UNSETTLING THE SELF: RETHINKING SELF-DETERMINATION IN MEDIATION

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INTRODUCTION

Does the uncoerced settlement of a dispute through mediation in which the parties voluntarily choose to participate necessarily represent a normatively desirable advancement of party self-determination? I suggest that it does not. This is not to say that such a settlement would be substantively bad or procedurally unjust; it could be a very good outcome for the parties. But it would not necessarily be consistent with *party self-determination*, one of

the foundational ethical principles of mediation practice.[1] We can only evaluate mediation practices in terms of party self-determination, I argue, by understanding at a granular level how mediator practices affect how the parties freely choose to define their goals and engage with the dispute and with each other. This task goes beyond the usual concerns of measuring the fairness of the process or the substantive goodness of the outcome in terms of pre-defined interests to require instead a close examination of how mediation supports the parties' ethical decision making.

Why should party self-determination be a foundational ethical principle of mediation at all, if settlements can be procedurally fair and substantively beneficial to both parties in the absence of robust self-determination? The mediator's effectiveness *as a mediator*, facilitating a dispute resolution process, requires a robust commitment to the parties' abilities to resolve their conflicts on their own terms.[2] This is why self-determination is generally considered important. If we are truly concerned with the abilities of the parties to resolve their conflicts on their own terms in ways that are good for them, then we ought to be concerned with supporting the parties in taking a reasoned approach to conflict—which requires a *critique* of "self-determination" as the advancement of party autonomy. The goal is to broaden mediation from a process of resolving disputes that otherwise would be litigated to a process of thinking together about conflict—from a process of joint problem-solving to one of joint problem-posing.[3]

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[1] AM. ARB. ASS'N, MODEL STANDARDS OF CONDUCT FOR MEDIATORS 3 (2005), https://www.adr.org/sites/default/files/document_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf [https://perma.cc/F6NJ-3EN2] [hereinafter MODEL STANDARDS].

[2] A mediator can help the parties achieve settlements—even good, fair ones—without committing to their self-determination. But, without the commitment to the parties' decision making, the process may be closer to arbitration. *See, e.g.*, Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 948 (1997).

[3] *Cf.* PAULO FREIRE, PEDAGOGY OF THE OPPRESSED 79–80 (Myra Bergman Ramos trans., 30th Anniversary ed. 2000).

What does self-determination mean in the context of mediation? "Self-determination" is the first entry in the Model Standards of Conduct for Mediators.[4] Debates concerning the appropriate role of mediation within the landscape of dispute resolution often turn on whether institutionalized forms of mediation are coercive and therefore inconsistent with the norm of party self-determination.[5] But, other than avoiding coercion, it is not clear what exactly the ethical obligation of advancing party self-determination requires of mediators.[6] The lack of clear definition means that different schools of mediation can (and do) take different approaches to giving this principle life.[7]

The principle of self-determination in American mediation has largely been understood in terms of protecting individual autonomy from external coercion, whether from the other party or from the mediator—a *negative* definition of self-determination as freedom from constraint.[8] Mediators have given insufficient attention to the *positive* question of *who the self is whose self-determination matters*

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[4] MODEL STANDARDS, *supra* note 1, at 3. The definition states that "Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome." *Id.*

[5] *See, e.g.*, Robert A. Baruch Bush & Joseph P. Folger, *Reclaiming Mediation's Future: Re-Focusing on Party Self-Determination*, 16 CARDOZO J. CONFLICT RESOL. 741 (2014). Court-connected mediation has long posed challenging questions of whether such forms of mediation advance party self-determination. *See, e.g.*, Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001).

[6] As Omer Shapira notes, "there is no agreement with respect to the *extent of the principle's application* . . . , its *meaning* . . . , and the *duties of mediators* stemming from it . . . ." OMER SHAPIRA, A THEORY OF MEDIATORS' ETHICS: FOUNDATIONS, RATIONALE, AND APPLICATION 128 (2016).

[7] Robert A. Baruch Bush, *A Pluralistic Approach to Mediation Ethics: Delivering on Mediation's Different Promises*, 34 OHIO ST. J. ON DISP. RESOL. 459, 477 (2019).

[8] *See* discussion *infra* Part I.B.

in a mediation.[9] On one level, the answer is obvious: self-determination means that the process and outcome are determined by the parties whose dispute is at issue. But that answer is insufficient, because it does not explain how the parties to the dispute become the kinds of subjects[10] who can engage fully with a mediation process; such capabilities are simply assumed.

Some forms of mediation, most notably narrative mediation, explicitly address the question of who the self is whose self-determination matters.[11] But other forms of mediation *implicitly* are concerned with this question of the subject in ways that go unrecognized, because concern with external determinants masks mediators' basic assumptions about the nature of the parties—namely, that the parties in the mediation will act as mostly-rational problem-solvers, if prompted. Through the work of facilitation, mediators invite the parties to shape themselves into problem-solving subjects that can engage with their disputes in rational ways—that is, they act upon the *subjects* of the parties.

The mediator's facilitation applies a particular form of power. When the mediator invites the parties to brainstorm value-creating trades as a way of facilitating a bargaining process, for example, the mediator exercises power in a way that helps the parties become problem-solving negotiators. By recognizing facilitation as an exercise of power directed toward the subjects of mediation parties, mediators can consider alternatives to the familiar models of

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[9] Posing this question subverts the usual understanding of self-determination by questioning the assumption that there is a stable self whose consent legitimates the mediation process. *See* Amy J. Cohen, *The Rise and Fall and Rise Again of Informal Justice and the Death of ADR*, 54 CONN. L. REV. 197, 210 (2022). But this question is consistent with a concern for how mediation practices are implicated in the construction of subjects who can meaningfully engage with disputes in specific ways.

On the exercise of self-determination as involving fundamentally positive, as opposed to negative, ideas of liberty, see Hiro N. Aragaki, *Does Rigorously Enforcing Arbitration Agreements Promote "Autonomy"?*, 91 IND. L.J. 1143, 1150–51 (2016). Aragaki explains that such positive notions of liberty require substantive value commitments—and the imposition of such values risks becoming coercive. *Id.* at 1152–53. That is the basis of transformative mediators' claims that problem-solving mediation undermines self-determination. But transformative mediation does not escape this bind; it also imposes certain value commitments.

[10] *See* JOHN WINSLADE & GERALD MONK, NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION 158 (2000). The question is how the parties become specific types of actors—whether litigants, problem-solvers, or otherwise.

[11] *Id.* at 44–47.

mediation parties as negotiators or as individuals in search of self-actualization. Understanding how mediation constitutes the subjects in a mediation—the selves whose self-determination is supposed to matter—provides a better basis for protecting party welfare than do the autonomy-based understandings of party self-determination that struggle with the idea of mediator power as anything other than repressive.

The article proceeds as follows: Part I explains the problem and its stakes through a novel reading of how self-determination has been understood. The usual model of self-determination in the mediation literature is a "negative" model insofar as it describes the mediator's work of advancing party self-determination as one of eliminating various external determinants and liberating some core individualized self. But the negative model smuggles in positive assumptions about that core self. This is a problem because mediation built upon such assumptions compromises the parties' ethical decision making; the traditional model of self-determination inhibits the parties' abilities to decide freely how to reason about conflict.

Part II explains the mechanisms by which the parties may be able to decide for themselves how to show up to a mediation, and the role of the mediator in assisting the parties with the use of these mechanisms. Mediators *already* utilize these mechanisms, but without necessarily recognizing that they are doing so. Ultimately, the utilization of these mechanisms is narrower than it could be because of the mediators' basic assumptions concerning the nature of the parties in mediation. This narrowness limits the parties' abilities to define themselves.

Part III offers an alternative path that avoids the twin pitfalls of the mediator *leading* the parties or *following* the parties. Instead, the mediator and the parties can co-create the mediation process and decide how they engage with their dispute. The result is to move away from traditional concerns with self-determination in favor of a constructive vision in which the parties retain the freedom to define themselves through critical dialogue.

I. THE PROBLEM: SELF-DETERMINATION REQUIRES MORE THAN VOLUNTARY, INFORMED DECISION-MAKING REGARDING SETTLEMENT

What is the relationship between a mediation *process* built around party self-determination and the *settlement* of a dispute? The mediator brings procedural expertise in facilitating a conversation about resolving disputes, in the service of allowing the parties to do the work of addressing the substance of their disputes.[12] For most mediators concerned with self-determination, the goal of the process is to help the parties reach settlement, whenever possible, provided that the parties retain control over the outcome and the general process. While the parties may be interested in other possible outcomes, the possibility of settlement is almost certainly within the contemplation of the parties in any form of *legal* mediation.[13] The question becomes how the parties engage with this possibility.

A mediation process that prioritizes party self-determination must give the parties control over procedural decisions, even as the mediator has a crucial role in shaping a process where the parties can meaningfully work through their dispute together, each respecting the self-determination of the other (however that is defined).[14] Such a process may result in settlement but need not. Some elements of self-determination are generally agreed upon: parties intending to produce a settlement agreement that can be enforced as a contract must express mutual assent to the

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[12] Omer Shapira, *Exploring the Concept of Power in Mediation: Mediators' Sources of Power and Influence Tactics*, 24 OHIO ST. J. ON DISP. RESOL. 535, 545–48 (2009).

[13] Parties may have other procedural interventions available. A couple experiencing conflict has the option of consulting a therapist, religious counselor, or mediator specializing in family law (among others). The decision to consult a mediator specializing in family law may turn on the parties' interests in seeking legal remedies, even if they are not fully committed to those remedies and may be willing to explore other solutions (and problem definitions), including non-legal ones. *See* Paul Brest & Linda Hamilton Krieger, *Lawyers as Problems Solvers*, 72 TEMP. L. REV. 811, 811 (1999). For an argument that lawyers may be poorly situated to mediate in a facilitative manner, as compared with, e.g., therapists or religious counselors, see Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145, 149 (2001).

[14] *See* MODEL STANDARDS, *supra* note 1, at 3.

agreement;[15] and, as a matter of due process, parties should give informed consent to the use of mediation.[16] But understanding self-determination in such narrowly legal terms avoids the possibilities of using mediation as an aid to reasoning.[17] To answer the question of *what* self-determination should require, we must first resolve *why* self-determination matters at all.

A. Process-oriented measures of mediation success

Party self-determination can matter instrumentally or as an end in itself. From one perspective (generally associated with the facilitative or problem-solving approach to mediation),[18] party self-determination is instrumentally valuable for helping the parties achieve substantively better outcomes: if the parties know what they value, they can craft a settlement agreement through mediation that serves their interests at least as well as (and possibly better than) any outcome dictated by a judge or an arbitrator.[19]

In problem-solving mediations, the mediator may invite the parties to share their goals and interests with each other, so that both parties can engage in the work of crafting mutually agreeable settlement proposals. The mediator may encourage the generation of creative proposals, even if infeasible, to spur parties to clarify the relative weights of their interests and to spur further creative thinking. The mediator's interventions are meant to assist the parties in identifying desirable outcomes because decision making authority rests with the parties.

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[15] *See* RESTATEMENT (SECOND) OF CONTRACTS, § 3 (AM. L. INST. 1979). Contract law principles explain that contracts may be unenforceable if assent is coerced or obtained fraudulently. *See* discussion *infra* Part I.A.

[16] *See* Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775 (1999).

[17] I am concerned here with how the principle of party self-determination benefits the parties. The principle of party self-determination may also have other effects—such as effectively shielding mediators from liability. *See* Michael Moffitt, *Suing Mediators*, 83 B.U. L. REV. 147 (2003).

[18] Author Note: Because I will be analyzing facilitative practices used in various forms of mediation, I will refer to the form of mediation that is often called "facilitative mediation" as "problem-solving mediation."

[19] *See, e.g.*, Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2672–76 (1995).

The idea that party self-determination matters as a way to achieve substantively better outcomes for the parties assumes that the parties can identify their interests, can rationally evaluate various settlement options and alternatives to settlement with respect to those interests, and can communicate clearly with their counterparts and with the mediator about the dispute.[20] Parties may freely reach agreement through their own initiative without being able to perform these tasks, but they will not necessarily reach substantively *good* agreements. From this instrumental perspective, it would be perverse to define self-determination in a way that celebrates the voluntary achievement of substantively *marginal* outcomes.[21]

From another perspective (generally associated with the transformative approach to mediation), party self-determination is valuable as an end in itself for empowering the parties to find their own solution amidst conflicts, social structures, and relationships that tend to *dis*empower them.[22] Transformative mediators may focus on listening to the parties express themselves in their own terms and probing for sources of conflict and for moments of self-understanding. The mediator supports the parties in following their own paths through the conflict.

Understanding self-determination as instrumentally valuable differs from understanding self-determination as valuable as an end in itself. This difference helps explain why these two

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[20] *See generally* Bruce Patton, *Negotiation*, *in* THE HANDBOOK OF DISPUTE RESOLUTION 279 (Michael L. Moffitt & Robert C. Bordone eds., 2005).

[21] While it may be true that "a bad settlement is almost always better than a good trial[,]" *In re* Warner Commc'ns Sec. Litig., 618 F. Supp. 735, 740 (S.D.N.Y. 1985), our sights should be set higher.

[22] *See* Robert A. Baruch Bush & Peter F. Miller, *Hiding in Plain Sight: Mediation, Client-Centered Practice, and the Value of Human Agency*, 35 OHIO ST. J. ON DISP. RESOL. 591, 596 (2020).

approaches to mediation (among others) diverge on how to promote party self-determination.[23]

The outcome of a mediation that prioritizes party self-determination as an ethical principle can only be defined as "successful" by the parties themselves, during the mediation.[24] To define success in terms of specific outcomes determined *ex ante* by the mediator or by a court, such as defining success in terms of reaching settlement, is to subordinate party self-determination to the goals of another.[25]

Mediators have ethical responsibilities and require principles with which to define mediation success, both with respect to outcome and process.[26] From the perspective of self-determination being instrumentally valuable, a successful mediation prioritizing party self-determination should achieve a wise settlement that satisfies the needs of the parties (if such a settlement can be found) and should avoid settlements that do not satisfy the needs of the parties.[27] From the perspective of self-determination being a

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[23] *See* Bush, *supra* note 7, at 477 ("In mediation, the mediator's role is . . . . This sentence cannot be completed easily because in mediation, given the pluralistic nature of practice as described above, the description of the mediator's role is not singular."). Many mediators and scholars recognize the importance of both values. *See, e.g.*, Carrie Menkel-Meadow, *The Many Ways of Meditation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOT. J. 217 (1995). But they can lead in different directions. The question then becomes how to select the right process. One approach is to shift this from a question of *how* to *decide* into a question of *who decides*, making the form of mediation purely a matter of party choice. But that answer still leaves unresolved *how* the parties are to decide. How parties can work with a mediator to determine the goals of their specific process is the question which this Article addresses.

[24] *See, e.g.*, MODEL STANDARDS, *supra* note 1, at 3-4.

[25] This is Bush's basic argument for why problem-solving mediation, oriented toward settlement, compromises party self-determination. *See, e.g.*, Bush & Folger, *supra* note 5, at 744.

