

The Psychology of Mediation: Issues of Self and Identity and the "IDR Cycle"

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INTRODUCTION

It is well established that issues of self-identity and self-esteem play an important role in mediation. Sometimes they are spoken of in terms of a party's need to "save face," or of a person's "ego" clouding his thinking. In psychoanalytic terms, they may be referred to as "narcissistic issues" (a term that no longer necessarily connotes pathology).¹ Put simply, most people take the conflict personally and the outcome of the mediation as a reflection of who they are.

Issues of self and identity raise profound and often painful questions about who we are. Psychoanalytic theorists have analyzed in depth the ways that a person's sense of self develops. On the other hand, some spiritual traditions insist that however it develops, the ego, our usual sense of who we are, is actually an illusion, something to be transcended. In recent years, there have been some important attempts to bridge the gap between these two positions. Yet the nature of the self and its identity remains a fundamental human mystery.

Parts I and II of this article briefly survey a number of different perspectives on the nature of the self and self-identity. Perspectives from psychoanalytic theory, neuroscience, social psychology and certain spiritual teachings are discussed.

Part III discusses mediation practice in light of those perspectives. Part IV focuses on the way that the mediator's own psychological issues of self and

¹ The term "narcissism" originally had an auto-erotic, and therefore a pejorative, connotation. *See, e.g.,* Sigmund Freud, *On Narcissism: An Introduction*, in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD (trans., J. Strachey 1967), *reprinted in* ESSENTIAL PAPERS ON NARCISSISM (hereinafter "ESSENTIAL PAPERS") 17 (Andrew P. Morrison ed., 1986). This is no longer the case. *See* Leonard Horwitz, *Narcissistic Leadership in Psychotherapy Groups*, 50 INT'L. J. GROUP PSYCHOTHERAPY 219-220 (2000) (contrary to older views, narcissism is now considered to be "shared by all humans" and as "vital . . . as the physiological functions of . . . temperature, respiration, and heartbeat.").

identity arise in mediation and the importance of learning to deal with them effectively.

Part V builds on the previous sections to describe and analyze the psychological cycle of narcissistic inflation, deflation and realistic resolution that occurs in many, if not most, mediations. I call this the "IDR cycle." Understanding this cycle helps explain why many of the "critical moments"² in mediation happen when they do, and why a deeper understanding of psychological dynamics can help mediators be more effective.

I. PSYCHOANALYTIC THEORY ON THE DEVELOPMENT OF THE SENSE OF SELF AND IDENTITY.

Issues of self and identity play an important role in negotiation and mediation.³ "Whether anticipated or enacted, whether about deeply held values or irrelevant non-issues, conflict produces ego-threat,"⁴ which greatly complicates conflict resolution. When a party's pride is wounded during negotiation,

² The meaning of this term is discussed *infra* note 223.

³ Tom R. Tyler, *The Psychology of Disputant Concerns in Mediation*, 14 NEGOTIATION J. 367, 371 (1998) ("What emerges from the dispute resolution research is the extreme importance which people . . . place on being treated in a way that enhances their feelings of self-worth and personal dignity"); Bert R. Brown, *The Effects of Need to Maintain Face on Interpersonal Bargaining*, 4 J. EXPER. SOC. PSYCHOL. 107, 109 (1968) (discussion of importance of face saving in negotiation); Madan N. Pillutla & J. Keith Murnighan, *Unfairness, Anger and Spite: Emotional Rejections of Ultimatum Offers*, 68(3) ORG. BEHAVIOR AND HUMAN DECISION PROCESSES 208, 210 (1996) (discussing wounded pride and spite in negotiations); DOUGLAS STONE ET AL., *DIFFICULT CONVERSATIONS, HOW TO DISCUSS WHAT MATTERS MOST* 111 (1999) ("Difficult conversations threaten identity").

⁴ Carsten W. De Dreu & Dan van Knippenberg, *The Possessive Self as a Barrier to Conflict Resolution: Effects of Mere Ownership, Process Accountability, and Self-Concept Clarity on Competitive Cognitions and Behavior*, 89 J. PERS. AND SOC. PSYCHOL. 345, 355 (2005).

settlement offers may not be evaluated objectively. To save face, even acceptable offers may be rejected out of spite.⁵

Much invaluable work in this area has been done from a behavioral or social psychological perspective.⁶ However, for the most part, this research does not address the nature of the self, or why these issues arise in negotiation and mediation.⁷ The views of psychoanalytic theorists on the development of the sense of self can help address these questions, as discussed below.⁸

A. *Margaret Mahler on the Separation/Individuation Process.*

Beginning in the 1950s, and over the course of several decades, Margaret Mahler and her colleagues ("Mahler") observed infants interacting with their mothers.⁹ Mahler concluded that initially the infant does not have a sense of

⁵ Roy F. Baumeister & David A. Butz, *Roots of Hate, Violence and Evil*, in THE PSYCHOLOGY OF HATE 87, 94-95 (Robert J. Steinberg ed., 2005), citing Brown, *supra* note 3. See also Robert S. Adler *et al.*, *Emotions in Negotiation: How to Manage Fear and Anger*, 14 NEGOTIATION J. 161, 173-174 (1998); Pillutla & Murnighan, *supra* note 3, at 210; Eric van Ginkel, *The Mediator as Face-Giver*, 20 NEGOTIATION J. 475 (2004) ("reduction in flexibility in the bargaining process may be an indication of a face concern").

⁶ Max Bazerman *et al.*, *Negotiation*, 51 ANN. REV. PSYCHOL. 279, 280-286 (2000) (tracing history of social psychological study of negotiation).

