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# Bush on Mediator Dilemmas

Joseph B. Stulberg\*

## I. INTRODUCTION

Professor Bush's study of ethics in mediation practice more effectively categorizes and explicates the range of situations posing mediator dilemmas than any other contribution to recent dispute resolution literature.<sup>1</sup> Dispute resolution theorists, practitioners, and trainers operate at their own peril if they do not treat Professor Bush's work as the requisite starting point for careful discussion and analysis of these matters.

Despite its richness, I believe that there are three features of the study that raise both conceptual and practical difficulties. They are: (1) its methodology for identifying ethical dilemmas; (2) its presumptions regarding the extent to which public policy can or should address some or all of the mediator's dilemmas; and (3) its applicability to mediator roles and dilemmas in contexts outside a court-referral system. I consider each of these features below.

## II. METHODOLOGY: IDENTIFYING AN ETHICAL DILEMMA

Professor Bush deploys a technique for targeting "ethical dilemmas" that has become popularized in recent inquiries in philosophical analyses.<sup>2</sup> In an apparently straightforward empiricist manner, the researcher asks his subject to describe the phenomenon under review, which is, in this instance, an "ethical dilemma." The researcher then records, categorizes, and analyzes the responses he obtains. The critical element of the process is to make certain that the central concept is defined in such a way that the subject can respond to it in an informed manner. Hence, Professor Bush describes his approach as follows:

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1. Other efforts toward this end have been made. See, e.g., JOSEPH B. STULBERG, TAKING CHARGE/MANAGING CONFLICT 15-22 (1987); Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RESOL. 1, 7 n.16; Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 259-66 (1989); Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. OF CONTEMP. LEGAL ISSUES 1 (1989); Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1 (1981).

2. The method is illustrated with force and effectiveness in such widely cited works as JAMES S. FISHKIN, *BEYOND SUBJECTIVE MORALITY: ETHICAL REASONING AND POLITICAL PHILOSOPHY* (1984); CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMENS' DEVELOPMENT* (1982).

The method for gathering the information was straightforward and simple. Mediators were asked to describe situations that they had encountered in practice that presented some kind of ethical dilemma regarding what course of action was proper for them to take as mediator. They were then asked to explain why they viewed the situation as presenting a dilemma. In other words, mediators were asked to tell and explain stories from their own practice that involved encountering *ethical dilemmas*.<sup>3</sup>

An important point here concerns the definition of the terms used in the study and in this report. In order to allow mediators the greatest latitude in responding, and thus elicit as much information as possible, the study intentionally avoided any narrow or formal definition of the central concept, "ethical dilemma."<sup>4</sup> Instead, in framing the question for the mediators, the interviewer defined "ethical dilemma" only as: "[A] situation in which you felt some serious concern about whether it was proper for you as a mediator to take a certain course of action, *i.e.* where you were unsure what was the right and proper thing for you as mediator to do."<sup>5</sup>

There are two fundamental difficulties with this approach: first, it does not provide for a sharp distinction between an ethical and a nonethical (but normative) dilemma; second, it provides no way to assess the legitimacy of the potential assertion that an ethical dilemma for one mediator is not an ethical dilemma for another (and not because the latter is ethically blind or insensitive). I consider each concern sequentially.

(a) *Moral vs. Nonmoral Dilemmas.* The rich literature in moral philosophy during the past fifty years has focused on, among other things, the analysis of the meaning of ethical terms.<sup>6</sup> A common distinction drawn in these meta-ethical analyses is that between ethical and non-ethical terms. Such a distinction does not equate "moral" with "right" or "good" and "immoral" with their opposite, but rather probes to distinguish morality from art, science, law, economics, politics, psychology, history, convention, or religion. In this sense, morality is what Bishop Butler called "the moral institution of life." Put more concretely, what is it that makes a particular dilemma a moral dilemma rather than a legal, professional, business, or religious dilemma?

