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COMMENT

Mediator as Peacemaker: The Case for Activist Transformative-Narrative Mediation

The practice of mediation has strayed far from its roots. Originally, mediation presented a forum through which members of the community achieve reconciliation, empowerment, healing, peace, and, ultimately, justice. This ideal has been diluted and eventually buried as mediation became subsumed within the adversarial judicial system and corporate-driven dispute resolution processes. A small but growing minority of dispute resolution practitioners and scholars have long bemoaned the shift in mediation from a process focusing on empowerment and justice to one aimed at merely achieving a quick, efficient, legally binding settlement.

Professor Isabelle Gunning argues that mediators should reject two bedrock notions of mediation—party self-determination and mediator neutrality—in favor of an approach in which the mediator actively intervenes in the mediation in order to help the parties achieve healing, resolution, and, most importantly, substantive justice. To that end, Dr. John Winslade and Dr. Gerald Monk, pioneers of narrative family therapy and narrative mediation, present a concrete approach to mediation that enables mediators and parties to achieve the sort of empowerment and justice sought by proponents of the community justice model of mediation such as Professor Gunning.

This article proposes an approach to mediation encompassing aspects of both of these takes on mediation, something one might loosely think of as “activist transformative-narrative mediation.” Essentially, this approach assumes the aspirations and ideology of Professor Gunning’s “activist” take on transformative mediation and achieves those aspirations using techniques from narrative mediation. By employing this approach, mediators can actively assist parties to identify and achieve reconciliation, peace, and justice.

I. BACKGROUND

Dispute resolution has a rich, complex history, drawing upon various legal, social, and economic influences.¹ One prominent modern strand of alternative dispute resolution stems from the community justice movement, which has employed mediation to achieve community empowerment, social justice, and equality since the 1960s.² The movement allowed members of disenfranchised communities to seize control of the conflict resolution process and achieve substantive

1. Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-shaping Our Legal System*, 108 PENN ST. L. REV. 165, 167-71 (2003).

2. *Id.* at 170-73.

justice outside the province of legal adjudication, which often yielded results that perpetuated the inequities of the time.³ These pioneers viewed mediation and settlement primarily as a mechanism for community healing and reconciliation.⁴ In the decades since, however, community-oriented mediation has “given way to court and corporate sustenance”⁵ yielding what has come to be known as the problem-solving model. This has been the dominant approach to mediation for nearly three decades.⁶ Under this approach, the primary goal of mediation is the efficient settlement of cases in a manner familiar to the legal system.⁷

The two bedrock values of effective problem-solving mediation are mediator neutrality and party self-determination.⁸ These twin aspirations have long been entrenched in mediation mythology and remain touchstones for mediator training; however, some mediation scholars have bemoaned the absence of these values in actual mediation practice.⁹ These scholars argue that mediators can and do wield substantial influence over both procedural and substantive issues in mediation, but still consider themselves neutral because they let the parties define the issues to resolve, identify potential solutions, and decide on the ultimate solution.¹⁰ As a result of this supposed neutrality, mediators unwittingly perpetuate social inequality by failing to address negative cultural myths and interpretive frameworks about disadvantaged identity groups during the mediation session.¹¹ Mediation outcomes tend to conform to the prevailing cultural myths which serve to marginalize disenfranchised groups, fatally compromising any meaningful attempt at self-determination.¹²

Due to the shortcomings of the problem-solving approach,¹³ many competing visions for mediation have emerged in the last two decades which have challenged the hegemony of the problem-solving model.¹⁴ The most influential alternative to the problem-solving model is the transformative model.¹⁵ Practitioners of transformative mediation are less concerned with settlement itself, instead focusing primarily on party empowerment and reconciliation¹⁶—aspirations which invoke the aims of the community justice movement.¹⁷

3. Isabelle R. Gunning, *Know Justice, Know Peace: Further Reflections on Justice, Equality, and Impartiality in Settlement Oriented and Transformative Mediations*, 5 CARDOZO J. CONFLICT RESOL. 87, 87-88 (2004).

4. James R. Coben, *Gollum, Meet Smeagol: A Schizophrenic Rumination on Mediator Values Beyond Self-Determination and Neutrality*, 5 CARDOZO J. CONFLICT RESOL. 65, 68 (2004).

5. *Id.* at 69.

6. *Id.* Dorothy J. Della Noce et al., *Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy*, 3 PEPP. DISP. RESOL. L.J. 39, 48-50 (2002).

7. Coben, *supra* note 4, at 69.

8. *Id.* at 70.

9. *Id.* at 71-74.

10. *See id.* at 70-77.

11. Gunning, *supra* note 3, at 93.

12. *Id.* See also Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Richard Delgado, et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985).

13. One well-known article discussing the shortcomings of the problem-solving approach is Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

14. Coben, *supra* note 4, at 78-83.

15. Della Noce, *supra* note 6, at 48-49.

16. *Id.* at 50-52.

17. Gunning, *supra* note 3, at 90.

While many commentators have rightly lauded transformative mediation for its emphasis on empowerment and mutual recognition, transformative mediation also shares the problem-solving model's adherence to the mythology of mediator neutrality and party self-determination.¹⁸ In order to combat the injustices which result from this mythology and to achieve substantive justice and peace through mediation, Professor Gunning calls for an "activist" approach to transformative mediation.¹⁹ She argues that the mediator (the "peacemaker") needs to work actively to identify and address any power imbalances between the parties, and to inject values of equality and justice when necessary to foster true self-determination in the disadvantaged party.²⁰ By intervening in this way, the mediator can foster healing, recognition, and empowerment, but can also achieve a just result.²¹

This author strongly concurs with Professor Gunning's criticism of transformative mediation and also believes mediators should actively strive for justice and empowerment in mediation. Professor Gunning proposes that mediators introduce the values of equality and justice into the mediation in the same way mediators frequently introduce the values of honesty, good faith, and decorum.²² Beyond this suggestion, though, Professor Gunning does not offer much practical guidance for mediators wishing to apply upon her vision of activist transformative mediation. This article proposes that mediators employ a hybrid approach to activist mediation, drawing upon both transformative mediation and narrative mediation.