⁷ Additionally, these approaches are not focused on the importance of psychological differences between individuals. Cf. Bazerman, *supra* note 6, at 281 (arguing that focusing on "individual differences" is of "limited use"). For a review of the self in social psychology, see Matthew D. Lieberman, *Principles, Processes and Puzzles of Social Cognition: An Introduction for the Special Issue on Social Cognitive Neuroscience*, 28 NEUROIMAGE 745 (2005) ("The self is as strange as psychological phenomena get.").

⁸ There are a range of views because there is currently a "theoretical pluralism" within psychoanalysis. Leo Rangell, *An Analysis of the Course of Psychoanalysis, The Case for a Unitary Theory*, 23 PSYCHOANAL. PSYCHOL. 217, 218 (2006). For reasons of space, not all of the current views can be dealt with here.

⁹ MARGARET S. MAHLER ET AL., THE PSYCHOLOGICAL BIRTH OF THE HUMAN INFANT, SYMBIOSIS AND INDIVIDUATION (hereinafter "MAHLER ET AL., PSYCH. BIRTH") ix (1975). A classic overview of Mahler's work is contained in JAY R. GREENBERG & STEPHEN A. MITCHELL, OBJECT RELATIONS IN PSYCHOANALYTIC THEORY 274-281 (1983).

self.¹⁰ The infant is predominantly in a physiological, sleeplike "autistic phase" after birth.¹¹

About three to four weeks after birth, the "symbiotic" phase begins. The infant experiences himself¹² and mother as a "dual unity," enveloped within a common boundary.¹³ "Mirroring" by the mother and mutual cuing foster the beginning of identity formation.¹⁴ At about four to five months, in the early stages of the "differentiation subphase," the infant's capacity for sensory discrimination between self and other begins to emerge.¹⁵

The practicing subphase. During the period from the age of ten or twelve months to sixteen or eighteen months,¹⁶ the "practicing subphase," the infant begins to explore the world. With a sense of omnipotence derived largely from the sense that he shares in his mother's powers,¹⁷ the child walks freely with an upright posture, is elated, and views "[t]he world [as] is his oyster."¹⁸ The infant's natural narcissism is at its peak.¹⁹

The rapprochement subphase. Beginning in the middle of the second year, the child begins to discover that "contrary to his earlier narcissistic sense of

¹⁰ GREENBERG & MITCHELL, *supra* note 9, at 278.

¹¹ MAHLER ET AL., PSYCH. BIRTH, *supra* note 9, at 41.

¹² Gendered terms such as "he" or "she" or "himself" or "herself" will be alternated at times in this article solely for the purpose of gender balance.

¹³ MAHLER ET AL., PSYCH. BIRTH, *supra* note 9, at 44-45.

¹⁴ MARGARET S. MAHLER, *The SELECTED PAPERS OF MARGARET S. MAHLER, VOL. II, SEPARATION-INDIVIDUATION (hereinafter "MAHLER, SELECTED PAPERS")* (1979) 86-87. For example, mother sees infant smile and reach for a toy; mother smiles in return and hands infant the toy. Mirroring would also include the familiar type of activity where mother responds to infant vocalizations by repeating them back or to infant activity by doing the same.

¹⁵ MAHLER ET AL., PSYCH. BIRTH, *supra* note 9, at 52-54; GREENBERG & MITCHELL, *supra* note 9, at 275.

¹⁶ MAHLER, *SELECTED PAPERS*, *supra* note 14, at 126.

¹⁷ *Id.* at 88.

¹⁸ MAHLER ET AL., PSYCH. BIRTH, *supra* note 9, at 71, MAHLER, *SELECTED PAPERS*, *supra* note 14, at 126.

¹⁹ MAHLER ET AL., PSYCH. BIRTH, *supra* note 9, at 70-71; GREENBERG & MITCHELL, *supra*, note 9, at 276.

omnipotence, he is in fact a very small person in a very big world.”²⁰ These “terrible twos” are a time of struggle and conflict.²¹ The child both wants and needs mother's help but also needs to deny that he is dependent upon others.²²

As a result, there is a great deal of ambivalence, with a tendency for the child to mentally “split” mother into a “good” mother and a “bad” mother.²³ The child cannot yet understand others as complex people who will sometimes meet his needs but at other times frustrate them.

Self and object constancy. Separation from mother and independent functioning become possible as the child develops the capacity to internalize an image or representation of mother in his mind. The child's internal representation of a supportive mother becomes, in effect, a durable, mental “object,” an object upon which he can rely.²⁴ He will then become less dependent upon having his actual, physical mother with him.²⁵

It is thus with the development of “object constancy” — “the ability to evoke a self-soothing internal representation of a need gratifying [mental] object when the object is not present”²⁶ — that the rapprochement crisis is resolved.

²⁰ *Id.* at 277; MAHLER, *SELECTED PAPERS*, *supra* note 14, at 128.

²¹ GREENBERG & MITCHELL, *supra* note 9, at 278; MAHLER, *SELECTED PAPERS*, *supra* note 14, at 128 (noting infant's “intense negativity” and “dramatic fighting” with mother during rapprochement).

²² GREENBERG & MITCHELL, *supra* note 9, at 278.

²³ MAHLER ET AL., *PSYCH. BIRTH*, *supra* note 9, at 84, 229; GREENBERG & MITCHELL, *supra* note 9, at 278 (noting that splitting of good and bad representations are characteristics of the rapprochement crisis). One reason for the splitting is that the child wishes to insulate the “good” mother or the “good” object from his aggressive or destructive urges. MAHLER ET AL., *PSYCH. BIRTH*, *supra* note 9, at 84 and 108.

²⁴ *Id.* at 110. The psychoanalytic concept of the “object” is a complex one; its full complexity cannot be dealt with here for reasons of space.

