

The Mediator as Ethicist

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"Recall that 'ethics' and 'morals' have different meanings. Morality is part of ethics, but ethics is a larger and more inclusive notion. Ethics is a response to the question, 'What sort of a person should I be and how should I live my life?' while morality is an answer to the question, 'What are my duties and responsibilities to others (and perhaps to myself too, on some views)?' One's morality flows from one's ethics, and reciprocally influences its character; but its scope is narrower."

A C Grayling, *Friendship*, [Yale UP, 203], 187

I have had the good fortune, in recent years, of spending as much time in reading and teaching ethics and moral philosophy as I have in focussing on mediation and dispute resolution. Initially, this seemed to me to be a distraction from my "real" work, but it's increasingly clear to me that this is in fact another window into the same world. In this blog, I want to offer a few preliminary observations on the contribution of ethics to our work as mediators – but to do so (I hope) in a non-moralising way and rather in the spirit of inquiry. This is also a continuation of the theme that a John Sturrock began in his recent blog, in reporting on reading that he had found helpful. The point here, I suppose, is that this is about what comes to our aid as mediators from the world of inquiry beyond the concerns with strategy, process and the specific norms of the practice of mediation.

Of course, ethics and mediation have been discussed in tandem for the past 40 years (at least . . . you could probably add a couple of zeroes to that number and be more historically accurate). The contemporary discussion of mediation and ethics has, however, been primarily concerned with the ethics of practice – the professional ethics concerns of neutrality, confidentiality, avoidance of conflict of interest, and so on. While not abandoning that cause, I'd like to expand the inquiry and invitation: reading ethics and moral philosophy is an enriching part of the professional development of us as mediators.

There are four aspects of our contemporary context which underscore the potential value of reading ethics:

First: by the very nature of mediation and its unmooring from the institutions and rules of formal systems that it is a form of distributed decision making. That is, the legacy of the 1976 Pound Conference and the core ideas of "going to where the disputants are", and fostering autonomy in decision making has led to a disaggregation of dispute resolution, and eventually to an official sanctioning of mediation, whether for reasons of efficiency or equity. This means that the responsibility for outcomes falls – as the ethos of mediation makes clear – on the parties; the decisions and outcomes are normatively and formally unhitched from the legal system. The conventional language in which this new-found responsibility is addressed in mediation takes the form of the primacy – and balancing – of "interests". But what this leaves unresolved in ethical terms, is the determination of the "right" answer. The risk is that the emphasis on private and distributed decision-making leads to a conclusion that "justice" is in some way the aggregation of private choices.

For a parallel discussion of "distributed morality", see Luciano Floridi, "Distributed Morality in an Information Society", *Science and Engineering Ethics*, 19.3, 727-743. [<http://link.springer.com/article/10.1007/s11948-012-9413-4>]

Secondly, and as a result of the first development, we find ourselves facing a world of pluralism and the temptations of ethical relativism. Demographically, politically, ideologically we find ourselves a world of diverse, often incompatible ways of life. One way of dealing with this is to retreat into conventions of supposed moral (or national) consensus; another is equally a retreat into the avoidance of the hard decisions through reliance on a flawed interpretation of early anthropologists' view of cultural and moral diversity and a principle of relativism – leading to an assumption and argument that elevates private (or cultural) preferences as a defence against engagement with others. There's no space to go into this here, but the single point is that the fact of pluralism and diversity is not an argument for moral relativism nor for a failure to enter the sometimes unruly forum of political discourse and dealing with differences.

A related third element of our contemporary context – and one that infects both politics and private decision-making – is a preference for pragmatism over principle. Indeed, pragmatism and principle are too readily seen as being in opposition whereas it seems to me that those who are reliably pragmatist (and not simply unpredictably whimsical in their choices) are likely to have a strong and discernible moral foundation. In the end, decisions – whether public or private – need to be defended and justified, and it would be a weak defence to rely merely on the reputation or authority of the decision maker, or on the procedural justification of autonomy and choice.