[26] The Model Standards of Conduct for Mediators are not, in themselves, binding; but "the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators." MODEL STANDARDS, *supra* note 1, at 3. The problem of defining mediation success or effectiveness purely in terms of the orientation of the mediator is explained in Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985, 991–92 (1997).

[27] *See* Michael Moffitt, *Casting Light on the Black Box of Mediation: Should Mediators Make Their Conduct More Transparent?*, 13 OHIO ST. J. ON DISP. RESOL. 1, 16 (1997).

valuable end in itself, a successful mediation should support the parties in finding their own solution, regardless of its substantive goodness.[28] If we are concerned with both the procedural fairness of the process and the substantive goodness of the outcome, as I think we should be, then our guiding concern should be whether there are non-paternalistic ways of helping parties voluntarily improve their outcomes.[29]

Committing to party self-determination, under either reason for self-determination, means that some mediations will properly result in non-settlement if the parties believe that is the right outcome. If self-determination is instrumentally valuable, a party may have a better alternative to settlement that they should rationally choose instead of settling.[30] Parties who settle on terms that are worse for them than their available alternatives to

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[28] ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT 71 (Rev. ed., 2005).

[29] Lon Fuller argued of the law that "there is no way open to us by which we can compel a man to live the life of reason. We can only seek to exclude from his life the grosser and more obvious manifestations of chance and irrationality." LON L. FULLER, THE MORALITY OF LAW 9 (Rev. ed., 1969). While we cannot compel reasoned behavior, my argument is that mediation can provide opportunities to assist in reasoning.

[30] These substantive reasons to avoid settlement are independent of the quality of the mediation process. If the parties have alternatives away from the mediation that are better than what they can achieve in mediation, or if their goals are incompatible with what mediation offers, then non-settlement is consistent with the mediator's duties. Indeed, if a mediator helps the parties understand that their situations are truly such that no settlement is rational, then that mediator has done an exemplary job.

A mediation that results in non-settlement may still be valuable to the parties, as transformative mediators have long recognized. *See* BUSH & FOLGER, *supra* note 28, at 217. Problem-solving mediators have been less comfortable embracing non-settlement as "successful." *See, e.g.*, Ava J. Abramowitz, *Toward a Definition of Success in Mediation: A Work in Progress*, 24 DISP. RESOL. MAG. 23, 27 (2018) (rating a settlement that falls apart in implementation as more successful than non-settlement with a commitment to continue dialogue). The parties may better understand the nature of the dispute and the concerns of their counterparts, which may lay a foundation for settlement at a later time. The parties may also better understand themselves and come into new relationships with themselves and with their counterparts. Mediations that reasonably result in non-settlement may be valuable to the parties in other ways and can still be considered "successful."

settlement do themselves no favors. Such "irrational" settlements[31] may indicate that parties failed to exercise meaningful self-determination, either because their agency was compromised by some external pressure to settle (from the mediator or otherwise), or because they were acting irrationally due to some cognitive failure (a failure to understand their own interests or to understand the alternatives available to them).[32]

If, instead, self-determination matters as an end in itself, for the parties to be empowered in addressing conflict, *why* the parties decide not to settle may matter less than *how* they do so: freely making the decision as part of a positive change in conflict behavior.[33] Either approach suggests deprioritizing *outcome*-based metrics of success in favor of metrics of success that measure reasoned engagement with the dispute.[34] But neither approach has a good answer for how to encourage the parties to engage with their dispute in freely reasoned ways.

B. The "negative" definition of self-determination

Despite the differences in how mediators understand the purpose and practice of advancing party self-determination, their obligations to advance party self-determination are generally understood in *negative* terms, as the elimination of external limitations of party autonomy, such as one party coercing another, or the mediator pressuring parties into settlement. Self-

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[31] I am not interested in arguing for or against any particular definition of what is or is not "reasonable." My concern lies with conduct that the parties themselves would reject, from a more considered perspective. On the suboptimality of choices made by human actors, see Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1069 (2000).

[32] *See, e.g.*, Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1 (1999) (discussing the psychological principals most relevant to negotiations in civil litigations).

[33] *See, e.g.*, BUSH & FOLGER, *supra* note 28, at 53.

[34] *See* Resolutions: A Podcast About Dispute Resolution & Prevention, *The Essence of Mediation: Previewing the 2022 Mediation Institute*, AM. BAR ASS'N, at 30:01 (Nov. 18, 2022), https://www.americanbar.org/groups/dispute_resolution/resources/resolutions-a-podcast-about-dispute-resolution-and-prevention/the-essence-of-mediation-2022-mediation-institute-preview/ [https://perma.cc/5JPB-J7ME](explaining that settlement is a bad metric of mediation success, and that the parties can benefit from a mediation that does not result in settlement).

determination, in this view, requires clearing away external determinants so that only the "authentic" selves of the parties are left to decide the outcome.[35] I group these external determinants under four broad categories: 1) those that void the creation of enforceable agreements under contract law by vitiating the parties' free expressions of mutual assent; 2) those arising from the domination of the parties by professionals (such as the mediator and the parties' attorneys) who exceed the scope of their proper authority; 3) those arising from structural social inequalities that disadvantage one party relative to another; and 4) those arising from internal cognitive failures that limit rational action. There is broad consensus that settlement agreements should be legally enforceable as contracts,[36] and that the mediator should not determine the outcome of the dispute for the parties.[37] But addressing the social and psychological determinants raises potential conflicts with other ethical principles of mediation.[38]

1. Contract enforceability

The first set of external determinants are those defined by law: a mediated settlement agreement that is the product of duress or undue influence is unenforceable as a matter of contract law.[39] One important rationale for these contract law doctrines is that the application of duress or undue influence (among other such doctrines) prevents the parties from freely manifesting their

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[35] I place the word "authentic" in quotes because I do not believe that one can "discover one's true self, to separate it from that which might obscure or alienate it, to decipher its truth thanks to psychological or psychoanalytic science, which is supposed to be able to tell you what your true self is." *See* Michel Foucault, *On the Genealogy of Ethics: An overview of work in progress*, *in* ETHICS: SUBJECTIVITY AND TRUTH 253, 271 (Paul Rabinow ed., 1997).

[36] *See* Part I.B.1. As Nancy Welsh summarizes the reduction of self-determination to the legal question of contract formation, "1) self-determination is now understood quite narrowly as a party's power to choose to agree or not to agree to a settlement; 2) this narrowed vision is consistent with courts' and attorneys' understanding of parties' free will; 3) courts are eager to enforce settlements and have established a strong presumption that a settlement reflects the exercise of parties' free will (or self-determination); and 4) courts require a strong showing to overcome this presumption and generally perceive coercion only in its most blatant forms." Welsh, *supra* note 5, at 78–79.

[37] *See* Part I.B.2.

[38] *See* Part I.B.3. and I.B.4.

[39] Welsh, *supra* note 5, at 62.

mutual assent to contract.[40] As a basic matter, an agreement produced under duress or through undue influence is one understood to vitiate the self-determination of the party experiencing that duress or undue influence.[41] Similarly, a party who is not deemed mentally competent may only assume voidable obligations.[42] Such doctrines voiding otherwise valid obligations provide a minimal standard for self-determination; contract law will not protect a party who manifests assent without exercising reasonable care, for example, provided the party was not prevented from doing so by the actions of another.[43]

The mediation standards' definition of self-determination as "the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome" requires the mediator to ensure that assent to a settlement agreement is free from legal coercion.[44] Courts agree. One California court explained that "the presumption of undue influence cannot properly be applied to . . . settlement agreements reached through mediation" given the mediator's duty "to attempt to determine whether the parties are 'acting under their own free will' in the mediation."[45] A mediator must, at a minimum, work to prevent a settlement from being the product of coercion.[46]

2. Abuse of professional expertise

The second set of external determinants arises when mediators abuse their professional expertise and exceed their authority. The Model Standards of Conduct for Mediators explains that mediators should not pressure the parties to settle, even when

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[40] RESTATEMENT (SECOND) OF CONTRACTS §§ 174–177 (AM. LAW INST. 1981).

[41] *See, e.g.*, Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 357–59 (1915).

[42] RESTATEMENT (SECOND) OF CONTRACTS § 15 (AM. LAW INST. 1981). Omer Shapira takes a broader view of capacity. *See* SHAPIRA, *supra* note 6, at 138–40.

[43] *See* Grace M. Giesel, *A New Look at Contract Mistake Doctrine and Personal Injury Releases*, 19 NEV. L.J. 535, 566–67 (2018).

[44] MODEL STANDARDS, *supra* note 1, at 3.

[45] *In re* Marriage of Kieturakis, 138 Cal. App. 4th 56, 85 (2006).

[46] SHAPIRA, *supra* note 6, at 148–50.

no legal lines of coercion are crossed.[47] Abstaining from such pressure is at the core of the ethical requirement of the mediator to advance self-determination.[48]

But it is not obvious what actions constitute inappropriate interventions, given that *every* intervention by a mediator can influence the course of the mediation in some way.[49] Problem-solving mediators argue that their practices are grounded in an ideal of self-determination because the mediator helps the parties exchange information, reserving the generation of settlement options for the parties exercising their own judgment regarding their interests.[50] Transformative mediators may be concerned with mediators positing settlement as a goal at all, rather than leaving the parties to decide their ultimate goals.[51] This approach, too, is grounded in an ideal of self-determination because the parties should be free to determine their ends rather than having settlement set forth as the universal goal of mediation.[52]

There are two problems with transformative mediation's argument that mediators should simply "follow the parties": it is self-contradictory, and it misunderstands the nature of power.[53] It is self-contradictory insofar as it describes mediators as powerless to cause an inner change in the parties, even as it claims that, if they were to try, they would so dominate the parties as to undermine their self-determination.[54] And, in seeking to free the parties in a mediation from pressure exerted by the mediator, transformative mediators risk narrowly understanding their power as purely repressive, making *all* involvement by the mediator

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[47] MODEL STANDARDS, *supra* note 1, at 3 ("A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.").

[48] SHAPIRA, *supra* note 6, at 130 ("it is impossible to consider a process as 'mediation' where the outcome is determined by the professional who conducts the process instead of by the parties."). *See also id.* at 146–48.

[49] *Id.* at 133.

[50] Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 24 (1996).

[51] Bush & Folger, *supra* note 5, at 743.

[52] Bush distinguishes a facilitative process directed toward settlement from a transformative process directed toward party empowerment, in which settlement remains a possibility if the parties freely so choose. *Id.* at 749.

[53] BUSH & FOLGER, *supra* note 29, at 222.

[54] *Id.* at 67.

potentially problematic.[55] But the mere presence of the mediator *necessarily* influences how the parties engage with each other,[56] and this power, in the form of procedural expertise, can be generative—as problem-solving mediators understand.[57]

Acknowledging that the advancement of self-determination requires limiting the mediator's influence *over* the parties while also embracing the necessity of the mediator's power as a *supportive*, generative force is complex: the challenge is to distinguish those interventions that strengthen the parties' exercise of self-determination from those that do not—a distinction that different schools of mediation draw differently, based on different notions of what party self-determination means.[58]

A related form of external determination involves the domination of parties by their attorneys.[59] While the nature of the attorney-client relationship is beyond the purview of the mediator, mediation may involve different expectations of party involvement than litigation or other legal processes.[60] Attorneys may have valuable experience with similar cases and may have procedural expertise concerning dispute resolution processes, but this expertise comes at a cost.[61] The incentives of attorneys may be in tension with those of clients,[62] and attorneys may impose a more narrowly legal frame on the dispute than the parties might

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[55] Bush & Miller, *supra* note 22, at 599–600.

[56] Amy Cohen notes that sociolegal scholars have long recognized this point, whether or not lawyers have. Cohen, *supra* note 9, at 213.

[57] *See* Bernard Mayer, *The Dynamics of Power in Mediation and Negotiation*, 1987 MEDIATION Q. 75, 75 (1987).

[58] This Article aims to provide a basis for making this distinction without recourse to any essentialized idea of a core subject. *See infra* Part III.

[59] That the client has the ultimate authority in the lawyer-client relationship is foundational to lawyers' professional ethics. MODEL RULES OF PRO. CONDUCT r. 1.2(a) (Am. Bar Ass'n 1988).

[60] *See generally* Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269 (1999).

[61] Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77 (1997). Korobkin and Guthrie describe the ability of lawyers to help clients analyze their cases from more analytical perspectives, but note that this should not come at the expense of imposing the lawyer's view of the case on the client. *Id.* at 82, 115.

[62] *See* ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 69–96 (2000).

otherwise choose.[63] Mediators may need to monitor for lawyers inappropriately dominating their clients in the name of protecting party self-determination.

3. Social inequalities

A third form of external determination arises from the possibility of one party dominating the other based on structural inequalities (but falling short of legal coercion). Recognizing that the parties to a mediation are not always similarly situated, and consequently may have different resources and legal entitlements, some analysts argue that mediators should engage in "power balancing" to prevent either party from dominating the process.[64] While these imbalances may result in behavior that approaches coercion, they may also manifest in ways that fall short of coercion, such as one party lacking relevant information regarding applicable laws or the expected value of a case.[65]

Advancing party self-determination through "power balancing" is in some tension with the principle of abstaining from professional overreach (because mediators may protect vulnerable parties in a mediation by steering them away from bad outcomes),[66] and it is in some tension with the distinct ethical principle of impartiality (because the mediator may treat the parties differently, in order to protect the vulnerable).[67] While these tensions have been appreciated in the literature for many years,[68] recent attention to systemic imbalances in mediation (as elsewhere in the legal system) has led to greater openness to this kind of power balancing as part of a mediator's responsibility for self-determination.[69]

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[63] *See* Robert A. Baruch Bush, *Mediation Skills and Client-Centered Lawyering: A New View of the Partnership*, 19 CLINICAL L. REV. 429, 451 (2013).

[64] SHAPIRA, *supra* note 6, at 217–23.

[65] *See id.* at 150–59 for an argument concerning a mediator's duties to generate conditions for informed decision-making.

[66] *See* BERNARD MAYER & JACQUELINE N. FONT-GUZMÁN, THE NEUTRALITY TRAP: DISRUPTING AND CONNECTING FOR SOCIAL CHANGE 48 (2022).

[67] SHAPIRA, *supra* note 6, at 221.

[68] *See, e.g.*, Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1592 (1991).

[69] *See, e.g.*, Bush, *supra* note 7, at 472.

But there is no stable position of party equality, and some inequalities may reflect shared values (such as inequalities arising from an uncontroversial set of legal entitlements).[70] The notion of power is fluid, and a party deemed "weak" in one moment or in one capacity may be "strong" in another.[71] Taken to its extreme, power balancing would require a hyper-interventionist mediator.