²⁵ GREENBERG & MITCHELL, *supra* note 9, at 279.

²⁶ William K. Hahn, *Developing Object Constancy in Group Psychotherapy*, 43 *INT'L. J. GROUP PSYCHOTHERAPY* 223, *citing* G. ADLER, *BORDERLINE PSYCHOPATHOLOGY AND ITS TREATMENT* (1985) and A. H. Modell, “*The Holding Environment and the Therapeutic Action of Psychoanalysis*,” 24 *J. Am. Psychoanal. Ass'n.* 285 (1976).

As the infant develops the capacity to hold images of mother and others in his mind, he also becomes able to conceive of himself as a person with a selfhood that endures over time.²⁷ He acquires, in other words, the capacity for "self-constancy," the capacity for self-representation and an understanding of himself as a separate person.²⁸

Self and object constancy includes the capacity to integrate both positive and negative aspects of self and/or others into a whole.²⁹ Ideally, this resolves the splitting that took place during childhood.³⁰ Otherwise, the child may continue to mentally split others, to relate to them as all-bad or all-good, throughout his life.³¹

Object constancy begins to develop in approximately the third year. For example, the child will be able to tolerate going to nursery school by the end of the third year.³² However, adults mature in object constancy throughout their lives.³³

Significance for mediation. Mahler's work, like the work of other "object relations" theorists,³⁴ yields the interesting insight that our relations with other

²⁷ MAHLER ET AL., PSYCH. BIRTH, *supra* note 9, at 223 (noting the child will also develop "a measure of self-constancy, the sense of "an enduring individuality," although the precise process by which this occurs is difficult to trace.)

²⁸ *Id.*; see also GREENBERG & MITCHELL, *supra* note 9, at 300-301 (discussing the self as self-representation in Mahler's work).

²⁹ Hahn, *supra* note 26, at 223.

³⁰ GREENBERG & MITCHELL, *supra* note 9, at 279 ("Libidinal object constancy presupposes the unification of good and bad representations of the object . . .").

³¹ MAHLER ET AL., PSYCH. BIRTH, *supra* note 9, at 107-108 (linking splitting in rapprochement and borderline disturbances); GREENBERG & MITCHELL, *supra* note 9, at 278 (discussing same).

³² John B. McDevitt & Margaret S. Mahler, *Object Constancy, Individuality, and Internalization*, 11, 14 in SELF AND OBJECT CONSTANCY: CLINICAL AND THEORETICAL PERSPECTIVES (Ruth F. Lax *et al.* eds., 1985).

³³ GREENBERG & MITCHELL, *supra* note 9, at 279.

³⁴ The object relations school focuses on understanding how the psychological residues of early relationships shape later adult psychological functioning. This is a departure from the classical Freudian view, which relied more heavily on instinctual drives to explain human psychology. See GREENBERG & MITCHELL, *supra* note 9, at 11-12, 21-49 and 299 (discussing object relations theory and Freud's "drive/structure" model). Some view Mahler more as a precursor than as a true member of the object relations school. See,

people consist *both* of our actual, physical relationships with them, and our relationships to mental images we hold of them in our minds.³⁵ Those images are filtered through one's early (and later) experiences³⁶ and through one's developing capacity for "self and object constancy," which includes the ability to hold a mature view of oneself, and others, as people with both positive and negative characteristics.

The later phases of Mahler's separation/individuation process parallel what I call "the IDR cycle," a psychodynamic process of narcissistic inflation, deflation and resolution that often occurs in mediation.³⁷

B. *Intersubjectivity in Infancy and Beyond.*

Daniel Stern and other researchers have also conducted observational studies, including frame-by-frame studies of face-to face play between mothers and infants. They have criticized Mahler's views, especially the view that the early infant is autistic and symbiotic.³⁸ Instead, they believe the early infant has a nonverbal sense of self even in the early days of infancy.³⁹

e.g., FRANK SUMMERS, OBJECT RELATIONS THEORIES AND PSYCHOPATHOLOGY, A COMPREHENSIVE TEXT, 19-21 (1994).

³⁵ GREENBERG & MITCHELL, *supra* note 9, at 10.

³⁶ *Cf.* LEO STONE, *Some Thoughts on the Here and Now*, 183 in TRANSFERENCE AND ITS CONTEXT (1984). ("[I]t seems self-evident that all major developmental vicissitudes and conflicts have occurred in the context of important relations with important objects and they or their effects continue to be reflected in current relationships with persons of similar or parallel importance.").

³⁷ *See infra* Part V. on the IDR cycle.

³⁸ DANIEL N. STERN, THE INTERPERSONAL WORLD OF THE INFANT (hereinafter "STERN, INTERPERSONAL WORLD") 240 (first paperback ed. 2000) (Mahler's ideas regarding early symbiosis are "problematic"); also at xiii (Stern's view of development "does away with the need to conceptualize phases of autism and symbiosis"); Phyllis Tyson, *Separation-Individuation, Object Constancy and Affect Regulation*, 69, 74 in THE LANGUAGE OF EMOTIONS, DEVELOPMENT, PSYCHOPATHOLOGY AND TECHNIQUE (hereinafter "LANGUAGE OF EMOTIONS") (Salman Akhtar & Harold Blum eds., 2005) (discussing rejection of autistic and symbiotic labels).

