TRANSFORMATIVE MEDIATION – A CRITIQUE

This article examines 'The Promise of Mediation' from the perspective of a UK mediation practitioner. It considers the contribution the book has made to the development of mediation, both as a critical evaluation of existing practice and as an inspiration for practitioners, including the author. It describes three major critiques of The Promise of Mediation before considering the question: does Transformative Mediation provide a coherent theory of mediation? In answering the question, the article considers what the urge for such a theory tells us about the stage of development of the mediation profession.

Introduction

When *'The Promise of Mediation'* was published in 1994, it immediately divided opinion. For some it was revelatory, setting out the true path for a profession that had lost its way in the thickets of the American justice system. For others it was delusional, confirming mediation as a 'touchy-feely' activity carried out by do-gooders with little practical relevance to actual disputes and, worse, foisting a goal of 'transformation' onto unwilling customers. Whatever view is accurate, these debates have continued to rage (see for example Gaynier, 2005; Folger & Bush, 2005; Raines, 2005; Goodhardt, I. (2005). Transformative mediation:

Assumptions and practice. Journal of Family Studies, 11(2), 317-322.) In 2005

Baruch Bush and Joseph Folger published a second edition which proclaimed,

*'In both these kinds of response, appreciative and critical, the first edition of our

book has fulfilled the purpose we had in mind.'* (Bush & Folger, 2005, p. 2)[1].

In this article I propose to:

- describe the 'transformative mediation' model

- consider its impact on my own practice

- compare and contrast critical reaction to the model

- in the light of this, consider its contribution to the mediation field

'The Promise of Mediation' took a risk in making a theoretical contribution to a

practical discipline. I have chosen three critics who illustrate that, in some

respects, it satisfies neither practitioners nor academics. This in turn raises the

question: *'Does mediation need an overarching theory?'* I will suggest that

transformative mediation, while considering both theory and practice, is at its

strongest in articulating a set of <u>principles</u> for mediators, which can be

characterised as the safest or least harmful stance available to conflict

interveners.

The *'Four Stories of Mediation'*

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[1] Where a page number is used alone, it refers to Bush, R & Folger, J (2005) <u>The Promise of
Mediation</u> San Francisco: Jossey Bass

As The Promise of Mediation claims to be a corrective vision it is helpful to examine how Bush and Folger view the rest of the mediation field.

Their first depiction is 'The Satisfaction Story'. In this story, they claim, mediation proponents describe its capacity to satisfy people's needs, emphasising its effectiveness in producing outcomes and contrasting its *"flexibility, informality and consensuality"* (p. 9) with the limitations of the legal process. The satisfaction story echoes the *'principled negotiation'* of 'Getting to Yes' (Fisher and Ury, 1981) in stressing mediation's ability to *"facilitate collaborative, integrative problem solving rather than adversarial distributive bargaining"* (p. 10). It also emphasises mediation's potential to reduce both the emotional and economic cost of disputes. This in turn produces private and public benefits: to individuals in resolving their disputes well with the minimum of fuss, to the state in dealing with costs and delays in the court system (p. 10).

Bush and Folger cite numerous authors in setting out a familiar litany of claims for mediation (See Folberg & Taylor, 1984; Menkel Meadow, 1995; Golann, 1996). Certainly the Satisfaction Story (sometimes known as the *'problem-solving'* approach – see Menkel-Meadow, 1985) is widely known, and for many people represents the 'true' definition of mediation.

Next is 'The Social Justice Story'. In this description, mediation is seen as contributing to the development of communities, particularly of the

underprivileged and marginalised: *"mediation can strengthen the weak by helping establish alliances among them"* (p. 12). Its advantages include reducing dependency and allowing groups to achieve more than the law might permit. Bush and Folger cite neighbourhood, environmental and consumer disputes as examples where the social justice story prevails. While they acknowledge that there are far fewer advocates of this story, nonetheless these claims are persistent (Wahrhaftig, 1982; Sheriff, 2006).

The third story is 'The Transformation Story'. Unsurprisingly, Bush and Folger use glowing terms here: *'unique', 'validating', 'self-determination'* and *'empowerment'* (p. 13). Their premise is that mediation has the potential to do more than merely settle disputes. It can change the way people deal with conflict, *'helping to transform society as a whole from a truce between enemies into a network of allies'* (p. 14). They recognise that this has not been the mainstream characterisation of mediation, but cite some influential authors in its support (Riskin, L, 1982; Menkel-Meadow, C, 1991).

