Two Models of Mediation Ethics

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Abstract

Mediation is increasingly regarded as a nascent profession. This raises some important questions about how the mediation profession should be structured and governed. This article distinguishes two models of professional ethics and considers their appropriateness for mediation. The first model, which I call the 'regulatory model', gives a central role to professional associations in formulating, applying and enforcing ethical codes of conduct. This model has been adopted by the legal profession in Australia and elsewhere. The second model, which I call the 'practice model', views a profession as a community of practice where ethical standards emerge and change organically over time. These standards may be codified, but are mainly enforced through social pressure. I develop the practice model through reference to the concepts of practice and tradition in the work of Alasdair MacIntyre. I then explore the implications of the two models by considering how they might respond to ethical breaches by practitioners suffering from mental illness, before considering their suitability for the mediation community. I contend that the practice model has important advantages over the regulatory model as a framework for mediation ethics.

I Introduction

It is becoming increasingly common to speak about mediation as a profession.[1] Mediation takes place in a wide range of different settings, dealing with various kinds of disputes. Mediators may, but need not, be lawyers; the process may, but need not, be associated with a court or the prospect of litigation. Family mediation, commercial mediation and workplace mediation may differ significantly in their focus and methods, while the aims of the process may vary depending on whether the mediator takes a facilitative, evaluative or transformative approach.[2]

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1 See, eg, Omer Shapira, *A Theory of Mediator's Ethics: Foundations, Rationale and Application* (Cambridge University Press, 2016) 6–7; Laurence Boulle, *Mediation*: *Principles, Process, Practice* (LexisNexis Butterworths, 3rd ed, 2011) 9 [1.7]; Conrad C Daly, 'Accreditation: Mediation's Path to Professionalism' (2010) 4 *American Journal of Mediation* 39; Rachael Field, 'A Mediation Profession in Australia: An Improved Framework for Mediation Ethics' (2007) 18(3) *Australasian Dispute Resolution Journal* 178; Rachael Field, 'Ethics for a Mediation "Profession": An Answer to the Neutrality Dilemma?' (2007) 10(2) *ADR Bulletin* 23; Samantha Hardy and Olivia Rundle, 'Applying the Inclusive Model of Ethical Decision Making to Mediation' (2012) 19 *James Cook University Law Review* 70; Forrest S Mosten, 'Institutionalisation of Mediation' (2004) 42(2) *Family Court Review* 292.

2 See generally Boulle, above n 1, 43–8 [2.40]–[2.43].

Nonetheless, mediators often find they have more in common with each other in terms of their everyday practice than they do with the bulk of lawyers, psychologists, social workers and members of other allied professional groups. For this reason, it makes sense to think about mediation as a distinct profession.

There is wide agreement among sociologists as to the main hallmarks of a profession. These include institutionalised education and training; a body of specialised knowledge and expertise; professional licensing; workplace autonomy; a communal code of ethics; and peer-to-peer accountability.[3] Mediation in Australia now fulfils many of these yardsticks. Specialised mediation courses are offered by universities and other institutions. Many of these courses are designed to fulfil the requirements of the National Mediator Accreditation System ('NMAS').[4] It is not legally required that mediators be accredited or hold certain qualifications, but the availability of peer accreditation and accountability is arguably more central to the notion of a profession than legal regulations. Shared ethical codes exist in the form of the Mediator Standards associated with the NMAS,[5] as well as codes maintained by other bodies, such as the Law Council of Australia.[6]

Why, then, might some people think that mediation in Australia still falls short of the definition of a profession? One concern that might be raised relates to the absence of a coordinated process for professional discipline. The Mediator Standards associated with the NMAS are maintained by the national Mediator Standards Board ('MSB'), but the MSB does not hear complaints or impose disciplinary sanctions.[7] Complaints must instead be directed to the Recognised Mediator Accreditation Body ('RMAB') to which the mediator belongs. There are more than 35 such bodies recognised by the MSB and their complaints processes vary widely.[8] Some of the RMABs are state bar associations or law societies, which do not generally regard mediation as a distinctive profession, so much as a specific form of legal practice. Can it really, therefore, be said that mediation has the kinds of ethical standards and accountability processes that characterise a standalone profession?

This is, I think, a complex and important question. It raises deep issues about how we think about professional ethics, both in terms of where ethical standards come from and how they are enforced. This issue, in turn, signals questions about the nature of the mediation community. Should a professional community ideally

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3 Cf Randy Hodson and Teresa A Sullivan, *The Social Organization of Work* (Wadsworth, 5th ed, 2012) ch 11; Shapira, above n 1, 5–6.

4 Mediator Standards Board, *National Mediator Accreditation System (NMAS)* (2015) <http://www.msb.org.au/ mediator-standards/national-mediator-accreditation-system-nmas>.

5 Mediator Standards Board, *National Mediator Accreditation System: Practice Standards* (2015) <http://www.msb.org.au/sites/default/files/documents/NMAS%201%20July%202015.pdf>.

6 See, eg, Law Council of Australia, *Ethical Standards for Mediators* (Law Council of Australia, 2011); Institute of Arbitrators & Mediators Australia, *Principles of Conduct for Mediators* (Institute of Arbitrators & Mediators Australia, 2003); Law Society of New South Wales, *Revised Guidelines for Solicitors Who Act as Mediators* (Law Society of New South Wales, 1993); Queensland Law Society, *Standards of Conduct for Solicitor Mediators* (Queensland Law Society, 1998).

7 Mediator Standards Board, *How Do I Make a Complaint Against a Mediator?* Mediator Standards Board <http://www.msb.org.au/faqs/how-do-i-make-complaint-against-mediator>.

8 Mediator Standards Board, *RMAB Contact List* Mediator Standards Board <http://www.msb.org.au/ accreditation-bodies/rmab-contact-list>.

have a centralised body that promulgates and enforces ethical standards? Or is a more decentralised model sometimes appropriate? If mediation increasingly views itself as a distinctive profession, does this necessarily mean we should move towards a more coordinated model of professional discipline? What, if anything, needs to be done about practising mediators who do not belong to any of the recognised accreditation bodies? Does legal regulation have a role to play in ensuring the universality of accreditation and disciplinary processes?