The infant is also primed from the beginning to be interested in others.⁴⁰ From this perspective, the infant's developmental task is not so much separation from mother, as the creation of ties with others,⁴¹ including mother. The development of the capacity for mutual recognition between mother and infant is particularly emphasized.⁴² As Jessica Benjamin, a leading intersubjective theorist argues, this “amplifies [Mahler’s] separation-individuation theory by . . . stressing the simultaneity of connection and separation.”⁴³ This is a “psychology of *mutually* sensitive minds.”⁴⁴

Significance for mediation. Intersubjective theorists understand the “continuing tension between recognizing the other and asserting the self” in human life.⁴⁵ They have useful insights on the psychology of impasse and conflict.⁴⁶

Criticism of Mahler has also extended beyond the intersubjective theorists. See Gyorgy Gergely, *Approaching Mahler: New Perspectives on Normal Autism, Symbiosis, Splitting and Libidinal Object Constancy from Cognitive Developmental Theory*, 48 J. AM. PSYCHOANAL. ASS'N. 1197 (2000) (summarizing criticisms of Mahler from intersubjective and other theorists, but also integrating Mahler's work into recent theories); but cf. Fred Pine, *Mahler's Concepts of "Symbiosis" and Separation-Individuation: Revisited, Reevaluated, and Refined*, 52 J. AM. PSYCHOANAL. ASS'N. 511 (2004) (responding to critics of Mahler).

³⁹ STERN, INTERPERSONAL WORLD, *supra* note 38, at xiv, xviii. In this view, the child is born with a nonverbal sense of self. Various aspects of the self and intersubjective capacity emerge and consolidate throughout infancy and beyond. *Id.* at xiv; *see also* xxii and Fig. 2.2 at xxv.

⁴⁰ JESSICA BENJAMIN, THE BONDS OF LOVE 18 (1988) (quoting Stern); DANIEL N. STERN, THE PRESENT MOMENT IN PSYCHOTHERAPY AND EVERYDAY LIFE (hereinafter “STERN, PRESENT MOMENT”) 85 (“infants are born with minds that are especially attuned to other minds”) (2004).

⁴¹ STERN, INTERPERSONAL WORLD, *supra* note 38, at, xiii.

⁴² JESSICA BENJAMIN, LIKE SUBJECTS, LOVE OBJECTS 35 (1995).

⁴³ *Id.* at 35 (noting, however, that Daniel Stern sees more difference between intersubjective theory and Mahler’s theories).

⁴⁴ STERN, PRESENT MOMENT, *supra* note 40, at 85; *see also* Colwyn Trevarthen, *The Concept and Foundations of Infant Intersubjectivity*, 15, 16 in INTERSUBJECTIVE COMMUNICATION AND EMOTION IN EARLY ONTOGENY (Braten Stein ed., 1998).

⁴⁵ BENJAMIN, *supra* note 42, at 38.

⁴⁶ *See infra* Parts IV.C. and V. E., especially notes 211-216, 224 (Benjamin) and notes 168-171, 217-222 (Stern).

C. *Attachment, Mentalization and Reflective Functioning.*

The nature of the bonds ("attachments") between mother and child has also been examined by attachment research and theory. In one series of experiments, twelve-month-old infants were placed in the "strange situation" of having their mothers leave the room for short periods of time. What psychologists call "securely attached" infants were visibly but not acutely distressed when their mothers left and would greet them happily when they returned. Others would either become anxious or avoidant, refusing even to recognize their mothers' absence or return.⁴⁷ Later research has also identified a disorganized style of attachment, in which there is no clear coping strategy.⁴⁸

Peter Fonagy and his colleagues have emphasized that with secure attachment the infant receives caregiving that implicitly treats the child as a mental agent.⁴⁹ For example, the caregiver might approach the child to ask, "Do you want your diaper changed?" or similar questions.⁵⁰ This enables "the child to find in the caregiver's mind . . . an image of himself as motivated by beliefs, feelings and intentions."⁵¹ Through this process, a core sense of selfhood develops.⁵²

Maternal mirroring also helps the infant learn to recognize and differentiate himself from others. It may include not only pure reflection but also signaling about the difference between the self and other. For example, when the infant

⁴⁷ M. AINSWORTH ET AL., PATTERNS OF ATTACHMENT, especially 31-33, 59-63 (1978); see also ALAN E. KAZDIN, 1 ENCYCLOPEDIA PSYCHOL. 284, 287 (2000) (discussing attachment generally, and the secure, avoidant, anxious and disorganized categorizations).

⁴⁸ M. Main & J. Solomon, *Procedures for Identifying Infants as Disorganized/Disoriented During the Ainsworth Strange Situation*, 121, in ATTACHMENT IN THE PRESCHOOL YEARS (M.T. Greenberg, D. Cicchetti & E.M. Cummings eds., 1990).

⁴⁹ PETER FONAGY ET AL., AFFECT REGULATION, MENTALIZATION AND THE DEVELOPMENT OF THE SELF 53-54 (first softcover ed. 2004).

⁵⁰ *Id.* at 53.

⁵¹ *Id.* at 55.

⁵² *Id.* at 54.

smiles but his mother returns the smile in an exaggerated way, the infant learns there is a difference between his mother's emotions and his own.⁵³ Similarly, through pretend play the infant learns to distinguish between reality and appearance, as when, for example, he learns the difference between a real bear and a pretend one.⁵⁴

Over time, the child begins to realize that his mind mediates and interacts with his experience; the process of acquiring that realization is called "mentalization."⁵⁵ This in turn develops "reflective functioning," the capacity to distinguish and understand mental states both in one's self and others.⁵⁶

As a result, the individual becomes able "to distinguish inner from outer reality, pretend from 'real' modes of functioning, and intrapersonal mental and emotional processes from interpersonal communications."⁵⁷ Research has confirmed the link between coherent mental functioning and attachment.⁵⁸

⁵³ *Id.* at 177, 201-202. For more on the "social biofeedback theory of affect mirroring" developed by Fonagy and his colleagues, especially Gyorgy Gergeley, to explain the way mirroring works, see *id.*, 145-202.