Narrative mediation is a promising new model of mediation, with origins in narrative therapy,²³ which posits that conflict is a breakdown in discourse, occurring when parties' views of reality and values are incongruent.²⁴ Essentially, narrative mediators focus on the parties' "stories" (both their narratives of the conflict as well as underlying interpretive frameworks which frame their understanding of the world), and then help the parties deconstruct the "conflict-saturated" narrative and construct a more constructive alternative story which the parties use as a platform to build a more positive interaction.²⁵ In this author's view, this technique is ideal for addressing both the relational problems between parties, managing power relations between the parties, and maximizing the parties' opportunities for understanding, recognition, and justice.

II. MEDIATION AT A CROSSROADS

As discussed above, there has been a profound shift in the goals and methods of mediation since the peak of the community justice movement.²⁶ Early media-

18. *Id.* at 90-91.

19. *Id.* at 94.

20. *Id.* at 93-94. See also Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 86 (1995).

21. Gunning, *supra* note 3, at 93-94.

22. *Id.* at 94.

23. Toran Hansen, Note, *The Narrative Approach to Mediation*, 4 Pepp. DISP. RESOL. L.J. 297, 297 (2004).

24. JOHN WINSLADE & GERALD MONK, *NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION*, 41-43 (2000).

25. *Id.* at chs. 6-9.

26. Gunning, *supra* note 3, at 87-88.

tion advocates sought to facilitate community empowerment, social harmony, healing, and generosity through the conflict resolution process.²⁷ Practitioners considered settlement to be a part of the process of reconciliation rather than an end in itself.²⁸ Parties felt empowered during the mediation process through participating voluntarily, playing an active communicative role in the resolution of the conflict, identifying the issues to be resolved, evaluating and choosing options for resolution of the conflict, and creating a climate of cooperation during the mediation.²⁹ Further, the movement allowed disenfranchised persons to achieve substantive justice outside of the courthouse, through a desire to transform power relations between unequal classes in society.³⁰ Before civil rights statutes were enacted, community mediation was an important means by which persons of color and persons in poverty could achieve substantive justice.³¹ Most importantly, mediation was a meaningful alternative to the adversarial legal system.³²

These underlying principles and goals of mediation have changed, however, as the community empowerment model of mediation has been largely replaced by the problem-solving model of mediation.³³ Mandated mediation is common, and court-annexed and corporate-driven mediation has replaced community-based mediation as the norm.³⁴ The principal objective of mediation shifted from community healing, empowerment, and justice to reaching an efficient settlement, often in the context of an adversarial dispute.³⁵ Instead of fostering collaboration and face-to-face reconciliation, mediators who employ problem-solving methods of mediation “separate parties rather than strive to keep them engaged together in conversation[, so] that the process is barely distinguish[ed] from a judicially managed settlement conference.”³⁶ Further, some argue that mediation (and alternative dispute resolution in general) benefits employers and large corporations rather than individuals, because corporations, who are often repeat players in the process, can not only choose court venue and governing law, but can also choose the methods and model of dispute resolution.³⁷

It is clear that mediation has strayed far from its community empowerment and reconciliation roots in favor of a model of mediation that frequently perpetuates the societal injustices and power imbalances manifested through adjudicatory processes—injustices which spawned the community justice movement in the first place. Commentators have long decried this shift in mediation values and called

27. Coben, *supra* note 4, at 68.

28. *Id.*

29. *Id.* at 68-69.

30. Gunning, *supra* note 3, at 87-88.

31. *Id.*

32. Coben, *supra* note 4, at 68.

33. *Id.* at 69.

34. *Id.* See also generally Holly A. Streeter-Schaefer, *A Look at Court Mandated Civil Mediation*, 49 *DRAKE L. REV.* 367 (2001).

35. Coben, *supra* note 4, at 69.

36. *Id.*

37. *Id.* at 70. See also Lisa S. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Arbitration Awards*, 29 *MCGEORGE L. REV.* 223 (1998) (empirical study demonstrating that “repeat player” employers do better than “one-shot” individuals); Carrie Menkel-Meadow, *Do the “Haves” Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 *OHIO ST. J. ON DISP. RESOL.* 19, 26 (1999).

for the return of peacemaking and justice as the primary objectives of mediation, often positing their visions of what mediation is and/or should be.³⁸

One of the more influential alternative models of mediation is the transformative model, as articulated by Bush and Folger in their seminal 1994 book "The Promise of Mediation."³⁹ In order to understand activist transformative mediation, it is instructive to first analyze the similarities and differences between problem-solving and transformative mediation.