4. Psychological limitations

A fourth form of external determination is psychological in nature. While psychological factors are usually described as "internal" to a party, rather than "external," I categorize them here because they limit the parties' abilities to show up as freely reasoning actors.[72] The mediation literature draws heavily upon studies of cognitive biases and irrationalities that create obstacles to rational settlement,[73] but which fall short of rendering a party incompetent to contract.[74] Parties may pursue goals that are irrational, have unreasonable beliefs about litigation, or otherwise struggle to evaluate the goodness of a settlement option.[75]

While mediators may be wary of being too evaluative, they are also aware that actually existing parties are not the rational actors of economic theory and that they may engage in self-defeating behavior.[76] Mediators may attempt to correct misapprehensions by "reality testing" or posing questions to encourage the parties to think rationally, while leaving decisions to the parties. Mediators may also make process accommodations to facilitate party understanding.[77]

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[70] *See* Michael Moffitt, *Three Things to Be against (Settlement Not Included)*, 78 FORDHAM L. REV. 1203, 1218–22 (2009).

[71] Robert S. Adler & Elliott M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 10–12 (2000). *See also* WINSLADE & MONK, *supra* note 10, at 49–51.

[72] Omer Shapira presents an accretive model on this point, but I do not think it differs substantively from my own: what I describe as elimination of biases and irrationalities, etc., he presents as building competence and knowledge. SHAPIRA, *supra* note 6, at 137–43.

[73] *See generally* Russell Korobkin & Chris Guthrie, *Heuristics and Biases at the Bargaining Table*, 87 MARQ. L. REV. 795 (2004).

[74] Bush & Folger, *supra* note 5, at 743.

[75] *See* Korobkin & Ulen, *supra* note 31, at 1069.

[76] Sternlight, *supra* note 60, at 336–39.

[77] SHAPIRA, *supra* note 6, at 145–46.

Here, too, the task of advancing party self-determination seems self-contradictory. Rooting out irrationality may impose a certain vision of rational behavior upon a party—precisely the kind of mediator imposition against which the principle of self-determination is meant to protect.[78]

5. Questioning autonomy

These four forms of external determination—the legal, the professional, the social, and the psychological—can prevent parties from freely engaging in the mediation process. The mediator's task of advancing party self-determination is usually understood to involve eliminating those external determinants so that the parties can freely exercise their will, recognizing that the demands of eliminating each barrier can be in tension with each other and with other ethical demands on the mediator. The task is to reveal a rational, willing subject at the core of a psychologically complex and socially situated self.[79]

What is this core subject that remains, once freed of cognitive biases, structural inequality, professional domination, and legal coercion?[80] The question is rarely posed. We typically understand the nature of the subject in terms of some essential human nature, defined by psychological and cognitive sciences.[81] The transformative school of mediation, for example, builds upon a model of human nature that focuses on the need for autonomy

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[78] Bush & Miller, *supra* note 22, at 599–600.

[79] Despite Shapira's framing of his model as accretive, he identifies the duties of mediators in *negative* terms: to refrain from conduct that undermines party self-determination and to prevent parties from taking action that does not meet the requirement of self-determination due to the actions of others. SHAPIRA, *supra* note 6, at 144; *see also supra* note 72.

[80] I am concerned here with human subjects; different considerations may arise in the context of other legal persons, such as corporations.

[81] The work of Jennifer Robbennolt and Jean Sternlight is particularly significant for explaining how psychology informs dispute resolution. *See, e.g.*, Jean R. Sternlight & Jennifer K. Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437 (2008). *See also* Lee Ross & Donna Shestowsky, *Contemporary Psychology's Challenges to Legal Theory and Practice*, 97 NW. U. L. REV. 1081 (2002). *But see* Foucault, *supra* note 35, at 271.

within the experience of living together in community.[82] The predominant problem-solving school of mediation is built upon a different model of the subject: an interest-based framework that operationalizes rational choice theory to describe a normatively desirable way to act in the world,[83] even as it recognizes the fundamental ways in which cognitive biases and irrationalities undermine that assumption of rationality.[84]

But why understand self-determination in terms of some essentialized subject?[85] Such an approach denies the malleability of the subjects who participate in mediation.[86] That the mediator's work of protecting the freedom of the parties can be *constructive*, rather than being a purely negative task of liberating an already existing, boundedly-rational subject, is not a claim that is typically cognizable within the mediation literature. Controlling the external forces that act upon the subject is important, but there remains space for individuals to construct their own subjects.[87] The parties' freedom does not only consist in letting the parties determine the

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[82] Bush & Miller, *supra* note 22, at 618 ("In short, *agency is the phenomenon of the self's identifying and expressing the self*, and as such it is at the core of human identity and consciousness."). *See also* BUSH & FOLGER, *supra* note 28, at 59–60.

[83] On the implicit nature of the assumption of rationality, see Korobkin & Ulen, *supra* note 31, at 1060. For ways in which the framework of *Getting to Yes* operationalizes microeconomic principles, see Andrew B. Mamo, *Three Ways of Looking at Dispute Resolution*, 54 WAKE FOREST L. REV. 1399, 1423–26 (2019).

[84] On the need to use behavioral sciences to challenge assumptions of rationality, see Korobkin & Ulen, *supra* note 31, at 1058. Howard Raiffa situates negotiation and mediation as involving prescriptions that "must be useful for real people—warts and all." HOWARD RAIFFA, NEGOTIATION ANALYSIS: THE SCIENCE AND ART OF COLLABORATIVE DECISION MAKING 9 (2002).

[85] Foucault aptly captured the sentiment motivating this analysis: "I have always been somewhat suspicious of the notion of liberation, because if it is not treated with precautions and within certain limits, one runs the risk of falling back on the idea that there exists a human nature or base that, as a consequence of certain historical, economic, and social processes, has been concealed, alienated, or imprisoned in and by mechanisms of repression. . . . I think this idea should not be accepted without scrutiny." Foucault, *supra* note 35, at 281, 282.

[86] Part of my interest in using Foucault as an interlocutor in this enterprise is Foucault's own blind spot with respect to the rational choice tradition's theorization of the subject. As Michael Behrent asks, "is the neoliberal claim that human behavior is essentially motivated by calculations of this kind not itself a theory of human nature, however thin and limited its claims may be? Why did Foucault not regard this understanding of human behavior as anthropological[?]" Michael C. Behrent, *Can the Critique of Capitalism be Antihumanist?*, 54 HISTORY AND THEORY, 372, 381 (2015).

[87] Foucault, *supra* note 35, at 283.

outcome of the process; it also consists in determining *what kind of subject* shows up to the mediation.

C. The shortcomings of the negative definition of self-determination

Party self-determination seems to require that the parties be able to engage with the dispute and with the mediation process in specific ways: the success of a mediation depends upon the parties to the mediation *being particular kinds of subjects*.[88] This is because the parties in a mediation are responsible for deciding upon their ends, decisions that are ultimately *ethical* in nature.[89] The fundamental problem is that while party self-determination is enshrined as the key ethical principle of mediation, the field barely engages with the question of *who the self is whose self-determination matters*.[90] This is no theoretical question; an answer is necessary to explain why party self-determination matters.[91] This failure to explicitly theorize the subject of mediation does not mean that mediation is agnostic about the subject; it means that mediators work with implicit and unacknowledged theories of the subject.[92]

1. The negative definition of self-determination relies upon positive definitions of the subjects of mediation

The mediator's understanding of the nature of the subject determines what practices they perform to advance party self-determination. Such understandings tend to assume the subject as

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[88] Cohen, *supra* note 9, at 210.

[89] *See* Part I.C.2.

[90] The general question has been asked within the legal literature. *See, e.g.*, John A. Powell, *The Multiple Self: Exploring Between and Beyond Modernity and Postmodernity*, 81 MINN. L. REV. 1481 (1997); *see also* Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 LAW & SOC. INQUIRY 503, 526 (2008).

[91] Author's Note: The differences among the major schools of mediation largely rest on this point, I believe: What justifies the belief that a mediator's facilitation will help parties achieve good resolutions (however "good" is defined)? What justifies the belief that there is any connection between a party feeling "empowered" and their reaching a wise outcome? In both instances, the answer seems to be a particular set of beliefs about the subjects who show up to a mediation.

[92] *See, e.g.*, Sharon Press & Ellen E. Deason, *Mediation: Embedded Assumptions of Whiteness?*, 22 CARDOZO J. CONFLICT RESOL. 453 (2021).

a stable and unitary individual.[93] Problem-solving mediators may see their job as assisting the parties to think rationally.[94] Their facilitative practices are performed in order to liberate a party's capabilities for acting more rationally and thereby advancing their self-determination: working with parties to identify their interests, brainstorm options for settlement, and explore criteria of fairness; designing a process with ground rules that will promote the full, open, transparent exchange of information; and designing process interventions to get beyond various barriers to reasoned settlement (such as the distorting influences of cognitive biases).[95]

Transformative mediators may see their job as getting out of the way to let latent capabilities for empowerment and connection flourish. They perform these facilitative practices to help the disputants "reconnect with and reassert their fundamental strength, through understanding and reflecting on their situation, and then deliberating and deciding how to address it": giving space to the parties to develop the skills of conflict engagement and to develop mutual understanding; and moving towards sources of conflict and hesitation rather than towards sources of agreement.[96] Either way, achieving self-determination is understood as a process of advancing autonomy.

In the common definition of mediation as "facilitated negotiation," both words do a lot of work.[97] The notion of mediation as a practice of facilitation underscores its commitment to party self-determination by placing the ideal mediator in a secondary role with respect to the parties, while the notion of mediation as a form of negotiation suggests that the ideal parties—whose selves determine the outcome of the mediation—principally act as rational negotiators, as defined in negotiation theory.[98] But there is an inconsistency at the heart of this definition. Negotiation theory operates with a distinct theory of the subject, in which irrational human beings must be transformed into rational negotiators

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[93] *See* Powell, *supra* note 90, at 1483.

[94] RAIFFA, *supra* note 84, at 318–19.

[95] *Id.*

[96] Bush, *supra* note 63, at 451.

[97] Riskin, *supra* note 50, at 13.

[98] *See, e.g.*, MAX H. BAZERMAN & MARGARET A. NEALE, NEGOTIATING RATIONALLY (1992).

through the application of specific practices.[99] The failure to acknowledge that negotiation theory's understanding of the rational negotiating subject is built upon the negotiator's use of specific practices is a weakness in building a theory of mediation as a facilitated form of rational negotiation.[100]

The transformative tradition of mediation similarly rests on a flawed understanding of the self. The idea that party self-determination means empowering the parties to reach their own decisions assumes that the parties, if properly supported in their capacities as actors, will strengthen their experiences of agency or their understanding of the conflict or of themselves.[101] But the mechanics of empowerment are built upon an unfounded assertion that the activation of innate sources of strength and interpersonal connection will yield transformation.[102]

Transformative mediation's promise to "follow the parties" implies an agnosticism with respect to the subjects of the parties, but the theory actually assumes quite a bit of them. It assumes that the parties are inherently self-directed on their journey through conflict transformation.[103] Its commendable concerns regarding the ways that the exercise of the mediator's power may limit party self-determination are pushed too far, failing to recognize that the mediator's power is omnipresent, generative, and limited.[104] Understanding mediation as a practice of following the parties on their journeys of self-directed empowerment fails to account for the work involved—by the parties, by the mediator, and by others—in creating subjects who are "empowered" to transform their conflict responses by being located within systems of power.

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[99] *See* WINSLADE & MONK, *supra* note 10, at 32.

[100] *See* Jennifer W. Reynolds, *Does ADR Feel Like Justice?*, 88 FORDHAM L. REV. 2357, 2372–73 (2020).

[101] For Bush, agency is "an inherent feature of human consciousness or identity; so that the restriction of agency violates the sense of self that human beings carry, and the support of agency enables the fulfillment of that sense of self." Bush & Miller, *supra* note 22, at 612.

[102] BUSH & FOLGER, *supra* note 28, at 54.

[103] *Id.*

[104] *See supra* Part I.B.2.

2. The negative definition of party self-determination ignores the ethical questions facing the mediation parties

The problem-solving approach to mediation as a facilitated negotiation builds upon theories of negotiation. I will focus on the framework of *Getting to Yes* as a particularly well-known example.[105] This framework is built upon principles of economic reasoning and outlines a method of distinguishing better outcomes from worse outcomes on the basis of party interests.[106] But the application of this method requires resolving two ethical questions about which the framework is silent. Resolving these questions requires the parties to engage in significant ethical reasoning.

The method of finding efficient solutions through problem-solving asks the parties to dig beneath their stated positions (what they ask for) to identify their underlying interests (why they want what they ask for),[107] and then weigh those interests to construct a scale of utility.[108] Each party evaluates their alternatives to negotiated agreement (such as continuing litigation or dropping the issue) against their scale of utility, and the alternative with the highest utility (the "best alternative to a negotiated agreement," or "BATNA") determines the minimum threshold of utility that a proposed agreement must achieve to be rationally acceptable to that party (because any proposed agreement that fails to reach this threshold should be rejected in favor of that party's BATNA).[109]

The parties generate various options, subject to their resource constraints, striving to identify the set of efficient options, defined as those for which any feasible modification will make at least one party worse off.[110] Any possible outcome that is an improvement for at least one party without being worse for another is strictly better.[111] Selecting a specific outcome from the set of efficient options necessarily requires tradeoffs (because no option within

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[105] ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (2d ed. 1991).

[106] *Id.* at 40–55.

[107] *Id.*

[108] RAIFFA, *supra* note 84, at 23–31.

[109] The goodness of an option for settlement relative to one's BATNA is determined with reference to one's interests, which define that individual's scale of utility. *See* FISHER & URY, *supra* note 105, at 101.

[110] RAIFFA, *supra* note 84, at 221–22.

[111] *Id.* at 227–28.

that set is strictly better than any other), and those tradeoffs can be made with reference to explicit criteria of fairness or legitimacy.[112] This process occurs within a communicative framework that is structured by emotions and relationships, and so the parties must take care to communicate in ways that facilitate information exchange.[113]

Once the parties settle upon a specific outcome, they must commit themselves to it by translating it from the realm of economic calculation to the world of binding contract.[114] The interest-based method of negotiation operationalizes the normative logic of economic theory by providing prescriptions for how biased and irrational humans can act in ways that more closely corresponded to the normative claims of neoclassical economic theory.[115] It is the bridge that connects an understanding of the subject with an understanding of the abstracted truths of economic theory.[116]

But this method of distinguishing better from worse outcomes is sandwiched between two moments of indeterminacy that cannot be resolved by a method: First, the parties must define and weigh their interests. Without the ability to generate stable scales of utility for the parties, there is no way to determine the relative value of settlement options.[117] But how do parties know their interests and the relative weights of those interests?[118] Determining what they value is a question of ethics. Second, the parties must decide the relative values of outcomes contained within the set of efficient outcomes, in which none is strictly "better" than another when measured against party interests. This, too, is a question of ethics. The theory urges the parties to find some principled way of choosing an outcome, but it goes no further.[119]

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[112] *See* FISHER & URY, *supra* note 105, at 81–94.

[113] Patton, *supra* note 20, at 281–82.

[114] *Id.* at 284.

[115] RAIFFA, *supra* note 84, at 9.

[116] For Foucault, this kind of knowledge that generates prescriptions necessarily affects the subject of the knower. MICHEL FOUCAULT, THE HERMENEUTICS OF THE SUBJECT: LECTURES AT THE COLLÈGE DE FRANCE 1981–82, at 236–37 (Frederic Gros, ed., Graham Burchell, trans. 2005).