Professor Bush answers this question by framing the definition of "ethical dilemma" as one in which the mediator was seriously concerned about whether it

3. Bush, *The Dilemmas of Mediation Practice*, *supra* note 1, at 6 (emphasis added).

4. *Id.*

5. *Id.*

6. Standard works in the philosophical literature include RICHARD M. HARE, *THE LANGUAGE OF MORALS* (1964); RICHARD M. HARE, *FREEDOM AND REASON* (1963); CHARLES L. STEVENSON, *ETHICS AND LANGUAGE* (1944); STEPHEN E. TOULMIN, *THE PLACE OF REASON IN ETHICS* (1970). For a relatively more recent description of the relationship between meta-ethical inquiry and normative analysis, see WILLIAM K. FRANKENA, *ETHICS* 95-116 (2d ed. 1973).

was proper to take a particular course of action, *i.e.* being unsure as to what "was the *right* and *proper* thing for you as *mediator* to do."<sup>7</sup> The problem lies with the highlighted words. The question "what is the right thing to do?" takes on a moral dimension because the agent must factor into her judgment some dimension and concept of the overall good that will be promoted by the competing courses of conduct, a concept of duty to others, and a belief that the decision being made is not person-dependent but must be "universalized" for all persons acting in such situations. In addition, the person is viewing the situation not from a prescribed role such as employee, boss, parent, spouse, or judge, but from a fundamentally-grounded "person" perspective. But "right" can be used in a variety of nonmoral contexts as well.

The "right" parenting arrangements for parents of teenage children from a psychological perspective may or may not be the "right" answer from a legal, moral, or religious point of view. Similarly, determining what is the "right" thing to do economically commands different criteria for judgment than those criteria involved in deciding whether that judgment is "right" from a political or historical perspective. Finally, when differing beliefs about the "right thing to do" conflict, as frequently happens between legal and economic viewpoints, it is not a logical consequence that that conflict itself constitutes a moral conflict.

How do these comments apply to Professor Bush's analysis? To have a mediator state that he or she is uncertain as to what the "right" course of conduct is does not automatically establish the response as posing an "ethical dilemma." Even if the response did reveal an ethical dilemma by virtue of its being compatible with other, meta-ethical criteria, there are at least two levels of ethical dilemmas that a person as a mediator could confront which must be distinguished.

A mediator might confront an ethical dilemma when she addresses a situation in which the resolution developed represents acceptable but not maximal settlement terms. The dilemma arises because persons, including the mediator, must decide whether additional effort, expense, and investigation should be undertaken in order to promote a greater gain, minimize a loss, or secure a more equitable distribution of scarce resources. The concern is that a better outcome might be achieved if it were not for a lack of imagination, energy, or will. Few of the examples reported by Bush fall into this category.

The second, and more frequent, "ethical dilemma" arises when the mediator perceives that he or she can advance a particular outcome as the mediator but that the outcomes are not morally "right." A mediator might, as Bush reports, press a "vulnerable" party for movement on a proposed financial arrangement because that person is perceived as "pliable," even though that party's demand appears "reasonable" and it is the negotiating counterpart's stubbornness that is dictating the mediator's decision regarding where to "press." But this becomes an "ethical" dilemma because the person perceives that her role as mediator might advance an outcome that is subject to criticism from an ethical point of view. It is this type of dilemma that characterizes most of the examples that Bush reports.

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7. Bush, *The Dilemmas of Mediation Practice*, *supra* note 1, at 6 (emphasis added).

But a curious shift has occurred. In the first situation, the presumption is that if one knew what constituted the morally right course of conduct, one would either follow it or lament that lack of pursuing it was a weakness of will. But the second dilemma presents a conflict of roles. It is a question of what responsibilities an individual has when, in executing the role of the mediator, she is in a position to advance outcomes that seem inconsistent with the stated values of the role or of the process.

Professor Bush, somewhat offhandedly, suggests that "any narrow or formal definition" of ethical dilemma would have been "counterproductive," because in order for mediator training programs and standards to be meaningful and helpful, they must provide guidance in situations where mediators themselves feel the need for guidance.<sup>8</sup> But that is too cavalier. No one would want to confuse a felt need for guidance about economic issues with ethical dilemmas confronted by persons serving as mediators. For instance, should the mediator bill her clients after each session or only at the conclusion of her service? Similarly, to accept *carte blanche* whatever respondents offer as ethical dilemmas fails to distinguish sharply among a broad category of concerns that properly characterize and define the mediator's calling. This is not a terminological quibble, as a consideration of the second concern reveals.

(b) *When One Person's Ethical Dilemma is Not a Dilemma for All.* Suppose that one respondent in Professor Bush's study viewed one or more of the proposed situations and responded by denying that it was a dilemma. That is, one respondent genuinely believed that a clear answer existed for what another perceived as a dilemma. How is one to assess this situation?

