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## **Session 3E**

**THERAPEUTIC JURISPRUDENCE: PROVIDING  
SOME ANSWERS TO THE NEUTRALITY DILEMMA IN  
COURT-CONNECTED MEDIATION**

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## Therapeutic Jurisprudence: Providing Some Answers to the Neutrality Dilemma in Court-Connected Mediation.

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### Abstract:

*Neutrality as an attribute of the practice of mediation has been criticised in the mediation literature. Key theorists maintain that mediator neutrality is a myth that hides the reality of the impact of the mediator on both the content and the process of mediation. Internationally, new models of mediation have been articulated that are therapeutic in nature, highly value relationships and include a multidiscipline approach to understanding conflict and emotion. These new models reject the concept of the neutral mediator. However, courts and governments rely upon neutrality as a “legitimising framework” for the wide adoption of mediation as an alternative to litigation. In this paper we discuss the paradigm of therapeutic jurisprudence and its links with new models of mediation, such as the transformative and narrative models. We postulate that the discourse of therapeutic jurisprudence can convince courts and governments to adopt models of mediation that eschew the attribute of neutrality.*

### Introduction

The use of the alternative dispute resolution process (ADR) of mediation is common in courts and tribunals in Australia. The third party facilitation of disputes is routinely used as an adjunct to litigation either prior to the instigation of proceedings or as part of the case management of actions.<sup>1</sup> In fact, the largest growth in the use of mediation has not come from public demand, but from the institutional adoption by courts and tribunals of this process.<sup>2</sup> In recent years government backed mediation schemes, or similar third party dispute resolution processes, has seen consistent and widespread growth.<sup>3</sup> One of the tenets of mediation has traditionally been the notion of the neutral third party. The

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1 Moreton Rolfe J, “The Relationship between Case Management and Mediation,”(2006) 26 *The Arbitrator and Mediator* 81.

2 Mack K, *Court Referral to ADR: Criteria and Research*. National Alternative Dispute Resolution Advisory Council and Australian Institute of Judicial Administration, (Canberra 2003).

3 For instance the overhaul of industrial relations includes the promotion of dispute resolution processes Part VIIA *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) and similarly the significant reform initiatives in Family Law further promote dispute resolution processes, see *Family Law Amendment (Shared Responsibility Act) 2006* (Cth).

neutrality of the mediator is part of the “legitimising framework” that places mediators alongside decision makers in courts and tribunals. Theorists have critiqued the notion of the neutral mediator arguing that the mediator affects the story of the mediation in a number of ways, most notably through facilitating the settlement of the dispute by privileging issues that lead to the ‘solving of the problem’. In this way mediators influence both the content and the process of the mediation and move the parties towards resolution. However, in the course of pursuing the answer to the problem of the mediation mediators may silence some parties concerns, particularly in regard to relationship and emotional issues, and may be unreflective regarding their own assumptions in relation to the parties.<sup>4</sup>

Not all models of mediation rely upon the rhetoric of neutrality. Internationally, new models of mediation have been articulated that are therapeutic in nature, highly value relationships and include a multidiscipline approach to understanding conflict and emotion. The most influential of these models are the narrative<sup>5</sup> and transformative<sup>6</sup> models and support for these approaches is evident in the United States and New Zealand. In Australia these two new models have not been widely practised<sup>7</sup> and the dominant models of practice, the facilitative and evaluative approaches, particularly where practised in the court-connected context, tend to mimic court processes in their pursuit of settlement. In particular, the evaluative model gives the role of the third party an advisory capacity reminiscent of the expertise and decision-making role of a judge, Magistrate or tribunal member. Although, in this model the mediator does not give a binding decision to the parties, the mediator advises the parties of their likely success in court. This introduces a powerful incentive for parties to settle and reflects a degree of mediator influence that has caused scholarly and industry comment.<sup>8</sup>

In this paper<sup>9</sup> we argue that the discourse of therapeutic jurisprudence can provide an alternative “legitimising framework” for the practice of mediation. The philosophy of therapeutic jurisprudence has grown in influence,<sup>10</sup> particularly in the last decade, and articulates a concern that the law be assessed under a normative framework that values the therapeutic impact of the law and legal actors.<sup>11</sup> Drawing upon the work of the social sciences this approach considers the law’s impact upon the emotional and psychological welfare of those who come in contact with our justice system.<sup>12</sup> As

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4 For instance mediators may harbor stereotypical assumptions regarding women and those from differing racial and ethnic groups, see for example Grillo T, “The Mediation Alternative: Process Dangers for Women” (1991) 100 *Yale Law Journal* 1545 and Gunning I, “Diversity in Mediation: Controlling Negative Cultural Myths” (1995) 1 *Journal of Dispute Resolution* 55.

5 Winslade J and Monk G, *Narrative Mediation*. (Jossey-Bass, San Francisco, 2000).

6 Bush RA and Folger JP, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*, (revised ed, Jossey-Bass, San Francisco, 2005).

7 Boule L, *Mediation: Principle Process Practice*, (2nd ed., Lexis Nexus, Sydney, 2005) 47.

8 Feerick F, Izumi C, Kovach K, Love L, Moberly R, Riskin L and Sherman E, “Symposium: Standards of Professional Conduct in Alternative Dispute Resolution,” (1995) 1 *Journal of Dispute Resolution* 95.

9 In a previous paper we have argued more generally for the benefits of therapeutic jurisprudence in addressing the dilemma of neutrality in mediation practice see Douglas K and Field R, “Looking for Answers to the Mediation Neutrality Dilemma in Therapeutic Jurisprudence,” Paper presented to the *8th National Mediation Conference*, Hobart, May 2006.

10 For a discussion of a range of initiatives in this area see Winick B and Wexler D, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, Durham, 2003).

11 Winick B, ‘The Jurisprudence of Therapeutic Jurisprudence’ (1997) 3 *Psychology Public Policy and Law* 184.

12 Winick and Wexler, n 10 at 7.

indicated many litigants are directed to mediation through the case management of courts and tribunals and though there have been seemingly high levels of satisfaction from participants,<sup>13</sup> disquiet has been expressed regarding the trend towards an evaluative model of mediation.<sup>14</sup> In our view the evaluative model provides the opportunity for the mediator to hide behind the mantle of neutrality whilst in effect pursuing a determinative role. We posit that this approach has anti-therapeutic outcomes for parties in that this model does not meet the emotional needs of participants and lacks procedural justice. We argue that courts and government need to adopt the philosophy of therapeutic jurisprudence to stem the tide of the use of this model and we call for more research into the benefits of different models of mediation.