[117] RAIFFA, *supra* note 84, at 227–228.

[118] *See generally* WILLIAM URY, GETTING TO YES WITH YOURSELF (AND OTHER WORTHY OPPONENTS) (2015).

[119] *See* FISHER & URY, *supra* note 105, at 89–90.

Choosing one's ends is not a matter of *method*, of following some process to find one's "true" interests or a "legitimate" selection criterion; rather, it requires ethical reasoning in the broadest sense—of deciding what one values and what justice requires. The selection of one's ends and the construction of one's subject are mutually constitutive.

a. The ethical question of defining one's interests

Party interests remain the irreducible core of problem-solving mediation.[120] Understanding interests means going beyond asking *what do the parties want?* to ask *why do the parties want this?* Interests are the "why"; they define the scale of utility by which parties can measure the goodness of outcomes.[121] But if we seek to go a level deeper still to ask *why are these the parties' desires, why do they weigh their desires in this way, and how do they know that these are their desires*, the trail goes cold.[122] While interests may evolve dialogically or through sustained reflection, they are generally understood to be irreducible.[123]

But interests come from somewhere. And a century (or more) of insights from sources as diverse as faith traditions,[124] Madison

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[120] Author's Note: While some scholars distinguish between interests and needs, the distinction between them is not particularly relevant for this article.

[121] *See* FISHER & URY, *supra* note 105, at 50–52.

[122] On the assumption that individuals best know their interests and the political consequences thereof, see BERNARD E. HARCOURT, CRITIQUE & PRAXIS 118–20 (2020).

[123] On the irreducibility of interests, see Behrent, *supra* note 86, at 382 ("One can explain choice only in terms of some notion of choice; as such, choice is always its own justification. This is particularly true when choices are seen as referring to choices relating to pleasure and pain, which constitute a kind of 'regressive doorstop' . . . that renders any further analysis futile. Second, these choices are intransmissible; that is, they are based entirely on the individual's own sense of what constitutes (for example) pleasure and pain. The name given to this radically irreducible and intransmissible principle of individual choice is 'interest.'") (footnotes omitted).

[124] For example, one of the core ideas of Buddhism is that desire is the source of suffering, and this desire can only be tamed by following the right path. *See generally* DAVID WEBSTER, THE PHILOSOPHY OF DESIRE IN THE BUDDHIST PALI CANON (2004).

Avenue,[125] rock music,[126] critical theory,[127] social media companies,[128] and contemporary cognitive science[129] all cast considerable doubt on the notion that the interests known to us regularly reflect our *considered* choices, or that we can access some inner part of ourselves (the source of our "true" interests) that is free from any external influences.[130] We may be unable or unwilling to acknowledge our motivations, perhaps because we do not have the right language with which to define them[131] or perhaps because our felt motivations do not align with what we believe our motivations *should* be.[132] Or we may be limited in how we think of our interests, unduly discounting long-term considerations, or failing to think through unpleasant contingencies, etc.[133] The interests that we identify in one moment may not matter to us later.[134] Pursuing one's stated interests may be less an exercise in

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[125] *See, e.g.*, EDWARD L. BERNAYS, PUBLIC RELATIONS (1945).

[126] *See, e.g.*, Bob Dylan, *The Man in the Long Black Coat*, *on* OH MERCY (Columbia Records 1989) ("Preacher was a-talkin', there's a sermon he gave / He said every man's conscience is vile and depraved / You cannot depend on it to be your guide / When it's you who must keep it satisfied").

[127] *See, e.g.*, THEODOR W. ADORNO, THE CULTURE INDUSTRY: SELECTED ESSAYS ON MASS CULTURE (J. M. Bernstein ed., 1991).

[128] *See, e.g.*, Georgia Wells et. al, *Facebook Knows Instagram Is Toxic for Teen Girls, Company Documents Show*, WALL ST. J. (Sept. 14, 2021, 7:59 AM), https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739 [https://perma.cc/CWG3-JJ8X].

[129] *See, e.g.*, Rebecca Hollander-Blumoff, *Law and the Stable Self*, 54 ST. LOUIS U. L.J. 1173, 1181–83 (2010).

[130] We can think of this as casting doubt upon a traditional notion of self-knowledge, in which:

> [i]t is in order to know oneself that one must withdraw into the self; it is in order to know oneself that one must detach oneself from sensations which are the source of illusions; it is in order to know oneself that one must establish one's soul in an immobile fixity which is not open to external events, etcetera.

FOUCAULT, *supra* note 116, at 68.

[131] William L.F. Felstiner et. al, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC'Y REV. 631, 643–44 (1980).

[132] *See, e.g.*, Sternlight & Robbennolt, *supra* note 81, at 462.

[133] *See* Hollander-Blumoff, *supra* note 129.

[134] *See* Chris Guthrie & David Sally, *The Impact of the Impact Bias on Negotiation*, 87 MARQ. L. REV. 817 (2004); *see also* Aditi Bagchi, *Contract and the Problem of Fickle People*, 53 WAKE FOREST L. REV. 1 (2018).

"self-determination" than one of following a path determined by extrinsic forces whose influences cannot be exorcised.[135]

Self-determination cannot consist of following the parties, unless we ignore all the ways that seemingly free choices are structured by others.One response might be that the question of the source of our interests is not one for mediation to address: that mediation works to satisfy one's identified interests, whatever their origin and whether they align with one's values, and that the question of what we desire and why is best reserved for one's therapist or priest.[136] But I do not think that is right; mediators recognize that the parties' concern with the care of the self can be broader than narrow self-interest in the instant dispute: a mediator can engage with a broad range of interests concerning not only the disposition of the instant dispute, but also concerning the disposition of future disputes and the health of the dispute resolution system as a whole.[137] Rather than grounding party self-determination in expressions of party interests, mediators could instead work with the parties to freely define their interests.

b. The ethical question of defining criteria of fairness

The same considerations are true of selecting a specific outcome by utilizing "objective criteria of legitimacy or fairness" with which to evaluate the relative merits of efficient options. The selection of a specific outcome can be made using various criteria of fairness.[138] Even if parties can refer to objective metrics, such as market values or legal precedents, standards of legitimacy or fairness are fundamentally normative.[139] They are some of the central concerns of ethical inquiry. Perhaps mediation truly is agnostic about the substance of whichever criteria of legitimacy or

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[135] *See* Korobkin & Ulen, *supra* note 31, at 1070; *see also* WINSLADE & MONK, *supra* note 10, at 95–96. It is worth noting that the word "interest" is composed of "inter" and "esse"—that interests are always about relations between us.

[136] Mediation tends to explicitly reject the notion that it is "changing hearts and minds" or that it is in any way related to therapeutic goals; the policing of this boundary performs vitally important work. *But see infra* note 150.

[137] *See, e.g.*, ROGER FISHER, POINTS OF CHOICE 21 (1978). *See also* Riskin, *supra* note 50, at 18–23.

[138] RAIFFA, *supra* note 84, at 242–47.

[139] *See generally* Ariel Eckblad, *In Pursuit of Fairness: Re-Negotiating Embedded Norms & Re-Imagining Interest-Based Negotiation*, 26 HARV. NEGOT. L. REV. 1 (2020).

fairness are used, concerned only with whether they help the parties reach a mutually acceptable agreement.

But I do not think that is right; mediation presents itself as concerned with parties using *wise* criteria that reflect aspirations of *fairness* (contested though these may be), even if there is no mechanical method for doing so.[140] And, if we take seriously the insights of critical race theorists, resolutions on the basis of interests may be fragile in ways that leave those on the margins at risk.[141] Just as the identification of one's interests is ultimately an ethical question concerning the parties' reasoned care of the self, so too is the selection of fair decision criteria to select the best outcome from the set of efficient ones.

Intrinsic to the practice of mediation is an ethical concern with the construction of the mediating subject, which bears upon how interests and criteria of legitimacy are determined in ways that are consistent with the practices of the care of the self. The common practice of problem-solving mediation involves the skilled application of a method based upon rational principles, sandwiched between the resolution of two ethical inquiries. In the absence of an "authentic" inner self that provides a source of one's "true" interests or some innate sense of fairness, resolving these inquiries in a mediation requires considering the definition of the subject as the *target* of the parties' work on the self, rather than seeing the subject as something transparently knowable.[142] The ethical problems of defining and weighing one's interests and of defining criteria of fairness are not ones that can be answered through a purely passive process of reflection, but rather are problems to be answered through the active construction of the self.

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[140] *See* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 839 (1984).

[141] *See* Andrew B. Mamo, *Against Resolution: Dialogue, Demonstration, and Dispute Resolution*, 36 OHIO ST. J. ON DISP. RESOL. 251 (2020).

[142] *See* FOUCAULT, *supra* note 116, at 223 ("Presence of self to self, precisely on account of the distance still remaining between self and self; presence of self to self in the distance of self from self: this should be the object, the theme, of this turning back of the gaze which was previously directed on others and must now be brought back, not to the self as an object of knowledge, but precisely to this distance from your self insofar as you are the subject of an action who has the means to reach your self, but above all whose requirement is to reach it.").

D. An alternative

Problematizing the nature of the subject reveals the limitations of self-determination as an ethical principle of mediation, and suggests possibilities for what mediation could be, *beyond* being a facilitated negotiation or a process of supporting the parties on a self-directed journey or any other specific model of mediation. The goal is to expand the ethical possibilities of how parties engage with disputes.[143]

The parties have the freedom to determine how they will engage with self and others during the mediation.[144] These decisions orient them with respect to the mediation process and they provide the basis for resolving the question of what they want from the mediation process—for which a reasoned answer is a prerequisite to exercising meaningful self-determination. Answering these ethical questions defines how the parties take responsibility for their actions.[145]

Taking seriously the work of constructing a subject that can determine its own conduct recasts mediation as a process through which the parties recognize that the substantive question of *what* they achieve from conflict and the procedural question of *how* they engage with conflict are both inseparable from the ethical question of *who* the subject is who engages with conflict. The subjects of the mediation parties are defined through relationships of

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[143] Such reimagining of self-determination may contribute to a project of recovering mediation "as an open-ended analytical category—one that sits between state adjudication and self-help or violence and that allows analysts to observe how people navigate and resist dominant social orders and envisage alternatives to them." Cohen, *supra* note 9, at 202–03.

[144] Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1272 (1990); *see also* Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1171 (2013).

[145] Scott R. Peppet, *Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining*, 7 HARV. NEGOT. L. REV. 83, 96 (2002). ("Increasing one's awareness has ethical consequences. One becomes, over time, a different sort of person. And that sort of person may no longer wish to engage in certain negotiation strategies. Rather than becoming *more* free, moment-to-moment, to choose a negotiation approach, a mindful negotiator may constrain himself, limiting his freedom of action in deference to his ethical commitments."). Peppet's description of self-imposed ethical constraints as limiting one's freedom contrasts with this Article's perspective, which sees reasoned ethical decision making as constitutive of one's freedom. *See also* Foucault, *supra* note 35, at 284 ("ethics is the considered form that freedom takes when it is informed by reflection").

interdependence with respect to both their counterparts and the mediator, in the context of an ongoing conflict, rather than defined as atomistic selves for whom mediation involves the autonomous decision-making of some authentic, preexisting self.[146]

The work of becoming a mediation party who can reason about how they engage with their disputes is essential because the parties are otherwise *unfree*, in the sense that they enter the mediation anchored to some initial position for reasons they do not fully comprehend and they conduct themselves in ways that are not fully reasoned.[147] If they cannot answer the foundational ethical questions of defining what they value and what is fair, they remain unfree because their conduct is determined by external influences rather than being freely reasoned.[148]

The challenge is to *construct a subject* that can reason ethically about its ends and the means of participating in mediation—making thoughtful decisions about whether to mediate as a "rational actor" or to assert their agency or prioritize reconciliation or otherwise. In the name of furthering the parties' freedom, mediators can work with and upon individuals to help them become

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[146] *See* Sara Cobb, *Creating Sacred Space: Toward a Second-Generation Dispute Resolution Practice*, *in* BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION 215, 217–18 (Daniel Bowling & David A. Hoffman, eds. 2003).

[147] Howard Raiffa argues that most negotiators "do not prepare adequately . . . They do not do their homework. They do not examine their fundamental interests or seriously explore their alternatives to negotiation. They don't brainstorm together . . . Without realizing it, negotiators leave potential gains on the table and fall into innumerable psychological traps." RAIFFA, *supra* note 84, at 270.

[148] Foucault argues that willing freely "means willing without what it is that one wills being determined by this or that event, this or that representation, this or that inclination. To will freely is to will without any determination, and the [untutored] is determined by what comes from both outside and inside." FOUCAULT, *supra* note 116, at 132.

different kinds of subjects—an act of conversion,[149] even if mediators deny that they are involved in such inner work.[150]

Protecting the ability of the parties to freely engage in mediation in a reasoned way requires addressing the construction of the self in addition to limiting the external determination of the subject. This requires dispensing with the attempt to liberate "authentic" subjects in favor of developing practices of freedom that permit mediation parties to freely construct their subjects.

II. THE MECHANISMS: HOW TO CONSTRUCT MEDIATION PARTIES

The negative definition of self-determination recognizes that the parties to a mediation can be influenced by external forces. They can be pressured into accepting unwise agreements (by other parties, the mediator, or their own counsel), they can agree to procedural interventions without full awareness of the stakes, they can be influenced by deep social structures, and so on.[151] Mediators should act to minimize the impact of these external forces upon the parties.

The constructive vision of party self-determination explains that the parties themselves have the power to define how they will show up to the mediation: Will they act cooperatively to craft an agreement that satisfies the needs of both parties? Will they maintain an adversarial posture in anticipation of litigation? Will they seek a swift resolution to terminate the dispute, regardless of whether it satisfies their own substantive goals? Only the parties can decide which version of themselves shows up, but they do not do so alone; the mediator's intervention is crucial. Mediators exercise power in their relationships with the parties, providing the

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[149] I retain this word "conversion"—used by Foucault—for its provocative character. FOUCAULT, *supra* note 116, at 210.

[150] The spiritual character of ADR practices runs deep, even as the definition of the boundaries of the theory excludes spiritual and therapeutic elements. *See* Cobb, *supra* note 146, at 216 ("attempts to define or describe these processes in noninstrumental terms, as communion (rather than the convening of stakeholders), as a process of witnessing (rather than listening), as a process of giving testimony (rather than stating interests), and as the creation of a covenant (rather than an agreement), constitute a serious transgression, blurring ADR's secular language with a language from religion(s), defying the boundary between church (synagogue, mosque, temple) and state. The tenacity of ADR's secular discourse grows out of the strength of our collective fear of blurring this boundary.").

[151] *See supra* Part I.B.

parties with the tools with which they can shape themselves into the subjects of a mediation. Mediator practices not only operationalize principles that get parties to settlement, they also constitute subjects.