(1) *Moral Blindness:* One might charge the respondent with being "morally blind." Perhaps if certain features of the situation were more explicitly revealed or highlighted, or the story were portrayed in a manner in which the potential harms done to an individual were more poignantly articulated, the respondent would "see" the issue in a different manner and respond more thoughtfully to the complexity of the matter. At this level, the charge is that the respondent has a distorted sense of values or an operative bias that is grounded in one's cultural, economic, or social background. In short, the criticism is that the respondent's conventional assessment of the phenomenon under review cannot withstand a demand for a justification at the level of an informed critical morality.

This, quite obviously, is a serious charge, but not without force or parallel in other arenas. The entire thrust of multi-cultural sensitivity is replete with claims of this sort which are probably accurate. But there exists another possibility as well.

(2) *Conceptual Clarity:* It might be the case that the respondent is correct and that it is the person who reports a dilemma who is misguided. That is,

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8. *Id.* at 7.

perhaps there is a straightforward, correct answer to the proffered situation, and it is the person who reports a dilemma who is being unnecessarily "fuzzy" or falsely modest in suggesting a hesitation. How could such a charge be justified?

The source of this latter disagreement, I submit, must stem from each person's conception of the mediation process and the role of the mediator. Much like a jurisprudential debate regarding the appropriate conception of law and the role of the judge in articulating a constitution,<sup>9</sup> the debate among mediators as to what constitutes a compelling conception of mediation and, by implication, the outlines of the mediator's role moves back and forth between considerations of moral ends and practical, institutional role definitions. This is an important debate to which Professor Bush elsewhere has been a most articulate participant.<sup>10</sup> But Bush's methodology in this study does not open up this dialogue; rather, it must be accepted as a starting point that each person's conception of mediation, whatever it may be, is acceptable and plausible. That is a dubious proposition which can be illustrated by using one of Bush's examples.

Bush reports that mediators are concerned about the limits to the principle of confidentiality, because other values sometimes point in the direction of disclosure.<sup>11</sup> His example is the following:

In a community mediation between two tenants over noise and disturbances, one party accuses the other of having sold drugs from his apartment, thus causing annoyance and danger to his neighbors. In the session, the accused party never admits but never clearly denies past drug dealing. He ultimately agrees "to have no illegal substances in the apartment at any time." Even if there *is* a statute requiring reporting of serious criminal allegations, should the mediator report this?<sup>12</sup>

I believe that the answer to this question is straightforward: no. The justification for the answer requires a fuller explication of the goals of the mediation process, its connection to the articulated public policies of the state, and to the principles of a critical morality that support a cohesive enterprise in a social setting. That, quite obviously, is no small task, but neither is it insurmountable.<sup>13</sup> For example, the justification could proceed as follows: mediation is a process in which persons

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9. See, e.g., the important debate between legal positivists and rights-based proponents in accounting for the appropriate posture of judgment for judges when adjudicating issues of constitutional interpretation. The most important writer, I believe, is Ronald Dworkin and the statement of his position in *LAW'S EMPIRE*. See RONALD M. DWORKIN, *LAW'S EMPIRE* (1986). Pressing similar themes is DAVID A.J. RICHARDS, *FOUNDATIONS OF AMERICAN CONSTITUTIONALISM* (1989). The classical statement of the positivist position remains HERBERT L.A. HART, *THE CONCEPT OF LAW* (1961); a recent account with similar claims is JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

10. See Bush, *Efficiency and Protection*, *supra* note 1, at 266-76.

11. Bush, *The Dilemmas of Mediation Practice*, *supra* note 1, at 15.

12. *Id.* (alteration in original).

13. See STULBERG, *supra* note 1.

are explicitly invited to share insights, aspirations, and concerns in an attempt to improve one's understanding of the other's situation, and then use that understanding as a basis for developing actionable terms that aid in addressing the conflict and are mutually satisfactory. Part of that enterprise requires a party's candid disclosure of her activities and aspirations. The mediator's role is to facilitate that discussion by gaining the parties' trust, clarifying issues, enhancing understanding, and helping to generate options for resolutions. In so doing, the mediator might obtain information that a party believes important to share but which reveals conduct that is not socially acceptable. The mediator's responsibility is to protect that information. That responsibility would be overridden only in the event that a person is in danger of imminent, irreparable harm that the mediator is in a position to prevent through her disclosure to known individuals. The nature of those harms that trump the duty of confidentiality can be discerned by the mediator from her informed analysis of a variety of texts, statutes, and social practices that can be justified as part of a coherent, consistent conception of her role as mediator and those of the parties.<sup>14</sup>

