to impact on the content of the dispute is thought to be essential to preserv-

⁵⁴ Ibid, 8.

⁵⁵ Douglas above n 3 [5.2] and Douglas above n 2, 146-7.

⁵⁶ Cobb above n 21, 1029; J Winslade and G Monk, *Narrative Mediation: A New Approach to Conflict Resolution* (Jossey-Bass, 2000) 37.

⁵⁷ See M Crotty, *The Foundations of Social Research: Meaning and perspective in the research process* (Allen and Unwin Pty Ltd, 1998) 42.

ing the privilege the parties have to define their own problems and build their own solutions. However, once we adopt an interactionist or social constructionist perspective, the mandate to separate content from process dissolves, as mediators recognize the inevitability of their impact on the content of the dispute. This attention to the evolution of the content calls for a “second-generation” mediation practice in which mediators interact with disputants so as to evolve the conflict stories, reformulate relationships, reframe the past and rebuild the future.⁵⁸

Adopting a social constructionist perspective means moving away from positivist, modernist views of human nature that emphasise the individual. It means reformulating practice away from a view of conflict as about competing individual interests and conflict resolution as about reaching compromise according to those interests. It is difficult therefore to make direct comparisons between problem-solving and alternative models. The distinction between procedural and substantive fairness, which makes sense for problem-solving models, does not translate as readily to alternative models. Nonetheless, in what follows discussion addresses how the role of the mediator and the benefits of mediation for parties are differently constructed in transformative and narrative models and the implications for ideas of procedural and substantive fairness.

IV THE TRANSFORMATIVE MODEL

The transformative model, originally developed by Bush and Folger,⁵⁹ is framed according to identifiable ‘premises, purpose and principles’.⁶⁰ The model is premised on a relational understanding of human nature. Rather than assuming that disputants aim simply to satisfy their individual needs, this model assumes ‘that people are, by their essential nature, both separate and connected beings, who are distressed whenever negative interaction between them continues, even if their separate needs get satisfied’.⁶¹ The model combines this premise with a theory of conflict that assumes that what people find most significant about conflict is not that it frustrates their individual rights or

⁵⁸ Cobb, above n 56, 1029.

⁵⁹ Bush and Folger, above n 37; R Bush and J Folger, *The Promise of Mediation: A Transformative Approach to Conflict* (revised ed, Jossey-Bass, 2005)

⁶⁰ T Fisher, ‘Transformative mediation: Differentiating principles from illusions – Part 1’ (2006) 9(3) *ADR Bulletin* 1, 2.

⁶¹ Bush and Folger, *The Promise of Mediation: A Transformative Approach to Conflict*, above n 59, 36.

interests, but ‘that it leads and even forces them to behave toward themselves and others in ways that they find uncomfortable and even repellent’.⁶² Bush and Folger argue that transformative mediation aims to achieve conflict transformation rather than conflict resolution. As such, it assumes that parties have both the desire and capacity to transform the conflict.

Consistent with a relational world view, Bush and Folger reject the distinction between process and content, maintaining that the two are intertwined and inseparable in practice.⁶³ Rather than depicting the mediator’s role as limited to process, the mediator’s role is to support the parties’ desire and capacity to transform their conflict. This is achieved according to the model by supporting positive interactional shifts, characterised as empowerment and recognition shifts.⁶⁴ In the first edition of their work, Bush and Folger define empowerment and recognition as follows:

In the simplest terms, *empowerment* means the restoration to individuals of a sense of their own value and strength and their capacity to handle life’s problems. *Recognition* means the evocation in individuals of acknowledgment and empathy for the situation and problems of others.⁶⁵

By articulating these aims of practice, Bush and Folger acknowledge the influence of mediators on content and at the same time they provide goalposts for the nature of that influence.⁶⁶ Their model does, however, highlight outcomes and uses this element to conceptualise each parties’ self-determination as a result of the mediation. A hallmark of the model, according to its authors, is that responsibility for outcomes is left with the parties.⁶⁷ Neutrality is reframed in this model to positive conduct which leaves outcomes in the control of parties:

The meaning of mediator neutrality, in the context of inevitable influence, is *commitment to use influence only for the sake of keeping the ultimate decision or outcome in the parties’ hands.*

⁶² Ibid 46.

⁶³ Bush and Folger, *The Promise of Mediation: A Transformative Approach to Conflict*, above n 59, 66; see also R Bush, “Mediation and adjudication, dispute resolution and ideology: An imaginary conversation” (1989) 3(1) *Journal of Contemporary Legal Issues* 1.