The mediator's responsibility for advancing a constructive vision of party self-determination is to offer psychologically complex *disputants*—who may be emotionally caught up in conflict and may be gripped by certain myths about mediation, litigation, and conflict behavior—the opportunity to become *mediation parties* who can reason about their participation in the mediation. This transformation of the subject requires the freely chosen participation of the one whose subject is at issue: it is a work of conversion. But the disputant is no unmoved mover. The mediator advances party self-determination by charting a path for the disputant's conversion of their subject.

What are the mechanisms by which mediation parties can shape their subjects, and what is the role of the mediator in the application of these mechanisms? This Part explains the mechanisms with reference to the construction of the subjects of both the mediation parties and the mediators, using the predominant method of problem-solving mediation as an example.

A. Relational practices of shaping the subject

The basic mechanism outlined here is drawn from Michel Foucault's analysis of the "technologies of the self," which are practices by which one can effect a change upon their subject.[152] Contemplative practices, for example, can function as technologies of the self insofar as they provide the user an opportunity to take stock of their life, measure the distance between where they are and where they want to be, and take steps to move themselves closer to where they want to be.[153] Such technologies of the self are relevant to mediation practice in several ways.

First, such practices implicate the connection between knowledge and the subject. That is, forms of mediation are built

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[152] *See generally* FOUCAULT, *supra* note 116. I am not the first to analyze dispute resolution practices in terms of Foucault's technologies of the self. *See* Cohen, *supra* note 90, at 528.

[153] FOUCAULT, *supra* note 116, at 223.

upon theories of conflict and of how parties can achieve resolutions that are procedurally just and substantively beneficial. Such theories imply that certain conduct is better in a mediation than is other conduct.

For example, Roger Fisher argues that a constructive approach to engaging with a counterpart is *unconditionally* better than taking a more adversarial approach.[154] Or, in the problem-solving approach to mediation, it is a simple truth that parties can objectively identify some outcomes as being better than others.[155] But the truths asserted about mediation are not simply propositions whose truth is available to all (the way that, for example, the elements of the doctrine of fraud can be known by anyone).[156] Instead, accessing the truths of mediation requires the knower to be a particular subject.[157] For example, merely comprehending and accepting the arguments in favor of a constructive approach to mediation is no guarantee of constructive behavior; internalizing the lesson requires a deeper transformation of the subject, effectuated through the application of technologies of the self.[158]

Second, such practices are deeply relational. One cannot effect change upon one's subject without some impetus from a teacher, who can provide the motivation to unsettle one's subject and a model against which to measure one's subject, and who can serve as an interlocutor during the ongoing work of reforming one's subject.[159] For example, if we accept that mediators work not only

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[154] ROGER FISHER & SCOTT BROWN, GETTING TOGETHER: BUILDING RELATIONSHIPS AS WE NEGOTIATE 36–37 (1989).

[155] *See supra* notes 111–112 and accompanying text.

[156] *See* FOUCAULT, *supra* note 116, at 15 ("for the subject to have right of access to the truth he must be changed, transformed, shifted, and become, to some extent and up to a certain point, other than himself. The truth is only given to the subject at a price that brings the subject's being into play. For as he is, the subject is not capable of truth.").

[157] *See id.* at 16 ("[I]n and of itself an act of knowledge could never give access to the truth unless it was prepared, accompanied, doubled, and completed by a certain transformation of the subject; not of the individual, but of the subject himself in his being as subject.").

[158] *See id.* at 487. In a less rarefied sense, this is consistent with my experiences of both learning and teaching dispute resolution: the theory initially presents itself as banal common sense, until one struggles to use it and appreciates how much depends on the position from which one engages with a dispute resolution process; as the layers of the theory become manifest, the subjects themselves come into focus.

[159] *See id.* at 406.

on the basis of knowing certain mediation principles and skills, but also (perhaps primarily) on the basis of achieving a particular subject position from which to apply mediation principles and skills,[160] then the work of mediation training matters for more than its formal content. The work of mediation training must be understood instead in terms of the trainer's ability to help the mediation trainees build themselves into particular subjects—work that will continue well beyond the training session.

These two aspects of the technologies of the self are related. The relational element is necessary *because* the truth of the practices can only be grasped from a certain subject position. The trainee can only internalize what it means to facilitate a problem-solving mediation by *becoming a mediator*, and the trainee can only do that through a process of continually working with a trainer who will challenge them and model what it means to be a mediator. The mediation party can only internalize the value of problem-solving by becoming a problem-solving negotiator, with the encouragement of the mediator (and, perhaps, from their attorney).

1. Subjects and truth: Learning to be a problem-solver

Even as mediators deny that mediation performs inner work, mediators provide the tools with which the parties can become *different kinds of subjects*. They do so through the application of certain facilitative practices.[161]

Ideally, a party's legal counsel will assist their client to think through their situation, define their interests and criteria for identifying a fair outcome, and so forth.[162] But parties may not have

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[160] *See generally* Daniel Bowling & David A. Hoffman, *Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation*, *in* BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONDUCT RESOLUTION 13 (Daniel Boweling & David Hoffman, eds. 2003).

[161] In describing such practices, Foucault observes that they are at once "what makes possible the acquisition of the true discourses we need in every circumstance, event, and episode of life in order to establish an adequate, full, and perfect relationship to ourselves" and simultaneously "what enables us to become the subject of these true discourses, to become the subject who tells the truth and who is transfigured by this enunciation of the truth, by this enunciation itself, precisely by the fact of telling the truth." FOUCAULT, *supra* note 116, at 332.

[162] Brest & Krieger, *supra* note 13 at 827. For an example of effective client counseling in a mediation context, see Jacqueline M. Nolan-Haley, *Lawyers, Clients, and Mediation*, 73 NOTRE DAME L. REV. 1369, 1381–90 (1998).

legal counsel, and legal counsel may not know how to cultivate their clients' skills in problem-solving.[163] Even a skilled lawyer may be unable or unwilling to ask tough questions of their client, due to the nature of their professional relationship. There will always be space for the mediator, as one who is not an agent of either party, to intervene.

The parties' transformation of their subjects proceeds simultaneously through several practices, which can be loosely grouped into two categories. One set of practices unsettles the subjects of the mediation parties: causing the parties to perceive the limitations of their own perspective on the conflict. A second set of practices models how to do the work of participating constructively in mediation: providing the parties with an example of the kind of reasoning subject whose conduct is consistent with the principles of problem-solving mediation.[164] While reasons can be given for these practices, the work involved is not based on reasoning in the first instance.

These practices enable the transformation of the mediation party from a subject who is externally conditioned by social scripts into holding undertheorized positions advanced through counterproductive strategies[165] into one who freely defines their very subject and whose actions are reasoned and in alignment with their general orientation to the world.

The ideal subject participating in a problem-solving mediation is the problem-solving negotiator. In Carrie Menkel-Meadow's influential description, problem-solving is less about generating specific solutions to problems than it is about orienting the parties to relate to each other in certain ways, as distinguished from the adversarial orientation of litigation.[166] Her vision of problem-

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[163] Anthony Kronman emphasizes the importance of good judgment and the challenge of cultivating the lawyer's role as counselor. *See generally* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993).

[164] The transformation of the subject "is an appropriation that consists in ensuring that, from this true thing, we become the subject who thinks the truth, and, from this subject who thinks the truth, we become a subject who acts properly." FOUCAULT, *supra* note 116, at 357. It "involves not so much thinking about the thing itself as practicing the thing we are thinking about." *Id.*

[165] *See, e.g.*, Reynolds, *supra* note 100, at 2366.

[166] Menkel-Meadow, *supra* note 140, at 760.

solving is grounded in the needs of the parties[167] and calls for them to work together to jointly face a problem, seeking opportunities to advance not only their own needs but also those of their counterparts,[168] in ways that lead to just outcomes.[169] Problem-solving is not a mechanical method of generating solutions, but rather is an orientation toward improving the likelihood that a solution is appropriate for the circumstances.[170]

Roger Fisher's notion of being "unconditionally constructive" performs similar work, proposing a strategy by which parties can engage in problem-solving regardless of what their counterparts do.[171] Fisher's prescriptions include negotiating rationally and honestly, with a concern for the needs of the other and an openness to their input.[172] Such an unconditional approach is intended to be risk-averse while still driving the relationship forward.

The truth of these arguments depends upon more than logical proof (though they are based upon closely reasoned argumentation); their truth requires parties to do the work of becoming constructive problem-solvers.[173] While there are important differences between these two concepts,[174] both orient the parties away from the competitiveness and gamesmanship of litigation in favor of a fundamentally different approach to conflict that is grounded in ethical decision making.[175]

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[167] *Id.* at 801–04.

[168] Menkel-Meadow, *supra* note 140, at 804–09.

[169] *Id.* at 813–17.

[170] *Id.* at 839.

[171] FISHER & BROWN, *supra* note 154, at 36–37.

[172] *Id.* at 38.

[173] The concern is not about whether these arguments about constructive problem-solving are logically compelled, but about the conditions in which these arguments make sense. *See* HARCOURT, *supra* note 122, at 110.

[174] For example, Menkel-Meadow's problem-solving is based in an ethic of care concerning the explicit inclusion of other-regarding interests as a way to satisfy needs, while Fisher's analysis is more explicitly concerned with how care for the other can ultimately benefit oneself. *Compare* Menkel-Meadow, *supra* note 140, *with* FISHER & BROWN, *supra* note 154.

[175] The critiques of the problem-solving mode of negotiation are also based on ethical arguments about what is appropriate conduct. *See, e.g.*, James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926 (1980).

2. Relationality: Mediation training as the transformation of the subject

Mediation training performs work on the subjects of mediators. Such training involves teaching principles and developing skills, but even more fundamentally it involves the production of particular subjects.[176] Skills matter (and are important components of mediation training), but how they matter depends upon who performs them and how.[177] For example, mediators learn how to achieve certain perspectives on conflict, seeing disputes from an "external" perspective even as they work closely with the parties and understand their particular perspectives on the conflict.[178]

The trainer provides the trainee with the practices that the trainee may use to perform work on their subject. But it is not enough to simply make these practices *available* because, as has been argued, the truth of these practices is only accessible to one whose subject is already prepared for them.[179] The pedagogical function of the trainer cannot consist solely in imparting propositional knowledge to the individual. The training is instead "a certain action carried out on the individual to whom one offers a hand and whom one extricates from the condition, status, and mode of life and being in which he exists. It is a sort of operation focused on the mode of being of the subject himself, and not just the transmission of knowledge capable of taking the place of or

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[176] Daniel Bowling and David Hoffman describe a three-stage process that begins with skills training, followed by a theoretical understanding of the process, and then a transformation of the mediator's very subject. Bowling & Hoffman, *supra* note 160, at 15–16. Kenneth Cloke argues that "we need to recognize, as Oscar Wilde quipped . . ., that 'nothing worth knowing can be taught.' This does not mean it cannot be learned, but rather that certain kinds of learning take place from the inside out, not the outside in." Kenneth Cloke, *What Are the Personal Qualities of a Mediator?*, *in* BRINGING PEACE INTO THE ROOM 49, 54 (Daniel Boweling & David Hoffman, eds. 2003). On mediation training generally, *see* Joseph B. Stulberg, *Training Interveners for ADR Processes*, 81 KY. L.J. 977 (1992).

[177] Cloke, *supra* note 176, at 50 ("Every question we ask is one that asks itself of us, just as every intervention in the lives of others intervenes in our own lives, often in subtle, unpredictable ways. Deep questions are not objects we manipulate, but forces that also manipulate us. By asking and answering questions in mediation, we do not merely mediate; we both *become* and *create* mediation.").

[178] Douglas N. Frenkel & James H. Stark, *Improving Lawyers' Judgment: Is Mediation Training De-Biasing?*, 21 HARV. NEGOT. L. REV. 1, 18–22 (2015).

[179] *See supra* Part II.A.1; *see also* FOUCAULT, *supra* note 116, at 236–38.

replacing ignorance."[180] Mediation trainers do not merely ask of their trainees that they learn how to perform a particular set of actions with reasonable competency; they invite their trainees to take a new approach to conflict, which involves taking a new approach to themselves. This is a kind of truth that cannot simply be *taught* but must be lived.[181]

Precisely because the kind of knowledge involved in becoming a mediator consists of being able to conduct oneself in certain ways, and because the truth of mediation cannot be grasped through the transmission of simple propositions alone, the work of becoming a mediator requires close engagement with some teacher who lives those truths and is concerned with the pupil's care of the self.[182] Learning mediation is not simply a matter of memorizing principles from a text, it involves the kind of transformation of self that can only occur in community with others.

There is a circularity to the relationship between the trainee's construction of their subject and the knowledge provided by the trainer: the trainee's utilization of these practices shapes their subject, while the practices can only be correctly utilized by one whose subject is prepared to understand them. The trainer's presentation of their own subject provides the impulse to enter this virtuous circle, bringing trainees into a new relationship with themselves as willing subjects.[183]

The trainer works upon the trainee in two ways: through the use of frank speech to unsettle the trainee's subject and make transformation possible, and through the power of the trainer's example as an attractive force.

a. Training mediators by unsettling the self

The trainer's concern with the trainee's care of the self is the source of the trainer's power to motivate the trainee in the transformation of their subject. This concern implicates the subject of the trainer in this work. For, if the trainer's goal is to make the trainee capable of understanding the truths of mediation, they

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[180] FOUCAULT, *supra* note 116, at 134.

[181] MICHEL FOUCAULT, FEARLESS SPEECH 165–66 (Joseph Pearson ed. 2001).

[182] *See* FOUCAULT, *supra* note 116, at 58.

[183] *Id.* at 130.

must speak truthfully.[184] They cannot flatter the trainee, because flattery inhibits the kind of self-knowledge required of acting freely in the care of the self.[185] It is only *frank* speech that permits the trainee to develop the kind of self-mastery that is the proper aim of self-determination,[186] leading to the transformation of the subject.[187] And because the trainer not only *teaches* certain practices but also *lives* them, the trainer must give an account of themselves.[188]

This kind of frank speech is inherently risky to the trainer because it is necessarily critical rather than purely demonstrative.[189] The trainer puts themselves in a subordinate position insofar as they are revealing a path that the trainee can accept or reject, rather than imposing one upon the trainee.[190] The trainee's work on their subject is only possible if voluntarily undertaken; the trainer cannot force it. From their subordinate position, the trainer speaks frankly, offering a critique of the subject of the trainee that reveals the limitations of their existing subject, and offering up their own subject for critique. The trainer gains the power to persuade by abjuring the power to command.[191]

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[184] *See* FOUCAULT, *supra* note 116, at 368.

[185] *Id.* at 376.

[186] Foucault describes this kind of speech as parrhesia, which "involves acting on [others] so that they come to build up a relationship of sovereignty to themselves, with regard to themselves, typical of the wise and virtuous subject." *Id.* at 385.

[187] The purpose of frank speech is "to convince someone that he must take care of himself and of others; and this means that he must *change his life*," for "not only are these practices supposed to endow the individual with self-knowledge, this self-knowledge in turn is supposed to grant access to truth and further knowledge." FOUCAULT, *supra* note 116, at 106–07.