III. PROBLEM-SOLVING MEDIATION VS. TRANSFORMATIVE MEDIATION

The problem-solving model of mediation is based upon a psychological and economic view of conflict, where conflict arises due to the parties' incompatible needs and interests.⁴⁰ Mediators who employ the problem-solving model presume that a solution, manifested in the form of a tangible settlement agreement, is the parties' primary objective.⁴¹ Mediators are encouraged to help the parties identify issues, generate options, and gently nudge them to "close the deal."⁴² The problem-solving model of mediation is an essentially individualist method of dispute resolution, in which humans are presumed to be autonomous and self-contained personalities motivated chiefly by self-interest.⁴³

By contrast, transformative mediation is based upon a social and communicative view of conflict, in which conflict is primarily a breakdown in the parties' interactions which destabilizes the parties' perceptions of themselves and each other.⁴⁴ In contrast to problem-solving mediation, which is based on an individualist ideology, transformative mediation is based on a relational ideology.⁴⁵ Transformative mediators see humans as social agents, "formed in and through their relations with other human beings, essentially connected to others, and motivated by a desire for both personal autonomy and constructive social interaction."⁴⁶ Conflict arises when interactions between the parties deteriorate, setting into motion the process of "interactional degeneration," a vicious cycle of disempowerment and demonization which transforms an initially positive interaction into an interaction that is destructive and alienating for all involved.⁴⁷ For transformative mediators, the primary objective is reversing this downward spiral by empowering the parties to restore a more conciliatory quality to their interaction.⁴⁸ Reversing the conflict cycle takes precedence over resolving particular substantive issues because mere agreement on substantive matters, without the corresponding

38. Coben, *supra* note 4, at 78-83.

39. Della Noce, *supra* note 6, at 47-48. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (2005).

40. Della Noce, *supra* note 6, at 48-49.

41. *Id.* at 49.

42. *Id.*

43. *Id.*

44. *Id.* at 50.

45. *Id.* at 51.

46. *Id.*

47. Robert A. Baruch Bush & Sally Ganong Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 PEPP. DISP. RESOL. L.J. 67, 74-75 (2002).

48. *Id.* at 75-76.

reconciliation and conflict transformation, still leaves the parties angry, distrustful, and disempowered.⁴⁹

More importantly, research suggests that people go to mediators looking for more than an efficient way to reach an agreement on particular issues.⁵⁰ Parties seek mediation in order to transform their negative interactions with the other party into positive interactions, to gain closure, and to let go of the bitterness and move on with their lives.⁵¹ The transformative model is based on the idea that people have the capacity to reverse the cycle of self-absorption and weakness which nurtures conflict by building personal strength (the empowerment shift) and cultivating responsiveness to others (the recognition shift).⁵² The transformative mediator's role is to help the parties identify opportunities for empowerment and recognition shifts as they arise during the mediation, and to assist the parties in transforming their interaction from a negative, destructive interaction into a positive, constructive one.⁵³ The transformative model recognizes the importance of resolving particular issues, but proponents of the transformative model argue that if mediators successfully reverse the cycle of conflict through empowerment and recognition shifts, parties will likely make positive changes in their interaction and reach an acceptable agreement where grounds for such an agreement exists.⁵⁴

Though the transformative model offers much to prefer over the problem-solving approach, it also shares a major flaw of problem-solving mediation, namely adherence to two pervasive myths of mediation: party self-determination and mediator neutrality.⁵⁵ These values are firmly entrenched in mainstream mediation in theory, but in practice, they stand directly in the way of substantive and procedural justice for parties.⁵⁶

IV. SELF-DETERMINATION AND NEUTRALITY: MEDIATION MYTHOLOGY

A. Self-Determination

In mediation lore, party self-determination is said to be mediation's "prime directive."⁵⁷ Indeed, ethical codes for mediators describe party self-determination as "the fundamental principle of mediation."⁵⁸ Self-determination has never been explicitly defined,⁵⁹ but the central principles have been summarized by Professor Nancy Welsh as follows: "The parties would: (1) actively and directly participate in the communication and negotiation that occurs during mediation, (2) choose

49. Bush & Folger, *supra* note 39, at 52.

50. *Id.* at 53.

51. *Id.* Extensive research on the REDRESS mediation program employed by the United States Postal Service demonstrated that "parties view interactional transformation as one of the most important reasons for using mediation." *Id.* See also Bush & Pope, *supra* note 47, at 75.

52. Della Noce, *supra* note 6, at 50. Bush & Folger, *supra* note 39, at 54.

53. Della Noce, *supra* note 6, at 51.

54. Bush & Pope, *supra* note 47, at 84.

55. Coben, *supra* note 4, at 70. Gunning, *supra* note 3, at 90-95.

56. *Id.* at 90-91.

57. Coben, *supra* note 4, at 71.

58. Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 4, n.1 (2001).

59. Coben, *supra* note 4, at 71.

and control the substantive norms to guide their decision-making, (3) create options for settlement, and (4) control the final decision regarding whether or not to settle.”⁶⁰ Under this rubric, the mediator’s role is to enable the parties’ will to emerge and govern the mediation and not actively goad the parties with regard to substantive issues.⁶¹

Though this commitment to self-determination is strong,⁶² critics and scholars have long questioned this vision of mediation.⁶³ Some scholars argue that as mediation has been institutionalized in the courts, individual parties in mediation are essentially at the mercy of evaluative mediators, corporate repeat players, and savvy lawyers, substantially diminishing parties’ self-determination in the process.⁶⁴ The parties are responsible for ultimately choosing whether to settle the dispute, but the attorneys and mediator involved in the case often establish the substantive framework to be applied, which in turn shapes the available set of settlement options.⁶⁵ Furthermore, court-connected mediation has produced a brand of mediator who provides frank evaluations of parties’ cases and settlement options, actively guiding parties to a result based on her assessment of each party’s weaknesses and strengths.⁶⁶ More troublingly, research suggests that many of these mediators aggressively evaluate the merits of the dispute and arguably coerce the parties into a settlement, resulting in an increasing number of complaints from disputants before courts and ethics boards.⁶⁷ Thus, while mediators continue to strive for party self-determination and extol it as a central tenet of mediation, it is clear that mainstream mediation has strayed from its party-centered roots and has assumed many characteristics of the adversarial legal system.⁶⁸