They call the fourth story 'The Oppression Story' (p. 15). In this Bush and Folger summarise major criticisms of the mediation movement over the last 25 years. These criticisms come from legal theorists such as Richard Abel (Abel, 1982) and feminists like Tina Grillo (Grillo, 1991) and Laura Nader (Nader, 1979). They come down to four:

- mediation increases the reach of the state, letting it become involved in previously private matters;

- mediation's lack of formality magnifies existing power imbalances in favour of the strong;

- mediation privatises disputes, preventing marginalised groups from operating in solidarity (pp. 15,16);

- the mediator's own power is unrecognised and therefore unaccountable.

Bush and Folger are right to acknowledge the power and persistence of these criticisms. It would be fair to assume that the model of mediation which they set out at least attempts to answer some of them.

Theoretical base: the relational worldview

Bush and Folger are clear that The Promise of Mediation has a theoretical dimension, using the term, *"The Transformative Theory of Conflict"* (p. 45). What is it?

Central to transformative theory is the idea that human beings do not only seek to satisfy their individual needs: they also have a desire for connectedness. This is described as a *relational* view of humanity (pp. 60, 252-260). While present in many philosophies and religions[2] it was particularly articulated in feminist social

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[2] Compare the Judeochristian idea that a person has a duty both to God and their neighbour

psychology (Lichtenstein, M, 2000). Carol Gilligan, in her groundbreaking book,

'In a Different Voice' (1982) describes how traditional accounts of morality and

psychology elevated the values of separateness over community, or self-

actualisation over relationship. Women's approaches to moral problems were

characterised (by men[3]) as less developed than men's supposedly superior

powers of abstract reasoning, which prioritised personal autonomy over

relationship to other. She articulated a vision of morality in which the

preservation of relationships is given equal significance with the fulfilment of

personal needs or interests (Gilligan, 1982, Ch 6). This vision has been adopted

by transformative mediation:

> *'Acknowledging the truth of our interconnectedness leads us to balance*
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> *our own desire for autonomy and self-fulfilment with our need to connect*
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> *with others, who have similar and sometimes competing needs.'* (Beal &
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> Saul, 2001, p. 10)[4]

Bush and Folger apply this view of humanity to conflict. Conflict is *'a crisis in*

human interaction' (p. 49) affecting us on both of these dimensions. It robs us of

autonomy by frustrating our wishes and making us feel weak, and at the same

time has a negative impact on our relationship to others. This dual phenomenon

is presented as a vicious circle. Weakness leads to suspicion of and alienation

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[3] Freud and Piaget being the most notable examples in the field of psychology. Gilligan also refers to the work of Lawrence Kohlberg (1981) and her own collaboration with him (Kohlberg & Gilligan,1971)

[4] A number of articles have been written by Bush and Folger's collaborators and published in two collections by their Institute for the Study of Conflict Transformation. I have found these useful in fleshing out the practical implications of transformative mediation. See Folger and Bush (2001) and Pepperdine Dispute Resolution Law Journal (2002) 3(1)

from the other party. That suspicion and alienation in turn leads to a more hostile stance, which reinforces the other person's sense of weakness and self-absorption, fuelling the conflict (p. 50). So for Bush and Folger, the most significant thing about conflict is its effect on our basic humanity (our relationship to self and other).

Reversing the vicious circle (Empowerment and Recognition)

If, then, conflict creates a vicious circle of weakness and self-absorption, its resolution involves setting in motion a contrary *'virtuous circle'* (p. 56) of strength and responsiveness to others. This logical step is at the heart of the transformative orientation (pp. 53-59, see also Bush and Pope, 2002).

It can of course be objected that conflict may be resolved in a number of ways: one person may give up or move away, the problem may get solved or a court or third party may impose a solution. This is where Bush and Folger's work requires a certain idealism or faith on the part of the reader. The title *'The Promise of Mediation'* implies that mediation is not fulfilling its true promise if it merely solves people's problems. Transformative mediation addresses the <u>way</u> people resolve conflict, rather than the solution itself: process rather than content. One recent writer has been critical of prioritising process over content, (Mayer, 2004, 144), but it should be remembered that Bush and Folger's vision

stands as a corrective to a mainstream they characterise as minimising process in its desire for outcomes. (p. 85)

What is the process? To go back to their *'relational worldview'* Bush and Folger assert that *'human beings have inherent capacities for* strength *(agency or autonomy) and* responsiveness *(connection or understanding)'* and that our *'social'* or *'moral'* impulse brings these into play when we are faced with conflict. (p. 54). This is a deeply held belief, repeated throughout the book.[5] Bush and Folger say they have observed hundreds of parties in conflict move from weakness to strength and from self-centredness to responsiveness to others (p. 55). These moves are described as '*shifts',* which Bush and Folger have christened *'empowerment'* and *'recognition'.* (p. 56)