[188] *Id.* at 97.

[189] *Id.* at 17 ("the danger always comes from the fact that the said truth is capable of hurting or angering the *interlocutor*. . . .]T]he function of *parrhesia* is not to demonstrate the truth to someone else, but has the function of *criticism*: criticism of the interlocutor or of the speaker himself.").

[190] It is criticism "either towards another or towards oneself, but always in a situation where the speaker . . . is in a position of inferiority with respect to the interlocutor." *Id.* at 17–18.

[191] Author's Note: Many who teach dispute resolution in academic settings (though by no means all) prefer not to assign grades out of concern that students may engage in certain practices to appeal to an instructor with grading authority, rather than freely experimenting and exploring these practices of their own accord.

b. Training mediators by modeling the self

Mediation training necessarily occurs by example rather than through the rational transmission of lessons alone.[192] Teaching by example requires congruence: the trainer must embody the principles that are being taught, because the trainer must win the voluntary participation of the trainee in this work on the self.[193] The trainer must be one whose subject provides a living example of what the trainee may hope to achieve.[194] The trainee moves themselves by engaging in the work of the self on the self, and the trainer motivates the trainee by demonstrating the truth that is being taught.[195] By creating this movement in the subject of the trainee, the trainer exercises power within this relationship; there is no way to perform this work on the self without some source of power.[196] Such power can be productive and need not be coercive.

B. Unsettling the self

The mediator exercises power through facilitative practices in the mediation, and this power *must* be used to help the parties bring themselves into a state from which to determine the course of the dispute. The mediator's power must be used in such a way because its source is in the mediator's concern for advancing the parties' exercise of self-determination; a mediator's attempt to dictate the

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[192] FOUCAULT, *supra* note 116, at 406 ("At the very moment he says 'I speak the truth,' he commits himself to do what he says and to be the subject of conduct who conforms in every respect to the truth he expresses. It is in virtue of this that there can be no teaching of the truth without an *exemplum*. There can be no teaching of the truth without the person who speaks the truth being the example of this truth.").

[193] Bruce Patton, *On Teaching Negotiation*, *in* TEACHING NEGOTIATION: IDEAS AND INNOVATIONS 7, 40 (Michael Wheeler ed. 2000).

[194] FOUCAULT, *supra* note 116, at 407 ("If, then, we call 'pedagogical' this relationship consisting in endowing any subject whomsoever with a series of abilities defined in advance, we can, I think, call 'psychagogical' the transmission of a truth whose function is not to endow any subject whomsoever with abilities, etcetera, but whose function is to modify the mode of being of the subject to whom we address ourselves."). I use the word "pedagogy" throughout, but in the sense of the "psychagogy" described here.

[195] *Id.* at 16.

[196] Foucault, *supra* note 85, at 298–99 ("The problem in such practices where power—which is not in itself a bad thing—must inevitably come into play is knowing how to avoid the kind of domination effects where a kid is subjected to the arbitrary and unnecessary authority of a teacher, or a student put under the thumb of a professor who abuses his authority. I believe that this problem must be framed in terms of rules of law, rational techniques of government and *ethos*, practices of the self and of freedom.").

process or outcome erodes the foundation for this power of facilitation. This power exists because the mediator stands in a particular relationship to the parties: not a fiduciary or an agent of either, nor acting as an attorney for either; rather, providing a service to both, and one that generally lacks formal certification standards or even uniformly accepted content.[197]

As fundamentally facilitative, the practice of mediation asks the mediator to assume a distinct stance toward oneself and others that allows the mediator to unsettle the subjects of the mediation parties out of a concern for their care of the self. In facilitating a negotiation between the parties, the mediator's ethical principle of impartiality requires frank speech, avoiding the insincerity that would leave a party unaware of the weaknesses of their own claims and the strengths of the claims against them, and avoiding the kind of rhetoric that seeks to sway a party to the mediator's perspective.[198] In the space of a mediation, the heightened confidentiality when a mediator caucuses individually with a party permits this kind of frank speech[199]—often framed as "reality testing," though I would go further to permit more general critique directed towards the parties' care of the self. The mediator can ask hard questions to prompt reasoned reflection and can offer frank feedback.[200]

Mediators cannot but exercise power,[201] and this power derives from the mediator becoming a particular subject. Mediation is a voluntary process, and the mediator cannot compel the parties to reach any particular outcome (or even to continue participating

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[197] *See* Moffitt, *supra* note 17, at 167–69, 184–87.

[198] SHAPIRA, *supra* note 6, at 264–65. As Galen observed of the truth-teller, "A good truth-teller who gives you honest counsel about yourself does not hate you, but he does not love you either." FOUCAULT, *supra* note 116, at 141.

[199] *See* WINSLADE & MONK, *supra* note 10, at 137.

[200] This work may require first helping the parties learn to hear these questions. *See generally* DOUGLAS STONE & SHEILA HEEN, THANKS FOR THE FEEDBACK: THE SCIENCE AND ART OF RECEIVING FEEDBACK WELL (2014).

[201] Foucault, *supra* note 85, at 298 ("The idea that there could exist a state of communication that would allow games of truth to circulate freely, without any constraints or coercive effects, seems utopian . . . The problem, then, is not to try to dissolve [power relations] in the utopia of completely transparent communication but to acquire the rules of law, the management techniques, and also the morality, the *ethos*, the practice of the self, that will allow us to play these games of power with as little domination as possible."). *See also* Ascanio Piomelli, *Foucault's Approach to Power: Its Allure and Limits for Collaborative Lawyering*, 2004 UTAH L. REV. 395, 436–39 (2004).

in the mediation). The mediator abjures the kind of coercive power exercised by the judge, for instance.[202] Rather than being a source of weakness, this renunciation of a juridical form of power gives the mediator their own particular form of power.[203] The mediator stands in a subordinate position with respect to the parties, as the ultimate decision-makers who can terminate the mediation at any time. This position makes the mediator's frankness inherently risky, as it involves a critique of the parties.[204] That riskiness is what makes the mediator's interventions meaningful for the parties' relationships to self. The lack of meaningful liability for mediators may be salutary if it enables mediators to deliver hard messages.[205]

1. The practice of the parties: Perspective-taking

One way for mediators to help parties unsettle their selves is to encourage them to take the perspective of their counterpart and see the dispute from a different angle. Why should a party empathize with their counterpart? Empathy is often described in instrumental terms: understanding the perspective of one's counterpart helps a party hypothesize that counterpart's interests and generate attractive settlement options.[206] It eases communication between the parties by giving a party greater insight into what their counterpart may be trying to express and how their own messages can be framed to improve understanding.[207]

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[202] Mayer, *supra* note 57, at 80–81. But, as Ben Golder explains, this juridical power is not the only form of power exercised in the law. BEN GOLDER, FOUCAULT AND THE POLITICS OF RIGHTS 11 (2015).

[203] *See Id.* at 80 ("To be able to say to parties that 'I will do what I can to help, but in the end the results are up to you' gives the mediator a great deal of power."). *See also* Robert D. Benjamin, *Managing the Natural Energy of Conflict: Mediators, Tricksters, and the Constructive Uses of Deception*, *in* BRINGING PEACE INTO THE ROOM 79, 129 (Daniel Bowling & David A. Hoffman, eds. 2003).

[204] For this reason, Shapira condones some softening of messages by the mediator as involving "only a minor degree of deception." SHAPIRA, *supra* note 6, at 268. I might take a stronger line, but he is clear that deception should be avoided whenever possible, as it involves paternalism that undermines party self-determination. *Id.* at 269.

[205] *See* Moffitt, *supra* note 17.

[206] MNOOKIN ET AL., *supra* note 62, at 48–49.

[207] *Id.*

But exercising empathy through practices of perspective-taking can do more. It generates effects on the party's subject by indicating the limitations of their own perspective, the horizon of which is defined by their own subject position.[208] Such practices have been shown to encourage a more objective perspective on a problem while reducing self-centeredness.[209] Perspective-taking also reveals the limitations of one's ability to step into the shoes of another; seeking to reconstruct the experience of another while recognizing the limitations of one's own ability to do so underscores that there remains something irreducibly *other* about one's counterpart.[210] The self who tries to step into the other's shoes still remains the original self.[211]

In the jargon of the field, by practicing perspective-taking, one can move among "three positions": 1) understanding one's own subject position, 2) understanding the position of one's counterpart, and 3) understanding the position of an objective observer.[212] Stepping into each of these three positions involves work. It is hard enough to gain a deep understanding of oneself,[213] requiring structured practices of reflection. Stepping into the position of one's counterpart requires an empathetic exploration of an alien subject that is inherently limited by the inability to actually step outside of oneself, particularly when experiencing conflict.

Insofar as serious examination of oneself begins to destabilize the subject of the negotiator, it lays a foundation for exploring the perspective of another.[214] Stepping into the position of an objective observer poses different challenges. Recognizing that there is no purely objective position, one can still consider the position of some hypothetical third party—that of the mediator or of a judge, for

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[208] Sternlight & Robbennolt, *supra* note 81, at 495–97.

[209] Frenkel & Stark, *supra* note 178, at 34–39.

[210] *See* Lucie E. White, *Seeking ". . . The Faces of Otherness . . .": A Response to Professors Sarat, Felstiner, and Cahn*, 77 CORNELL L. REV. 1499, 1508 (1992).

[211] *Id.*

[212] *See, e.g.*, ROGER FISHER, ELIZABETH KOPELMAN & ANDREA KUPFER SCHNEIDER, BEYOND MACHIAVELLI: TOOLS FOR COPING WITH CONFLICT 32 (1994).

[213] URY, *supra* note 118, at 34.

[214] *Id.* at 122–24; *see also* Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1, 56 (2002).

example. This work of perspective-taking can occur in conversation with others, such as through role-plays.[215]

The practice of perspective-taking, therefore, need not only be about gaining a strategic advantage by understanding the other (because it is, ultimately, an *imaginative* reconstruction of the other). It can, instead, involve suspending one's own subjectivity for critical examination.[216]

2. The practice of the parties: Self-reflection

The mediator may also encourage the parties to engage in critical self-reflection. Reflective practice involves achieving the kind of self-mastery that permits one to take responsibility for determining what one does with one's skills.[217] Self-reflection, as a practice of self-formation, occurs within a wider world that is the crucible in which the subject is formed.[218]

Sustained reflection can help surface one's underlying interests—not because the act of reflection provides transparent insight into the self as an object of knowledge, but because the repeated act of reflection reveals one's self as something that is *not* transparent, that one's interests are necessarily *un*stable, moving targets whose definition is part of the work of self-creation.[219]

The subject practicing self-reflection captures certain details through the observation of one's thoughts and feelings, records them, and arranges them in particular ways to construct a new

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[215] Robert C. Bordone et al., *The Negotiation Within: The Impact of Internal Conflict over Identity and Role on Across-the-Table Negotiations*, 2014 J. DISP. RESOL. 175, 208–19 (2014).

[216] *See* WINSLADE & MONK, *supra* note 10, at 38.

[217] This kind of reflection can be a vital element of the care of the self. FOUCAULT, *supra* note 116, at 456 ("Caring for oneself means not just using the faculties one has, but using them only after determining the use to which they are put through recourse to this other faculty that determines whether the use is good or evil."). This form of self-reflection is "a gaze that enables reason in its free employment to observe, check, judge, and evaluate what is taking place in the flow of representations and the flow of the passions." *Id.* at 457.

[218] On the relationship with the world as a test of the subject, see FOUCAULT, *supra* note 116, at 485–86. *See also* FOUCAULT, *supra* note 181, at 166 ("One can comport oneself towards oneself in the role of a technician, of a craftsman, of an artist, who from time to time stops working, examines what he is doing, reminds himself of the rules of his art, and compares these rules with what he has achieved thus far.").

[219] URY, *supra* note 118, at 34.

understanding of the self.[220] Ideally, this becomes a regular practice: consistent use develops the skill of engaging in self-reflection even in moments of stress and conflict.[221] While this work can be performed by reflecting on one's actions after the fact, reflection can also occur while *in* action, through a practice of continually monitoring one's performance.[222] Mindfulness practices increase the self-awareness of the practitioner,[223] which permits them to make considered ethical decisions rather than reacting instinctually.[224]

Self-reflection may also involve surfacing one's assumptions about the drivers of the conflict (including one's own responsibility for the conflict).[225] This act of committing to assume responsibility is meant to empower: to identify what is within our power and what is not, and to use our energies where we can, by embracing the opportunities of the present moment.[226] Cultivating gratitude, contentment, and respect for others can reduce the sense of scarcity and insecurity that drives zero-sum negotiating in favor of finding integrative solutions from a position of confidence and security that benefits both parties.[227] As with other practices of self-reflection, repetition can help the parties become the kinds of subjects who see opportunities for solving problems rather than fighting.

C. Modeling the self

The mediator's affect acts as an attractive force on the subjects of the mediation parties through the mediator's ability to "bring peace into the room."[228] This element of mediator effectiveness arises from the mediator's habits of self. Simply by being present with the parties, by paying careful attention to their needs and by

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[220] URY, *supra* note 118, at 26–27; *see also* Bordone et al., *supra* note 215, at 203–08.

[221] URY, *supra* note 118, at 26–27.

[222] *See generally* DONALD A. SCHÖN, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION (1983).

[223] Riskin, *supra* note 214, at 53.

[224] *See* Leonard L. Riskin, *Awareness and Ethics in Dispute Resolution and Law: Why Mindfulness Tends to Foster Ethical Behavior*, 50 S. TEX. L. REV. 493, 498–99 (2009).

[225] Riskin, *supra* note 214, at 55–56.

[226] URY, *supra* note 118, at 106.

[227] *Id.* at 80–85. Ury also recommends identifying practices that spur our generosity to make it easier to give. *Id.* at 156.

[228] Bowling & Hoffman, *supra* note 160, at 35.

fostering mutual respect, the mediator can influence the dynamics of a mediation.[229] By recognizing that the mediator is fully in the room with the parties to a dispute and that the mediator is fully *in* the conflict with the parties rather than sitting somewhere above the fray, the mediator understands that their conduct matters to the dynamics of the conflict, and that their subject is as much at issue as the subjects of the parties—the subjects whose self-determination matters so much.[230]

The mediator's adherence to ethical standards has a direct impact on how they apply their skills, and it has a pedagogical function of modeling practices of self-overcoming.[231] So understood, the appeal to impartiality asks the mediator to perform certain practices of positioning oneself in a certain way with respect to the parties, listening attentively and seriously to arguments presented by both sides, and structuring a process in which each side has the same opportunity to present their story and ask questions.[232] Impartiality is not a fixed state, but a dynamic practice.[233]

Actually existing mediators are people with commitments of their own and, notwithstanding these commitments, they demonstrate that they can work to advance the mediation process by suspending those personal commitments.[234] Because the mediator does not stand outside of the conflict, they must be situated in relation to the parties—in terms of recognizing potential implicit biases and affinities, in terms of the mediator having a professional stake in the outcome (subject to impartiality and conflicts rules), in terms of the mediator having a stake in the resolution of disputes as a potential future disputant and as a

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[229] Bowling & Hoffman, *supra* note 160, at 40.