Furthermore, dogmatic adhesion to the myth of party self-determination leads to injustice.⁶⁹ Many scholars have questioned the legitimacy of pursuing party self-determination “in a society plagued by asymmetric distribution of power.”⁷⁰ Given pervasive imbalances of power along racial, ethnic, religious, employment, immigration status, or economic lines, many critics have argued that striving to achieve party self-determination merely perpetuates those power imbalances in the mediation session.⁷¹ As a result of stringent adherence to the myth of party self-determination and the corresponding neutrality of mediator intervention, it becomes difficult for disempowered parties to truly gain justice through the modern mediation process.⁷² This argument against self-determination, however, is

60. Welsh, *supra* note 58, at 4.

61. Coben, *supra* note 4, at 71.

62. *Id.*

63. *Id.*

64. *Id.* at 69-71. Welsh, *supra* note 58, at 4-5.

65. *Id.* at 5.

66. *Id.*

67. *Id.*

68. Welsh, *supra* note 58, at 5.

69. Coben, *supra* note 4, at 71. See also Gunning, *supra* note 3, at 90-91. See generally Grillo, *supra* note 12 and Delgado, *supra* note 12.

70. See *supra* note 69.

71. Gunning, *supra* note 3, at 90-91. Coben, *supra* note 4, at 72. See generally Grillo, *supra* note 12 and Delgado, *supra* note 12.

72. Gunning, *supra* note 3, at 90-94.

inextricably bound to criticism of mediator non-intervention, or neutrality, the other pervasive myth in mediation.⁷³

B. Mediator Neutrality

Modern mediation has increasingly evolved to separate mediators from the communities in which they serve.⁷⁴ As mediation has become institutionalized and assimilated into court-connected programs, it has adopted legal and judicial concepts of impartiality and conflict of interest.⁷⁵ By contrast, wise elders and community leaders in indigenous cultures take a much more active role in the dispute resolution process, governing the dispute using shared community norms and values in order to achieve community empowerment and justice.⁷⁶ In modern mediation, mediators are urged to be detached from the dispute at hand in order to comply with foundational notions of mediator neutrality.⁷⁷ “Neutrality,” as used in modern mediation essentially refers to a mediator’s obligation to act with “impartiality,” which is “freedom from favoritism or bias in word, action or appearance, and includ[ing] a commitment to assist all participants as opposed to any one individual.”⁷⁸

Scholars have long argued, though, that neutrality is impossible to achieve.⁷⁹ Mediators are not immune from the influences of society and their own unconscious (or conscious) biases and attitudes.⁸⁰ Parties and mediators alike enter the mediation room with their own “complex systems of intersecting ideas, experiences, and perspectives that provide the lens through which each individual views the world.”⁸¹ Not surprisingly, there is a tacit acceptance of mediator non-neutrality in the actual practice of mediation, despite the fact that the foundational concept of neutrality “trumpets loudly” in mediation training and lore.⁸² A mediator necessarily makes many strategic, normative, and procedural decisions during a mediation, any of which can (and almost certainly do) affect the substantive outcome of the mediation.⁸³

Christopher Moore catalogs several ways in which a mediator wields influence over the parties in mediation in his oft-cited mediation treatise: (1) managing the negotiation process by controlling the agenda, (2) managing communication between the parties through active listening and use of caucus, (3) managing the physical setting of the mediation, (4) timing decisions (i.e., deciding when to disclose settlement offers and/or responses), (5) orchestrating “associational influence” by choosing who can sit at the bargaining table, and (6) use of authority to

73. *Id.*

74. *Id.*

75. Coben, *supra* note 4, at 73.

76. Gunning, *supra* note 20, at 83-85.

77. Coben, *supra* note 4, at 73.

78. *Id.*, citing the Model Standards of Practice for Family and Divorce Mediation, Standard IVA (2001).

79. Susan Oberman, *Mediation Theory vs. Practice: What Are We Really Doing? Re-Solving a Professional Conundrum*, 20 OHIO ST. J. ON DISP. RESOL. 775, 799 (2005).

80. *Id.*

81. *Id.*

82. Coben, *supra* note 4, at 73-74.

83. *Id.*

influence the parties (either the mediator's own, outsiders, or experts), among others.⁸⁴

Not only is neutrality nearly impossible to achieve and often ignored by mediators, but striving to achieve neutrality prevents mediators and parties from achieving fairness, justice, and peace through the mediation process.⁸⁵ The relationship of the parties invariably reflects "the roles and hierarchies in which they engage one another in the 'outside' world," and these hierarchies and imbalances of power are "re-enacted in the mediation."⁸⁶

One of the most valuable aspects of mediation is that parties have the opportunity to tell their own stories and have them be heard, but this narrative process can also contribute to reinforcing the societal inequalities of the parties.⁸⁷ Each party involved necessarily has her own narrative, and these narratives then compete for legitimacy or primacy during the mediation.⁸⁸ The parties position their stories in relation to pre-existing stories, meta-narratives, and cultural myths with which the parties, mediator, and other participants are familiar.⁸⁹ Disadvantaged group members have fewer positive meta-narratives or cultural myths in which to couch their narratives and frequently have more negative cultural myths (stereotypes) attributed to their group, so their ability to position their narratives positively in the mediation can be fatally compromised.⁹⁰ The party who finds herself in the unfortunate position of responding to the primary narrative typically responds to the primary narrative using the same characters, sequence of events, and moral/social interpretive framework as the primary narrative, which usually means she must "defend" herself by justifying or denying statements from the primary narrative.⁹¹ In doing so, she both reinforces her secondary ("bad") position and inadvertently reinforces the primary narrative, solidifying its status in the mediation—a position she may never recover from.⁹²