This, quite obviously, is a justification at a very general level. But it begins to do the required work. Others can criticize this conception of mediation because of differing views about the value of mediation and its alternatives or about the relationship between public and private dispute resolution processes.<sup>15</sup> But not all conceptions are comparably compelling. Some, for instance, advocate a mechanistic, directive process in which predictions of trial outcomes play a central, persuasive role in the mediator's discharge of her duties.<sup>16</sup> If that is one's operative conception, then qualms about party autonomy simply do not carry much weight.

The narrow but central claim is that, irrespective of one's conception, *having* a conception of the mediation process is a necessary condition for assessing whether or not some practice or situation presents a *dilemma* let alone an *ethical dilemma*. It is only by viewing the debate in this context that warrants Bush's call for public support and guidance in answering these dilemmas. But, I suggest, his expectations in this regard are either misplaced or unwelcome.

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14. The framework for the argument follows similar epistemological strategies set forth by both Dworkin and Richards, *see supra* note 9. Dworkin's account of his Herculean judge offers a crisp account of this strategy. *See* RONALD M. DWORKIN, *TAKING RIGHTS SERIOUSLY* 81, 105-130 (1977).

15. *See* James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47 (1991), in which several differing views of practitioner mediators are set forth.

16. *See id.* For a discussion of related approaches to conceptions of mediation and how it is implemented in court-annexed programs, *see* Thomas J. Stipanowich, *The Quiet Revolution Comes to Kentucky: A Case Study in Community Mediation*, 81 KY. L.J. 855, 899-901 (1992-93).

### III. POLICY IMPLICATIONS FOR MEDIATOR DILEMMAS

Presume that there can be developed an articulated conception of the mediation process and the role that individuals serving as parties and mediators are expected to assume in it. How does "public policy" inform that conception and, thereafter, resolve or remove the dilemmas that Bush's mediators cite?

Bush suggests a remarkably broad role for policy makers. He states:

For mediators' interest in good practice, however encouraging, will not be enough by itself to guarantee the responsible handling of the numerous and difficult dilemmas described above. The mediators themselves know this. They need guidance: training, standards, supervision, etc. And that guidance must come from policy makers — at the program, the state, and the national level. The real cause for concern is not what mediators are doing, but what policy makers are doing — or rather, not doing.<sup>17</sup>

Bush continues: "This is the caution: if identifying and solving problems of the subtlety, complexity, and seriousness of those described above is left to the ingenuity and conscience of the individual mediator, without coherent programmatic guidance, there is serious cause for concern."<sup>18</sup>

Noting that some important efforts to develop practice standards have occurred which are addressed to meeting this vacuum, Bush concludes that real problems remain. "Two problems in particular are most important."<sup>19</sup> He continues:

First, the codes and standards promulgated thus far almost always suffer from internal inconsistency. That is, where the mediator is confronted in a dilemma with the need to choose between two values, like fairness and self-determination, the codes typically contain provisions that, read together, tell her to *choose both*. . . . The second problem also results in a lack of effective guidance. That is, codes and standards are framed at a level of generality that is not responsive to the mediator's need to know how to apply the principles in specific situations. They lack concreteness, and rarely include examples or illustrations of situations that may arise, and sample responses. Yet clearly, given the kinds of problems mediators encounter, specific guidance is what they most need.<sup>20</sup>

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17. Bush, *The Dilemmas of Mediation Practice*, *supra* note 1, at 43-44.

18. *Id.*

19. *Id.*

20. *Id.* at 44-45 (alteration in original).



The call, and expectation, for answers is misplaced. It is not simply that the administrative apparatus required to articulate and implement the system would be remarkably cumbersome; I submit that no such apparatus could address the concerns that Professor Bush has so acutely identified.