These are questions the mediation community must ask itself as part of its process of growth, maturity and professionalisation. Discussions of this sort are far from new,[9] but it is timely to revisit the issue. My aim in this article is to offer a new framework for thinking about the options open to the mediation community as it reflects on the meaning of its professional identity. I want to distinguish two different ways of thinking about mediation ethics and professional standards more generally, which I call the 'regulatory' and 'practice' models. I explain the central features of each approach and explore their implications by considering how they might respond to ethical misconduct by practitioners suffering from mental illness. I then consider the appropriateness of the models for mediation in particular. I argue there are good reasons to prefer the practice approach as a model for mediation ethics. This has important implications for how mediators think about their professional identity and respond to the kinds of questions articulated above.

II The Nature of Ethical Judgments

It is useful to begin by taking a step back and reflecting on the nature of ethical judgments. Ethics is a practical discipline: it raises questions about how we should behave. How, then, do ethical standards guide people's actions? It is tempting to think about ethical decision-making as a reflective and deliberate process, where people consider the options available to them, weigh them up and then make a decision. However, the way ethical dilemmas present themselves in practical situations — such as in a mediation process where the practitioner must respond to manipulative or abusive behaviour by one of the parties — shows that decision-makers often lack the opportunity for measured consideration. Rather, they must respond quickly to a dynamic and evolving situation. They must often rely on past experience and their instinctive feelings to determine what is required.[10]

This type of example shows that ethical decisions cannot always be guided by reflective deliberation. They must make use of snap judgments, instincts and intuitions. There is now a substantial body of research in moral psychology confirming this insight. The work of Jonathan Haidt and Daniel Kahneman, in

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[9] Cf Field, 'A Mediation Profession in Australia', above n 1; Field, 'Ethics for a Mediation "Profession"', above n 1. For an overview of developments in other jurisdictions, see Leonardo V P de Oliveira and Carolyn Beckwith, 'Is There a Need to Regulate Mediation? The English and Welsh Case Study' (2016) 42(3) *Commonwealth Law Bulletin* 327.

[10] See generally Jonathan Crowe, 'Ethics and the Mediation Community' (2015) 26(1) *Australasian Dispute Resolution Journal* 20. See also Jonathan Crowe, 'Natural Law and Normative Inclinations' (2015) 28(1) *Ratio Juris* 52; Jonathan Crowe, 'Levinas on Shared Ethical Judgments' (2011) 42(3) *Journal of the British Society for Phenomenology* 233; Jonathan Crowe, 'Pre-Reflective Law' in Maksymilian Del Mar (ed), *New Waves in Philosophy of Law* (Palgrave Macmillan, 2011) 103.

particular, shows the central role of snap judgments in ethical decision-making. This body of research draws on what are known as 'dual process models' of cognition. Dual process models present cognition as involving two distinct types of processes: the first (often called 'System 1') involves fast, intuitive snap judgments, while the second ('System 2') involves controlled, reflective deliberation.[11] A series of experiments conducted by Haidt and his collaborators demonstrates that System 1 processes are central to ethical thought.[12] People typically react to ethical dilemmas by first forming snap judgments about the situation and then rationalising or modifying these judgments through further reflection.

One of Haidt's studies presented subjects with a hypothetical case where adult siblings engage in consensual, mutually enjoyable sex without any harmful consequences.[13] They give full and enthusiastic consent, take adequate birth control precautions and keep their encounter secret from their families. Haidt notes that people's negative moral judgments about incest remain robust when presented with such scenarios. Other cases presented to subjects involved acts such as eating a pet dog killed in an accident and having sex with a dead chicken before cooking and eating it.[14] Haidt and his collaborators observe that people are inclined to morally condemn such acts despite the absence of any obvious harm, concluding that emotions such as disgust strongly shape moral judgments and override more considered analysis.

Some moral philosophers have criticised Haidt's readiness to conclude that the moral judgments observed in these scenarios are not well founded.[15] Haidt seems to assume that because the acts described are not obviously harmful, there is no reason to condemn them. However, it is doubtful whether harm is the only relevant factor in evaluating such cases. Furthermore, even focusing solely on harm-based considerations, there could be good reason to condemn the behaviour in these scenarios on the basis that harm has been irresponsibly risked. Nonetheless, Haidt's studies seem to confirm the central role of snap judgments in people's moral responses. He notes, for example, that cases such as these tend to produce 'moral dumbfounding'.[16] People have clear and robust intuitions about the scenarios, but

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11 See, eg, Jonathan Haidt, 'The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment' (2001) 108(4) *Psychological Review* 814; Jonathan Haidt, '"Dialogue Between My Head and My Heart": Affective Influences on Moral Judgment' (2002) 13(1) *Psychological Inquiry* 54; Jonathan Haidt, 'The New Synthesis in Moral Psychology' (2007) 316(5827) *Science* 998; Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux, 2013); John A Bargh and Tanya L Chartrand, 'The Unbearable Automaticity of Being' (1999) 54(7) *American Psychologist* 462; Shelly Chaiken and Yaacov Trope (ed), *Dual-Process Theories in Social Psychology* (Guilford Press, 1999).

12 Haidt, 'The Emotional Dog and Its Rational Tail', above n 11; Haidt, '"Dialogue Between My Head and My Heart"', above n 11; Haidt, 'The New Synthesis in Moral Psychology', above n 11; Jonathan Haidt, Silvia Helena Koller and Maria G Dias, 'Affect, Culture, and Morality, or Is It Wrong to Eat Your Dog?' (1993) 65(4) *Journal of Personality and Social Psychology* 613.

13 Haidt, 'The Emotional Dog and Its Rational Tail', above n 11, 814.

14 Haidt, Koller and Dias, above n 12.

15 For discussion, see Peter Railton, 'The Affective Dog and Its Rational Tale: Intuition and Attunement' (2014) 124(4) *Ethics* 813, 847–51.

16 Haidt, 'The Emotional Dog and Its Rational Tail', above n 11, 814, 817.

when questioned they prove unable to explain them. They are often unwilling to revisit their views when presented with counterarguments.[17]

The resulting picture of ethical reasoning differs considerably from the traditional idea of a reflective, considered process. People do not usually respond to an ethical dilemma in a dispassionate way by weighing up the different options. Rather, they use System 1 thinking to form a snap judgment about the situation at hand. These snap judgments are not arbitrary, but are generally based on rough rules of thumb or heuristics that enable us to deal with complex situations in a cognitively efficient way. The soundness of the judgments will then depend on the reliability of the heuristics involved.[18] We may then, in some circumstances, use System 2 thinking to reflect upon our snap judgments, but we nonetheless start with a preconceived sense of the outcome. Our initial snap judgment may be reconsidered and replaced upon reflection, but it may also be entrenched through post hoc rationalisations.[19] Snap judgments, then, play a critical role in ethical decision-making. We overlook them at our peril when reflecting upon the role of ethics in professional life.