⁵⁴ *Id.* at 54, 258-289, 304-306, 308-312 (through "playing with reality" the infant learns to mature beyond the "psychic equivalence mode." He learns, for example, that even if a sponge is painted like a rock it is still a sponge, not a rock.).

⁵⁵ *Id.* at 3 ("Mentalization . . . is the process by which we realize that having a mind mediates our experience of the world.") and 54 ("the caregiver's capacity to observe the moment-to-moment changes in the child's mental state is critical in the development of mentalizing capacity.").

⁵⁶ *Id.* at 23.

⁵⁷ *Id.* at 25. Fonagy and his colleagues have also hypothesized the existence of an underlying neural structure, called the Interpersonal Interpretive Mechanism ("IIM"), which serves as the mechanism for processing new experiences and social information. The IIM underlies mentalization and reflective functioning but may also have functions beyond them. *Id.* at 124-125. It is probably located in the medial prefrontal cortex. *Id.* at 131-132.

⁵⁸ For example, when expectant mothers were asked to describe their childhoods, mothers of children who later became securely attached described their childhoods more coherently than other mothers. This was true even if the mothers' own childhoods had been difficult. Depending upon the mothers' level of verbal coherency in these prenatal interviews, and factors related to the mothers' mental organization, researchers were able to predict with a high degree of accuracy whether the mothers' as yet unborn offspring

Conversely, with inaccurate mirroring and inadequate attunement, the child does not receive an adequate reflection of himself or his feelings. The self will feel "empty" because an accurate link between the infant's self and his emotional state has not been forged.⁵⁹ A false or alien self is internalized.⁶⁰

Significance for mediation. According to Fonagy, reflective functioning is particularly important during interpersonal conflict. Why? "Conflict — or rather its adaptive resolution — prototypically calls for the perception both of the self and of the other in relation to the self, requiring individuals to reconcile their own legitimate claims with concern for the other."⁶¹ The capacities for reflective functioning and mentalization thus constitute an important "potential mediator of psychosocial risk."⁶² Encouraging reflective functioning is therefore a task of paramount importance for mediators.

D. *Parent/Child Interaction and the Psychology of the Self (Narcissism).*

Parents' reactions to a child during the formative years of childhood may also shape a child's sense of self in other ways. Heinz Kohut, the founder of "self psychology," was one of the earliest theorists to emphasize that the failure to react enthusiastically to a child's achievements may be experienced as a rejection and

would later be securely attached. Peter Fonagy *et al.*, *Maternal Representations of Attachment During Pregnancy Predict the Organization of Infant-Mother Attachment at One Year of Age*, 62 CHILD DEVELOPMENT 891, 901 (1991). This demonstrates the link between coherent mental functioning and attachment.

⁵⁹ FONAGY ET AL., *supra* note 49, at 10-11.

⁶⁰ *Id.* at 11-12. A similar phenomenon has been described from an object relations perspective as the internalization of an internal monster. William M. Singletary, "The Internal Monster: An Aspect of Hostile Self and Object Constancy—Discussion of Tyson's Chapter 'Separation-Individuation, Object Constancy and Affect Regulation,'" in LANGUAGE OF EMOTIONS, *supra* note 38, at 83.

⁶¹ *Id.* at 62.

⁶² *Id.* at 16.

even active destruction of a child's young self.⁶³ The child needs, instead, a form of mirroring that supports her exhibitionistic displays,⁶⁴ although ultimately she must mature beyond them.⁶⁵

When a child's parents are too cold and self-involved or humiliate her for failures during the separation and individuation process, she may develop a sense of inadequacy and shame, or a belief she is loved only if she performs adequately for them.⁶⁶ The child may then deal with this shame and vulnerability (and her fear of abandonment by the parents) by adopting a defensive stand of grandiosity and hostility.⁶⁷ In short, she develops a troubled relationship to the self, potentially a forerunner of a narcissistic disorder.⁶⁸

⁶³ HEINZ KOHUT, *THE ANALYSIS OF THE SELF* 120 (1971) ("a relationship to an empathically approving and accepting parent is one of the preconditions for the original establishment of a firm cathexis of the self.").

⁶⁴ *Id.* at 116.

⁶⁵ *Id.* at 108. ("The gradual recognition of the realistic imperfections and limitations of the self . . . is in general a precondition for mental health."). Details of the rather technical debate between Heinz Kohut and Otto Kernberg about certain aspects of the etiology of narcissism are not dealt with here. For a discussion, see Arnold M. Cooper, *Narcissism*, 297 in *AMERICAN HANDBOOK OF PSYCHIATRY* (S. Arieti ed., 1959) reprinted in *ESSENTIAL PAPERS*, supra note 1, 135-139.

⁶⁶ Arnold Rothstein, *The Theory of Narcissism: An Object Relations Perspective* (hereinafter "Rothstein, *Theory*"), 66 *PSYCHOANAL. REV.* 35 (1979) reprinted in *ESSENTIAL PAPERS*, supra note 1, 309, 314-316; Arnold Rothstein, *Shame Conceived from the Perspective of Compromise Formation Theory*, 19 *PSYCHOANAL. INQUIRY* 332, 333 (1999); William K. Hahn, *Shame: Countertransference Identifications in Individual Psychotherapy*, 37 *PSYCHOTHERAPY* 10, 15 (2000) (avoidance reactions to shame include narcissistic defenses such as grandiosity and mistrustful detachment, which are designed to compensate for repeated failures in empathic attunement).

Shame as a response to difficulties during the practicing period may be an inherent part of the process of biological maturation of the infant brain. See ALLAN N. SCHORE, *AFFECT REGULATION & THE REPAIR OF THE SELF*, Ch. 4, esp. 156 (2003).