Indeed, many scholars have argued and demonstrated through empirical research that conflicts involving minority (or simply less powerful) group members and majority (more powerful) group members frequently result in the minority group member receiving less than they would have received had the dispute been adjudicated in a court of law.⁹³ Given the inevitable power imbalance between parties, when the mediator stays silent, or in the mythology's parlance remains neutral, regarding the outcome of the mediation, the outcome will tend to be con-

84. *Id.* at 74-75, citing CHRISTOPHER MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT*, 327 (2d ed. 1996).

85. See generally Gunning, *supra* note 3. These relationships include the power imbalances between husbands and wives, employers and workers, landlords and tenants, parents and children. *Id.* Also, racial and ethnic power imbalances are a factor here as well. Gunning, *supra* note 20 at 79-80.

86. Oberman, *supra* note 79, at 800.

87. Gunning, *supra* note 20, at 68.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 69.

92. *Id.*

93. Gunning, *supra* note 3, at 88-89 (citing generally Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 *Law & Soc'y Rev.* 767 (1996)); Delgado, *supra* note 12; Grillo, *supra* note 12.

gruent with the dominant cultural myths, resulting in injustice for the disempowered party.⁹⁴

Arguments against mediators' disingenuous pursuit of party self-determination and mediator neutrality are directed squarely at the problem-solving model of mediation, but the same arguments have been leveled against the transformative model as well.⁹⁵ Though transformative mediation is rightly lauded for its emphasis on mutual recognition, empowerment, and healing, transformative mediators, like their problem-solving counterparts, "are unwilling to take seriously the impact of the larger social forces on the individuals involved in the mediation."⁹⁶

Advocates of transformative mediation maintain that mediators must refrain from defending or assisting a party even when one party holds a clear power advantage over the other.⁹⁷ The transformative mediator's primary goals are "(1) to foster empowerment shifts, by supporting—but never supplanting—each party's deliberation and decision-making . . . and (2) to foster recognition shifts, by encouraging and supporting—but never forcing—each party's freely chosen efforts to achieve new understandings of the other's perspective."⁹⁸ If a mediator intervenes with the goal of advancing fairness or justice, she would be making an improper "directive response" to the parties' conversation, compromising both her neutrality as well as the parties' self-determination.⁹⁹ The transformative mediator "trusts the parties [,] respects the parties and their choices," and represses the impulse to assist a disadvantaged party or direct them towards a more fair agreement.¹⁰⁰

To be sure, a mediator should not impose upon the parties her opinion of what the important issues are or when and whether to settle the dispute, but when a mediator chooses to remain silent (or neutral) when obvious injustice is unfolding in the mediation, she prevents the less powerful party from exercising true self-determination.¹⁰¹ Professor Gunning argues that modern mediators should strive to achieve procedural and substantive justice in mediation, in keeping with the mediation's roots in the community justice movement.¹⁰² Specifically, Professor Gunning advocates what she calls "activist mediation," in which the mediator discards empty notions of neutrality, instead using intervention techniques during the mediation in order to equalize power imbalances and facilitate procedural and substantive justice.

94. Gunning, *supra* note 3, at 93.

95. *Id.* at 90-91.

96. *Id.*

97. *Id.* at 91.

98. Bush & Pope, *supra* note 47, at 84.

99. *Id.* at 92-93.

100. *Id.* at 93.

101. Gunning, *supra* note 3, at 89.

102. *Id.* at 90.

V. ACTIVIST MEDIATION

A. *Theory and Criticism*

Numerous professional standards for mediators incorporate an obligation to ensure fairness in the mediation,¹⁰³ yet mainstream mediation, insofar as it is dominated by the problem-solving model and misguided adherence to notions of party self-determination and mediator neutrality, fervently resists mediator intervention to facilitate justice.¹⁰⁴ As discussed above, mediators are far from neutral, as they wield substantial influence over the mediation process.¹⁰⁵ Unfortunately, the accepted methods of mediator influence¹⁰⁶ undermine justice because the influence is employed solely in the interest of efficient settlement rather than facilitating party empowerment, redistribution of power, and, ultimately, justice.¹⁰⁷ Given the influence of negative cultural myths and power imbalances in the mediation process, mediator intervention to effectuate justice and fairness can be proper.¹⁰⁸ Congruent with the roots of mediation in the community justice movement, mediators (“activist mediators”) should introduce notions of equality and justice in the mediation so mediation “can work most of the time in favor of everybody.”¹⁰⁹

As discussed in Section IV.B, *supra*,¹¹⁰ when minority or disadvantaged groups participate in mediation, their ability to situate their story positively within the mediation narrative is undermined by negative cultural myths and social inequality.¹¹¹ The primary narrative (that of the advantaged group member) fits more easily into prevailing cultural myths, so the mediator needs to be able to recognize this advantage when it manifests itself and transform it.¹¹² The mediator should alert the parties when negative cultural myths enter the discussion and help them access, create, and inject alternative cultural myths into the mediation discourse in order to transform the interpretive framework, moral codes, and myths employed in the mediation narrative.¹¹³ By helping the parties identify alternative narratives in which to couch their stories, the mediator in essence undermines the hegemony of the primary narrative in the mediation discourse, enabling the disadvantaged party to tell her story using her own interpretive framework and moral code.¹¹⁴

The main argument against this sort of mediator intervention is, perhaps unsurprisingly, that such intervention compromises the mediator’s neutrality and, in turn, undermines the parties’ self-determination.¹¹⁵ Consistent with the pervasive

103. Gunning, *supra* note 20, at 80, n.101 (string citation of several professional standards and treaties which impose a duty of ensuring fairness on the mediator).