How, then, does the picture presented above bear on mediation? I noted previously that mediators will often have to respond dynamically to ethical issues emerging in the dispute resolution process. Party preparation and the provision of ground rules can, of course, help provide a predictable structure for mediation. However, they cannot ensure that the process unfolds in a particular way. New information and power dynamics may come to light that the mediator did not and could not have anticipated. The mediator's response to such challenges will invariably make use of System 1 thinking.[20] This does not mean the response is arbitrary: it will be shaped by the mediator's professional experiences, as well as by her or his training and knowledge of the relevant professional codes. Nonetheless, the response will be guided more by intuitive responses than by considered reflection. Even where there is an opportunity, at the time of decision or later on, to reflect upon the best response, this process may end up rationalising the mediator's initial snap judgments, rather than genuinely reconsidering the issue.

None of this means that professional codes of conduct are unimportant in setting the parameters of ethical practice. However, it does mean that such codes are rarely, if ever, the most important factor in determining whether a mediator responds appropriately to a given scenario.[21] The most important inputs guiding mediation ethics are the heuristics the mediator uses to shape her or his intuitive judgments. These heuristics are a product of the mediator's past experiences, as well as the priorities, values and guidelines she has absorbed as part of a community of practice.[22] Codes of conduct may shape these heuristics, as well as playing a role in the mediator's reflection upon her or his snap judgments. However, they will not

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17 Ibid 817.

18 Cf Cass R Sunstein, 'Moral Heuristics' (2005) 28(4) *Behavioral and Brain Sciences* 531.

19 Haidt, 'The Emotional Dog and Its Rational Tail', above n 11, 822–3.

20 Cf Crowe, 'Ethics and the Mediation Community', above n 10.

21 Cf Crowe, 'Pre-Reflective Law', above n 10.

22 For further discussion, see Crowe, 'Ethics and the Mediation Community', above n 10. See also Crowe, 'Natural Law and Normative Inclinations', above n 10; Crowe, 'Levinas on Shared Ethical Judgments', above n 10.

be the only factor involved in judgment formation and may or may not be a particularly important one. Any adequate account of what it means for mediators to formulate and enforce a set of shared professional standards needs to take this context into account.

III The Regulatory Model

We are now in a position to introduce and analyse the two models of mediation ethics mentioned at the start of this article. I will begin with the more familiar way of thinking about professional ethics, which I call the regulatory model. The regulatory model assumes that a professional community at a particular stage in its development will identify the need for shared standards of conduct. It will, therefore, draw on the wisdom of experienced members of the community to identify appropriate rules. These rules will be drafted and endorsed by the leaders of the community and, perhaps, by the community as a whole. They will then be promulgated as a code of conduct binding upon all. The professional standards contained in the code will be taught as part of a standardised accreditation process, often linked to licensing and enforced by legal regulations. Formal complaints about breaches will be adjudicated by a body of practitioners with the power to impose professional sanctions, such as suspension or withdrawal of accreditation.

This model is familiar from its adoption by the legal profession in Australia and elsewhere.[23] The legal profession in England has traditionally been self-regulating. This self-regulation took shape at the Bar through the tight knit and rigidly hierarchical communities of the Inns of Court. Professional associations for solicitors then emerged during the 18th century as a way of emulating the influence of the Inns of Court and standardising ethical guidelines. Powers of admission and regulation in Australia were initially exercised by the supreme courts of the various states, but the bulk of these functions were transferred to the law societies by the mid-20th century. This model was seen as more in keeping with the ideal of a profession as a self-regulating community. The idea of self-regulation, however, often translates in practice to a preeminent role for professional associations. These associations, like any institution with social standing and power, have their own internal politics, giving rise to groups with a stake in maintaining existing hierarchies and entrenching the control of associations over their members.

The regulatory model can be seen in sociological terms as a natural outgrowth of the social influence of professions and, in particular, their more established members. Professions have historically asserted a monopoly over certain kinds of specialised knowledge and expertise.[24] This tends to give rise to institutions that serve as gatekeepers of this knowledge and, by extension, admission to the profession itself. Professional schools, associations and licensing systems can all be seen in this light. These structural features of professions go beyond ethics to knowledge and expertise more generally, but ethics is far from immune. It therefore makes sense that professions tend to give rise to recognised bodies with the role of

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[23] See generally Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2nd ed, 2014) ch 3.

[24] Cf Hodson and Sullivan, above n 3, 266–8.

formulating and enforcing ethical standards. These bodies then also play a gatekeeping role in their ability to suspend or exclude people from the professional community. The resulting ethical standards may also play a broader role in accreditation and licensing. Regulatory legal ethics, for example, occupies a significant place in legal education and legal practice admissions processes.

The regulatory nature of professional legal ethics has been recognised and critiqued (using different terminology) by authors such as David Luban, William Simon and Christine Parker for the emphasis it places on professional autonomy over relational ethics and duties of care.[25] A hierarchical model of self-regulation risks emphasising rigid rules of conduct, rather than recognising the ethical complexities of legal practice. It also risks privileging the perspective of the legal profession — or, more precisely, its most established and privileged members — over the needs of clients and other affected parties. The dangers of self-regulation for vulnerable stakeholders are increasingly well recognised by both scholars and policymakers. Indeed, criticisms of the effectiveness of the state law societies in addressing ethical problems in the profession have resulted in recent years in significant regulatory powers being transferred to independent legal services commissioners. This development, however, does not affect the prevalence of the regulatory model. Indeed, it further entrenches and centralises the model by transferring powers from professional bodies to statutory government regulators.

I suggested previously that ethical judgments rely heavily on snap assessments using System 1 thinking. The regulatory model can be seen as attempting to capture the content of these judgments through ethical rules and principles that are promulgated and enforced by professional bodies. The resulting codes of conduct can then be seen as attempts to both shape and regulate the intuitive ethical judgments of members of the profession. The rules and principles set out in the codes may be internalised by practitioners and help guide their snap decisions. The ethical judgments of practitioners may also be moderated, revised or rationalised through a reflective thought process that makes reference to formal rules and guidelines. It is unlikely that codes of ethics will fully determine the decisions of practitioners in actual scenarios. They can, however, play a key role in shaping these decisions and the ethical discourse of the professional community.