To pursue our aim we will first discuss the dilemma of neutrality in mediation, we will then explore the discourse of therapeutic jurisprudence, we next canvass in detail models of mediation including the narrative and transformative models and lastly we consider the need for research that evaluates court-connected mediation models not merely around satisfaction rates, but whether there has been improvements to participants emotional and psychological well-being.

## The Neutrality Dilemma

We have already asserted that, currently, neutrality remains an important concept in mediation, and particularly in problem-solving, court-ordered models of mediation. Certainly, most traditional definitions of mediation include a statement to the effect that “the mediator is a neutral intervener in the parties’ dispute”.<sup>15</sup> There is clear ideology in the retention of neutrality rhetoric for mediation.<sup>16</sup> Cobb, for example, has noted the connection with a moral commitment to concepts such as equality, participation, voice, and personal responsibility.<sup>17</sup> Ideals of fairness, even-handedness and appropriate process are implied in the language of “neutrality”. And although in reality it is an elusive concept;<sup>18</sup> and, in mediation in particular, one that is manifestly under-defined,<sup>19</sup>

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13 Research shows that mediation has largely high satisfaction rates amongst parties, however we need to query the expectations of participants of the process when assessing satisfaction rates, see Boule, n 7 at 581.

14 See for example Welsh N, “The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?” (2001) 6 *Harvard Negotiation Law Review* 1.

15 Boule, n 7 at 18. See also Folberg J and A Taylor A, *Mediation: A Comprehensive Guide to Resolving Conflict Without Litigation*, (Jossey-Bass, San Francisco, 1984) at 7-8; Moore CW, *The Mediation Process*, (Jossey-Bass, San Francisco 3rd ed., 2003). This is reflected, for example, in Laffin ME, “Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators” (2000) 14(1) *Notre Dame Journal of Law, Ethics and Public Policy* 479, Kovach KK and Love LP, “Mapping Mediation: The Risks of Riskin’s Grid” (1998) 3 *Harvard Negotiation Law Review* 71. However, of note is the fact that Sir Laurence Street’s three fundamental principles of mediation do not include a reference to neutrality on the part of the mediator: Street L, “The Language of Alternative Dispute Resolution” (1992) 3 *Australian Dispute Resolution Journal* 144 at 146.

16 See for example Coben JR, “Gollum, Meet Smeagol: A Schizophrenic Ruminations on Mediator Values Beyond Self-Determination and Neutrality” 5 *Cardozo Journal of Conflict Resolution* 65.

17 Cobb says that “moral values are so pervasive within our democratic culture that we do not notice them as moral commitments; we do not notice them as a frame containing moral discussions that is itself a moral framework.”: Cobb S, “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 at 1019.

18 As MacKay comments: “It is easy enough to say that the mediator should be a neutral facilitator, but what does that mean?”: McKay RB, “Ethical Considerations in Alternative Dispute Resolution” (1989) 45 *Arbitration Journal* 15 at 21. Indeed it has even been said of mediators that they have a “very limited vocabulary to explain how neutrality functions.”: Rifkin J, Millen J and Cobb S, “Toward a New Discourse for Mediation: A Critique of Neutrality” (1991) 9(2) *Mediation Quarterly* 151 at 152.

19 For example, Laue has commented of the 1987 SPIDR ethical standards that “by my count, [the word neutrality] appears more than 35 times in the standards without any definition or description”: Laue Jin Society of Professionals in Dispute Resolution (SPIDR) (1987) “SPIDR’s Ethical

it is little wonder that governments, who want to see themselves as providing good, moral and democratic dispute resolution processes, continue to see the notion of neutrality as central and key to informal appendages to litigation. Nevertheless, relatively rigorous debate continues in the field of dispute resolution about the general meaning of the term.<sup>20</sup>

Court-ordered mediation is predominantly focussed on problem-solving facilitative mediation models; but with an increasing emphasis on evaluative approaches by mediators.<sup>21</sup> Problem-solving models of mediation are also more broadly dominant in Australia.<sup>22</sup> Such models arguably allow for superficial assertions to be made of third party (mediator) neutrality, because the mediator's focus is on reaching a solution; and because they emphasise, consistent with liberal legal ideology, the importance of the individual, and focus on finding an end result, or outcome, to the problem that brings the parties to the mediation table. Such models tend also to 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."<sup>23</sup> Further, it is an assumption in relation to these models that the mediator's expertise is focussed predominantly on process only, not on the content of the dispute, and that their facilitation role aims mainly to assist parties to their own mutually agreed outcome.<sup>24</sup>

Clearly, neutrality becomes *plausible* if the rhetoric is that the mediator's focus in problem-solving mediation is on process only, as opposed to the content or outcome of the dispute. Equally, clearly, neutrality can also be argued as *necessary* in the context of problem-solving mediation in that it can be seen as playing an "important legitimising function".<sup>25</sup> The problem-solving nature of court-ordered mediation is comparable to the problem-solving nature of litigation; and notions of mediator neutrality arguably make problem-solving models of mediation credible,<sup>26</sup> because there is an overt

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Standards for Professional Conduct" *Forum*, Newsletter of the National Institute for Dispute Resolution, March at 12. Taylor refers to the lack of a shared vocabulary in mediation practice: Taylor A, "Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence and Transformative Process" (1997) 14 *Mediation Quarterly* 215 at 217.

20 Astor H, and Chinkin C, *Dispute resolution in Australia*. (2nd ed., Lexis Nexis, Sydney, 2002) at 77. Gadlin H and Pino EW "Neutrality: A Guide for the Organisation Ombudsperson" (1997) 13 *Negotiation Journal* 17 at 17-18. Wolski, for example, also notes that focussing on theoretical differences in the approaches of various models of mediation to neutrality, whilst it is useful, "can disguise the extent to which all mediators influence the course and outcome of mediations": Wolski B, "Mediator Settlement Strategies: Winning Friends and Influencing People"(2001) 12(4) *Australasian Dispute Resolution Journal* 248 at 249.