Consider the following hypothetical. A commercial tenant refuses to pay rent, alleging that the owner has failed to furnish adequate heat, elevator service, and fire protection for the building as required by code. The tenant is the sole occupant of the building. The parties submit their rent dispute to mediation. During the course of the dialogue, the parties agree to renegotiate and extend the lease by two years, reduce the monthly rent, and make prescribed repairs to the heating system. By everyone's account, however, the building remains in violation of the code. The tenant agrees to hold the landlord harmless should there be any inspection or filing by an employee of the tenant regarding OSHA violations. Each party views the proposed terms as advancing their respective interests and agrees to proceed under them. The drawback is that both parties know, and the mediator knows, that they have agreed to terms that constitute both a waiver of what the tenant is entitled to have pursuant to code standards as well as the public's protection against "faulty" buildings.

Presumably, Bush believes that a "program" (such as those in Florida) could set forth what the mediator should do in such a situation. What could the "program" do? First, a program would have to anticipate every type of possible dilemma, including its factual setting, and give a blanket "rule" that would answer it. Even our legal system does not expect such clarity to be provided to the judiciary by the legislative body.

If there were to be a "program rule" to cover the instance noted above, it would probably be formulated in a manner such as: "when party preferences conflict with important public policies of the jurisdiction, the mediator should ensure that settlement terms are in accord with those public policies." Would such a rule help the mediator or does the rule suffer from the "generality" description that Bush criticized in the quotation immediately above? Assume the rule would have to be framed at this level of generality. If there were texts, rules, or guidelines that indicated what public policies were relevant to a given factual setting, and there was some assurance that the mediator knew what these policies were through his or her training, the parties bringing these matters to the mediator's attention, or through some other vehicle, then the mediator could apply the program's directive and behave accordingly. At that point, the dilemma would be resolved. But, note what has happened.

It is not the mediation program's directive that was critical to resolving the dilemma; rather, it was the mediator's knowing what the public policy was and having a capacity and standard for assessing its relative importance. But this insight is what opens a Pandora's box, for the challenge is how one determines "public policy" in a way that is neither ambiguous or contestable. To believe that some agency or program could anticipate and catalogue all such policies and their priorities in advance of mediator service is to suggest a degree of certainty and wisdom that is belied by the fluidity and unpredictability of human experience.

Hence, there is no way to escape the need for individuals, acting in their capacity as mediators, to work through various puzzles or challenges on a case-by-case basis. This is not an undesirable state of affairs, for the practical drawback of Bush's approach is that it would most likely lead to an immediate replication of the legal system with its various weights and measures. That is, persons acting as mediators would be encouraged by program personnel to view their roles as testing the parties' proposed settlement terms only against legal criteria. It would encourage caution where imagination is preferred. It would most likely lead to the very type of judgmental "decision-making" orientation of directive mediators that Bush has so eloquently, and effectively, argued against elsewhere.<sup>21</sup> Finally, it might create the impression that such standards, guidelines, and "decisions" apply not only to mediation activity in court-annexed programs, which is the subject of Bush's analysis, but also to the use of the mediation process in other arenas. It is to a consideration of that final topic to which I now turn.

#### IV. MEDIATOR DILEMMAS AND PRACTICE CONTEXTS

The paradigmatic scenario of Bush's study, quite explicitly and understandably, is that of parties referred to the mediation process because they have filed a legal claim seeking appropriate relief. Whether *pro se* or represented by counsel, parties operate within the shadow of the legal system. Mediators, in particular, confront a variety of challenges, concerns, and pressures precisely because they are so situated.

But do the same concerns occur in contexts that are not as explicitly identified with the legal process and legal outcomes? I consider three types of contexts in which mediator dilemmas arise but are not captured by Bush's schemata.<sup>22</sup>

(a) *Community and Public Policy Disputes*: The Rodney King case presents a "hard case" for those in dispute resolution. Minimally, there are two aspects of the King case to address. The first relates to the widely reported acts of looting and violence that followed the initial jury verdicts. The question, quite simply, is whether mediators could or did have any role to play in attempting to stabilize the situation. The second dimension relates to those planning meetings and activities that surrounded the second trial and jury verdict. Many religious and civil rights groups, working with law enforcement officials and political leaders, engaged in a variety of dialogues to create resources and fall-back situations so that the response to the second verdict, whatever it might be, created less harm to innocent persons than was the case following the first trial. Presumptively, many individuals served in a "facilitating" role in order to identify relevant groups for

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21. See Bush, *Efficiency and Protection*, *supra* note 1.

22. See Bush, *The Dilemmas of Mediation Practice*, *supra* note 1, at 9-10, Table 1, for a lucid summary of his schemata.

dialogue, construct agenda, generate options for dealing with issues, and forge agreements on plans of conduct.