I want to suggest that the regulatory model tends to constrain the scope of ethical discourse within a profession in at least three important ways. First, it tends to yield a focus on hierarchical relationships between members of the professional community, rather than their duties of care to outsiders or each other. The regulatory model emphasises ethical codes of conduct that are formulated by expert bodies and enforced by professional organisations or regulators. This approach inevitably gives the sense that the ethical responsibility of practitioners consists in being accountable to these bodies. Ethical duties, although owed in theory to clients and other professionals, are more responsive in practice to the priorities and interpretations of the professional organisations that maintain them and the disciplinary bodies who

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[25] David Luban, *Lawyers and Justice: An Ethical Study* (Princeton University Press, 1988); William H Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Harvard University Press, 2000); Christine Parker, 'Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness' (2002) 25(3) *University of New South Wales Law Journal* 676.

interpret and impose them. This results in what we might call a 'hierarchical' conception of ethical discourse.

A second feature of the regulatory model is that it tends to emphasise compliance with the specific rules and guidelines expressed in codes of conduct, rather than the broader principles or virtues of ethical practice. This yields what might be called a 'formalistic' way of thinking about professional conduct, whereby the formal rules are seen as defining or exhausting the ethical domain. Professional ethics, on the regulatory model, tends to become juridified: the focus falls on determinate rules that can be applied and enforced by regulatory bodies. Ethical codes of conduct give rise to their own specialised fields of jurisprudence, attracting specialised advisors, advocates and scholarly authorities. The resulting ethical discourse tends to place significant focus on what is necessary to comply with the rules and escape sanction. Broader ethical issues that do not fit neatly into this framework risk being conceptualised as falling outside the ethical domain.

Finally, the emphasis the regulatory model places on centralised enforcement and sanctions gives the sense that ethics is primarily the responsibility of regulators, rather than the professional community as a whole. This suggests a *coercive* conception of professional accountability where practitioners obey ethical rules mainly due to the threat of sanctions, rather than seeing ethics as a shared and ongoing responsibility for which each practitioner is accountable to the other members of her or his profession. This feature of regulatory ethics risks giving rise to a kind of tragedy of the commons, where areas of ethical life not subject to centralised enforcement are viewed as nobody's specific responsibility and are, therefore, neglected or ignored. In this way, the coercive dimension of regulatory ethics risks undermining the voluntary dimension of ethical compliance on which the health of the associated normative standards substantially depends.

IV The Practice Model

I now want to introduce an alternative way of thinking about professional ethics, which I call the 'practice model'. The practice model begins with the insight that snap judgments in response to concrete scenarios lie at the heart of ethical discourse. Ethics, as we have seen, is primarily driven by System 1 thinking, with System 2 processes serving to refine or reinforce these intuitive responses. Ethical standards, on this view, do not arise when they are formulated and announced by a body of experts. Rather, they emerge and evolve over time as members of a professional community respond to ethical scenarios. The decisions made in particular circumstances by members of the community are repeated and internalised when the same situations recur over time. These judgments are then shared and reinforced through communication with other members, who may have had similar experiences. As a result, certain kinds of responses come to be widely shared within the group. The members of the group may then reflect upon these responses, expressing them as principles that are adopted as guides for future conduct.

We can add further depth to our understanding of the practice model by drawing on the work of the moral and political philosopher, Alasdair MacIntyre. Two of the central concepts in MacIntyre's moral and political theory are those of

a 'practice' and a 'tradition'. He uses these two ideas to explain the purposive character of human action. All human action is directed towards certain goals and objectives deemed to be worth pursuing, but where do these goals and objectives come from? MacIntyre argues that this question cannot be adequately answered without paying attention to what it means to be part of a moral community. The goals and objectives we use to orient our conduct gain meaning from their role in wider social practices and traditions. MacIntyre explains his concept of a practice as follows:

> By a 'practice' I am going to mean any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended.[26]

Practices, then, are social institutions that contain their own internal standards of excellence. These standards of excellence give rise to goods or values that members of the community aim to achieve when participating in the practice. Practices and goods, in turn, arise in the context of what MacIntyre calls a 'living tradition', which represents 'an historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition'.[27] Traditions, then, are always in a state of movement; it follows that practices and goods will evolve over time in response to changes in the wider tradition of which they form part. Conversely, traditions and practices may wither and die over time if the relevant forms of good cease to be recognised and pursued by the community.[28] There is, in this sense, an ongoing dialogue within any moral community about the goods that its members are trying to achieve. The form this dialogue takes is likely to have important implications for the future direction of the tradition.

MacIntyre is far from the only philosopher to point out the importance of social context for purposive and meaningful human action. Charles Taylor, for example, makes a related point in his critique of what he calls *atomistic* varieties of political liberalism.[29] The idea of a right to individual liberty, Taylor argues, makes no sense without a backdrop of social judgments that enable us to identify meaningful forms of human action by reference to their role in broader practices and traditions. '[F]reedom is important to us', he claims, 'because we are purposive beings'; we therefore make 'distinctions in the significance of different kinds of freedom based on the distinction in the significance of different purposes'.[30] Simone Weil likewise identifies rootedness in a normative social context as a fundamental precondition for human flourishing. She describes this basic human need as follows:

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26 Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (University of Notre Dame Press, 3rd ed, 2007) 187.

27 Ibid 222.

28 Ibid 222–3.

29 Charles Taylor, 'What's Wrong with Negative Liberty' in Alan Ryan (ed), *The Idea of Freedom: Essays in Honour of Isaiah Berlin* (Oxford University Press, 1979) 175.

30 Ibid 183.

> A human being has roots by virtue of [her or his] real, active and natural participation in the life of a community which preserves in living shape certain particular treasures of the past and certain particular expectations of the future. This participation is a natural one, in the sense that it is automatically brought about by place, conditions of birth, profession and social surroundings. Every human being needs to have multiple roots. It is necessary for [every human being] to draw wellnigh the whole of [her or his] moral, intellectual and spiritual life by way of the environment of which [she or he] forms a natural part.[31]

I want to suggest that there is value in thinking about professional ethics in general — and mediation ethics, in particular — as a MacIntyrean practice. A professional community is engaged in an ongoing discussion about the goods that members of the community are seeking to pursue in their work.[32] This conversation is, as MacIntyre puts it, 'historically extended [and] socially embodied'.[33] It is historically extended in the sense that the terms of the discussion change over time as the social role of the profession changes. It is socially embodied in the sense that the discussion is not merely an abstract conversation, but is embedded in and responsive to the active pursuit or neglect of the goods that constitute the tradition. The role of snap judgments in ethical decision-making can help us understand what MacIntyre means here. Professionals respond to ethical situations intuitively, then reflect on their responses and discuss them with colleagues. This process shapes professional discourse about ethical norms, which in turn helps shape the judgments made in future cases. There is a kind of feedback loop between the ethical judgments and the tradition that shapes them.