Empowerment could be characterised as 'agency' – the capacity to make decisions and act on them[6]. As this capacity returns, people in conflict become less self-absorbed and can show recognition[7] – the capacity to understand and take into account another's perspective. The results are portrayed in glowing terms:

> *'The stronger I become, the more open I am to you. The more open I am*
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> *to you, the stronger you feel, the more open you become to me, and the*

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[5] See for example p. 70: *'The other requirement (for a transformative mediator) is a deep acceptance of the premises about human motivation and capacity that constitute the ultimate foundation of the transformative theory.'* C/f Beck (1998) *'natural selection has endowed us with many benevolent capacities: empathy, generosity, altruism.'* p. 287

[6] *'Parties are empowered in mediation when they grow calmer, clearer, more confident, more organised and more decisive – and thereby establish or regain a sense of strength and take control of their situation.'* (Bush and Folger, 1994)

[7] *'Parties achieve recognition in mediation when they voluntarily choose to become more open, attentive, sympathetic and responsive to the situation of the other party, thereby expanding their perspective to include an appreciation for another's situation.'* (Bush and Folger, 1994)

stronger I feel. Indeed, the more open I become to you, the stronger I feel in myself, simply because I'm more open; that is, openness not only requires but creates a sense of strength, of magnanimity. So there is also a circling between strength and responsiveness once they begin to emerge. But this is not a vicious circle, it is a "virtuous circle" – a virtuous circle of conflict transformation' (p. 56).

Conflict is presented as an *'emergent, dynamic phenomenon'* (p. 55) whose resolution requires, not the once-for-all solving of problems, but a process to tackle this and future conflicts. (See also Lichtenstein, 2000, p. 25)

Consequences for 3rd party interveners

If conflict is transformed when parties regain strength and generosity of spirit, what is the role of a mediator? Bush and Folger mention three factors:

1) Conventional definitions of mediation, featuring a 3rd party neutral helping people to resolve issues, are replaced. Instead the 3rd party works with parties *'to change the quality of their conflict interaction.'* (p. 66)

2) The mediator *'helps'* parties to make *'positive interactional shifts'* (p. 66)

3) The mediator does this by *'supporting – but never supplanting'* party empowerment and *'encouraging and supporting – by never forcing'* inter-party recognition (p. 66).

They are at pains to emphasise the distinction between supporting parties and *'supplanting'* or *'forcing'* them. Perhaps they have been stung by criticism of their original model (see Williams, 1997, p. 151) that it is as directive as any other form of mediation if mediators force or drive empowerment and recognition.

Another important observation is that empowerment tends to precede recognition. Although recognition is an appealing quality, people in conflict rarely display much generosity towards each other until their own needs are being dealt with.

A third caveat follows: *'the move toward conflict transformation is unlikely to be smooth and even'* (p. 68). No quick fixes here: see *'Ten Hallmarks of Transformative Mediation Practice'* (Folger and Bush, 2001), No. 6, *'Clarity Emerges from Confusion'* and No. 9, *'Conflict Can Be a Long Term Affair'*.

One final note of caution: *'the transformative model does not ignore the significance of resolving specific issues'* (p. 68). Again we detect the impact of criticism, as Bush and Folger acknowledge that resolving issues does matter to people.

To summarise, the transformative model of mediation sees conflict as a crisis in the way people interact. This sets up a vicious circle where people feel weak and therefore become self-absorbed, fuelling a similar reaction in the other. Ameliorating conflict involves reversing this process and setting in motion a virtuous circle of strength and connection. A mediator can help with this, but not

force it, by supporting empowerment and recognition shifts. Mediators thereby do not so much help people solve their problems as help them find a better way of dealing with conflict, and with each other. This can be described as moral growth or moral development (p. 73).

Here we see evidence of transformative mediation's values. These concern human capacity, the nature of conflict and the role of third parties. How do these values translate into principles that might assist a practitioner?

Transformative mediation in my own practice

The original *'Promise of Mediation'* (1994) had a considerable effect on my practice as a mediator. It seemed to suggest a return to values that had enthused me when I was training.