⁶⁴ Bush and Folger, *The Promise of Mediation: A Transformative Approach to Conflict*, above n 59, 65-9.

⁶⁵ Bush and Folger, above n 37, 2. (emphasis in original)

⁶⁶ Ibid 104-5.

⁶⁷ Bush and Folger, *A Transformative Approach to Conflict*, above n 59, 70.

Neutrality means that the mediator's only interest is the interest in using his or her influence to make sure that *the parties maintain control of decisions* about outcome... By adopting the transformative approach, the mediation movement gains a solution to the problem of the inevitability of influence, and a new and meaningful conception of mediator neutrality emerges."⁶⁸

This reframing of neutrality mandates the influence of the mediator on 'content' in a limited sense - the focus of interest for the mediator is the transformation of the conflict rather than the detail of the dispute.⁶⁹

Questions of procedural and substantive fairness are not obviously addressed in the transformative model beyond equating fairness with the outcome determined by the parties. According to Bush and Folger, empowerment is independent of substantive outcomes: 'Whether the outcome is a settlement that the mediator finds fair and optimal or unfair and even stupid, or a decision not to settle at all, the goal of supporting empowerment [can be] achieved.'⁷⁰ Furthermore, they expressly distinguish their goal of empowerment from any idea of balancing power between the parties, whether within the mediation session or as a consequence of the process.⁷¹ They argue that the mediator's role in supporting empowerment should be distinguished from any role as advocate, adviser or counsellor which they assert are contrary to the transformative approach.⁷²

The transformative model's avoidance of questions of substantive fairness has been criticised by Noone, who argues that it assumes that parties have the requisite capacity and knowledge to reach just and reasonable agreements. As well as excluding the imposition of individual mediator's views of what is fair, the model does not take account of community standards of fairness or the question of the potential for an overbearing party to take unfair advantage of the other party. Bush and Folger attribute both private and public benefit to the increased autonomy and connectedness experienced by parties as a result of conflict transformation.⁷³ The public benefit 'simply put, is the value of providing a moral and political education for citizens, in responsibility for them-

⁶⁸ Bush and Folger, above n 37, 105-6, emphasis in original.

⁶⁹ Bush and Folger, *The Promise of Mediation: A Transformative Approach to Conflict*, above n 59, 65-9.

⁷⁰ Ibid 65-9.

⁷¹ Ibid 76.

⁷² Ibid 56, 76-7.

⁷³ Ibid 37-8.

selves and respect for others'.⁷⁴ According to Noone this claim to long-term public benefit is yet to be substantiated.⁷⁵

V NARRATIVE MODELS

There is more than one version of a narrative approach to mediation in the literature. The predominant versions are those advanced by Winslade and Monk⁷⁶ and Cobb.⁷⁷ Cobb's approach is grounded in communication theory, while Winslade and Monk build their model from a basis in narrative therapy.⁷⁸ In the discussion that follows, Cobb's approach is described as "story telling", in order to distinguish it from the work of Winslade and Monk, which is described as a narrative model.

A The Narrative Model

The narrative model advanced by Winslade and Monk is premised on a social constructionist ontology, an understanding of conflict as a function of the existence of difference, and on a narrative metaphor for mediation. The authors base their model on four specific principles – antiessentialism, antirealism, language as a precondition for thought and language as a form of social action.⁷⁹ Antiessentialism rejects any assumption of individual essential needs and replaces it with the notion that needs are constructed in social discourses – rather than essential, they can be transformed. Antirealism questions the existence of objective facts, positing instead that all knowledge is a matter of perspective. The principle that language is a precondition of thought implies that language is a meaning-making activity, not simply a form of expression. The principle that language is a form of social action means that language is intimately connected with the construction of social experience rather than being merely a

⁷⁴ Ibid 81.

⁷⁵ M Noone, 'The Disconnect between Transformative Mediation and Social Justice' (2008) 19 *Australasian Dispute Resolution Journal* 114, 118.

⁷⁶ Winslade and Monk, above n 56; J Winslade, 'Mediation with a focus on discursive positioning' (2006) 23 (4) *Conflict Resolution Quarterly* 501. J Winslade, G Monk and A Cotter 'A Narrative Approach to the Practice of Mediation' (1998) 14 (1) *Negotiation Journal* 21.