What makes the practice model a useful way of thinking about professional ethics? It is useful to return here to the ways in which the regulatory model influences the shape of ethical discourse. I suggested before that a regulatory approach tends to make ethical discussions hierarchical, formalistic and coercive. The practice model, by contrast, places much less emphasis on the role of centralised professional and regulatory bodies. Instead, it emphasises the decisions professionals make in response to practical scenarios. The majority of these scenarios are likely to involve interactions with clients and other stakeholders from outside the professional community. (This is particularly the case with mediation, as we will see shortly.) These interactions then form the basis for the ethical discussions that occur among professionals, but the nature of the interactions helps ensure that those debates are not overtly hierarchical. Rather, the practice model tends to yield a conception of ethical discourse as inherently *relational*.

The practice model, unlike the regulatory model, does not give formal codes of conduct a privileged role. Rather, as we have seen, the practice model regards ethical discourse as shaped by the snap judgments of practitioners, along with the reflection and discussion that follows those judgments. The values that practitioners identify in their practice through these discussions may well come over time to be

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31 Simone Weil, *The Need for Roots: Prelude to a Declaration of Duties Towards Mankind* (Arthur Wills trans, Routledge, 2002) 40 [trans of: *L'Enracinement: prélude à une déclaration des devoirs envers l'être humain* (first published 1949)].

32 Cf Lynn Mather, Craig A McEwen and Richard J Maiman, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (Oxford University Press, 2001) ch 4.

33 MacIntyre, above n 26, 222.

expressed in codes and guidelines. However, the content of those codes and guidelines always remains subsidiary to the underlying discourse. The discourse, as we have seen, is historically extended and changes over time. The resulting picture of ethics is therefore not formalistic, but *dynamic*. This feature has the advantage of rendering the practice responsive to professional challenges and wider social developments. A practice or tradition that remains static and refuses to change is, as MacIntyre observes,[34] likely to wither or die as a living institution, whether or not it continues to be expressed in formal documents or imposed by regulators.

The centralised nature of the regulatory model yields a focus on coercive mechanisms of enforcing the associated ethical standards. The practice model, by contrast, disperses both power and responsibility among members of the professional community. It does not view regulatory bodies as having the primary responsibility for ensuring the health of the ethical rules. Rather, the ongoing health of the practices that make up professional ethics depends upon the attitudes of practitioners and, in particular, their willingness to engage reflectively with their snap judgments and participate in discourse with other community members. The regulatory model yields a picture of enforcement focusing on professional sanctions, such as suspension or revocation of licenses. The practice model, by contrast, view enforcement in terms of the pressure exerted among members of the community by their mutual participation in a shared moral tradition. The model is therefore not coercive, but *normative* in its understanding of compliance.

V The Case of Mental Illness

I suggested previously that the regulatory model tends to yield a hierarchical, formalistic and coercive conception of professional ethics. I now want to dwell for a moment on how these three aspects of the regulatory model can narrow the scope of professional discourse on ethical issues and contrast this narrowing effect with the implications of the practice model. There has been a spate of professional ethics hearings around Australia in recent years involving lawyers suffering from mental illness who were accused of ethical breaches, such as misuse of client funds.[35] The Legal Services Commissioner of Queensland has estimated that around 30% of all lawyers' professional discipline cases fall into this category.[36] The prevalence of

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[34] Ibid 222–3.

[35] See, eg, *Legal Services Commissioner v Lynch (Legal Practice)* [2015] VCAT 772 (28 April 2015); *Legal Services Commissioner v Owens (Legal Practice)* [2010] VCAT 1686 (14 October 2010); *Legal Services Commissioner v Morgan (Legal Practice)* [2010] VCAT 1543 (12 August 2010); *R v Grant* [2006] VSC 235 (4 July 2006); *Legal Practitioners Conduct Board v Ardalich* (2005) 243 LSJS 145; *Council of the Law Society of New South Wales v Bharati* [2010] NSWADT 159 (25 June 2010); *Council of the Law Society of New South Wales v Wall* [2010] NSWADT 176 (8 July 2010); *Council of the New South Wales Bar Association v Butland* [2009] NSWADT 177 (15 June 2009); *BRJ v Council of the New South Wales Bar Association* [2016] NSWSC 146 (29 February 2016); *Legal Profession Complaints Committee v A Practitioner* [2010] WASC 13 (21 December 2009); *Legal Profession Complaints Committee v Leask* (2010) 74 SR (WA) 11; *Legal Services Commissioner v Watts* [2016] QCAT 4 (8 January 2016); *Legal Services Commissioner v XBY* [2016] QCAT 102 (14 June 2016); *Legal Services Commissioner v Wilson* [2013] QCAT 307 (18 June 2013).

[36] John Briton, 'Lawyers, Emotional Distress and Regulation' (Paper Presented at the Bar Association of Queensland Annual Conference, Gold Coast, Australia, March 2009) 1 <http://www.lsc.qld.gov.au/__data/assets/pdf_file/0006/106197/lawyers-emotional-distress-and-regulation.pdf>.

such cases is not surprising, given that the legal profession is arguably in the throes of a mental health crisis.[37] It is worth asking how well the regulatory model of professional legal ethics has handled the challenges posed by these scenarios.

Gino Dal Pont summarises the traditional view on this issue when he states that stress or mental illness will rarely provide a defence to disciplinary proceedings against a legal practitioner for breaches of ethical standards.[38] The purpose of disciplinary proceedings, he notes, has traditionally been viewed as protecting the public against unethical conduct by lawyers, rather than punishing the perpetrator. The psychological wellbeing of the wrongdoer is, in this sense, irrelevant, since the public needs protection from the mentally ill just as much as the healthy if they are likely to commit ethical breaches. Evidence of mental illness therefore generally carries 'little or no weight' before disciplinary bodies.[39] Indeed, from this perspective, disciplinary bodies may be justified in treating mentally ill practitioners more harshly than their healthy counterparts if their mental illness makes them more likely to reoffend. Suspension, rather than striking off, may sometimes be considered, but 'uncertainty in predicting a person's future mental state' can often cause difficulties in setting a determinate timeframe for return to practice.[40]