In particular I was taught the idea of *'empowerment'*[8]. This seemed to involve respecting clients and helping to mobilise their own ability to solve their problems. But I was troubled by another injunction: *the mediator is responsible for the process, the clients are responsible for the outcome.* This packaging out of process and outcome was, I believe, common on training courses at that time. Unexamined within it lay a deeply disempowering message: the professional remains in charge. It is his or her process. And so when I read: *'transformative mediators invite parties to shape process as well as outcome'* (Beal & Saul,

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[8] On Family Mediation Scotland's National Training Course of 1992/3

2001, p. 12) it was both liberating and alarming. Could I really trust the parties to this extent? I envisaged high-conflict separating couples conducting trench warfare over every choice, but liked the idea of moving *'at the parties' pace, comfortable with expressions of conflict, emotion, confusion and ambiguity'* (Beal & Saul, p. 12).

Further encouraged by Folger and Bush's *'Ten Hallmarks of Transformative Mediation Practice'* (Folger and Bush, 2001), I attempted to apply this principle in practice. Instead of trying to keep people on track with reminders like: *'Hold on, hold on, we were talking about X and you just had an argument about Y',* I tried to follow the parties where they chose to go. This was a conscious application of the third hallmark, *'The Parties Know Best'* and the guidance, *'the third party's actions are* responsive *to the disputants' moves – because it is the party's judgment that controls.'* (Folger & Bush, 2001, p. 27)

This has had two consequences. First, the mediation sessions have become less predictable – people deal with arguments and resentments from the past as well as practical issues. Second, and more surprisingly, the sessions don't spiral out of control. In one example, a woman returned to a theme she had repeated throughout our sessions, that her ex-husband's mother didn't show sufficient warmth towards their son. Previously I would have intervened, perhaps attempting to return the focus to matters I judged more constructive, or simply protecting the man from what appeared to be a sustained verbal attack. Instead,

recalling my transformative reading, I followed the argument very carefully, giving my full attention to each person when they spoke. After about 3 or 4 minutes, the woman paused. I said, *"Have you said all you need to say about that?"*, she nodded, and the conversation moved forward, never returning to that topic. This incident supports Bush and Folger's belief that people are equally responsibly for regulating their own conflict, and have good reasons for choosing what to discuss and when to discuss it.

It has also been useful to consider empowerment and recognition opportunities in mediation. As soon as I began practising as a mediator I noticed that, while the problem-solving model suggested an overall direction for the sessions, it gave little guidance about particular, moment-by-moment interactions. Transformative mediation provides a practical template. I can make a mental note to myself that this person is looking to be empowered, or this one has just offered some recognition. I can then choose to highlight or amplify it (Jorgensen et al, pp. 135-145). The insight that recognition tends to follow empowerment (p. 67) is also helpful, explaining why people in conflict appear so obdurate in refusing to recognise the other person's plight, while suggesting a strategy for the mediator in such 'stuck' situations – help to empower the person first, and recognition will follow.

Mediation is like chess: you can learn a number of openings by heart, but by the 20th move the permutations are almost infinite. Rather than learning moves by

rote, mediators need to have a clear set of principles to apply in responding to conflict as it unfolds. *'The Promise of Mediation'* has helped to crystallise some of those principles for me. For example:

- trust the parties – they chose those words at that moment for a reason

- believe the best of people – the last thing they need is another professional to tell them they are doing things wrong

- be flexible

- believe that people can solve their own problems

- be aware of the subtle ways in which you can disempower people by controlling the direction or process of mediation

However, I would agree with those who say that transformative mediation can be combined with other models. Sometimes problem-solving appears the wisest choice at a particular stage in a dispute: I can still apply transformative principles by asking clients if that is what they want to do. On other occasions I draw on the principles of Narrative Mediation (Winslade & Monk, 2001), perhaps using the technique of an *'externalising conversation'* to help people consider their conflict in a different light. Narrative Mediation should be compatible with the transformative approach as it starts from some of the same premises, such as the *'relational worldview'* (Winslade & Monk, Ch 5) and suspicion of problem-solving (Winslade & Monk, pp. 32-27)

So, whatever the flaws of transformative mediation (discussed below), it is still useful as a *stance* or statement of principles. The discipline of following the parties may not be as productive as Bush and Folger sometimes claim, but it is arguably a safer stance than attempting to guide people towards a particular agenda, no matter how benign[9]. It is also respectful. Although it requires a certain amount of faith to say, *'The Parties Have What it Takes'* (Folger and Bush, 2001, p. 27), this echoes the words of a mediation pioneer:

> *'Part of this wisdom is "that of God" that each of us carries... the reader may feel more comfortable in spelling God with two 'O's, so as to say that there is good in everyone...If there is "that of God" in everyone, then the mediator must in all humility seek it'* (Haynes & Haynes, 1989, p. 1728).