⁷⁷ S Cobb, above n 56; S Cobb, 'Empowerment and Mediation: A Narrative Perspective' (1993) *Negotiation Journal* 9 (3) 245; S Cobb and J Rifkin, 'Practice and Paradox: Deconstructing Neutrality in Mediation' (1991) *Law and Social Inquiry* 16 (1) 35

⁷⁸ Winslade and Monk above n 56, xii; see also Winslade, above n 76, 510.

⁷⁹ Winslade and Monk, above n 56.

form of its expression. These four principles have direct implications for mediation as a meaning-making, social activity in which parties reconstruct and co-construct their needs or interests according to ever-changing perspectives.⁸⁰

According to Winslade and Monk, people rely on narratives, or stories, to make sense of their lives. Stories are culturally situated and are therefore shared according to various dimensions of identity. An assumption of the narrative model is that conflict is produced within competing cultural norms. People construct needs and interests quite apart from any essential biological needs and may perceive these constructions as entitlements.⁸¹ Sometimes, ‘stories compete with or conflict with each other. Thus conflict can be understood as the inevitable result of the articulation of difference.’⁸²

According to this model, differences that lead to conflict must be understood rather than necessarily resolved. Understanding may of itself precipitate resolution: ‘In coming to understand the nature of a dispute, there are different versions of meaning to be explored, rather than sets of facts to be discovered.’⁸³ Understanding requires an appreciation of relations of power and privilege as these are constructed by, and in turn construct, dominant meanings and hence, dominant discourses.⁸⁴ Following Foucault, discourses are conceived as social practices ‘dispersed through a cultural world in linguistic forms and exerting a domination effect on what can be thought or spoken.’⁸⁵

The narrative model does not separate process and content, because it is argued that “relationship, process, and content issues are all interwoven in the very fabric of mediation.”⁸⁶ Narrative mediators are not neutral and take an explicit position on issues of power and privilege. Mediators are actively engaged in recreating the reality of experience for the parties.⁸⁷

That is, mediation conversations can open the space for the issues to be described in different terms, for positions offered within dominant discourses to be refused, and for parties to reposition themselves within dominant discourses that they are experiencing as problematic⁸⁸.

⁸⁰ Ibid

⁸¹ Ibid Chs 1 and 2.

⁸² Winslade, Monk and Cotter, above n 76, 25.

⁸³ Ibid

⁸⁴ Ibid 25-6; Winslade, above n 76, 501-5.

⁸⁵ Winslade, above n 76, 502.

⁸⁶ Winslade and Monk, above n 56, 15.

⁸⁷ Winslade, above n 76, 510-12.

⁸⁸ Ibid, 512.

The authors identify personal agency as a goal rather than self-determination. A relational and dynamic idea of power is employed. As a consequence, rather than looking to balance power as between parties, the aim of practice is to open a space for relations of power to be reconstructed. “Narrative mediators would rather talk about how people can take up opportunities to resist the operation of power in their lives ... This process of expressing resistance develops a sense of agency in people who have felt silenced and marginalized”.⁸⁹

Procedural fairness is not explicitly addressed in this model and narrative mediators identify a vested interest in social justice. Narrative mediation espouses an overt bias towards the promotion of social justice.⁹⁰ According to Winslade and Monk, ‘the mediator can either promote social justice and attend to equity and fairness, or reinforce unjust dominant cultural practices ... The mediator in this situation is hardly neutral’.⁹¹ Narrative mediators are encouraged to challenge any cultural norm that exaggerates entitlement and would effectively privilege some groups of people over others. Violence, racism and sexism are explicitly mentioned as practices that must be challenged.⁹²

The degree to which, in the co-construction of alternative narratives, the mediator controls the reconstruction is not entirely clear. What is clear is that there is ample room for the mediator to take control and that arguably more than an appeal to general principles of social justice is needed to delimit his/her role. Given the authors’ postmodern premise that ‘there is no privileged viewpoint from which mediators can understand the realities of the world in which we live’,⁹³ it is not clear how the detail of a social justice perspective, which drives a narrative approach, is determined. However with social justice as its aim, narrative mediation does give explicit attention to issues of substantive fairness.

B The “Story – telling” Model

According to Cobb’s story telling approach, the aim of mediation is transformation of the parties’ conflict narratives. She describes these as consisting of particular perceptions of the problem, its antecedents and the roles played by the parties. Each party presents a story in which they depict themselves as the

⁸⁹ Ibid, 50-1.