21 For example, the influential body, the National Alternative Dispute Resolution Advisory Council (NADRAC), often assumes in its literature a problem-solving orientation: National Alternative Dispute Resolution Advisory Council, *The Development of Standards for ADR: Report* (Canberra, 2001).

22 Boule, n 7, at 46 and Della Noce DJ, Baruch Bush RA and Folger JP, "Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy" (2002) 3 *Pepperdine Dispute Resolution Law Journal* 39 at 49: "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." We prefer the term settlement based mediation. There are some positive attributes in relation to problem-solving, that arguably should be retained, but the focus of the mediation should not be upon settlement, a driving force to achieve a solution to the problem.

23 *Ibid*.

24 *Ibid*.

25 Boule, n 7 at 18-19. See also Astor, n 20 at 74 referring to Cobb S and Rifkin J, "Neutrality as a Discursive Practice: The Construction and Transformation of Narratives in Community Mediation" (1991) 11 *Studies in Law and Politics* 69 and Harrington C and Engle Merry S, "Ideological Production: The Making of Community Mediation" (1998) 22 *Law and Society Review* 709.

26 Mayer B "The Dynamics of Power in Mediation and Negotiation" (1987) 16 *Mediation Quarterly* 75 at 83.

connection with the language and ideology of judicial impartiality.<sup>27</sup> This is an aspect of court-ordered mediation that possibly draws potential parties to the mediation process; that is, because of neutrality's promise of fairness and its offer of protection against biased or unfair practice. Such protections connect problem-solving mediation with the authority and legitimacy of formal legal adjudication processes.<sup>28</sup>

There are, however, many issues arising from the neutrality claim in problem-solving mediation. Some of these issues derive from the falsity of neutrality (discussed further below); but others arise as a result of the morally driven belief in the truth of neutrality, referred to above. For example, the ostensibly neutral stance of the mediator in outcome and results-oriented problem-solving models is problematic from the perspective of achieving sustainable conflict resolution, because it can result in insufficient time or attention being devoted to emotional issues in disputes.<sup>29</sup> Certainly, a neutral mediator who controls process only is unable to involve themselves extensively in the detail of the parties' emotions and relationships. It follows that in problem-solving approaches to mediation, and particularly, for example, in court-connected mediation contexts, and in legal mediation contexts where the "shadow of the law" is very strong,<sup>30</sup> relationship dimensions of conflict can be subordinated.

There are a number of additional reasons why neutrality can be said to be a false or misleading concept in the context of problem-solving mediation. For example, although the aspirational aims of neutrality are convincing, "pure neutrality is very difficult to achieve and sustain."<sup>31</sup> This is partly because mediation involves experiential imperatives, as mediators work "to assist clients who are struggling not only with interpersonal conflicts, but also intra-personal issues."<sup>32</sup> Sometimes, as a result, departure from conceptual notions of neutrality is required.<sup>33</sup> It is almost inevitable, at least to some extent, that a mediator's own emotional reaction to the parties and the dispute will influence their actions and decisions in mediation. The mediator's "own knowledge, experiences, and values" are also influential.<sup>34</sup> Whether the mediator is aware of it or not, they cannot avoid a certain element of transference and counter-transference between themselves and the parties.<sup>35</sup>

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27 Boule, n 7 at 18-19.

28 Ibid.

29 Bush and Folger, n 6 at 239-247. See also Alexander N, "Mediation on Trial: Ten Verdicts On Court-Related ADR" (2004) 22 *Law in Context* 8 at 17; the exception may be in the Family Law jurisdiction.

30 Mnookin R and Kornhauser L, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 *Yale Law Journal* 950.

31 Bernard SE, Folger JP, Weingarten HR and Zumeta ZR "The Neutral Mediator: Value Dilemmas in Divorce Mediation" (1984) 4 *Mediation Quarterly* 61 at 72.

32 Taylor, n 19 at 215.

33 Taylor asks: 'The question for practitioners is whether articles like those of Rifkin, Millen and Cobb (1991), which propose a theoretical basis for understanding neutrality, are so conceptual as to be of limited value to the practitioner.' Taylor, n 19 at 218. As Astor has put it: "Whilst practitioners make decisions every day about neutrality, it does not seem that those decisions are very much informed or assisted by the current research and theorising about neutrality.": Astor H, "Rethinking Neutrality: A Theory to Inform Practice- Part 1," (2000) 11 *Australasian Dispute Resolution Journal* 73 at 77.

34 Cohen O, Dattner N, and Luxenburg A 'The Limits of the Mediator's Neutrality' (1999) 16(4) *Mediation Quarterly* 341 at 342.

35 Ibid.

Neutrality can also be considered a flawed concept in mediation because the reality of mediation practice is that mediators are truly powerful. Therefore, any “notion that mediators are passive participants in a process shaped by forces they have not deployed” is simply manifestly inaccurate.<sup>36</sup> The work of Greatbatch and Dingwall, for example, has clearly shown that mediator values and judgments can, and often do, enter the mediation process and influence mediation outcomes.<sup>37</sup> Particularly in relation to problem solving models, such as those used in court-ordered mediations, we know that some mediators will prioritise the reaching of a settlement, any settlement. Settlement-oriented mediators use what Greatbatch and Dingwall refer to as “selective facilitation” to push negotiations towards achieving an outcome. In such circumstances, the mediator is clearly not neutral. Rather they have an important impact on both the content and outcome of the mediation. They cannot be said to be merely a process expert.<sup>38</sup>

In support of these assertions, Astor and Chinkin warn that “it is not sufficient simply to claim mediator neutrality (as) mediators have considerable power in mediation and there is evidence that they do not always exercise it in a way which is entirely neutral as to content and outcome.”<sup>39</sup> And according to Silbey “mediators exercise power by manipulating the immediate situation of mediation, and the interactions and communication between the parties, in order to control and shape the outcomes.”<sup>40</sup> We also know, for example, that mediator power can be exercised in a gendered fashion. For example, the *Report on the Evaluation of the Family Court of Australia Mediation Service* acknowledged, significantly, that women were much “more likely to report that mediators pressured them into agreement or tried to impose their viewpoints on them.”<sup>41</sup>

Neutrality can also be considered “unreal” in the context of problem-solving mediation because it contradicts and interferes with what many mediators consider to be their ethical duty to ensure just outcomes. It has been said, for example, that neutrality is a lesser value in the mediation process than the commitment to ensuring “fairness, or win-win settlements.”<sup>42</sup> This is the basis on which some mediators, consciously, non-neutrally and actively intervene for the benefit of a weaker party or absent third parties, such as

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36 Silbey S, “Mediation Mythology” (1993) 9(4) *Negotiation Journal* 349 at 352.