104. Coben, *supra* note 4, at 77.

105. *See supra* Part IV.B.

106. *Id.* *See also* Moore, *supra* note 84, at 327.

107. Coben, *supra* note 4, at 77.

108. Gunning, *supra* note 20, at 80.

109. *Id.* at 86.

110. *See supra* Part IV.B.

111. Gunning, *supra* note 20, at 79.

112. *Id.* at 79-80.

113. *Id.*

114. Gunning, *supra* note 3, at 93.

115. Gunning, *supra* note 20, at 81.

myth of the neutral mediator and party self-determination, critics of mediator intervention argue that the mediator needs to remain neutral so the parties can reach an agreement in their own way, on their own terms.¹¹⁶ As discussed above, transformative mediators cling to the notions of mediator neutrality and self-determination as strongly as mainstream problem-solving mediators do.¹¹⁷

Indeed, Robert A. Baruch Bush,¹¹⁸ co-originator of the transformative model of mediation, has strongly emphasized the importance of preserving party autonomy through mediator neutrality.¹¹⁹ He argues that the mediator should refrain from intervening even if, for example, in a divorce mediation, the husband believes the family home is his property under the law and is bullying his wife into accepting this interpretation despite its inaccuracy and patent inequity.¹²⁰ Similarly, the mediator is not to intervene when a business-savvy husband uses his expertise to force his wife into a financially disadvantageous settlement.¹²¹ Even when the mediator knows that a party is lying or withholding pertinent information, the mediator cannot in any way introduce this into the mediation because it infringes upon the parties' "decision-making autonomy" and self-determination.¹²² Bush argues that if the mediator intervenes in any way beyond the typical questioning of the parties regarding their understanding of the issues or terms of settlement, the mediator has overstepped her bounds and compromised her neutrality and the parties' self-determination.¹²³

This critique of activist mediation, though it raises some valid concerns, is ultimately misguided and reflects a misunderstanding of the nature and purpose of mediator intervention.¹²⁴ Bush's conception of self-determination and neutrality fails to consider the possibility that there cannot be true self-determination unless the parties can make informed, voluntary decisions.¹²⁵ It is not difficult to see that the wife being bullied by her husband into believing he is entitled to the house outright cannot make an informed decision unless she is made aware of the true state of property law, the existence and nature of the husband's coercive negotiating, and any other information that would enable her to make a rational decision.¹²⁶ Further, the ability to make a voluntary decision must be central to true self-determination, but a wife being tricked into a disadvantageous settlement by her more business-savvy husband is not allowed to make a voluntary, informed decision.¹²⁷ In other words, mediator neutrality in this instance merely re-enacts the power imbalance between the husband and wife in the mediation and prevents her from exercising self-determination.¹²⁸ Conversely, there is no reason to be-

116. *Id.* at 81-82.

117. *See supra* Part IV.B.

118. Author of *THE PROMISE OF MEDIATION* and co-originator of the transformative model of mediation.

119. Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RESOL. 1, 18 (1994).

120. *Id.* at 17-18.

121. *Id.*

122. Gunning, *supra* note 20, at 82.

123. *Id.* at 81-82.

124. *Id.* at 82.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

lieve that mediator intervention in this example would impair the parties' self-determination, unless mediators are willing to accept the more powerful party's bullying or lying as a legitimate exercise of self-determination.¹²⁹ "If self-determination is divorced from informed decision-making or voluntary consent, it cannot claim to constitute authentic self-determination."¹³⁰

Moreover, the normal process of questioning the parties about their understanding of the issues and terms of agreement cannot be considered neutral.¹³¹ As discussed above,¹³² the parties' narratives compete for primacy and legitimacy in the mediation discourse.¹³³ In this competition, the more powerful party establishes the interpretive framework and baseline story through the primary narrative, frequently nesting her story in positive historical and cultural myths.¹³⁴ The more powerful party will benefit from so-called "neutral" questioning because, without active resistance by the mediator, the mediator's questions will merely invoke and reinforce the primary narrative, sealing both the primary narrative's dominance in the mediation discourse and the disadvantaged party's secondary status.¹³⁵ Unless the mediator makes a conscious effort to expose the cultural myths invoked by the primary narrative and elicit a competing narrative from the weaker party, disadvantaged groups will simply remain disadvantaged in mediation.¹³⁶

To be sure, when a mediator takes steps toward effectuating procedural and substantive justice, there is a risk that the mediator will be perceived as biased toward one party (most likely the disadvantaged party who the mediator is trying to protect.)¹³⁷ Mediator bias is certainly a legitimate concern, but striving to ensure a just process and outcome is not the sort of bias mediators should be worried about. Regardless of the mediator's opinions of the parties, their respective positions, or the outcome, the mediator can never be considered neutral.¹³⁸ Mediator intervention certainly raises the possibility of overreaching and supplanting her own view of an issue for the parties' views, but non-intervention demonstrates bias as well.¹³⁹ Given the common scenario where there is a conflict between parties with demonstrable power imbalances, silence is bias.¹⁴⁰

B. Activist Mediation in Practice

Professor Gunning laments that mediators face a "damned if we do and damned if we don't" decision.¹⁴¹ Should mediators intervene in a mediation in order to foster justice and true self-determination (and risk "scuttling a settle-

129. Gunning, *supra* note 3, at 93.

130. *Id.*

131. Gunning, *supra* note 20, at 82.

132. *See supra* Part IV-B.