A theory of mediation?

My own practice has taught me that transformative mediation is valuable in providing both practical ideas and a set of principles for mediators, and in articulating an alternative to the benign dictatorship that problem-solving mediation can become. But does it provide an overarching theory for mediation? In answering that question I will refer to the work of three critics. One is a practitioner, examining the validity of Bush and Folger's critique of practice. The other two address the theoretical foundations of transformative mediation.

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[9] See Janet Walker's address to Family Mediation Scotland's 2004 Conference (available from the Newcastle Centre for Family Studies) when she revealed that, since the implementation of the Family Law pilots in England and Wales, which arguably place more pressure on mediators to achieve particular outcomes, the number of clients who were either dissatisfied or very dissatisfied with mediation had risen from one third in 1994 to nearly half.

A defender of existing mediation practice

One of the first to publish a reaction was Michael Williams. Like other critics he starts with warm words: *'They have made me think again about my work, and how I do it. I am grateful'.* (Williams, 1997, p. 143) He then disputes two propositions:

1) That problem-solving mediation, as caricatured in the 'Satisfaction Story' (see above), is inevitably directive.

2) That problem-solving and transformative mediation are mutually exclusive and cannot successfully be combined.

Williams claims that proposition 1) is unsupported by evidence. He selects a series of assertions Bush & Folger make about the problem-solving approach. An example is: *'These behaviours suggest that when mediators focus on the objective of solving problems, they generally use a strong directive hand in trying to do just that. In other words, problem solving mediation tends to become directive mediation* (Williams, 1997, p. 145, citing Bush & Folger, 1994, p. 101). Williams probably speaks for numerous mediators in protesting that he believes he can help his clients solve their problems without being directive. For him, Bush and Folger describe an example of incompetent mediation, and he offers the alternative proposition that incompetent mediators tend to be directive.

He takes a further swipe at Bush and Folger in suggesting that, when clients have asked for help in solving their problems, mediators who attempt to achieve transformation are breaching their ethical duty:

> *'If we try to think of an adjective that describes a mediator who decides that he knows what his clients need, and he is going to give it to them whether they ask for it or not, "directive" is one – and a milder one of many words that might fairly be applied to him'* (Williams, 1997, p. 151).

It is probably proposition 2) that irks Williams the most. Indeed it is the most persistent source of complaint about Bush and Folger's approach (see Suel, 1999; Gaynier, 2003, both cited below, and Lande, 1997, p. 856: *'I am sceptical of a single-school approach for both philosophical and pragmatic reasons'*). It presents mediators with a dilemma: if they are attracted to the model outlined in The Promise of Mediation they are explicitly told they must jettison their existing approach. The implication is that each approach will sabotage the other. Even in their 2005 re-statement Bush and Folger are uncompromising, referring to *'the incompatible objectives of different models and the conflicting practices that flow from these diverse objectives'* (p. 228). Again Williams complains about the lack of evidence for this assertion before attempting to demonstrate from his own experience that it is quite possible for a mediator (or anyone) to hold two apparently contradictory ideas in tension (Williams, 1997, p. 148)[10].

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[10] See also Zumeta (2000) *'However, in informal discussions, many practitioners who utilize the transformative model state that they mix facilitative and transformative techniques rather than using one or the other exclusively.'*

How credible is this attack? It can be argued that Williams has done what he accuses Bush and Folger of doing by caricaturing their position. In so doing he erases its subtleties. For example, his defence against the charge of being directive ignores the concern (expressed by others besides Bush and Folger[11]) that some directiveness has crept into mediation.   And when he accuses Bush and Folger of suggesting that mediators can't concentrate on two things at once, he may be being disingenuous. They do not suggest that the problem is holding two ideas at the same time. Rather they portray it as one of operating according to two contradictory sets of premises about the world, *'a process at war with itself'* (p. 231). In reducing this to a practical matter, Williams not only fails to engage with the issue but illustrates the pragmatic and anti-theoretical preferences of many mediators.

In considering the question of theory, it should be noted that Bush and Folger, in the passages cited by Michael Williams, use terms like *'objectives', 'approach'* and *'process'.* Williams has responded as a practitioner to ideas about practice. These critiques are valid insofar as *'The Promise of Mediation'* is a manual of mediation practice. However, it purports to be more than that, using the word *'theory'.* I now examine the work of two academics who have addressed the theoretical basis for transformative mediation.