37 Dingwall R and Greatbatch D, “Who is in Charge? Rhetoric and Evidence in the Study of Mediation” (1993) *Journal of Social Welfare and Family Law* 365, and Greatbatch D and Dingwall R, “Selective Facilitation: Some Observations on a Strategy Use by Divorce Mediators” (1989) 23 *Law and Society Review* 613. See also Mayer, n 26; Wade J, “Forms of Power in Family Mediation and Negotiation” (1994) 6 *Australian Journal of Family Law* 40. Della Noce et al also note the reality that mediator practices can and do influence the parties’ conflict, (and raise) questions of what kinds of influence are appropriate and why, the nature of differences in mediators’ motives and orientations, and how different underlying ideologies shape mediators’ goals, and therefore, their influence on the conflict, in very different ways: see Della Noce et al, n 22 at 47.

38 Boule points to a growing realization amongst mediators of this issue and the concomitant realisation that neutrality is an aspiration rather than a reality, see Boule, n 7 at 35.

39 Astor and Chinkin n 20 at 102. Professor Wade has said that “virtually every step taken by a mediator involves the exercise of power.”: Wade, n 37 at 54. The research of Greatbatch and Dingwall asserts that mediators are clearly not neutral in their mediation practice; see n 37 at 74.

40 Silbey, n 36.

41 Bordow S and Gibson J *Evaluation of the Family Court Mediation Service* (Family Court of Australia Research and Evaluation Unit 1994) at 112.

42 Bernard et al, n 31.



children.<sup>43</sup> McCormick, for example, has asserted that “a mediator committed to representation of all the interests cannot be preoccupied with neutrality.”<sup>44</sup>

Theoretically, at least, a further complication arises in the distinction that is sometimes drawn between neutrality and impartiality.<sup>45</sup> This distinction aims to address the neutrality dilemma in mediation by acknowledging that whilst a mediator may not always be neutral, they should always manage to be impartial.<sup>46</sup> That is, certain mediator uses of power in mediation (for example interventions, actions or evaluations) can be seen as legitimate even though they might be said to strictly contradict the notion of neutrality. Their legitimacy is based on the fact that such conduct still can be said to fall within the concept of impartiality.<sup>47</sup> Such semantic distinctions, we think, are not necessarily meaningful or practically relevant for mediators or parties in terms of how they experience the reality of the mediation room. Many people, for example, consider neutrality and impartiality to be synonymous. We don't consider the distinction to be particularly useful, then, in any real sense; at least not without detailed explanation being provided to the parties.

Our support of approaches to mediation that reject notions of neutrality is based on the issues with neutrality in problem-solving mediation articulated here. We support concepts of mediation that move beyond the current preoccupation with false assertions of neutrality, and that move towards a principle of providing parties with a clear and accurate sense of what the mediation process can and cannot provide for them.<sup>48</sup> As neutrality cannot realistically be achieved we argue that the better approach is to move to models of mediation that can be supported in other ways. We believe that the theory of therapeutic jurisprudence offers a potential way forward for removing the perceived need for neutrality to be a “legitimizing” concept for mediation. We next outline this theory and then relate it to the practice of new models of mediation.

## Therapeutic Jurisprudence

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43 Astor considers that this has “the regrettable consequence that what many mediators would regard as ethical behaviour involves loss of neutrality”: see Astor H, “Rethinking Neutrality: A Theory to Inform Practice – Part II” (2000) *Australasian Dispute Resolution Journal* 145 at 147.

44 McCormick M, “Confronting Social Injustice as a Mediator” (1997) 15 *Mediation Quarterly* 293 at 295.

45 “In the case of mediation, each concept (of neutrality and impartiality) has a different significance. Impartiality must be regarded as a core requirement in mediation, in the sense that its absence would fundamentally undermine the nature of the process. It is inconceivable that the parties could waive the requirement that the mediator act fairly. Neutrality, however, is a less absolute requirement and could be waived without prejudicing the integrity of the mediation process, for example in relation to a mediator's prior contact with one of the parties or his or her previous knowledge about the dispute.” Boule, n 7, at 20.

46 Ibid.

47 Boule asserts that impartiality can be used to refer to “an even-handedness, objectivity and fairness towards the parties during the mediation process.”: *ibid* at 19.

48 Ibid.

Therapeutic jurisprudence<sup>49</sup> is a recent philosophy<sup>50</sup> that promotes a different approach to courts, tribunals and associated services in our legal and justice system. Stemming from the work of United States academics, Winick and Wexler, in the mental health field therapeutic jurisprudence is an attempt to chart the impact on the emotional life and psychological well-being of those affected by decisions of our justice system.<sup>51</sup> The aim is to draw upon the work of the social sciences in charting the therapeutic or anti-therapeutic effect of decisions by courts and more widely, justice agencies. This philosophy has been linked with other initiatives in the law, such as movements in preventative and collaborative law<sup>52</sup> and has been identified as an influential vector of the comprehensive law movement.<sup>53</sup> All of these approaches to the law attempt to move away from our adversarial system and look to innovative ways to solve the problems<sup>54</sup> that present to our legal and justice system. The success of therapeutic jurisprudence is in its promotion of diverse initiatives, such as problem-solving courts<sup>55</sup> and correctional programs.<sup>56</sup> It is also advocated as a paradigm to temper the litigious culture of lawyers<sup>57</sup> and promote practice that assists in the furtherance of a client's overall well being.<sup>58</sup>

It is an interdisciplinary approach<sup>59</sup>, and acknowledges the various disciplines involved in justice including, social workers and psychologists. Although in Australia this approach has been mainly taken up in the criminal justice system<sup>60</sup> therapeutic jurisprudence has

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49 The website for therapeutic jurisprudence can be found at <http://www.therapeuticjurisprudence.org> (accessed at 24th April 2006).