⁶⁷ Rothstein, *Theory*, supra note 66, at 316-317.

⁶⁸ Peter Fonagy and his colleagues have also theorized that the child who experiences the self as "empty" or alien may be predisposed to the development of Narcissistic Personality Disorder. FONAGY ET AL., supra note 49, at 10-12. See also Otto Kernberg, "Identity: Recent Findings and Clinical Implications," LXXV *PSYCHOANAL. Q.* 969, 980-981 (2006) (inaccurate mirroring may predispose to Narcissistic Personality Disorder; the

When a Narcissistic Personality Disorder develops, the person develops a sense of grandiosity and entitlement that is unrealistic and out of proportion to life circumstances.⁶⁹ When entitlement is threatened, aggression and hostility are characteristic.⁷⁰ Compassion and conscience may also be almost entirely missing. Other characteristics of the disorder include: fantasies of unlimited success or power, interpersonal exploitiveness and arrogant, haughty behaviors and attitudes.⁷¹

Everyone has these tendencies to some degree.⁷² As Kohut and Wolf have observed, however, the degree of stability and coherence of the sense of self can

importance of the early capacity for differentiation between self and other must be emphasized).

⁶⁹ AARON T. BECK ET AL., *Narcissistic Personality Disorder*, Ch. 11 in COGNITIVE THERAPY OF PERSONALITY DISORDERS 242, 252 (2003).

⁷⁰ BECK ET AL. *supra* at note 69, at 245.

⁷¹ According to the American Psychiatric Association, the diagnostic criteria for a Narcissistic Personality Disorder are:

“A pervasive pattern of grandiosity (in fantasy or behavior), need for admiration, and lack of empathy, beginning by early adulthood and present in a variety of contexts, as indicated by five (or more) of the following:

- (1) has a grandiose sense of self-importance (e.g., exaggerates achievements and talents, expects to be recognized as superior without commensurate achievements)
- (2) is preoccupied with fantasies of unlimited success, power, brilliance, beauty, or ideal love
- (3) believes that he or she is "special" and unique and can only be understood by, or should associate with, other special or high-status people (or institutions)
- (4) requires excessive admiration
- (5) has a sense of entitlement, i.e., unreasonable expectations of especially favorable treatment or automatic compliance with his or her expectations
- (6) is interpersonally exploitative, i.e., takes advantage of others to achieve his or her own ends
- (7) lacks empathy: is unwilling to recognize or identify with the feelings and needs of others
- (8) is often envious of others or believes that others are envious of him or her
- (9) shows arrogant, haughty behaviors or attitudes.”

AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 717 (4th ed. Text Revision (2006) (punctuation as in original).

⁷² Horwitz, *supra* note 1, at 219-220; Constantine Sedikides *et al.*, *Are Normal Narcissists Psychologically Healthy? Self-Esteem Matters*, 87 J. PERS. AND SOC. PSYCHOL. 400 (2004) (discussing normal narcissism).

differ widely in different people.⁷³ For example, while narcissists have a stable but grandiose sense of the self, those with "identity diffusion" lack a clear sense of themselves and others.⁷⁴ One person may have a self strong enough to remain firm in the face of conflict, another may not.⁷⁵

Research in social psychology supports these observations,⁷⁶ and the finding that narcissists become aggressive in response to ego threat.⁷⁷

⁷³ Heinz Kohut & Ernest Wolf, *The Disorders of the Self and Their Treatment: An Outline*, 59 INT'L J. PSYCHOANAL. 413 (1978), reprinted in ESSENTIAL PAPERS, *supra* note 1, at 175, 177. ("The adult self may . . . exist in states of varying degrees of coherence, from cohesion to fragmentation; in states of varying degrees of vitality, from vigor to enfeeblement; in states of varying degrees of functional harmony, from order to chaos.")

⁷⁴ Kernberg, *supra* note 68, at 988 (arguing that borderlines typify the syndrome of identity diffusion, which is characterized by a lack of integration of the concept of self and others; but "in the case of narcissistic personality disorder, what is most characteristic is the presence of an apparently integrated but pathological, grandiose self, contrasting sharply with a severe incapacity to develop an integrated view of significant others").

⁷⁵ Kohut and Wolf, *supra* note 73, at 178 (a strong self allows us to tolerate victory or defeat, success or failure.).

⁷⁶ Brad J. Bushman & Roy F. Baumeister, *Threatened Egotism, Narcissism and Self-Esteem and Direct and Displaced Aggression: Does Self-Love or Self-Hate Lead to Violence?* 75 J. PERS. AND SOCIAL PSYCHOL. 219, 227-228 (1998) ("High self-esteem . . . may be stable and largely impervious to evaluations by others, or it may demand frequent confirmation and validation by others and be prone to fluctuate in response to daily events"); Christine H. Jordan *et al.*, *Secure and Defensive High Self-Esteem*, 85(5) J. PERS. AND SOC. PSYCHOL., 969, 975 (2003) (noting that high self-esteem "can assume relatively secure or defensive forms that relate to whether an individual possesses less conscious, negative self-feelings"); T. S. Stucke & S. L. Sporer, *When a Grandiose Self-Image is Threatened: Narcissism and Self-Concept Clarity as Predictors of Negative Emotions and Aggression Following Ego-Threat*, 70 J. PERS. 509, 530 (2002) ("our findings can be seen as additional evidence for the notion that individuals with a positive but unstable and insecure self-view are especially vulnerable to ego-threats").

⁷⁷ Bushman & Baumeister, *supra* note 76, at 227; Tanja S. Stucke, "Who's to Blame? Narcissism and Self-Serving Attributions Following Feedback", 17 EUR. J. PERS. 465, 466 (2003) ("after negative feedback narcissistic individuals are prone to negative reactions directed toward others").