133. Gunning, *supra* note 20, at 68.

134. *Id.* at 82.

135. *Id.* at 82-83.

136. Gunning, *supra* note 3, at 93.

137. *Id.* at 92.

138. Gunning, *supra* note 20, at 83.

139. *Id.*

140. Coben, *supra* note 4, at 83.

141. Gunning, *supra* note 3, at 93.

ment¹⁴² or appearing biased), or should mediators adhere to status quo notions of remaining neutral, despite the myriad problems associated with mediator neutrality? Given the impossibility of mediator neutrality and the inequities which result from dogged faithfulness to the mythology of neutrality and self-determination, this author maintains that mediators need to be open to the possibility of intervention when necessary. The appearance of bias which might result from intervention is no more troubling than the actual bias which occurs through both the problem-solving model of mediation and even the more commendable transformative model of mediation.¹⁴³ Mediators should facilitate empowerment and mutual recognition as emphasized in the transformative model of mediation, but with an activist bent. This begs the questions: What would such a mediation look like? How can mediators foster recognition, empowerment, and justice and also avoid the pitfalls of intervention? Described below are some goals and practice strategies proffered by Professors Gunning and Hyman, followed by an approach one might call “activist transformative-narrative mediation,” a hybrid technique drawing upon traditional transformative mediation, activist mediation, and narrative mediation.

To introduce fairness and justice into the mediation discourse, mediators need to find a way to incorporate those values without injecting the mediator’s own view of what “fairness” and “justice” mean into the conversation.¹⁴⁴ The mediator needs to establish a relationship with the parties such that there can be a true dialogue (or triologue) between all persons involved in the mediation rather than a constant “battle for command of the moral high ground.”¹⁴⁵ To do this, the mediator needs to clearly establish a discursive framework where the parties do not try to “win” by convincing the mediator that their view of the contested facts is “right,” but rather strive to find common ground on which to build positive relations, regardless of whether contested facts are ever settled.¹⁴⁶

Professor Gunning observes that, at the outset, when the mediator is laying out the typical ground rules for the mediation (such as prohibiting interruptions or name-calling), it is not uncommon for the mediator to also implore the parties to speak honestly, to tell the truth as they understand it, and to “affirm that we all have the same need for self-respect, autonomy, and pride.”¹⁴⁷ At this juncture, the mediator should also introduce the shared goals of justice and fairness in his opening statement in order to embed those values in the mediation discourse from the beginning.¹⁴⁸ Further, the mediator should discuss the possibility of power imbalance and potential negative consequences of such an imbalance, such as injustice and unfairness, by frequently referring to the initial quasi-agreement between the parties to strive toward a fair result.¹⁴⁹ To accomplish this, mediators will need to be trained to think about power imbalances which result from negative cultural

142. Gunning, *supra* note 20, at n.103 (quoting Baruch Bush, *supra* note 119, (arguing that mediator intervention increases the risk of the parties not coming to an agreement at all.)).

143. Gunning, *supra* note 3, at 92-93.

144. Jonathan M. Hyman, *Swimming in the Deep End: Dealing With Justice in Mediation*, 6 CARDOZO J. CONFLICT RESOL. 19, 50 (2004).

145. *Id.* at 53.

146. *Id.* at 54.

147. Gunning, *supra* note 3, at 94.

148. *Id.*

149. *Id.* at 94-95.

myths. As the mediation progresses, the mediator should “check in” with the parties as issues or proposals are introduced and discussed, reminding the parties of their shared commitment to equality and fairness.¹⁵⁰ By introducing American Creed notions like equality and justice in the mediation, the mediation becomes another forum in American political, social, and legal life in which these notions are explored and defined.¹⁵¹

Professor Gunning’s analysis of how activist mediation works in practice ends here, with a valuable but vague suggestion to inject values of equality and fairness into the mediation. Narrative mediation builds on Professor Gunning’s discussion of altering the mediation discourse to achieve equality and justice, using techniques derived from narrative therapy.

C. Narrative Mediation

Narrative mediation is an emerging approach to mediation with roots in narrative family therapy.¹⁵² Narrative mediation, like narrative family therapy, is founded upon postmodernism, social constructionism, and language theory,¹⁵³ and operates using a narrative view of conflict.¹⁵⁴ This view of conflict is based on the idea that the language is a meaning-making activity—humans literally “speak [themselves] into existence” and define themselves through language.¹⁵⁵ Personhood is constructed through language and discourse, and given the enormous diversity in the ways people make meaning in their lives, there is bound to be discord amongst people with divergent perspectives.¹⁵⁶

From this perspective, mediation is not merely a forum to talk about past events, but is actually another meaning-making opportunity.¹⁵⁷ Mediation, like society generally, “is where lives and relations are produced and reproduced . . . where cultural stories are performed and enacted . . . [and] where social or institutional change can take place.”¹⁵⁸ Since personhood and, hence, conflict are products of breakdowns in discourse, discourse is also the medium for resolution.¹⁵⁹ Discourse not only includes the conversation at hand but a complex web of taken-for-granted underlying assumptions that give meaning to social practices, personal experience, structural arrangements, and societal institutions.¹⁶⁰ The object of narrative mediation is to deconstruct (or unpack) these taken-for-granted assumptions, then identify and expose those ideas “that masquerade as unquestioned truth

150. *Id.*

151. Gunning, *supra* note 20, at 86.

152. See Toran Hansen, Comment, *The Narrative Approach to Mediation*, 4 PEPP. DISP. RESOL. L. J. 297 (2004).

153. Winslade & Monk, *supra* note 24, at xii-xiii.

154. *Id.* at 39-41.