This approach is borne out by recent disciplinary decisions in a number of Australian jurisdictions. Emphasis is placed in these rulings on protection of the public and the value of general deterrence, rather than the duties the professional community may owe to its mentally ill members. The Western Australian case of *Legal Profession Complaints Committee v A Practitioner* concerned a practitioner who forged medical reports and submitted them to the Legal Practice Board.[41] She was subsequently diagnosed with bipolar disorder and borderline personality disorder. The Supreme Court of Western Australia took the view that the aim of professional discipline is 'the protection of the public and the maintenance of proper standards in the legal profession',[42] so evidence of mental illness will not prevent a practitioner being struck off. Indeed, it may support deregistration if the mental illness means the practitioner will continue to prove a risk to the public.[43] This approach was followed in *Legal Profession Complaints Committee v Leask*, where it was noted that the sanctions needed to protect the public may sometimes be more severe than those warranted as punishment.[44]

Reference is also sometimes made in this context to the role of general deterrence as a factor that applies regardless of the individual practitioner's propensity to reoffend. The Queensland case of *Legal Services Commissioner v Wilson*, for example, involved a 67-year-old solicitor with a 40-year unblemished

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37 Cf Norm Kelk et al, *Courting the Blues: Attitudes towards Depression in Australian Law Students and Legal Practitioners* (Brain and Mind Research Institute, 2009). See also the contributions in Rachael Field, James Duffy and Colin James (eds), *Promoting Law Student and Lawyer Well-Being in Australia and Beyond* (Routledge, 2016).

38 G E Dal Pont, *Lawyers' Professional Responsibility* (Lawbook, 5th ed, 2013) 762–4 [23.145].

39 Ibid 762 [23.145].

40 Ibid 763 [23.145].

41 [2010] WASC 13 (1 February 2010).

42 Ibid [25].

43 Ibid [27].

44 (2010) 74 SR (WA) 11, 23 [53].

record of legal practice.[45] His partnership dissolved and he encountered financial difficulties. He then 'accidentally shot himself and sustained severe and extensive facial damage involving a complex and unpleasant convalescence'.[46] His marriage broke down and he was diagnosed with 'a continuing, at times severe, depressive condition'.[47] The complaint concerned his misappropriation of $3,354.50 in clients' funds. The Tribunal held that while 'this is not a case in which a substantial fine is necessary to ensure adequate, personal deterrence … any penalty must also reflect the seriousness of the offending and, also, matters of general deterrence'.[48] He was fined and reprimanded, with significant conditions imposed for readmission to practice.

The traditional approach to disciplinary breaches by mentally ill attorneys in the United States context (which generally mirrors that discussed above) has recently been criticised by Kirsty Bernard and Matthew Gibson, who argue that penalties for such practitioners should focus on treatment, rather than punishment or deterrence.[49] Bernard and Gibson contend that '[w]hen an attorney's mental impairment is treatable and unlikely to recur, the public in general and the attorney's clients in particular are better served by helping the attorney, with strict oversight, to overcome or otherwise deal with mental impairment'.[50] A partial adoption of this kind of approach in the Australian context can be seen in *Council of the Law Society of New South Wales v Bharati*, where the Tribunal elected to reprimand the practitioner and place conditions on his practising certificate, but declined to strike him off the roll, due in part to his depressive illness.[51] A similar approach was applied in *Council of the Law Society of New South Wales v Wall*.[52]

The approach in these cases is more compassionate towards practitioners suffering from mental illness than the traditional model's focus on public protection and deterrence. However, the surrounding discourse is still clearly framed in terms of the regulatory model of professional ethics. The ethical dimension of the issue is presented in terms of the practitioner justifying herself before a tribunal by reference to a formal code of conduct and rebutting a presumption that she should be deregistered. The primary focus is placed on the practitioner's formal duties to the court, the profession and the public at large. This formal process then results in the imposition of sanctions, although their severity may depend on the tribunal's approach to the practitioner's mental health. The decision to consider the practitioner's mental illness is still framed mainly in terms of protecting the public, taking account, in particular, of the practitioner's propensity to reoffend.[53]

The approach described above offers one way of thinking about mental illness in a professional context: namely, in terms of how it affects the practitioner's

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45 [2013] QCAT 307 (18 June 2013).
46 Ibid [5].
47 Ibid.
48 Ibid [25].
49 Kirsty N Bernard and Matthew L Gibson, 'Professional Misconduct by Mentally Impaired Attorneys: Is There a Better Way to Treat an Old Problem?' (2004) 17(4) *Georgetown Journal of Legal Ethics* 619.
50 Ibid 627–8.
51 [2010] NSWADT 159 (25 June 2010).
52 [2010] NSWADT 176 (8 July 2010).
53 See, eg, *Council of the Law Society of New South Wales v Bharati* [2010] NSWADT 159 (25 June 2010) [148]–[165].

ability to comply with formal rules of conduct and fulfil her or his duties to various stakeholders. However, the issue of work-related mental illness has a further important ethical dimension: namely, the duties lawyers owe to each other to ensure healthy and sustainable working conditions and offer support to mentally ill colleagues. The almost complete absence of this dimension from the formal ethics hearings in the cases discussed above can be attributed to the three central features of the regulatory model. First, recognising unsustainable or unhealthy work practices as an issue for legal ethics arguably does not serve the interests of the powerful members of the legal community who play a central role in maintaining and enforcing ethical codes. It also does not involve formal duties to the court, the public or the profession as a whole, so much as a general duty of care to other practitioners. It therefore sits uneasily with the hierarchical aspect of the regulatory model.

Second, there is no mention of a duty to care for mentally ill colleagues in the relevant codes of conduct. The formalistic focus of the regulatory model therefore tends to ensure such issues are understood as either lying beyond or, at best, peripheral to the scope of legal ethics as a whole. The discussion around these issues is not juridical and rule-oriented, but rather based on appeals to underlying values. This makes it seem external to professional ethics as conceived by the regulatory model. Third, a duty to care for mentally ill colleagues, if it exists, is more readily understood in terms of the responsibilities colleagues owe to each other, than as a duty enforceable by professional bodies and regulators. It, therefore, does not sit neatly with the coercive focus of the regulatory model. Talk of public protection and deterrence, by contrast, fits more comfortably with coercive sanctions. These three features of legal ethics, then, seem to make it poorly suited to deal with at least some kinds of pressing ethical challenges that face the profession. It is worth asking if there is another way to conceptualise these kinds of issues.