[230] *Id.* at 22–23.

[231] *See* FOUCAULT, *supra* note 116, at 407 and accompanying text.

[232] *See* Frenkel & Stark, *supra* note 178, at 31–33.

[233] SHAPIRA, *supra* note 6, at 213.

[234] *Id.* at 212.

community member.[235] Impartiality, in this sense, is not an adjective that describes the mediator's relationship to the parties, but rather is a performance that captures how the mediator responds to standing in a certain relationship with the parties, through the use of specific practices of modeling a particular kind of subject and engaging in frank speech.

The mediator's practices of the self—the cultivation of practices of impartiality and curiosity, of respect for the decision-making power of the parties, and of speaking frankly to the parties from a position of vulnerability—shape not only the subject of the mediator but also the subjects of the disputants. The application of the mediator's specific form of power in a mediation establishes the conditions of possibility for the mediation parties to define their own subjects.[236] The construction of the subject through a facilitative process, such as mediation, reveals the freedom of the parties to define their own subjects in ways that cannot be done as easily through the litigation process.[237]

1. The practice of the parties: Listening

The mediator may model practices of listening and may encourage the parties to listen to each other in particular ways. Training a mediation party in this kind of listening may require demonstration rather than explication.[238] The practice of active listening requires listening to one's counterpart in an engaged

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[235] Bowling & Hoffman, *supra* note 160, at 43–44 ("In most mediations, we encounter parties whose disputes do not differ radically from conflicts that have arisen in our own lives—that is, their issues are our issues. . . . A truly successful resolution of a mediation thus can become, for the mediator, a metaphor for the personal challenges in his or her life and a means for achieving a higher level of personal integration."). More concretely, implicit bias is one important way in which ideals of impartiality may be impossible to realize. *See, e.g.*, Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J. L. & POL'Y 71 (2010). *See also* Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 LAW & SOC. INQUIRY 35 (1991).

[236] GOLDER, *supra* note 202, at 73 ("[T]he subject emerges in the field of power relations and is entirely immanent to and bound up with it. This does not signal the inaction or failure of the subject's agency but rather its condition of possibility. The . . . subject's capacity for action (including self-rearticulation) hence derives not from some primal pre-existent, but from the very capacity-bequeathing discourses and institutions whose norms it variously repeats, obeys, betrays, transgresses, and appropriates.").

[237] Foucault, *supra* note 85, at 300.

[238] *See* Moffitt, *supra* note 27, at 10.

manner and with curiosity. A party may inquire to go deeper into a story, acknowledge the emotions raised by the story, or simply paraphrase what they are hearing. The party learns more about their counterpart while simultaneously communicating that they are listening. The practice of active listening has strategic benefits of gathering information and of building rapport.

But, as with perspective-taking practices, practices of active listening also perform work on the practitioners' subjects. The practice of active listening requires not only certain conduct, but conduct performed with a certain inner state; it requires demonstrations of interest from a *genuine* position of curiosity.[239] This curiosity may be heightened through practices of mindfulness.[240] Listening in this way is less about data collection than it is about cultivating a suspicion of certainty.[241] Insofar as active listening requires genuine curiosity, rather than the strategic simulation of curiosity, it requires assuming a particular relationship to self and others.

2. The practice of the parties: Brainstorming

The mediator's facilitation may involve helping the parties identify possible solutions to their conflict. Problem-solving involves generating options that are better for each party than their best alternative to agreement, with the goal of identifying the most efficient options possible (the set of options for which neither party can be made better off without making the other party worse off).[242] One practice for generating efficient outcomes is brainstorming, which involves generating as many options as possible without either evaluation or ownership, to spur creative thinking and without reflexively committing to one's own ideas or rejecting the ideas of one's counterpart.[243] The mediator's explicit

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[239] Jonathan W. Reitman, *The Personal Qualities of the Mediator: Taking Time for Reflection and Renewal*, *in* BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMOACT THE PROCESS OF CONFLICT RESOLUTION 235, 235-36 (Daniel Bowling & David A. Hoffman, eds. 2003).

[240] Riskin, *supra* note 214.

[241] *See* WINSLADE & MONK, *supra* note 10, at 125–27.

[242] *See generally* Chris Guthrie, *Panacea or Pandora's Box?: The Costs of Options in Negotiation*, 88 IOWA L. REV. 601 (2003).

[243] *Id.* at 604–05.

encouragement may be necessary, together with modeling the appropriate behavior.[244]

Taking the principles of non-evaluation and non-ownership seriously means cultivating a certain subject position of exploring options that would be beneficial for both parties without reference to who generated an idea. Once the brainstorming process has generated several possible outcomes, and the parties have evaluated them to eliminate options that are strictly worse than others, then they must grapple with the ethical question of how to use criteria of fairness or legitimacy to select one specific outcome from their own subject position.

D. Using these mechanisms for other purposes

Mediators *already* perform this work of shaping the subjects of mediation parties. Mediators ask parties to consider alternative perspectives, coach parties in how to listen to others and communicate to be understood, and so forth. Mediators may not appreciate that these facilitative interventions are more than just invitations for the parties to perform certain actions, they are invitations for the parties to assume a different relationship to themselves and to others.

The failure to problematize the subjects of mediation means that typical processes assume quite a bit of the parties, in ways that may benefit those who are already privileged.[245] Emphasizing that the parties in mediation are always in the process of *becoming* may make mediation more accessible to those who do not fit the assumptions of what mediation parties look like.

Mediators utilize the mechanisms outlined in this section to effectuate specific forms of mediation, such as facilitating a problem-solving negotiation.[246] This is the great insight of transformative mediation, even if it does not succeed in finding an alternative. If problem-solving mediators take the lead in shaping the parties in specific ways, and if transformative mediators believe that the parties should take the lead and that the job of the mediator is to follow, what would it look like to recognize the

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[244] *See* Moffitt, *supra* note 27, at 27–28.

[245] *See generally* Press & Deason, *supra* note 92.

[246] *See, e.g.*, Bush & Folger, *supra* note 5, at 744.

mutual interdependence of the mediator and the parties—so that none lead or follow, but all co-create themselves and the mediation process?

III. THE PROPOSAL: A CONSTRUCTIVE VIEW OF PARTY SELF-DETERMINATION

Mediators generally understand their facilitative interventions as assisting the parties to engage with conflict in reasoned ways; this is what problem-solving mediation is about. Mediators can prompt the parties to identify their interests, brainstorm settlement options, and so forth.[247] But the mediator's ability to use facilitative practices to move the parties through a process of reasoned negotiation is fundamentally limited. The mediator can move the parties through a structured method of building rapport, mapping interests, evaluating alternatives, generating options, and so on,[248] but the mediator as process architect cannot resolve the ethical questions that, I have argued, sandwich the "objective" method of interest-based negotiation.

The parties must still define their ends: which interests they are concerned with, and to what extent, and what principles of fairness should determine the final outcome.[249] The parties must grapple with these ethical questions, which implicate them in their very subjects. The procedural interventions of the mediator as facilitator of a reasoned negotiation between the parties are not enough, in themselves, to provide for party self-determination in the constructive terms outlined in this article. Mediators must work with the parties to help them shape themselves into subjects who can freely engage in mediation in a reasoned way, including choosing their goals.

And, if we take seriously the claims of transformative mediators that parties may want to do something in a mediation *other than* rationally solving problems, then we need to create space in mediation for those other ways of engaging with conflict. But this cannot mean transformative mediation's maxim of "following the

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[247] For several ways in which a mediator may perform this work, see Raiffa, *supra* note 84, at 318–19.

[248] *See supra* notes 107–114 and accompanying text.

[249] *See supra* Part I.C.2.

parties," because the work of the self on the self requires some external impetus.[250]

This section describes mediation as a space where the mediator and the parties encounter each other to discover what they require from conflict and to create a process that satisfies their needs. It asks whether "self-determination" is the appropriate answer to the question of how to protect the freedom of mediation parties, proposing instead a model of collaborative co-creation of the mediation that rejects the illusion of an atomistic self capable of determining its own course, independent of others.

A. The space of the mediation

By considering mediation as a space where the disputing parties encounter each other and a mediator in a structured setting (which itself is an intrinsic part of the system),[251] we can see how

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[250] In a powerful statement of the method of transformative mediation, Trina Grillo explained that:

> Once [a party] is more aware of what she wants and needs, she may be more open to the needs, and even the humanity, of the other party. That recognition, however, is not a sure thing and must come on the client's timetable; it can neither be forced nor guaranteed. Still, the only path to it is through a respect for and acknowledgment of the emotion generated by the situation.

Trina Grillo, *Respecting the Struggle: Following the Parties' Lead*, 13 MEDIATION Q. 279, 281–82 (1996).

While it is surely true that the parties' recognition of the other cannot be forced or guaranteed, neither is it a matter that should—or even can—be left to the parties alone without the encouragement of the mediator. *See* Cobb, *supra* note 146 at, 227 (proposing "a radical departure from what could be called first-generation mediation practice, where the mandate not to influence the content of the dispute is thought to be essential to preserving the privilege the parties have of defining their own problems and building their own solutions" because "once we adopt an interactionist or social constructionist perspective, the mandate to separate content from process dissolves, as mediators recognize the inevitability of their impact on the content of the dispute").

[251] For the significance of the physical context, see generally Andrew B. Mamo, *Object Lessons: The Materiality of Dispute Resolution*, 38 OHIO ST. J. ON DISP. RESOL. (2023). *See also* WINSLADE & MONK, *supra* note 10, at 41 ("[M]ediation is more than just a place where particular interpersonal problems get resolved and some kind of social homeostasis gets restored. It is where we should take care to talk with an eye on the kind of world we are creating because we are always in the process of creating it.").

multiple processes of self-formation can occur, each informing the others.[252]

The ways in which the mediation process is convened bear upon the willingness and ability of the parties to engage in their work upon the self. Because the parties' work on their subjects must be undertaken willingly, it matters whether the parties voluntarily choose to participate in mediation or whether they are required to do so.[253] If they participate in mediation only because they are required to do so, they are unlikely to choose to do the work of constructing their subjects. Even if they participate voluntarily, it matters whether they do so as a way of seeking a quick, efficient solution or whether they do so as a way of engaging in a more searching inquiry into the nature of their conflict and their role in it.[254] The motivations of the parties are not fixed; parties who initially resist performing deep work may open up with appropriate engagement.[255] The convening process matters for the substance of the mediation and the possibilities of self-creation.

The space of the mediation, which is designed by laws and material architectures to be one that is largely beyond the reach of the litigation system, also matters. The laws governing mediation contain robust limitations on disclosure, defined by the rules of evidence, distinct mediation privileges, and contractual protections of confidentiality, within spaces that are designed to be confidential, comfortable, and conducive to candor.[256] These protections permit the kind of frank speech, explorations of the limitations of one's perspective, and expressions of emotion that might otherwise prejudice one's legal case.[257]

Within the space of the mediation, the mediator utilizes certain practices to assume a particular subject position, as

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[252] *See* Cobb, *supra* note 146, at 231.

[253] *See generally* Welsh, *supra* note 5. On the irony of parties being compelled to use processes defined by voluntarism, see Stephen Landsman, *ADR and the Cost of Compulsion*, 57 STAN. L. REV. 1593, 1600 (2005).

[254] *See* FOUCAULT, *supra* note 116, at 132.

[255] *See* WINSLADE & MONK, *supra* note 10, at 210–11.

[256] *See, e.g.*, Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do with It?*, 79 WASH. U. L. Q. 787, 796–97 (2001).

[257] On expectations of candor among participants, see SHAPIRA, *supra* note 6, at 265–66.

described previously.[258] In doing so, the mediator invites the parties to apply these practices themselves, which transformative mediators understand as limiting self-determination insofar as they impose a goal of problem-solving upon the parties.[259] But once the mediator's own subject is put at issue, then the parties act upon the mediator even as the mediator acts upon them. The parties teach the mediator about the stakes of the conflict as the mediator helps the parties explore appropriate conflict engagement strategies, revealing a broader range of possibilities.[260]

Consider the perspective-taking practice of moving through the "three positions": each party is asked to consider their own standpoint and that of their counterpart, and also to consider the "third position" of an impartial observer—such as that of the mediator.[261] The mediator may be doing similar work: trying to understand the perspectives of the parties and perceive the limitations of their own position.[262] The parties and the mediator may all be exploring each other's perspectives. As argued above, the payoff of this kind of perspective-taking practice is less to *genuinely understand* the perspective of another—one must be wary of assuming that they can accurately understand the perspective of another when they are reconstructing that perspective from their own standpoint—than to *unsettle* their own perspective.

Perspective-taking is an exercise in self-critique that confronts the limitations of one's own subject position—including the mediator's own.[263] Awareness of these limitations opens up the possibility of becoming a different subject.[264] Through such practices, a mediation party can cease to be a reactive disputant and instead can become a self-aware mediation subject concerned with the care of the self in the context of lived experiences of (in)justice.[265] The practices of ethical self-reflection can be applied

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[258] *See supra* Part II.A.2.

[259] *See, e.g.*, Bush & Folger, *supra* note 5, at 744.

[260] *See generally* BERNARD S. MAYER, BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION (2004).

[261] *See supra* Part II.B.1.

[262] Frenkel & Stark, *supra* note 178, at 44.

[263] *Id.*

[264] *See supra* Parts II.B. and II.C.

[265] *See* Reynolds, *supra* note 100, at 2377.

by mediation parties to engage in problem-solving or to reframe mediation as something other than a facilitated form of negotiation.

The mediator can also explore their own position as the facilitator of a process, committed to the parties' care of their selves.[266] To what extent do the parties perceive the mediator to be in a position of power over them, and how can the mediator counter this perception? What do the parties want to do: solve a problem or something else? How can they make a thoughtful decision, based on a reasoned examination of their goals? The mediator can invite an open inquiry of these basic questions.

The subject of the freely reasoning mediation party only comes into being through this work on the self. It is by understanding their own position in relation to others, by recognizing the concerns of their counterpart through the work of imaginative reconstruction (and by recognizing the concerns of the mediator through this work of imaginative reconstruction) that they can construct their own subjects. The subject emerges through a constructive process of performing specific practices in relationship with others. Self-formation involves an exploration of the self, through which the mediation parties cease to be reactive disputants by coming to a fuller understanding of their selves in relationship with others, and the mediator abandons the belief *ex ante* that the parties to the mediation want the mediator's help solving a well-defined problem.