Fourth, and finally, what I think we see in both public discourse (ranging from letters to the editor through to political arguments) are self-serving interpretations of ethical options. First, and most commonly, there are narrow and instrumental interpretations of utilitarianism, so that what began as a critical and democratic argument (Bentham, J S Mill, and in modern times, Peter Singer) in which everyone was to count as one, and none was to count as more than one in the determination of social good, descends into an arithmetical calculation of short term advantages, and the risk of abandoning a minority to their fate as the losers in this round of political or economic choices. In mediation, there may be a corresponding risk that an interests-based approach will foster a temptation to think only in terms of the interests of those directly involved, to the neglect of those wider and unrepresented constituencies who may be impacted by the private choices. Second, in popular thinking there's a risk that the liberal principles of liberty and freedom may be interpreted narrowly and preferentially, with a tendency to neglect the proviso requiring the exercise of one's autonomy and choices with a respect of the like – and equally valued – liberty of others. As Howard Gardner points out, "It's easy to be ethical when one's self-interest is advanced . . . The acid test for ethics occurs when one's self-interest is pitted against the right thing to do in one's role. . . The test of ethics is responsibility, independent of one's own particular niche or stake in the outcome. I think here of John Rawls's view of the 'just community', established through a veil of ignorance. On Rawls's account, the rules governing a society should be crafted without foreknowledge of one's own capacities and niche within that society." [Howard Gardner, *Truth, Beauty, and Goodness Reframed: Educating for the Virtues in the Twenty-First Century*, [Basic Books, 2011, p.85]

As this blog is already over the standard word limit, I'll leave it to next month to explore where ethics might take us, as mediators, in responding to these characteristics of decision making. As hinted before, this is not to turn mediators into determiners of moral rectitude but rather to suggest that ethics – as a long tradition of thinking about complex problems – can help clarify our own thinking as well as that of those with whom we work.

As a spoiler alert, the points I want to explore later are [unless other readers and fellow bloggers pre-empt me]:

(i) The various "schools" of ethics – consequentialist, deontologist or duty-based, and virtue or character-based – can serve, alongside our usual tools of framing and reframing as ways of interpreting and rendering more internally consistent the ways in which disputants pursue interests and outcomes. To take the title of one of the books by philosopher Anthony Appiah, ethics is (or are) a way of "thinking it through", and it's always going to help to understand just what it is that shapes our thinking. Like Molière's character, Monsieur Jourdain, who was surprised to discover that he's been speaking prose all his life, we may be surprised to find that we regularly invoke philosophy and ethics even when we exclaim "that's not fair".

(ii) One thread runs through all of the traditions of ethics, whatever the emphasis and focus, and that is the importance of reasoned dialogue and discourse. This has become an even more central element in recent work on social justice, in a shift away from grand and institutional theories of justice towards a recognition that justice – in our modern pluralist society – requires engagement, collaboration and democratic deliberation. This is both new – in the work of, for example, Michael Sandel, Seyla Benhabib, Amartya Sen, Anthony Appiah, Mark Kingwell, Jürgen Habermas – and very old, in the ancient traditions of Greek philosophy and ethics.

"Citizenship is a way of making concrete our ethical commitments of care and respect, or realising in action an obligation to aid fellow travellers – in short, of fostering justice between persons." [Mark Kingwell, *The World We Want: Restoring Citizenship in a Fractured Age*, Rowman & Littlefield, 2000, 5]

At its most aspirational, mediation might be seen as part of that tradition of ethical dialogue; but even without going that far (and scaring away the clients, who have come to you for help in solving a specific problem, not in righting the wrongs of the world), the point to explore later concerns the ways in which we may draw on that tradition in which "justice" is the outcome not only of private and interest-oriented negotiations, nor of formal or legalist criteria, but rather of that larger reflection on what's the right thing to do.

I may not share the political conservatism of Michael Oakeshott, but there is something in recognising that we – even in our private disputes and differences – are joining in a larger conversation:

"As civilized human beings, we are the inheritors, neither of an inquiry about ourselves and the world, nor of an accumulating body of information, but of a conversation, begun in the primeval forests and made more articulate in the course of centuries. It is a conversation which goes on both in public and within each of ourselves. Of course there is argument and inquiry and information, but wherever these are profitable they are to be recognized as passages in this conversation, and perhaps they are not the most captivating of the passages. It is the ability to participate in this conversation...which distinguishes the human being from the animal... Practical enterprise is recognized not as an isolated activity but as a partner in a conversation, and the final measure of intellectual achievement is in terms of its contribution to the conversation in which all universes of discourse meet." Michael Oakeshott, "The Voice of Poetry in the Conversation of Mankind," in *Rationalism in Politics and Other Essays* (Indianapolis, Ind.: Liberty, 1991), 490-91