E. *Significance of Psychoanalytic Developmental Findings for Mediation.*

Psychoanalytic developmental theory consistently recognizes that with the development of a healthy sense of self, human beings also develop a reality-based and objective, but ideally also self-reflective, *sense of self-and-other*. This is what Peter Fonagy calls "reflective functioning."⁷⁸ It is also, roughly, what Margaret Mahler calls "self and object constancy,"⁷⁹ and what intersubjective theorists describe as the capacity for mutual recognition,⁸⁰ that is, the capacity for recognition, not just of one's self, but of others.⁸¹ This is especially important during conflict.⁸²

Stated in practical terms, those who are able to function with adequate objectivity about themselves and others — or who can be encouraged to do so — will do better in mediation.

⁷⁸ See *supra* notes 56-57, 61-62 and accompanying text.

⁷⁹ "It is the achievement of self and object constancy over time that enables human beings to experience themselves as members of the family of humankind, and, at the same time, makes it possible for each of us to endure and adapt to the inevitable experiences of aloneness. . . ." JOYCE EDWARD ET AL., *SEPARATION/INDIVIDUATION: THEORY AND APPLICATION*, 154 (2d ed. 1992). See also *supra* notes 24-33 (capacity to know oneself and others in self and object constancy).

I am indebted to William Singletary for pointing out that there are similarities in the concepts of reflective functioning and self and object constancy. (Personal communication with author, December 2007). See also Gergely, *supra* note 38, at 1214-122 (integrating Mahler's concept of object constancy with recent psychoanalytic theory, including the work of Fonagy).

⁸⁰ See notes *supra* 40-44 (mutual recognition in intersubjective theory).

⁸¹ For similar concepts in the work of Kohut and Kernberg, see, e.g., HEINZ KOHUT, *HOW DOES ANALYSIS CURE?* (Arnold Goldberg & Paul E. Stepansky eds., 1984), esp. 52, 70, 77, 79, and Kernberg, *supra* note 68, at 981 (emphasizing the importance of "the early capacity for differentiation between self and other").

⁸² See *supra* notes 20-31, 43-46, 61-62, 73-77 and related text, and *infra* Part V.E.

Another significant theme is the importance of mirroring.⁸³ Through mirroring and its intersubjective correlate, mutual recognition,⁸⁴ the self comes to know itself, and to relax in the secure awareness of its rightful place in the world.

Conversely, there will be heightened sensitivity when the self is unstable or vulnerable. The research on narcissism thus suggests that much of the hostility and sense of insult parties exhibit in mediation is a defensive reaction to underlying feelings of shame or vulnerability.⁸⁵ Some who are most challenged will manifest arrogance instead of vulnerability.⁸⁶ These people will have trouble whenever issues of the self arise, and in mediation they always will.

Due to the primacy of issues of self and identity, the process of mediation may be dominated, not just by narcissistic defenses such as grandiosity, but by reactions to those defensive or aggressive postures. For example, grandiosity or overconfidence will often be followed by disappointment and deflation. This causes the IDR cycle, discussed below.⁸⁷

II. OTHER VIEWS OF SELF AND IDENTITY.

The study of the nature of the self and the self's identity is not solely the province of psychoanalysis or social psychology. Questions of self and identity

⁸³ See, e.g., discussion *supra* notes 14, 42, 53, 59, 64-68 and corresponding text.

The term "mirroring" is used here in its most general sense, although different theorists use the term somewhat differently. For example, for Fonagy and his colleagues, mirroring implies a reflecting back or echoing of another's state or feelings, while for Kohut it also has a connotation of being regarded with joy and approval. Compare KOHUT, *supra* note 81 at 143, with FONAGY ET AL., *supra* note 49, at 35, 157, 190, 375-376.

⁸⁴ Details on the distinctions between mirroring and recognition in psychoanalysis will not be dealt with here. *But see* Stephen A. Mitchell, *Juggling Paradoxes: Commentary on the Work of Jessica Benjamin*, 1 *STUDIES IN GENDER AND SEXUALITY* 251-255 (2000). *Cf. also* Gergely, *supra* note 38, at 1206-1210 (discussing points of similarity and difference in concepts of mirroring in Mahler and recent theorists).

⁸⁵ See notes *supra* 66-77, and accompanying text.

⁸⁶ *Id.*

⁸⁷ See *infra* Part V.

arise in every aspect of life. In considering these questions, most of us assume that the person we refer to as "I" or "me" is a unified, central, executive self. This assumption has been questioned, however, as discussed below.

A. *The Deconstruction of the Unitary Self: Buddhism and Neuroscience.*

In recent decades, neuroscientists have studied the way the brain shapes who we are and who we think we are. One of their most important recent findings has been the discovery of the “mirror neurons.”⁸⁸ Through these neurons, the visual information we receive when we watch another’s behavior gets mapped onto equivalent motor representations in our own brain.⁸⁹ For example, when we watch another person reaching for a glass of water, our own brain registers the scene as if *we* were reaching for the glass.⁹⁰

The finding of mirror neurons and similar neurological systems⁹¹ validates the psychoanalytic emphasis on mirroring and recognition. Due to our automatic “embodied simulations” of each other, we are subtly wiring and reconfiguring each other on a neurological level as we communicate.⁹² It seems, then, that our

⁸⁸ This discovery was first made by accident while scientists were studying macaque monkeys. Scientists now accept that a similar mechanism exists in humans. Vittorio Gallese *et al.*, *Intentional Attunement: Mirror Neurons and the Neural Underpinnings of Interpersonal Relations*, 55 J. AM. PSYCHOANAL. ASS'N. 131, 134-135 (2007).