How would the practice model deal with mental illness among members of the profession? Its primary focus would lie not on how the matter is treated by regulatory codes, but how practitioners encounter and respond to the issue in their workplace environments. Ethical discourse, on this model, would take the form of an open-ended conversation about the appropriate responses to this challenge within the profession. This discourse would consider matters such as the need to protect the public and preserve the image of the profession, but it would also encompass broader issues about workplace environments and support for mentally ill colleagues. The focus would fall not on formulating rules and imposing sanctions, but on cultivating a shared sense of responsibility among members of the professional community about the values and virtues worth cultivating in our workplaces. This kind of discussion around mental illness is, of course, occurring in the legal profession right now.[54] However, my claim is that the regulatory model of professional ethics tends to hinder, rather than support, this form of discourse.[55] There is, in principle, no

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[54] Bodies such as the Tristan Jepson Memorial Foundation <http://www.tjmf.org.au> and the Wellness Network for Law <http://wellnessforlaw.com> serve as focal points for this discussion. See also the contributions to Field, Duffy and James, above n 37.

[55] Similar issues can be discerned in other well-established and heavily regulated professions, such as medicine. See Beyond Blue, *National Mental Health Survey of Doctors and Medical Students* (Beyond Blue, 2013) <https://www.beyondblue.org.au/docs/default-source/research-project-files/bl1132-report---nmhdmss-full-report_web>.

conflict between formal codes of conduct and genuinely shared ethical values, but serious problems can arise when the former supplants the latter as the focus of ethical life within a community.

VI The Mediation Community

The practice model of professional ethics is relational, dynamic and normative, by contrast with the hierarchical, formalistic and coercive focus of the regulatory model. These features make the practice model an appealing conception of professional ethics — and, indeed, ethics more generally.[56] They offer particular advantages in dealing with ethical issues, such as mental illness among lawyers, which challenge existing power structures, have a strong relational component and where shared responsibility is more appropriate than sanctions. However, I also think the practice model is particularly well suited to mediation ethics, due to the nature of mediation and its relationship to other forms of dispute resolution. I therefore want to conclude by elaborating on the merits of the practice model in the mediation context and drawing some lessons for how we view the mediation community.

There are, I think, three key features of mediation that make it particularly hospitable to the practice model. First, mediation is an inherently relational process. The regulatory model of legal ethics mirrors, to some extent, the traditional focus of legal practice on litigation — a hierarchical, formalistic and coercive form of dispute resolution. Mediation, by contrast, has often been presented as offering a more relational alternative to the adversarial norms of the courtroom process.[57] Mediation takes many diverse forms, but at its core lies the simple idea of parties sitting down together and discussing their interests in a structured format. Shuttle mediation and private conferences may depart from this model to some extent, but they still involve structured communication between the party and the mediator. Mediation, in this sense, places a heavy emphasis on what the French philosopher Emmanuel Levinas calls the face-to-face encounter with the other.[58] This makes it particularly well suited to generate meaningful ethical discourse about the responsibilities mediators and parties owe each other in the process.

Second, mediation has long been regarded as a relatively unstructured form of dispute resolution — certainly by contrast to litigation and the courtroom environment. It is unstructured both in the sense of being relatively informal in its procedures and in the sense of not being governed by substantive rules for resolving the dispute at hand. Mediation, of course, is not entirely unstructured: mediators

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[56] Cf Crowe, 'Natural Law and Normative Inclinations', above n 10; Crowe, 'Levinas on Shared Ethical Judgments', above n 10.

[57] See, eg, Robert A Baruch Bush and Joseph P Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (Jossey-Bass, 2005).

[58] Emmanuel Levinas, *Totality and Infinity: An Essay on Exteriority* (Alphonso Lingis trans, Martinus Nijhoff Publishers, 1979) 202 [trans of: *Totalité et Infini: essai sur l'extériorité* (first published 1961)]. For discussion, see Jonathan Crowe, 'Levinasian Ethics and Legal Obligation' (2006) 19(4) *Ratio Juris* 421; Jonathan Crowe, 'Levinasian Ethics and the Concept of Law' in Desmond Manderson (ed), *Essays on Levinas and Law: A Mosaic* (Palgrave Macmillan, 2009) 39; Crowe, 'Levinas on Shared Ethical Judgments', above n 10.

guide the parties through a scaffolded decision-making procedure, often setting out ground rules that constrain the process, and disputes may implicitly take place in the shadow of the law.[59] Nonetheless, this feature of mediation renders it a more dynamic environment than many other forms of dispute resolution. Mediators are innovators: the nature of the process enables them to try new things and evolve their practices over time. This flexibility extends to ethics as well as other aspects of the process. Mediation, then, is well suited to a dynamic conception of professional ethics that views it as a historically extended discourse.

A third feature of mediation that lends itself to the practice model is its interest-based focus. It is commonly accepted that whereas litigation focuses on legal rights and duties, mediation focuses on the interests of the parties.[60] This enables mediation to retain its flexibility and forge a workable outcome in each individual dispute. The interests-based focus of mediation also makes it hospitable to a model of professional ethics that views ethics as a set of shared responsibilities, rather than a set of formal rules imposed from above. Ethics, understood in this way, can be responsive to the needs and interests of all those affected by mediation, including both mediators and parties. It need not be constrained by the feasibility or desirability of formal attributions of blame. Mediators are well used to responding to the idiosyncrasies of the parties and their disputes without relying on formal rules to balance competing interests. This makes the mediation community well suited, in principle, to take shared responsibility for ethical norms.

I want to conclude, then, with some remarks about the nature of the mediation community. Mediation, as we have seen, is increasingly viewed as a distinctive profession. This brings certain expectations by the community at large. The impact of these changing expectations can be seen in recent discussions among mediation practitioners and scholars in Australia. Mediation scholars, for example, have been prompted to scrutinise and evaluate the traditional view of neutrality as central to mediation ethics.[61] They have reflected on the evolving ethical standards of the mediation community and the appropriateness of lawyers' ethical codes for mediation contexts.[62] The MSB and other peak bodies have led efforts by Australian

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59 Robert H Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88(5) *Yale Law Journal* 950. Cf Becky Batagol and Thea Brown, *Bargaining in the Shadow of the Law: The Case of Family Mediation* (Federation Press, 2011); Rachael Field and Jonathan Crowe, 'The Construction of Rationality in Australian Family Dispute Resolution: A Feminist Analysis' (2007) 27(1) *Australian Feminist Law Journal* 97.

60 See, eg, Boulle, above n 1, 28–9 [2.21]; Nancy A Welsh, 'The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?' (2001) 6 *Harvard Negotiation Law Review* 1, 3–4.