⁹⁰ Winslade and Monk, above n 56,100; Winslade, Monk and Cotter, above n 76; 25-6; Winslade, above n 76, 513.

⁹¹ Winslade and Monk, above n 56, 100.

⁹² Ibid, 94-106

⁹³ Ibid, 123.

victim of wrongdoing by the other party.⁹⁴ The moral of the story presented by each party requires the other party to change in some way.⁹⁵ The role of the mediator is to assist parties to re-tell the story of the conflict so that it contains elements of both disputants' positions.⁹⁶

As demonstrated in the earlier quote from Cobb, she actively rejects the distinction between process and content in adopting a social constructionist ontology. Cobb's model depicts the mediator as explicitly non-neutral and actively interventionist. The mediator is highly engaged in re-storying disputes. Mediators act to construct meaning jointly with the parties by actively creating a space in which altered stories can appear. Mediators affect 'the evolution of the conflict, both by the content of the conversation, as well as by the nature of the interaction in which that content emerges'⁹⁷.

Cobb criticises mediators' attempts to empower parties by balancing power between them. She argues that power in this context is used in the Weberian sense of the ability of one party to impose his or her will on the other. As such, it is developed externally to a given mediation, and functions to constitute the authority and privilege of the mediator as expert in assessing and attempting to balance power.⁹⁸ According to Cobb, "if mediators must monitor and control power-as-the-imposition-of-will, they privilege *their* account of power over disputants' accounts of the problem, effectively usurping disputants' rights to account for their own actions, to construct their own stories."⁹⁹ Paradoxically then, balancing power becomes disempowering since it de-legitimises party autonomy.

The autonomy of the parties is presumably protected and advanced by the explicit moral dimension of practice. Cobb argues that the mediator's input into co-construction of a new story is not arbitrary, but rather based on an explicit set of 'favoured versions of reality'. These favoured versions combine value-determined assumptions about parties' experience of conflict and values about appropriate conflict resolution. She describes mediator intervention as guided by an intent to establish clearly the suffering of each party; create descriptions of that suffering which acknowledge each party's responsibility in it without minimising the experience of suffering or 'blaming the victim'; attributing

⁹⁴ Cobb, above n 21, 1022-3

⁹⁵ Ibid, 1020.

⁹⁶ Cobb, above n 77, 255.

⁹⁷ Cobb, above n 56, 1029.

⁹⁸ Cobb, above n 77, 247-9.

⁹⁹ Ibid, 247-8, emphasis in original.

positive intent to the actions of each party; creating variation in character traits; and adding more and varied value sets to those presented by the parties.¹⁰⁰

According to Cobb's model, as a result of the transformation of conflict narratives, relationships are transformed - reconstituted through the construction of new moral frameworks. The role of the mediator is to witness this transformation and shift to new values which celebrate personal responsibility, reciprocity and community.¹⁰¹ Rather than individual self-determination, Cobb's model favours interactional, socially constructed outcomes. Her concept of community hinges on the emergence of the parties' sense of interdependence, which enables and is enabled by the construction of a new, conjoint moral story. According to Cobb, '[a]ll of this involves the creation of a space where the community can witness itself as community in which social obligations and norms materialize.'¹⁰²

Cobb's model does not deal directly with questions of procedural or substantive fairness. While it emphasises the participation of parties and the mediator in reconstructing stories, it is not clear how fairness is constructed. It is not clear whether questions of fairness are equivalent to the parties' ideas of fairness, or those of the mediator and, if the latter, whether they would need to be consistent with Cobb's 'favoured versions of reality'.

VI SUMMARY AND CONCLUSIONS

Problem-solving models of mediation rely upon the distinction between process and content or outcome as the foundation for furthering the central aim of practice – promoting the self-determination of parties. As a corollary of this aim these models rely upon the distinction as the basis for articulating the role of the mediator as confined to issues of process and excluded from content or outcome. The mediator's claimed neutrality is co-incident with this distinction as s/he is said to be in control of the process but neutral as to content or outcome. Hence the distinction grounds understanding of both mediator neutrality and party self-determination as key principles of practice. These principles are reflected in the National Mediation Accreditation System.

Limiting mediators' interventions to those of process has focussed attention on the capacity of mediation to promote and ensure procedural fairness. The National Practice Standards reflect this emphasis by requiring mediators to en-

¹⁰⁰ Cobb, above n 56, 1028.

¹⁰¹ *Ibid*, 1032-3.