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[11] Murray Levin (Levin, M, 2001) cites numerous articles debating the appropriateness of 'evaluative mediation', an overtly directive form of the activity. Titles include *Facilitative or Evaluative Mediation: May Your Choice Be A Wise One; Evaluative Mediator Responds; "Evaluative" Mediation Is an Oxymoron; The Top Ten Reasons Why Mediators Should Not Evaluate; When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals.* For a complete list with citations, see p. 267. See also Dingwall & Greatbatch, (2000) p. 251

An academic critic of the theoretical basis for transformative mediation

Jeffrey Seul examines the claim that transformative mediation can lead to moral growth (Suel, 1999). While he declares himself supportive of the idea of transformation, he wishes to test the model's *'fitness for purpose'*. He homes in on the premise that moral development involves improving our capacity to attend to self and others, a capacity strengthened by a mediator's attention to 'empowerment' and 'recognition' (Suel, p. 135). He claims that, if moral development is the most important goal of transformative mediation, it would be helpful to refer to a *'comprehensive theory of human development'* (Suel, p. 136). In outlining such a theory, Suel can calibrate transformative mediation against it to assess whether it actually delivers.

Suel notes that Bush and Folger lean heavily on Carol Gilligan's work in developing their *'relational'* moral framework: *'Their model's dual emphasis on "empowerment" and "recognition" appears to be a direct outgrowth of Gilligan's vision of adult maturity, which values both autonomy and connection.'* (Suel, p. 136) However, Gilligan was not attempting to outline an overarching theory of human development. For this he turns to Robert Kegan (Kegan, 1982; Kegan, 1994) who outlines a five-stage theory of lifespan development (apparently incorporating Gilligan's insights). The idea is that we develop throughout our lives, growing from one stage to the next in terms of how we make sense of the

world. Apparently most American adults occupy, or are in transition to, one of the last three stages, known as *'interpersonal', 'institutional'* and *'interindividual.* (Suel, p. 140)

Suel assesses transformative mediation according to the simple question: does it help people to develop from one stage to the next? For the reasons outlined below, this is unlikely.

First of all moral development is a gradual, at times imperceptible, process: *'A mediation, even one that consists of multiple sessions, is extremely unlikely to support a complete shift from one developmental stage to the next.'* (Suel, p. 156) Secondly, moral development seems to go in one direction only: *'developmental stages cannot be skipped.'* (Suel, p. 163) So adults who have not yet reached the *interindividual* stage can't think their way into it: it *'is not simply a matter of choice, as Folger and Bush seem to believe.'* (Suel, p. 164)

Thirdly, clients' different starting points (in terms of their own moral development) mean that a task that may help one person's growth may be quite inappropriate for someone at another stage.

Fourthly, Kegan himself declares that growth requires:

> *'an ingenious blend of support and challenge. This occurs when the strengths of one's current way of making meaning are affirmed at the*

same time that one is sympathetically invited – and supported in one's

efforts – to encounter and transcend its limitations' (Suel, p. 156).

Suel then examines how transformative mediation might help hypothetical adults

at both the *interpersonal* and *institutional* stages in their development to the next.

For an individual at the interpersonal stage of development, the emphasis on

empowerment may be helpful. It will challenge them to move beyond

dependence on others to assert their own interests. However, as such a person

has *'little ability to construct a perspective that is his "own" over and apart from*

other's perspectives' (Suel, p. 161), this challenge needs to be accompanied by

reassurance about the continuity between their current way of looking at things

and the new way that is being suggested:

> *'Mere insistence on self-authoring behaviour is unlikely to present a bridge*
>
> *secure enough for the party to consider crossing* [to the next stage of
>
> moral development] (Suel, p. 161)

The model fares little better in dealing with people at the *institutional* stage of

development. The real move forwards isn't about considering other's

perspectives; it is the multifaceted nature of one's own perspective that needs to

be developed and encouraged, *'as one develops beyond the institutional*

stage…….to begin to glimpse the internal diversity within oneself' (Suel, p. 166).

Suel suggests that a rather particular form of recognition (of one's own multiple

perspectives) may be helpful, but may seem a bit strange to the parties, and concludes:

> *'As presently constructed, Bush and Folger's model of mediation appears at best to hold transformative potential for a fraction of all adults, and it probably does so no more effectively than a common approach to problem solving mediation that they criticize.'* (Suel, pp. 167-171)

Finally, Suel adds his voice to the chorus objecting to Bush and Folger's claim that transformative and problem-solving mediation cannot be mixed:

> *'Mediators who view themselves as agents of individual moral development will contribute to the growth of few parties, if any, without a willingness to encourage and facilitate party problem-solving where necessary to provide the challenge and support that produces such growth.'* (Suel, p. 171)

Can transformative mediation derive any comfort from this assessment? First of all, it is important to distinguish two senses of transformation. Suel concedes that a more straightforward vision: *'the creation of more human compassion, understanding and moral decision-making'* is *'relatively unproblematic'* (Suel, p. 171). It is the more technical use of the term to connote *'individual moral development'* (Bush & Folger, 1994, p. 24) that he holds up to the light and finds wanting. Perhaps Bush and Folger have over-reached themselves in dipping

into the technical literature on psychological development, particularly the work of Carol Gilligan, without a broader understanding of its context.