For each of these situations, the mediator's role is and would be much more fluid than those involved in a "court-referral" situation. Those differences include identifying who a "party" is, addressing the question of "who invited or accepted the intervener" as legitimate, the timing of the entry, the "ripeness" of the issues for discussion, the nature of the resources available to the participating parties, the nature of the possible outcomes in terms of their enforcement and specificity, the capacity of parties to "agree to anything" and thereafter ratifying it, and the public or private nature of the discussions. Finally, the question of how the intervener is to be compensated must be addressed.

These mediator challenges arise in a variety of social contexts including mediated regulatory negotiations,<sup>23</sup> facilitated dialogue among legislative leaders and private stakeholders on subject-specific legislation, and prisoner uprisings. Do they raise dilemmas for mediators that are not captured by Bush's analytical schemata? In multi-party disputes, it is often the case that some parties are without financial resources but wish to participate in structured dialogues. The mediator's being paid by only one of the parties to the dispute raises important practical questions regarding perceived impartiality but that is not addressed by Bush's discussion of "conflicts of interests."<sup>24</sup>

There are other considerations related to available resources. In a multi-party negotiation in which parties must travel from disparate sites to attend a session, if one party's participation is adversely affected by resource constraints, does the mediator "reinforce power inequalities" by always having the mediation sessions at one site rather than "rotating" sites? Does she abandon or reinforce equality if she were to schedule all meetings to occur at a place most convenient to those individuals with the fewest resources?

Additionally, what should the mediator do if she knows that there are sufficient resources to begin the dialogue but she is not certain whether there will be adequate resources to sustain a dialogue whose "end" is not yet in site? Unlike the court referral in which one "knows" within several hours whether there is settlement or not, the policy dispute setting has no clear ending point, and the very fact that mediated negotiations have started might put parties in a position that is more vulnerable after a stated time period than would have been the case had other options been pursued.

Finally, especially in multi-party and multi-cultural settings, there is arguably a more active role and responsibility for the intervener in deciding whether her first intervention should be undertaken with a mediation team that reflects the diversity of the disputants involved. Whereas Bush notes that some mediators feel a dilemma regarding one's impartiality when class or group relationships exist,

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23. Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982); Philip J. Harter, *The Role of Courts in Regulatory Negotiation — A Response to Judge Wald*, 11 COLUM. J. ENVTL. L. 51 (1986).

24. See Bush, *The Dilemmas of Mediation Practice*, *supra* note 1, at 12-14.

none of the mediators felt compelled to withdraw from service.<sup>25</sup> Indeed, the unstated program value is that "justice is blind," so that a mediator's personal profile is irrelevant to her qualifications for service. In racial or ethnic conflicts, however, it might arguably be an affirmative obligation of any intervener to create a context for the parties in which the discomfort is never faced because the mediator had anticipated it, responded to it, and thereby removed it as a "burden" for the parties.

Given the fluidity of the situation, some of the mediator's obligations — ethical or practical — remain more elusive in this context than in the more structured setting of the court-annexed program. But, there are institutional structures other than a court in which the mediation process is used that raise different practice dilemmas.

(b) *Mediation Systems within Administrative Agencies:* There have been efforts to create and implement mediation programs within governmental administrative agencies that have statutory oversight responsibility for implementing public policy. Two arenas in which these efforts have arisen are employment discrimination claims<sup>26</sup> and worker compensation controversies.<sup>27</sup> Are there dilemmas of practice that emerge in this context that are not captured by Bush's schemata?

Two pressing dilemmas arise for the intervener operating in this context. The first involves her reconciling the purported neutrality of the mediator's role with her statutory duty to enforce the law. The second relates to the staff mediator who, by virtue of handling multiple cases throughout the day, encounters the "repeat player" who is most often the defendant. The "repeat player" is not simply a forceful example of Bush's category of "preserving impartiality among parties and lawyers."<sup>28</sup> In that setting, Bush notes that the mediator is most uncomfortable when, after disclosure of the relationship and after no objection to continued service is raised, the mediator becomes preoccupied with the possibility that any subsequent attempt by the mediator to generate movement from that party might revive the latent concern about impartiality. In a mediation program within an administrative agency, however, the mediator cannot "excuse himself" for the very notion of "repeat player" prevents it. Under those circumstances, does the intervener face "impartiality" concerns that differ from those of the court-annexed mediator?