¹⁰² *Ibid*, 1031.

sure a procedurally fair process and by articulating a set of practical principles to achieve this. At the same time mediators, according to these Standards, are excluded from any substantive decision-making consistent with the central aim of the process in promoting the self-determination of the parties.

In principle substantive fairness is equated with the parties' self-determined outcomes – the agreements they reach consensually. The limitation of this logic in practice is that imbalances of power as between parties can produce outcomes that are not substantively fair though consented to. Creating a procedurally fair process may not be enough to safeguard the self-determination of one party where a structured or entrenched inequality between parties impedes the personal autonomy of the vulnerable or disadvantaged.

Narrative and transformative models have emerged out of a critique of the problem-solving model and some of the assumptions upon which it rests. Significantly for this discussion, these models reject the distinction between process, and content or outcome, wholly or in part. The transformative model retains a distinction between process and content on the one hand and outcome on the other. The role of the mediator in these alternative models is not limited either to process or procedural fairness. Consequently, the mediator is not depicted as neutral in relation to content. One might expect then that these models leave open the possibility of addressing issues of substantive fairness. In fact while both models set a social justice agenda neither model provides a practical answer to the question of imbalances of power between parties.

Each of the transformative and narrative models articulates particular views of reality and human nature at odds with the individualism of a problem-solving approach. Each is premised on its own theories of conflict and conflict resolution, which do not assume that maximising the satisfaction of individual interests by mutual agreement is the optimal goal of mediation. Each of these models contains explicit values that contradict the idea that mediators have no substantive impact on the process. The transformative model espouses empowerment and recognition for the parties, and moral growth for society at large as the goals of mediation. Here, neutrality is recast as the mediator's lack of control over outcomes because the parties are said to control outcomes. Narrative mediators are co-creators of the parties' experience of mediation and are therefore not neutral as to content. Nor are they neutral as to outcome, because they actively open up the possibilities of alternative stories that do not necessarily coincide with the dominant discourses presented by the parties.

Each model considered constructs an idea of self-determination. For the prob-

lem-solving model, party self-determination is explicitly identified. For the transformative model, empowerment is a central aim, which is set against a relationship with the other party (recognition) and with society more broadly (advanced moral growth of citizens). In the narrative paradigm individual decision-making is given a social context through the identification of a social justice agenda. The relationship of the individual in society is given a particular focus with less emphasis on the meeting of individualised needs. In Winslade and Monk's narrative model, personal agency is identified. In Cobb's story telling model, celebration of personal responsibility and reciprocity is tied to an idea of community as a desired outcome.

Each model examined avoids dealing with questions of imbalances of power between parties. On the face of it, each model's theoretical foundation and core aim of promoting self-determination, in whatever form, provides justification for avoiding any practical answer to this issue. The problem-solving model's reliance on the distinction between process and content or outcome precludes the mediator's intervention to substantively redress a power imbalance, because to do so would impinge on the parties' control of content and outcome. The transformative model's identification of the role of the mediator as fostering empowerment and the party's control of the outcome precludes the mediator from acting as advocate, adviser or counsellor to redress a power imbalance. For the two narrative models considered power has a postmodern construction. Just as the distinction between process, content or outcome has no meaning for these models, power cannot be measured in a modernist sense so as to reveal an imbalance needing to be redressed. Yet both of the narrative models examined rely upon a social justice agenda. This value base though only broadly drawn in both narrative models arguably presupposes that substantially fair outcomes ought to be available to both parties.

Where to from here? It is possible that all the models of mediation considered fail to deal adequately with questions of imbalances of power between parties because of an under-theorised understanding of self-determination. Problem-solving models articulate a decidedly individualistic construction of this aim. Narrative models attempt a greater focus on a social construction positing a social justice objective. The transformative model refers to three contexts – the individual, the individual in relationship with the other party and society as a whole. Something can be taken from each model in pointing to avenues for further investigation. More thought needs to be given to how an individual party's self-determination is constrained, and yet perhaps fostered, by their relationship with the other party and the social context in which their dispute arises.

More thought needs to be given to the role of mediators and of mediation in legitimising a social justice agenda and hence in promoting fairness for both parties, which might mean constraining the self-determination or autonomy of one according to legitimised community standards. This paper concludes that more thought could and should be given to the role of mediators in ensuring substantive fairness in mediation, and that re-construction of the principle of party self-determination is an appropriate vehicle for that investigation.