In fact Bush and Folger painstakingly describe the *'Negative Conflict Spiral'* (p. 50) drawing on the work of Aaron Beck (Beck, 1999) and Daniel Goleman (Goleman, 1995). Their real aim is reversing that spiral (the process they describe as *'conflict transformation')* (p. 52): moral growth seems to be more of a bi-product of this transformation than its primary purpose. In the light of Suel's assessment it may have been an unfortunate choice of terminology.

And here is the rub for mediation: when this 'johnny-come-lately' discipline attempts to lean on the theoretical development of other professions it finds the territory already occupied and riddled with complexities. A simpler and therefore more universal vision of the transformative potential of conflict interaction may better serve its purposes. Suel is not so much saying that transformative mediation cannot operate as a theory of conflict resolution, as pointing out a fault in the present construction of that theory.

A mediator with another professional allegiance – 'Gestalt'

This critique comes from a practising mediator who likes the transformative approach but suggest that the theoretical underpinnings of another discipline

offer a more robust basis (Gaynier, 2005)[12]. Like others, Lisa Gaynier starts with a tribute – *'They do the field of mediation a service by shaking up the status quo',* (Gaynier, p. 397) – before bemoaning Bush and Folger's insistence that transformative mediation cannot be mixed with other forms: *'It is an unfortunate position because the stated theoretical basis for the practice of transformative mediation is weak and could benefit from cross-pollination.'* (Gaynier, p. 398)

Gaynier, like Williams, may speak for many when she says:

> *'I squirm with discomfort at the moral growth imperative of transformative mediation, but my approach to client work is quite similar to the transformative approach as described in their book. So why my discomfort?'* (Gaynier, p. 402)

Again like others (Williams, 1997, Suel, 1999, Lande, 1997), she questions whether moral growth can ethically be the purpose, or objective, of mediation. Gaynier instead suggests that mediators don't need to take responsibility for people's moral growth. There is quite enough going on in mediation. She uses the term *'magic'* to describe *'the phenomenological experience of the two people in dispute becoming more fully who they are.'* (Gaynier, p. 403) implying that, in effect, Bush and Folger have come up with the right methods by the wrong route. The idea of moral growth is only a partial explanation of transformative practice, rather than a coherent theory.

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[12] Compare Jorgensen (2000) who proposes that transformative mediation can benefit from integrating *'Coordinated Management of Meaning'* theory.

This is why some people have *'sidestepped the moral growth imperative of transformative mediation while fully embracing the methodology. The methodology works!'* (Gaynier, p. 403,404) What mediators need, posits Gaynier, is *'a theory of human meaning making and human interaction to guide them as they interact with the disputants'* (Gaynier, p. 404).

So what does she suggest? Gaynier turns to Gestalt Theory, a discipline with a long and credible pedigree (Perls, Hefferline & Goodman, 1951). She claims that some of Bush and Folger's central ideas – microfocus, non-interpretive and non-judgmental approach, clients making their own meaning – are informed by the work of Gestalt psychologists (Gaynier, p. 405). She also draws a parallel between the Gestalt idea of *'contact'* and the kind of empowerment and recognition shifts desired by Bush and Folger (Gaynier, p. 406). Finally, she commends Gestalt for its *'clarity of intent'* that sees the third party intervener as part of a system along with the parties.

Gaynier's position, then, is that while Transformative Mediation is a useful contribution to the field, it is not a complete theory. Gestalt Theory, on the other hand, claims to be just that: *'They* [the disciplines of psychoanalysis, semantics and philosophy] *have been critically examined and organised into a new whole, a comprehensive theory.'* (Perls, Hefferline & Goodman, 1951, p. viii)

In fact Gestalt Theory and Transformative Mediation may have more in common than Gaynier admits. Both offer a *'unitary principle'* (Perls et al, p. xi) which is based on a purportedly universal view of human nature: compare Perls et al's statement:

> *'we believe that practically everything we shall deal with is applicable, in some degree or in some respect, to every human being living in our times under the conditions of Western civilisation.'* (Perls et al, p. 5)

with this by Bush and Folger:

> *'this potential for conflict transformation is real and attainable because human beings themselves have inherent, deep reserves of capacity and motivation for self-reliant agency and other-directed empathy.'* (p. 259)

Both tend to use terms like *'natural'* and *'inherent'*. And here is the difficulty for both Gestalt and Transformative Theories: their very commitment to a multiplicity of worldviews, constructed scene by scene by individuals, means that they undermine themselves in the measure to which they claim universality.