B. Critique as a necessary stage of the construction of the parties

Understanding party self-formation as an exercise of freedom calls for identifying the full range of possibilities that are available to the parties in the definition of their subjects—acts of definition that occur in conversation with others. The negative model of party self-determination, which depends upon the liberation of some "authentic" self through the elimination of sources of domination, takes an uncritical view of the disputants, assuming, for example, that they are predictably irrational problem-solving negotiators or

[266] This exploration of the role of the mediator as concerned with the parties' care of the self may include reflecting upon mediation as a practice that advertises itself as concerned with an ethic of care—and how the failure to actually deliver on that promise can be particularly dangerous to certain parties. *See* Grillo, *supra* note 68, at 1603.

that they are self-directed agents striving for self-actualization.[267] By contrast, the constructive view of party self-formation is necessarily a *critical* activity that begins by exposing the limitations of the existing subject[268] to reveal possibilities that had not previously been recognized.[269] It necessarily points beyond the existing limits of the subject, because once the malleability and limitations of the subject have been revealed, the work of reconstituting the subject can begin.[270] The critique of the existing subject reveals the possibilities of freedom.[271]

The process of critique may begin with the mediator exercising the mediator's power to unsettle through truth-telling from a position of vulnerability. The mediator must be open to complicating their own understanding of self through the process and can only be trusted to facilitate the parties' exploration if they are similarly vulnerable to critique from others and to self-

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[267] *See supra* Part I.C.1. I borrow the phrase "predictably irrational" to capture the range of ways in which behavior deviates from axioms of rational behavior. *See generally* DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR BEHAVIOR (2008).

[268] FOUCAULT, *supra* note 116, at 94 ("The practice of the self is established against a background of errors, bad habits, and an established and deeply ingrained deformation and dependence that must be shaken off.").

[269] *Id.* at 93 ("The function of the practice of the self will be as much correction as training. Or again: the practice of the self will become increasingly a critical activity with regard to oneself, one's cultural world, and the lives led by others. . . . The training component remains and is always present, but it is fundamentally linked to the practice of criticism.").

[270] *See* GOLDER, *supra* note 202, at 32. Critique "entails a historical exposure of the contingency of our present and of how it was composed. At the same time, and by virtue of this, it also exposes the possibility of thinking, acting, and doing that present otherwise." *Id.* at 36.

[271] *Id.* at 58 ("Critique . . . is not (indeed, cannot be) an instance of pure negation or rejection, but is rather best understood as an affirmative exposure of human possibilities that are forgotten when contingent social and political formations come to be naturalized and rendered commonsensical. On this view critique is a form of excavation. What critique excavates is the hidden margin of freedom immanent in all contingent human arrangements, and what it thereby demonstrates is the sustaining possibility of their being otherwise than they are now . . . .").

critique.[272] Doing otherwise reproduces the hierarchical position of the professional situated above the parties that mediation was meant to avoid.[273] But this voluntary assumption of a subordinate role is the source of a different form of mediator power, by which the mediator has the power to unsettle the subjects of the parties.

The mediator's critical work of unsettling the subjects of the mediation is only the beginning. The parties to mediation are invited to critique the definition of their own subjects by confronting the limits of their own self-knowledge. The parties in dispute enter the mediation with a limited perspective on the dispute—and on themselves. To the extent that they do not know the experience of the other, they cannot know *themselves*—because they can only come to know themselves in terms of the effects that they generate in the world.

The freedom thus revealed through critique is not necessarily a welcome one; the freely chosen determination of one's subject, in dialogue with others, requires a depth of work on the self that goes beyond what is traditionally understood of mediation, work that the disputant may never have performed and may not want to perform (and cannot be compelled to perform).[274] Learning information that is inconsistent with one's partial self-perception can be difficult, which means that a mediator engaging in frank speech has the challenging task of encouraging each party to come to know

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[272] Michelle LeBaron, *Trickster, Mediator's Friend*, *in* BRINGING PEACE INTO THE ROOM:HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONDUCT RESOLUTION 135, 137 (Daniel Bowling & David A. Hoffman, eds. 2003) ("We step into the private domain of other people's conflicts, involving ourselves as resources in all that those conflicts evoke and deliver, the inner turmoil and the outer bravado. Mediators challenge the boundaries others have erected, inviting parties to imagine new ways of sharing resources while expanding their repertoires of constructive ways to relate. As mindful mediators, we also challenge boundaries within ourselves, noticing when our assumptions and beliefs get in the way of parties' progress.").

[273] *See* WINSLADE & MONK, *supra* note 10, at 122–23. I think this still leaves some space for a lawyer/mediator to speak generally about the law without imposing their views upon the parties, as can be the case with "evaluative mediation." *See supra* note 2.

[274] Foucault argues that "right from the start, at the moment of his birth, even in the lap of his mother . . . the individual has never had the relationship to nature of rational will that defines the morally sound action and the morally valid subject. . . . The individual should strive for a status as subject that he has never known at any moment of his life. He has to replace the non-subject with the status of subject defined by the fullness of the self's relationship to the self. He has to constitute himself as subject, and this is where the other comes in." FOUCAULT, *supra* note 116, at 129.

themselves—having the courage to gain the kind of knowledge that may, if handled properly, be seen as a gift (in the way that honest feedback is a gift). And the mediator must do so while also engaging in self-critique.

Mediation, as a form of dispute resolution that exists within defined legal parameters but that contains the possibilities of resolution based on principles beyond the juridical, creates opportunities for critically reimagining the bases for how we resolve disputes.[275] The space of the mediation, and the deep engagement with the substance of issues that is permitted by a mediation, permits experimentation in ways that avoid the universalizing claims of the law.[276]

C. The mutual construction of the parties and the mediator

The only way for the mediation parties to exercise the freedom that self-determination was meant to protect, I have argued, is for them to take responsibility for becoming the kind of subject they wish to be in the context of engaging with a dispute in a process involving others. And the only way for mediation parties to do so is by first critically exploring the limitations of their own subjects, in dialogue with the mediator and each other.[277] It is not enough for a mediator to facilitate a process, because ultimately the outcome of the mediation turns on how parties address ethical questions that

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[275] GOLDER, *supra* note 202, at 22 ("to be critical . . . is to pose questions of the government of conduct . . . using the available political resources and repertoire furnished by government itself, a kind of refractory turning of government against itself from within the discursive and political field of possibilities opened up by government. The critic is necessarily situated within the field of government and tries to destabilize existing governmental arrangements from this immanent vantage point, thereby freeing them up to the possibility of their being otherwise."). *See also* Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971).

[276] Cohen, *supra* note 9, at 235 ("[M]ediation is not necessarily an alternative to the state, although it can be. But, crucially, mediation is always a vector, pointing to and co-constitutive with the social order beyond it. In other words, it is a category that is emergent from the social order and that simultaneously insists that this order needs to be played with, inverted, invoked, evaded, transgressed, changed, perhaps abolished."). *See also* GOLDER, *supra* note 202, at 51 ("this is a form of critique that does not measure and thereby attempt to change existent arrangements by holding them up to universal normative standards that transcend them, but rather one that tries to isolate and mobilize the particular possibilities for change and contestation disclosed within and by those practices themselves.").

[277] *See* Benjamin, *supra* note 203, at 113.

involve the relationship between the subjects of the mediation participants and the resolution of their specific dispute. It is not enough for a mediator to "follow the parties," because the parties cannot perform the work of constructing their subjects without the intervention of the mediator as a frank interlocutor and as an exemplar of a critical approach to conflict.

What would it mean for the parties to use mediation for the purpose of self-creation, undertaken in relationship with each other and the mediator, within a protected space? It is impossible to say with precision, because the point is to leave this up to the parties to define. But such forms of mediation would be demanding of the parties because a commitment to party self-creation would require that the parties be the ones to make a reasoned determination of how they will engage with the mediation process, without believing in the fiction that this determination is *theirs alone*—they cannot extricate themselves from their social context. They must determine what their conflict means for them.[278] They must determine how they will relate to the mediator and the other party and the space of the mediation.[279] Each party must do so while recognizing their counterpart's ability to reach different determinations and while in conversation with third parties, such as the mediator. Party self-determination requires taking responsibility for the construction of the self.

Such forms of mediation would be demanding of the mediator, because they would require abandoning an *ex ante* commitment to mediation as problem-solving (or anything else).[280] For the mediator to model a specific relationship to self and other would require the mediator to have access to a broad range of conflict

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[278] For more on how consensual dispute resolution is instrumentally valuable as a way of achieving justice, and that sometimes other means are necessary instead, see REBECCA SUBAR, WHEN TO TALK AND WHEN TO FIGHT: THE STRATEGIC CHOICE BETWEEN DIALOGUE AND RESISTANCE (2021).

[279] *See* WINSLADE & MONK, *supra* note 10, at 47 ("Complexity increases the range of possibilities for how things can develop. Multiple identities increase the range of resources that people can bring to bear on a situation. Conflicting discourses mean that people can always learn from looking at things from another perspective.").

[280] *See, e.g.*, Grillo, *supra* note 68, at 1610 ("the mediator must learn to respect each client's struggles, including her timing, anger, and resistance to having certain issues mediated, and also must learn to refrain, to the extent he is capable, from imposing his own substantive agenda on the mediation").

engagement behaviors.[281] The mediator would require a protean strategy of neither leading nor following the parties, but of acting as a mirror to co-create the parties' approaches to the dispute and to themselves.[282] The obligation of promoting party self-determination requires creating space for these acts of self-creation.

This vision of mediation requires recognizing the mutual interdependence of all the parties and the mediator, without using such interdependence as an excuse to avoid moral claims.[283] The stakes of the dispute are not limited to the concrete settlement terms, but extend to systemic considerations of creating fair processes (which perhaps requires the ability to see the other as, in some fundamental sense, similar to ourselves) and of recognizing the myriad of forces that contributed to the harm.[284] In effect, mediation focused on the possibilities of party self-creation through a reasoned and empathetic engagement among the parties and the mediator, as a foundation for problem-solving or other settlement-oriented conduct (whatever the outcome), has the potential to avoid both the moralizing binary of victim/offender and the amoral, bureaucratized logic of dispensing with legal claims by paying their market value.[285]

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[281] *See generally* MAYER, *supra* note 260.

[282] *See* Cobb, *supra* note 146, at 230 ("[T]he purported magic of mediation is revealed—shifts in relationships, which themselves bear witness to shifts in how we see self and other, are not mysteriously produced by the mediation process itself but by the careful process of double witnessing in which both pain and accountability emerge as features of the problem, and its solution emerges via the evolution of the narratives that parties tell. By implication, double witnessing requires that mediators themselves own their participation, as witnesses who do not only reflect the pain of the parties but also actively construct it, along with its link to responsibility (the ability to respond). They must witness themselves as witnesses to others.").

[283] *See* Grillo, *supra* note 68, at 1561–62. The language of blame may still have a role, even when the parties identify that they may each have contributed to the existence of a problem. The risk lies in using the existence of multiple causes as an excuse to avoid a difficult discussion of culpability, or to use "problem solving" as an excuse to avoid exploring the parameters of the problem. *See also* Peter Gabel, *Critical Legal Studies as a Spiritual Practice*, 36 PEPP. L. REV. 515, 530–31 (2009).

[284] On the possibility of recognizing the shared experiences of suffering, see Riskin, *supra* note 224, at 500.

[285] *See* WINSLADE & MONK, *supra* note 10, at 47. In doing so, it may transcend the distinction drawn between "self-determination theorists" and "social norm theorists" in mediation. Ellen Waldman, *The Concept of Justice in Mediation: A Psychobiography*, 6 CARDOZO J. CONFLICT RESOL. 247, 250 (2005).

It might be the case that parties in mediation do not wish to do the work on their selves that would permit them to freely determine how they participate in a mediation; self-creation may demand more of the parties than they are willing to give.[286] And that is fine; there is no need to force the parties to be free. If so, the mediator may be able to take the lead in facilitating a problem-solving process or to follow the parties on their journey through conflict, as they see fit.[287] Mediation without work on the self may yield a good outcome and may do so faster (and cheaper) than the alternatives. Parties may be content to have some opportunity for voice in a mediation, and that perception of meaningful participation may be sufficient to make mediation satisfactory in terms of procedural justice.[288] It would suffice to guard the mediation process against coercion, mediator overreach, gross bargaining inequality, and sheer irrationality, as existing approaches to mediation do. But, if so, we should cease pretending that mediation is built upon a foundation of self-determination.

So, why insist on a robust notion of mediation involving party self-creation? Because achieving it is possible. The parties to a mediation *can* freely determine the course of their mediation with the assistance of a thoughtful and critical mediator. That possibility should be celebrated. I invite others to join me in doing so but claim nothing more than that.[289]

CONCLUSION

We return to the questions posed at the beginning of this Article. Does the uncoerced settlement of a dispute through a

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[286] For evidence that litigants prefer ex ante to have third-party control over their process, see Donna Shestowsky, *How Litigants Evaluate the Characteristics of Legal Procedures: A Multi-Court Empirical Study*, 49 U.C.D. L. REV. 793, 820 (2016). On the obstacles to fulfilling the promises of mediation, see Robert Rubinson, *Of Grids and Gatekeepers: The Socioeconomics of Mediation*, 17 CARDOZO J. CONFLICT RESOL. 873, 875 (2016).

[287] *See* WINSLADE & MONK, *supra* note 10, at 118; *but see* Stulberg, *supra* note 26, at 991–92.

[288] *See* Nancy A. Welsh, *Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation*, 70 S.M.U. L. REV. 721, 735–37 (2017).

[289] More specifically, I do not claim that this is the "right" way to mediate, only that I find this to be a helpful framing of my practice now. *Cf.* HARCOURT, *supra* note 122, at 49.

mediation in which the parties voluntarily choose to participate *necessarily* represent a normatively desirable advancement of party self-determination? No. A genuine commitment to party self-determination would ask more of the parties. The outcome of a mediation built around party self-determination would need to be the product of the parties' reasoned engagement with the conflict, even if the parties decide to exit the mediation without a resolution. A genuine commitment to party self-determination would also ask more of the mediator. It would ask mediators to approach mediation as a *critical* practice of unsettling the subjects of mediation parties through frank speech at some risk to themselves. This would permit the parties to freely determine how they would engage with the mediation process and with the other participants in a mediation—whether or not it leads to problem-solving or to a settlement.

Why should party self-determination be a foundational ethical principle of mediation if settlements can be procedurally fair and substantively beneficial to both parties in the absence of robust self-determination? The motivation for requiring party self-determination is for the parties to freely choose how they engage with their dispute in a mediation. The concern is that, in the absence of party self-determination, this choice will be made by others. But that is not quite right: parties are acted upon, and they act upon others; a mediator's exercise of power through facilitation may be, but is not necessarily, coercive. The better questions, if we are concerned with protecting mediation's capability to advance the freedom of the parties, are whether the parties have chosen how to engage with the mediation in ways that make sense to them and whether the mediator has helped the parties become the best versions of themselves to make those choices—as skilled problem-solvers or as fighters or otherwise.

Who is the self whose self-determination matters? A self that is so thoroughly connected to others that there is simply no atomistic inner self that can determine the course of the mediation alone. The mediator can work with the parties to understand what they want from the conflict, recognizing that this may be a moving target. The mediator, as an expert not only in problem-solving but in a broad range of conflict engagement strategies, can help the parties understand what it would look like to work together toward resolution as skilled problem solvers *and* what it would look like to

skillfully raise the stakes—so that the parties can make an informed and thoughtful determination of how to proceed.

The fundamental question of self-determination is not how to protect the parties as autonomous actors, but how the parties can freely constitute their own subjects—determining the self that engages with conflict.