61 See, eg, Hilary Astor, 'Mediator Neutrality: Making Sense of Theory and Practice' (2007) 16(2) *Social and Legal Studies* 221; Hilary Astor, 'Rethinking Neutrality: A Theory to Inform Practice — Part I' (2000) 11(2) *Australasian Dispute Resolution Journal* 73; Hilary Astor, 'Rethinking Neutrality: A Theory to Inform Practice — Part II' (2000) 11(3) *Australasian Dispute Resolution Journal* 145; Field and Crowe, above n 59.

62 See, eg, Bobette Wolski, 'Mediator Standards of Conduct: A Commentary to the Revised National Mediator Accreditation System Practice Standards' (2016) 5(2) *Journal of Civil Litigation and Practice* 109; Bobette Wolski, 'An Evaluation of the Rules of Conduct Governing Legal Representatives in Mediation: Challenges for Rule Drafters and a Response to Jim Mason' (2013) 16(1) *Legal Ethics* 182.

mediators to reflect on their ethical responsibilities.[63] Indeed, it could be said that the NMAS, which was adopted after several years of consultation with mediators and has recently been revised in response to further consultation and feedback, more closely mirrors a practice than a regulatory model.[64]

There is no inconsistency between the practice model and communal efforts to formulate ethical standards as an aid to debate and reflection. A regulatory model of professional ethics must be grounded in some form of practice if there is to be any connection between the formal regulations and actual norms of conduct. Similarly, most (if not all) manifestations of the practice model will involve at least some regulatory aspects, since shared ethical standards will tend to be codified at some stage in their evolution. The two models of professional ethics presented in this article are, in this sense, best understood in terms of a continuum, rather than a rigid dichotomy. The danger for mediation, then, is not that codes of conduct might be employed to bring clarity and focus to discussions of professional standards, but that these codes may supplant communal discourse and move the profession too far towards the regulatory end of the spectrum.

Laurence Boulle argues that mediation discourse in Australia has now moved through four stages of development.[65] The first stage was characterised by optimism and enthusiasm, along with idealised and overblown claims for the potential of mediation to improve society. The second stage brought a reaction against these inflated claims in the form of sceptical and sometimes hostile critiques. The third stage involved a more balanced and mature awareness of the strengths and weaknesses of mediation, along with increased institutionalisation. This trend towards institutionalisation has accelerated in the fourth stage, particularly with respect to the integration of mediation into the court system. It is tempting to see these developments as signalling an inevitable trend towards institutionalisation and regulation. However, it would be a shame if the mediation community lost sight of the ideals and values that generated such enthusiasm in its early stages.

The model of mediation presented earlier in this section might strike some readers as somewhat idealised. The relational, unstructured and interests-based features of mediation have all been widely discussed by scholars, but it is questionable whether these attributes are always found in mediation practice. The idea of the mediation profession as a reflective community might also seem aspirational, given that market forces often encourage mediators to compete for clients, rather than collaborate to improve their practice. These kinds of responses raise a deeper question about whether professional ethics should be understood primarily in pragmatic or aspirational terms. Ethics, after all, is a normative discipline: it concerns how we ought to behave. Professional ethics must remain sufficiently pragmatic to have actual purchase on practitioners as a practical guide

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63 This discussion resulted in a revised set of *National Mediator Accreditation Standards* being released in 2015, replacing the original version from 2008. For an overview and critical discussion, see Wolski, 'Mediator Standards of Conduct', above n 62.

64 Mediator Standards Board, *National Mediator Accreditation System: A History of the Development of the Standards* Mediator Standards Board <https://www.msb.org.au/sites/default/files/documents/A%20History%20of%20the%20Development%20of%20the%20Standards.pdf>.

65 Boulle, above n 1, 349–51 [10.1]–[10.2].

to conduct. At the same time, however, it must be sufficiently aspirational to inspire respect as a normative standard. Furthermore, at least on the practice model, professional ethics has an important forward-looking role: it is how a profession projects its vision of itself as a normative community with its own values and standards of excellence.

It is important for the mediation community — and I include here both practitioners and scholars — to reflect upon its distinctive attributes and avoid complacency about its shared values. If members of the mediation community value their profession's relational, dynamic and interests-based focus (whether this is understood on a descriptive or an aspirational level), they need to be prepared to articulate this vision and avoid undermining it through heavy-handed regulation. The ongoing discussion about the professionalisation of mediation in Australia and elsewhere means that issues such as accreditation, licensing and professional discipline are on the agenda. No doubt centralised professional governance, perhaps along with legal regulation, will be among the options discussed. Centralised governance has potential merits in assisting the formulation of shared standards and facilitating a sense of professional belonging. However, it also has a tendency to produce hierarchies, along with a focus on formal rules of conduct and the imposition of sanctions. It tends to lead, in other words, to a regulatory view of ethics. I have argued that mediators have reason to be troubled by this prospect.

MacIntyre tells us that traditions will wither and die if their goods cease to be actively pursued by members of the moral community.[66] Weil likewise warns against the danger of communities losing their sense of rootedness when their shared values are inadvertently lost or supplanted.[67] One way this might happen is if a focus on centralised regulation leads members of the community to cease viewing ethics as a shared responsibility and see it instead as a regulatory framework imposed from above. Something like this has arguably happened in legal professional ethics — the failure of the legal profession to accept shared responsibility for developing and maintaining ethical norms beyond the formal codes of conduct plausibly plays a significant role in the current crisis over lawyers' psychological wellbeing.[68] Legal ethics, on this view, is withering as a moral tradition, hampering the profession's efforts to respond to ethical challenges on issues such as stress levels and work practices that fall outside the narrow scope of regulatory discourse.

The mediation community, by contrast, is well placed to determine the form of its ethical life. My central claim in this article is that mediation practitioners and scholars should recognise the merits of the practice model and resist the pressures that may come to weaken or abandon it. If mediators want their community to be defined by relationality, dynamism and shared responsibility, rather than by hierarchies and formal rules, they need to be able to articulate that vision and fight for it. They should not simply accede to the widespread assumption that a mature professional ethics equates to a regulatory model. The mediation profession needs to have an ongoing dialogue about the prospects of centralised licensing and regulation, and ask whether that is really what its members want. My point, then, is

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66 MacIntyre, above n 26, 222–3.
67 Weil, above n 31, 44.
68 Cf Briton, above n 36.

not so much to suggest a single correct model of professionalization, as to open up a discussion about the different forms it may take. It is up to the mediation community to determine its shared goals and values — and whether these are best realised through a regulatory or practice-based approach to ethical life.