The debate surrounding these challenges is one about what role we want the intervener to play. Is it the role of the mediator as defined in various statutes or

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25. Bush, *The Dilemmas of Mediation Practice*, *supra* note 1, at 12-14.

26. The Equal Employment Opportunity Commission instituted a Rapid Charge Processing System during the tenure of Eleanor Holmes Norton (1977-81) that was aimed at facilitating settlements of individual claims.

27. One example of such a system is reflected in the Michigan Workers' Disability Compensation Act. See MICH. COMP. LAWS ANN. §§ 418.222-223 (West 1993).

28. Bush, *The Dilemmas of Mediation Practice*, *supra* note 1, at 12, 22-34.

is it a more constrained assignment? There is a role here for policy makers to be clear in their program design objectives, but, for reasons noted above, some dilemmas of practice will remain. An institutional setting deploying mediation in which questions of program design are raised even more sharply is that of our high schools.

(c) *Peer Mediation*: Mediation in the school systems has gained widespread popularity in the past decade. Training high school students to mediate cases involving disputes between other students is viewed as a way of reducing tensions, enhancing citizenship skills, and promoting a school climate that supports students taking responsibility for their behavior. Are the "dilemmas" of mediator practice in this environment captured by Bush's schema? Consider the following case. Two male high school students engage in a fight because one has made offensive comments about the other's girlfriend. During the mediation session, the student acknowledges that he made the offensive remarks, promises not to do it again and wants to leave it at that. The mediator gains the counterpart's acceptance, and the parties' agreement that they will refrain from any future physical contact with one another. The mediator feels uncomfortable because nowhere in the discussion or agreement is there a public acknowledgment of unkind behavior having occurred, an apology to the female target of the comment, or a sense that the students must learn how to get along with one another except in the negative fashion of avoiding all contact with each other. What is the source of the discomfort?

At one level, the discomfort arises from a belief that part of high school education should involve affirmatively fostering values such as being courteous to one another. The mediation model, with its presumption that all of its participants are "full citizens" and have the capacity for "autonomous choice" rings somewhat hollow when referring to fourteen year old students. Thus, some believe it would be "better" if the peer mediator, and the program, were postured in a more "educative" mode in terms of the moral development of individuals rather than blindly adopting the conception of mediation as used elsewhere in which all parties decide as free, independent persons on what settlement terms they prefer. These issues, for sure, are ones of program design. But, if some of those sentiments crept into program practice, then all of the questions regarding the preservation of impartiality, self-determination/maintaining nondirectiveness, and the separation of mediation from counseling/advice giving<sup>29</sup> arise with different meanings.

Of course, one response to these examples (though Professor Bush by no means could be construed as holding it) is to suggest that these dilemmas are not important because the stakes in these settlements are neither as tangible or critical as those involved in a law suit. Only those persons who have not stepped into a high school building in the last decade could possibly be comforted by such a cavalier dismissal of the skills, needs, and aspirations of those in whose hands our free and democratic institutions are to be entrusted.

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29. *Id.* at 28-33.

## V. CONCLUSION

In Professor Bush's concluding remarks, he notes that his findings:

show that mediators' concerns are not only for narrowly defined ethical dilemmas such as conflict of interest, intimacy with clients, etc. Mediators' concerns also include broader "value dilemmas" involving hard conflicts between different values and objectives at stake in mediation. Indeed, many of the dilemmas they describe go to the central question of what their job or role is, as mediators, and what they should concern the primary purpose of the mediation process when different objectives clash.<sup>30</sup>

I believe that he is absolutely correct in this observation. But its implications, I suggest, are to invite discussion, analysis, and dialogue around the broader themes, contexts, and policies within which dispute resolution systems of whatever type operate. While these matters might be handled in part by Bush's call for "policy makers" to answer them, I remain dubious that such matters can or should be resolved by such individuals. The lessons and richness of the experience of the individuals serving as mediators, whom Bush so aptly applauds for their conscientiousness, must always remain the driving and informative source from which program policies are ultimately framed. Even when the heavy hand of institutionalization is well intentioned, it cannot be a substitute for the very ideals to which Bush's study speaks: an informed and responsive sensitivity to those dynamics in human interaction in which each person's conduct has visible implications for everyone's well-being.

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30. *Id.* at 43.