50 Therapeutic jurisprudence has been categorized as a collection of practices rather than a philosophy, see Frieberg A, "Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?" (2003) 20 *Law in Context* 6 at 9.

51 Winick and Wexler, n 10 at 7.

52 Collaborative law has been canvassed in Australia see Scott, M "Collaborative Law: A New Role for Lawyers" (2004) 15 *Australasian Dispute Resolution Journal* 207; has recently begun to be trialled in Canberra, see Liverani M, "Canberra Law Firms Set the Pace on Collaborative Law" (2005) *Law Society Journal* 20 and is being promoted in Victoria, see Gale C, "Working Together" (2006) 80 *Law Institute Journal* 4.

53 Daicoff, S "Law as a Healing Profession: The "Comprehensive Law Movement" (2006) 6 *Pepperdine Dispute Resolution Law Journal* 1.

54 For example many initiatives in Victoria rely upon the therapeutic jurisprudence philosophy and are aimed at dealing with systemic problems such as the over-representation of people from marginalized and disadvantaged backgrounds in the justice system, see Department of Justice, *Policy Framework to Consolidate and Extend Problem-Solving Courts and Approaches* (Courts and Programs Development Unit, March 2006).

55 See for a discussion of a range of initiatives Winick and Wexler n 10 at 25.

56 See for example Birgden A, "Therapeutic Jurisprudence and Sex Offenders: A Psycho-Legal Approach to Protection," (2004) 16 *Sexual Abuse: A Journal of Research and Treatment*, 351; Birgden A, "Therapeutic Jurisprudence and Responsibility: Finding the Will and the Way in Offender Rehabilitation" (2004) 10 *Psychology, Crime & Law* 283.

57 Popovic J, "Judicial Officers: Complementing Conventional Law and Changing the Culture of the Judiciary" (2003) 20 *Law in Context* 121.

58 King M, "Exploring the Scope of Therapeutic Jurisprudence" (2006) 80 *Law Institute Journal* 48.

59 The philosophy is supportive of interdiscipline practice between various professions such as the law and social work Hartley C and Petrucci C, "Justice, Ethics and Interdisciplinary Teaching and Practice: Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and the Law" (2004) 14 *Washington University Journal of Law and Policy* 133. This is an appealing aspect to the philosophy as mediation also draws upon a wide range of professional backgrounds such as social work, psychology as well as law.

60 Western Australian has a number of initiatives including the adoption of a resolution by Western Australian Magistrates supporting this approach see King M, "Country Magistrates' Resolution on Therapeutic Jurisprudence" (2005) 32 *Brief* 23; King M, "Applying therapeutic Jurisprudence in Regional Areas-The Western Australian Experience" (2003) 10(2) *E Law- Murdoch University Electronic Journal of Law*, <http://www.murdoch.edu.au/elaw/issues/v10n2/king102.html> (accessed at 27th July 2005). Victoria has introduced court services and programs attached to Magistrates Courts that could be categorized under the therapeutic jurisprudence philosophy see Popovic J, "At Your Service; A Guide to the Magistrates' Court Services and Programs" (2003) 77 *Law Institute Journal* 32. Various states have drug, family violence and Indigenous Justice courts that arguably can be seen as therapeutic jurisprudence initiatives see Frieberg A "Sentencing" in Chappell D and Wilson P, *Issues in Australian Crime and Criminal Justice* (Sydney: Lexis Nexis, 2005).

also been used as a theoretical framework in a variety of areas<sup>61</sup> including civil law,<sup>62</sup> medical issues such as anorexia<sup>63</sup> and neighborhood disputes.<sup>64</sup> The mediation movement's focus upon alternatives to litigation, which reduce stress and cost, has resonance with the aims of therapeutic jurisprudence;<sup>65</sup> "It also studies the effects of conciliation and mediation processes as means of reaching settlement and avoiding the anti-therapeutic effects of protracted litigation and adversarial trials."<sup>66</sup> Some writers limit the kind of models of mediation that can be categorized as therapeutic to the transformative and narrative models.<sup>67</sup>

Therapeutic jurisprudence has been accused of being paternalistic<sup>68</sup> and might be said to extend the social control of the state due to the more active role of the court in supervising the lives of those who come before it.<sup>69</sup> However, in the context of mediation, we see value in this philosophy in promoting models of practice that eschew neutrality, deal with emotion and provide a greater degree of procedural justice. There are clear links between therapeutic jurisprudence and new models of mediation.<sup>70</sup> Mediation is known for its therapeutic effect when incorporating storytelling,<sup>71</sup> an attribute of both narrative and transformative models.

## Models of Mediation

Unlike litigation there are many definitions of alternative dispute resolution processes (ADR) including mediation.<sup>72</sup> Definitions range from the simple to the extensive and in an effort to provide a benchmark for practice the National Alternative Dispute Resolution Council (NADRAC), has provided two descriptions of mediation,<sup>73</sup> but

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61 McMahon M and Wexler D, "Therapeutic Jurisprudence: Developments and Applications in Australia and New Zealand" (2003) 20 *Law in Context* 1.

62 See for example an analysis of recent USA civil case law and the therapeutic framework Wexler D, "Lowering the Volume through Legal Doctrine: A Promising path for Therapeutic Jurisprudence Scholarship" (2002) 3 *Florida Coastal Law Journal* 123

63 Carney T and Saunders D, "Therapeutic Jurisprudence and Anorexia: A Synergy?" (2003) 20 *Law in Context* 54.

64 McMahon M and Willis J, "Neighbours and Stalking Intervention Orders: Old Conflicts and New Remedies" (2003) 20 *Law in Context* 95.

65 See for example Schneider A, "Therapeutic Jurisprudence/Preventative Law and Alternative Dispute Resolution" (1999) 5 *Psychology, Public Policy and Law* 1084 and Shepard A, and Bozzomo J, "Efficiency, Therapeutic Justice, Mediation, and Evaluation: Reflections On A Survey of Unified Family Courts" (2003) 37 *Family Law Quarterly* 333.

66 King, n 58 at 50.

67 Paquin G and Harvey L, "Therapeutic Jurisprudence, Transformative Mediation and Narrative Mediation: A Natural Connection" (2002) 3 *Florida Coastal Law Journal* 167.