155. *Id.* at 39.

156. *Id.* at 40-41.

157. *Id.*

158. *Id.* at 40.

159. *Id.* at 42.

160. *Id.*

or as inevitable realities.”¹⁶¹ Deconstruction enables people to create new meanings in a dispute where existing meanings result in impasse.¹⁶²

It is the mediator’s job to “unpack the suitcase and take out the pieces and hold them up for view by the parties,” helping them detach themselves from the old discourse which resulted in conflict and construct a new, positive discourse.¹⁶³ The mediator must work actively¹⁶⁴ to deconstruct the conflict-saturated story, undermining the certainties and bases for discursive discord on which the conflict feeds.¹⁶⁵ Position calls are an example of how this deconstructive process can lead to resolution.¹⁶⁶ In every story, including (and perhaps especially) conflict-saturated stories, people assume and are assigned roles—victim or villain, for example.¹⁶⁷ These positions, like the rest of the conflict narrative, are constructed and reinforced in discourse, and therefore can be exposed through deconstruction and reconstructed from a new perspective.¹⁶⁸ In some conflicts, discussing these positions and exposing their bases in the conflict-saturated narrative might be key to achieving a resolution, particularly if entrenchment in these positions is a significant part of the conflict.¹⁶⁹

Deconstructing the conflict-saturated story enables the mediator and parties to create space for an alternative, conflict-free (or conflict-diminished) narrative. A key component of the process of constructing an alternative narrative is “recovering unstoried experience,” in which the mediator helps the parties weave stories that are not represented in the conflict-saturated narrative into the mediation discussion.¹⁷⁰ Often, parties have had or continue to have relations that are relatively untouched by the conflict-saturated story.¹⁷¹ This information can often provide grounds for an alternative narrative.¹⁷² For example, two feuding neighbors may be able to recall past interactions where they cooperated or helped each other. The mediator can then build upon these more positive (or at least not conflict-saturated) stories in order to break down the conflict-saturated story and build an alternative story using these shared goals and positive experiences.¹⁷³

D. Activist Transformative-Narrative Mediation

This author proposes that mediators take an active role in facilitating justice and equality through mediation, as Professor Gunning suggests, but by using tools of narrative deconstruction and alternative narrative construction set out by Drs. Winslade and Monk. As discussed in Sections IV.B and V, *supra*, taken-for-

161. *Id.* at 43.

162. *Id.*

163. *Id.*

164. Which is to say, not act “neutrally” in the sense discussed in Part IV.B, *supra*.

165. Winslade & Monk, *supra* note 24, at 72.

166. *Id.* at 72, 74.

167. *Id.* at 72. Also, since the mediation itself is part of the conflict story, the mediator herself is also assigned “roles” by the parties. Mediators should recognize and take care that these roles (i.e. “expert” or “disinterested neutral”) are not woven into the conflict-saturated narrative. *Id.* at 75.

168. *Id.* at 74.

169. *Id.*

170. *Id.* at 84.

171. *Id.*

172. *Id.*

173. *Id.* at 84-85.

granted assumptions about race, wealth, gender, ethnicity, age, or immigration status often produce negative cultural myths which serve to disadvantage persons from marginalized groups.¹⁷⁴ Professor Gunning suggests that mediators inject values of equality into the mediation in order to assist the parties in breaking down these myths and increase the disadvantaged person's potential for achieving justice.¹⁷⁵ While this practice could very well be useful in some disputes, narrative mediation offers an even greater opportunity for achieving equality, healing, and justice.

Activist narrative mediation affords mediators the opportunity to expose negative cultural myths (and other assumptions) that contribute to the conflict-saturated story as well as construct a new narrative that, ideally, is not captive to those assumptions. Reminding the parties that they share the same need for respect and equality, as Professor Gunning suggests, might alert the parties to the presence of these myths and assumptions but does not empower the parties to construct a new, conflict-free narrative. Mediators should not only alert parties to these cultural forces in the mediation, but actively assist the parties in discarding those assumptions in order to weave a new, conflict-free narrative using shared notions of respect and equality. In this way, activist transformative-narrative mediation offers the parties all the benefits of Professor Gunning's vision of activist-transformative mediation plus more—the ability to help the parties move forward with a new story to write.

Mediation is indeed “where lives and relations are produced and reproduced . . . where cultural stories are performed and enacted . . . [and] where social or institutional change can take place.”¹⁷⁶ This idea would sound familiar to the practitioners familiar with mediation's community justice roots. By recognizing that language is the common medium through which conflict and resolution is created, and by literally breaking apart the conflict narrative in favor of a new narrative, mediators empower the parties to break free of the limitations presented by these constructs and move forward with a new truth.

E. Conclusion

In an increasingly diverse society, it is important to find some sort of common ground. This article contends that one such common ground is language as a meaning-making activity, and mediation is an important way to galvanize people and communities through shared values, healing, and justice. Persons do not enter the mediation room to have a solution handed to them. The mediation room is community space, where community is reflected, created, and potentially healed. No single approach to mediation could possibly address every sort of conflict, but activist transformative-narrative mediation certainly presents an opportunity to recapture and expand upon the ideals of justice and empowerment underlying mediation's origins in the community justice movement.

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174. Gunning, *supra* note 20, at 78-80.

175. *Id.* at 86.

176. Winsdale & Monk, *supra* note 24, at 40.