For a Gestalt therapist or transformative mediator to say *'this works'*[13] is unobjectionable. You may agree or disagree. Many mediators may now say that about the transformative framework. But to claim that it works because of something basic, fundamental or irreducible in human nature propels the model

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[13] *'we present nothing that you cannot <u>verify for yourself in terms of your own behaviour'</u>* (Perls et al, 1951, p. 7)

into the realms of faith. Perhaps this is why Suel attempted (see above) to site

his critique in terms of an empirically verifiable system.

Does mediation need an overarching theory?

This raises the further question of whether mediation needs an overarching

theory. As illustrated above, its attempts to lean on the theoretical underpinnings

of other disciplines are susceptible to the charge of dabbling. And yet there is

something distasteful in the immodesty of universal theories like Gestalt. Some

have accused transformative mediation of having similar self-aggrandising

tendencies: John Lande expresses concern about the *'ideological contests'*

endemic during the *'institutionalising project'* of a new discipline and cites

transformative mediation as an example of the *'single-school'* view (Lande, 1997,

p. 854). Bernie Mayer is dismissive, questioning its distinctiveness, *'despite the*

efforts of many of its adherents to claim a unique status for it' (Mayer, 2004, p.

146).

To return to the question: why does mediation need a single, unifying theory?

Would not strong ideas about practice combined with a statement of principles

(see above, p. 10) be sufficient? Perhaps one clue lies in the fact that all of the

above critiques share with the transformative approach a strong thread of zeal

about the mediation activity. Could it be that true believers require a big idea to

explain something that is so self-evident to them? People are clearly gripped by

mediation, finding it absorbing, challenging and satisfying when in the 'hot-seat'.

Indeed, *'many more people want to act as conflict resolvers than to use conflict*

resolution services' (Mayer, 2004, p. 5). Could this be an example of cognitive

dissonance, the phenomenon whereby people respond to evidence that their

efforts are unsuccessful by redoubling those efforts (Festinger, 1957)? Or is it an

example of the seductive power of being a helper in other's misfortunes: *'I could*

not do this work if I did not need to do this work' (James Hillman, 1979, cited in

Hawkins and Shohey, 1989, p. 13)? Then again, it may be the simple desire to

attain professional respectability by providing a theoretical justification for

practice.

Conclusion

I have attempted to describe the impact of *'The Promise of Mediation'* and some

of the debates it has spawned. Even its most ardent critics find it difficult to

ignore. As a description of what is best in mediation, and as a work of inspiration

it is perhaps unrivalled. As a prescription for all situations, with hints of empire-

building, it over-reaches. As one contribution to the development of a new field,

'The Promise of Mediation' can stand proudly enough without having to denigrate

other approaches. Like Lisa Gaynier I believe it works: whether it works for the

reasons Bush and Folger give is less clear.

Such a high-profile book has to accept scrutiny. The critics I have cited demonstrate that transformative mediation is still very much a work in progress. It creates a false dichotomy between problem-solving and transformative mediators. It has not sufficiently considered the claim that it can assist moral development. And it has too strong a sense of its own uniqueness: Gestalt Theory can claim to have developed many of the same ideas.

And it is at this level of theory that I believe the greatest challenge lies, not just for Bush and Folger, but for all mediators. Where do we get our theory from? Can we simply borrow from other fields such as psychology, the law or conflict theory? Do we need to develop an overarching theory of conflict resolution? I have suggested that this impulse may stem more from the needs of highly committed mediators than any logic to the activity itself. I would also suggest that *'big theories'* are somewhat anachronistic, reminiscent of a time when western thinkers could muse about what is *natural* or *inherent* from the comfort of their armchairs and apply these deductions to all people, everywhere. Bush and Folger, despite their undoubted erudition, seem to sit in that tradition.

At the same time it would be churlish to deny their achievement in articulating principles which have the power to inspire mediators. That is where the true *'Promise'* of mediation lies. The challenge of the next decade will be to consider not only why it works, but when and how it works best.

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