68 Arrigo B, "The Ethics of Therapeutic Jurisprudence: A Critical and Theoretical Enquiry of Law, Psychology and Crime" (2004) 11 *Psychiatry, Psychology and Law* 23.

69 Hoffman, M "Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous" (2002) 29 *Fordham Urban Law Journal*, 263.

70 Paquin and Harvey, n 67.

71 Ibid.

72 Tillett G, "Terminology in Dispute Resolution: A Review of Issues and Literature" (2004) 15 *Australasian Dispute Resolution Journal* 178.

73 "Mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.

An alternative is 'a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator) negotiate in an endeavour to resolve their dispute'" see National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms*, (Canberra 2003) at 9.

acknowledges that different agencies will have differing definitions according to their needs.<sup>74</sup> Notably in their descriptions of mediation NADRAC does not include the attribute of neutrality however many courts and tribunals still do. For instance, the Federal Court of Australia describes the mediator in the court-connected process as neutral and in addition advises that the mediator may suggest possible solutions.<sup>75</sup>

Boule, when commenting upon the difficulties of establishing a definition of mediation points to the use of models as a way of showing the range of practice of this approach to dispute resolution. There are a number of models<sup>76</sup> identified by Boule, including the facilitative model which he states is the model extensively used in “training, writing and practice in community, neighborhood and family disputes” and the evaluative model which he states is much in evidence in “court-connected, commercial and industry-based mediation”.<sup>77</sup>

As indicated earlier in this paper these two models are examples of problem-solving models where settlement of a dispute is the main aim of the process.<sup>78</sup> However, these dominant approaches do not provide the range of dispute resolution methods to deal with the differing kinds and contexts of conflict in our society.<sup>79</sup> An alternative approach to problem-solving models is the narrative and transformative models where the aim is not to focus upon solutions, but to prioritize exploring emotion and relationship issues between the disputants, although solutions to the problems brought to the mediation table are often found.<sup>80</sup>

In this discussion we first wish to highlight the differences between the two problem-solving models of mediation and in the process of this discussion argue that evaluative mediation has anti-therapeutic outcomes.

#### (i) Problem-Solving Models of Mediation

In the early days of the present wave of mediation practice, there was little distinction between the models of mediation that were being practiced. This was the case even though there were significant differences in approaches taken by mediators. Riskin,<sup>81</sup> in

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74 NADRAC indicates that these two descriptions are not intended to be prescriptive; see *ibid* .

75 See the *Federal Court of Australia* website and the button dealing with information regarding mediation at the Federal Court <http://www.fedcourt.gov.au/litigants/mediation/mediation.html> (accessed at 24th April 2006).

76 These are the settlement, facilitative transformative and evaluative models. He also refers to the narrative model by does not include this models as one of the four major paradigms of mediation see Boule, n 7 at 43-47. In this paper we discuss all of the models identified by Boule, save the settlement model, which we regard as close to the evaluative model.

77 *Ibid* at 43.

78 Mediators have been criticised for their “how to” approach to mediation , avoiding theory in favor of a focus upon skills that lead to settlement, see Della Noce et al, n 22 at 45.

79 Mills values diversity in the practice of mediation, although it may be that each model may require a different ethical code see K A Mills, “Can a Single Ethical Code Respond to All Models of Mediation?”(2005) 21 *Bond Dispute Resolution News*, 5 <http://www.bond.edu.au/law/centres/drc/newsletter/Vol21Dec05.pdf> (accessed at 22 February 2006).

80 Bush and Folger, n 6 at 239-247.

81 There have been a number of publications discussing the Riskin grid, see for example Riskin L, “Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed” (1996) 1 *Harvard Negotiation Law Review* 7

an influential analysis of models, pointed to the use of two main models of mediation, the facilitative and evaluative models. He posited that mediation could be explained as a grid showing movement between an approach where the mediator sought to gain agreement through delving behind party's positions and discovering needs and interests, to an approach where the mediator advised party's of likely court outcomes and evaluated their dispute. Riskin aimed to provide a grid to assist parties and their lawyers, to understand and make choices about mediation models.<sup>82</sup> The articulation of the grid led to debate in the mediation industry concerning whether the evaluative model, or at least one part of the grid, could even be categorized as mediation and the negative repercussions of promotion of this type of practice.<sup>83</sup> More recently, Riskin has responded to a range of criticism regarding this model and renamed the approaches "elicitive" and "directive". As indicated, these kinds of models could be described as problem-solving models as the aim of the process is primarily to bring about a solution to the problem that brings the parties to the mediation.<sup>84</sup> Evaluative mediation has grown significantly in court-connected mediation in Australia and the United States,<sup>85</sup> particularly due to the apparent preference of lawyers for this approach. Boule, when considering the extent of mediator interventions in disputes notes that:

*...in commercial, court connected, personal injury and tribunal-based mediations, mediators tend to be "highly interventionist" in terms of informing, advising expressing opinions and making recommendations to the parties, highlighting their potential difficulties on the facts and law, and predicting what might eventuate if the matter proceeded to a court or tribunal. In these settings mediators tend to be experienced lawyers, ex-judges, court registrars or other experts and the parties are often legally advised.<sup>86</sup>*

Importantly, mediators may move through a range of models when mediating. That is they may begin with an elicitive, facilitative approach and later introduce an evaluation of the merits of parties respective cases, becoming directive.<sup>87</sup> Even in the transformative approach, where authors Bush and Folger emphasis that models should not be combined,<sup>88</sup> mediators do sometimes move between models.<sup>89</sup>

Where mediators take up that part of Riskin's grid where they evaluate disputes and fail to consider parties emotional and relationship needs we argue that this model is anti-therapeutic. This is because the positive psychological effects of dealing with

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82 Riskin L, "Decisionmaking in Mediation: The New Old Grid and the New New Grid System" (2003-2004) 79 *Notre Dame Law Review* 1 at 4.

83 Love L P, "The Top Ten Reasons Why Mediators Should Not Evaluate" (1997) *Florida State University Law Review* 937.

84 Some writings regarding therapeutic jurisprudence include the facilitative model, see for example Wexler, n 62 100. The adoption of the therapeutic jurisprudence framework may allow facilitative mediation to develop an approach to practice that does not rely upon neutrality and focuses more attention upon emotion rather than settlement, however we do not discuss this issue in detail in this paper.

85 Welsh n 14.

86 Boule, n 7 at 40.

87 *Ibid* at 43.

88 Bush and Folger n 6 at 45.

89 See Martin M, "How Transformative Is Volunteer Mediation? A Qualitative Study of the Claims of Volunteer Mediators in a Community Justice Program" (2000) 18 *Mediation Quarterly* 33. In this article the author describes research which demonstrates that mediators with the best intentions to practice transformative mediation would move, on occasion, from the transformative approach to a problem solving approach. The more experienced the mediator the more likely the mediator was to adhere to the goal of transformative mediation.

emotions and relationships are curtailed in evaluative mediation. There is a focus upon outcomes and the “soft” issues of emotions and relationship are not addressed or are given marginal attention. Jones and Bodtke<sup>90</sup> have identified the lack of reflection by many mediators of the place of emotion in conflict. They have pointed to the need for all mediators, whatever model of mediation is practiced, to address emotion as they argue that “emotion is the foundation for all conflict”.<sup>91</sup> If mediators do not reflect upon the impact of emotion there can be negative effects for disputants and for the mediator (as the mediator’s emotional responses affect his/her practice).<sup>92</sup> The evaluative model potentially will be anti-therapeutic as this approach focuses on solutions to problems and may merely provide simplistic venting of emotional concerns.<sup>93</sup>

The rise of the evaluative approach is at odds too with one of the core ideas of mediation, self-determination. Parties are said to determine their own outcomes when undergoing mediation as there is no third party empowered to decide the dispute. Welsh argues that as the evaluative model has become more popular in court-connected mediation the ideal of self-determination has diminished:

*However, as mediation has been institutionalized in the courts and as evaluation has become an acknowledged and accepted part of the mediator’s function the original vision of self-determination is giving way to a vision in which the disputing parties play a less central role.<sup>94</sup>*

Significantly, the evaluative model tends to place less emphasis upon the parties articulating their concerns and more of a focus upon the rights of disputants. The mediator provides an evaluation of the parties’ rights and may, in some instances, pressure the parties to settle the dispute. However, during the process the mediator will maintain the myth of neutrality, protesting that he/she has no decision-making capability. In a mediation this may mean that after a short hearing of opening statements, sometimes delivered by the legal representatives, the participants may be ushered into different rooms and the mediator will deliver offers by moving back and forth between the rooms.<sup>95</sup> This approach to mediation arguably affects the psychological outcome for the parties as parties lose true self-determination.<sup>96</sup>

In this context the psychology of procedural justice is an important issue to consider. Research has shown that litigants highly value a sense of being involved in a fair process. Being able to tell the story of the conflict and being treated with respect was more important than winning in court.<sup>97</sup> Tyler’s recent research led him to state:

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90 Jones T and Bodtke A, “Mediating with Heart in Mind: Addressing Emotion in Mediation Practice,” (2001) 17 *Negotiation Journal* 217.

91 *Ibid* at 219.

92 *Ibid* at 239.

93 Retzinger, S and Scheff, T “Emotion, Alienation and Narratives: Resolving Intractable Conflict” (2000) 18 *Mediation Quarterly* 71.

94 Welsh, n 14 at 4.

95 Welsh N, “Making Deals in Court-Connected mediation: What’s Justice Got To Do With It?” (2001) 79 *Washington University Law Quarterly* 787.

96 Hensler, D “Suppose It’s Not True: Challenging Mediation Ideology” (2002) *Journal of Dispute Resolution* 81.

97 Winick and Wexler describe this concept as follows: “The literature on the psychology of procedural justice, based on empirical work in a variety of litigation and arbitration contexts, shows that if people are treated with dignity and respect at hearings, given a sense of “voice,” the ability to tell

*People's evaluations of the fairness of judicial hearings are affected by the opportunities which those procedures provide for people to participate, by the degree to which people judge that they are treated with dignity and respect, and by judgments about the trustworthiness of authorities. Each of these three factors has more influence on judgments of procedural justice than do either evaluations of neutrality or evaluations of the favorableness of the outcome of the hearing.<sup>98</sup>*

Procedural justice has long been recognized as an attribute of mediation,<sup>99</sup> but differing models provide differing experiences of procedural justice. We argue that the narrative and transformative models better meet parties' need for procedural justice. They do so through the professional practice of the mediator allowing parties the opportunity to be heard by the authority figure of the mediator. These new models value the stories brought to the process by the parties and listen without rushing to settlement. Tyler identifies the wish by parties to experience procedural justice as more important than the issue of neutrality. Some may argue that parties still need to feel the process of mediation is fair and by abandoning the rhetoric of neutrality there is a risk that parties may feel the process is lacking. However, we maintain that if the mediator conducts the process in an *even handed way*, giving equal time and attention to the parties,<sup>100</sup> the experience of fairness will be assured without relying on the attribute of neutrality.

We will now discuss narrative and transformative mediation in more detail and show how they better deal with emotion and relationships and issues of procedural justice.

## (ii) Narrative Mediation

Narrative mediation is a relatively new model of mediation that has its origins in narrative therapy<sup>101</sup> and is predicated on a storytelling<sup>102</sup> approach to conflict. Based upon post-modern and social constructivist perspectives conflict is not constructed as the product of colliding individual needs, as postulated in problem solving models, but as "...the inevitable product of the operation of power in the modern world".<sup>103</sup> The mediator is not seen as the neutral facilitator of the process of the mediation, or as an evaluator of the merits of a dispute, but as a co-author in the re-storying of the conflict that brought the parties to the mediation table. The authors of this model reject the

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their story, and "validation," the feeling that what they have said has been taken seriously by the judge or hearing officer, they will experience greater satisfaction and comply more willingly with the ultimate outcome of the proceedings, even if adverse to them", see Winick and Wexler, n 10 at 129.

98 Tyler T, "The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearing," in Wexler D and Winick B, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* as cited in Daicoff above n 53, 18.

99 Note that Boule identifies procedural justice as an attribute of facilitative mediation, see Boule, n 7 at 44.

100 For example, in the narrative model the mediator is careful not to be seen as excessively warm towards one party and will not make off putting remarks to any party, see Winslade and Monk, n 5 at 137-40.

101 Hansen T "The Narrative Approach to Mediation," (2003) 4 *Pepperdine Dispute Resolution Law Journal* 297.

102 This model has much in common with Cobb's mediation as storytelling approach see Cobb S, "Empowerment and Mediation: A Narrative Perspective"(1993) 9 *Negotiation Journal* 245 . New models of mediation practice may be described as "second generation practice", see Cobb, n 17. The storytelling model has not been considered in this paper, but we include it in our more general paper Douglas and Field, n 9.

103 Winslade and Monk, n 5 at 41.

liberal ideology that supports notions of neutrality observing when considering dominant models of practice that:

*The ultimate model for the mediator is that of the scientist-practitioner, the detached neutral observer applying the knowledge generated within modernist scientific tradition, in which the concept of problems solving is well entrenched.*<sup>104</sup>

Instead, this approach looks beyond the facts and interests that are the subject of problem-solving mediations and deconstructs “the cultural and historical processes by which these facts and interests came to be.”<sup>105</sup> The mediator is given the authority<sup>106</sup> to be a co-author of the re-storying of the conflict from his role in the mediation process and he utilizes a number of innovative interventions to achieve the aim of arriving at a new, more harmonious view of the conflict. Through techniques such as mapping the history of the dispute, curious questioning and externalising the problem, mediators seek to shake loose stories of mutual blame. The written word is used to assist in the development of a new story, which may address the concern/s that brought the parties to the process.<sup>107</sup>

### (iii) Transformative Mediation.

The transformative model of mediation offers an alternative to litigation and the mirroring of the litigious process by problem-solving models, such as evaluative mediation.<sup>108</sup> The mediator in the transformative model is not considered a neutral third party, but instead acknowledges the impact of mediator interventions upon the mediation story with the normative aim of achieving moral growth.<sup>109</sup> Unlike litigation mediation provides the opportunity to achieve unique outcomes, such as the transforming of the parties conflict. The aim is to achieve the twin objectives of empowerment and recognition contributing to moral growth. Parties can achieve empowerment through deciding for themselves how to address the conflict they are experiencing. Mediator interventions encourage parties to see the conflict from the other party’s point of view, achieving a degree of empathy, called recognition. Achieving moral growth is the priority in conflict transformation, but solutions to problems can be found in addition to this normative aim. In this respect, achieving the transformation of conflict, mediation cannot be compared to any other dispute resolution option<sup>110</sup> and its transformative dimensions can benefit the specific dispute being mediated as well as the community

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104 Ibid at 34.

105 Ibid at 38.

106 The mediator needs to be reflective regarding the authority to co-author and the power he or she wields in the process. This requires reflexive practice, see ibid at 121.

107 Ibid at 37-47.

108 Bush and Folger, n 6 at 37.

109 See Della Noce et al, n 22 at 57.

110 Bush and Folger, n 6 at 60.



more generally as participants become more adept at dealing with conflict.<sup>111</sup> Thus the moral growth of participants affects the disputing parties and the wider community.<sup>112</sup>

Like narrative mediation this approach relies upon postmodern and social constructionist literature as part of its philosophical basis, but also draws upon the fields of communication, cognitive psychology and social psychology.<sup>113</sup> Drawing in particular from psychology Bush and Folger analyse conflict as causing an individual a “kind of crisis”. When parties experience the conflict that leads to mediation they will often feel a sense of disempowerment and displacement. Importantly, conflict of this kind affects an individual’s sense of self and relationships with others. Parties react with a sense of weakness; becoming self-absorbed and self-centred. Bush and Folger describe this process as a negative spiral of conflict which the transformative model can reverse. Mediators intervene in the conflict with the normative aim of transforming the conflict through empowerment and recognition shifts.<sup>114</sup>

Clearly, both the narrative and transformative model articulate an approach to emotional issues and relationships that problem-solving models do not. The opportunity to tell the story of the conflict in these two models, listened to in an evenhanded manner by the mediator, arguably provides superior opportunities to experience procedural justice than in the problem-solving models. We therefore believe that these new models, with their rejection of neutrality, are the approach that courts and policy makers should increasingly adopt in court-connected mediation programs.

### **Conclusion: The Need For Research Based Upon a Therapeutic Jurisprudence Framework**

At present research shows mediation has generally high satisfaction rates from parties.<sup>115</sup> However, satisfaction may be affected by the expectations that parties bring to the process. Boule argues that:

*Some of the views expressed by mediating parties, for example that mediation ‘met my expectation’ have limited value without knowledge of the respondents’ prior expectations and understandings and more specificity on which individual needs were met in the process.*<sup>116</sup>

Research into mediation often does not break down the model used<sup>117</sup> and as such provides limited information to courts and policy makers as to the competing benefits of various models. It is only when we are able to test the effectiveness of models of mediation that we will be able to make informed choices regarding the appropriateness

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111 Ibid at 37.

112 Ibid at 78.

113 Della Noce et al, n 22 at 48

114 Ibid at 45-53.

115 Mack, n 2 at 29.

116 Boule, n 7 at 578-9.

117 Ibid at 579.

of the use of a model in a particular setting. Therefore, we require evaluations of models that are based upon indicators other than satisfaction rates. In our view evaluations should include assessments of the improvements to participants' emotional and psychological well-being after experiencing a particular model of mediation.

In this paper we have attempted to provide an alternative to the use of neutrality as a "legitimizing" framework for the practice of mediation in court-connected matters. We have canvassed new models of mediation that do not rely upon the rhetoric of mediation in the way that problem-solving models do. There is a resonance between therapeutic jurisprudence and the practice of narrative and transformative mediation that can be traced to the emphasis that these models place upon the emotional and relationship dimensions of conflict and the resultant arguably positive therapeutic outcomes for parties who experience these models. Evaluative mediation, we have posited, has anti-therapeutic outcomes due to the sidelining of emotional concerns and the lack of procedural justice associated with this approach. In order to test our assertions we believe that these models need to be researched in the court-connected context. In this way policy makers<sup>118</sup> and courts can engage with the benefits of these kinds of models. The approach of the research however, needs to be grounded in the philosophy of therapeutic jurisprudence. Any evaluation must include the normative outcomes valued by this movement.

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<sup>118</sup> Evaluations of justice initiatives are now common place in Australia, see for example Department of Justice, *Quality Assurance Framework* (Courts and Programs Development Unit, March 2006).