⁸⁹ STERN, PRESENT MOMENT, *supra* note 40, at 78-79.

⁹⁰ *Id.* at 79.

⁹¹ As an example of these other systems, Stern speaks about the discovery of “adaptive oscillators,” which act like clocks within our body, and which are reset over and over so their rate of firing can be adjusted to match the rate of an incoming stimulation. “The result is that the outreaching arm of the person drying the dishes is perfectly coordinated in time with the outreaching hand of the person handing over the dish.” STERN, PRESENT MOMENT, *supra* note 40, at 80-81.

⁹² Gallese, *supra* note 88, at 143 and 159 (discussing “embodied simulations” and suggesting that due to the mirror neurons, an attuned response to a patient is automatically simulated biologically by the patient).

selves are fundamentally social selves, subtly wired for human interconnection from the earliest days.⁹³

As scientists locate the mechanisms in the brain that create experiences we might consider related to a self, there has been what might be called a deconstruction of the individual self. Using the deductive power of the scientific method, coupled with brain imaging, scientists have identified different forms of memory,⁹⁴ and different self-related functions.⁹⁵ They have posited the existence of different types of selves.⁹⁶ They have not found a unified self. Some suggest doing away entirely with the concept of the little “homunculus;” yet even so, they must grudgingly acknowledge that human experience includes a sense of self.⁹⁷

As neuroscientists deconstruct the self, some gain sustenance from the Buddhist notion that the ego, the conventional sense of self, is an illusion. For Buddhists, all phenomena arise dependently upon and with each other, and do not exist separately. This includes the self, which is merely a part of the influx of

⁹³ See Daniel J. Siegel *et al.*, *Mind, Brain and Behavior*, 3 in BEHAVIOR AND MEDICINE (D. L. Wedding & M.L. Stuber eds., 2006) (“the brain is a profoundly social organ of the body”). The emerging field of social cognitive neuroscience is exploring the neuroscience of the social brain in detail. See Beth Azar, *At the Frontier of Science*, 33(1) MONITOR ON PSYCHOL. (2002); David M. Amodio & Chris Firth, *Meeting of Minds: The Medial Frontal Cortex and Social Cognition*, 7 NATURE 268 (2006) (focusing on the unique role played by the medial frontal cortex of the brain in social cognition).

⁹⁴ DANIEL J. SIEGEL, THE DEVELOPING MIND: HOW RELATIONSHIPS AND THE BRAIN INTERACT TO SHAPE WHO WE ARE 23-39 (1999).

⁹⁵ Georg Northoff *et al.*, *Self Referential Processing in Our Brain — A Meta-analysis of Imaging Studies on the Self*, 31 NEUROIMAGE 440, 441 (2006) (extensive literature review of studies of various self-related functions).

⁹⁶ SIEGEL, *supra* note 94, at 230 (“As we can see, both developmental studies and cognitive science appear to suggest that we have many selves”); Northoff *et al.*, *supra* note 95, at 441 (“What remains unclear, however, is what unites these distinct concepts of self allowing us to speak of a self in all cases.”).

⁹⁷ ANTONIO DAMASIO, THE FEELING OF WHAT HAPPENS, BODY AND EMOTION IN THE MAKING OF CONSCIOUSNESS 190-191 (1995) (deconstructing the view of the self as a little internal “homunculus” but acknowledging “*Whether we like the notion or not, something like the sense of self does exist in the normal human mind as we go about knowing things.*”) (emphasis supplied). On this same theme, see Francis Crick & Christof Koch, “*The Unconscious Homunculus*,” 2 NEURO-PSYCH. 3-11 (2000).

phenomena “continuously arising.”⁹⁸ An interesting alliance has developed between Buddhism and neuroscience.⁹⁹

Significance for mediation. During mediation, the ego is a psychological reality. Each party comes to mediation seeking benefits for the ego, that is, for the self as he or she conceives of it.

Yet, it is also true that parties in mediation can have a more or less expanded sense of the self. They can lock in, psychologically, to one or more of the items on the bargaining table, or they can let go. To the extent that Buddhism and neuroscience provide a more expanded, "non-self-centric" vision of the self,¹⁰⁰ they can be useful or inspiring for mediators as they attempt to help parties release the connection in their minds between their identities and the outcome of the negotiation.¹⁰¹

⁹⁸ Thus, for the Buddhist, "this seemingly solid, concrete, independent, self-instituting I under its own power that appears actually does not exist at all." MARK EPSTEIN, *Forms of Emptiness: Psychodynamic, Meditative and Clinical Perspectives*, 42, 63, in PSYCHOTHERAPY WITHOUT THE SELF (2007) quoting T. GYATSO (the XIV Dalai Lama), KINDNESS, CLARITY AND INSIGHT (1984). On this point see also Darshan Brach, *A Logic for the Magic of Mindful Negotiation*, 24 NEGOTIATION J. 25, 38 (2008) (discussing co-dependent arising); KAREN ARMSTRONG, THE GREAT TRANSFORMATION, THE BEGINNING OF OUR RELIGIOUS TRADITIONS 283-284 (2006) (discussing doctrine of *anatta* or no-self).

⁹⁹ For example, conferences have been held with neuroscientists and Buddhist monks, with the XIV Dalai Lama himself attending. The principal area of shared interest has been the neuroscience of mindfulness, a practice discussed further *infra* Part IV.C. Experiments have been performed linking up Buddhist meditators with functional magnetic resonance imaging devices. See, e.g., J.A. Brefczynski-Lewis *et al.*, *Neural Correlates of Attentional Expertise in Long-Term Meditation Practitioners*, 104 PROC. NAT'L ACAD. SCIENCES, 11483-11488, July 3, 2007. A neuroscientist has written a book about the neuroscience of mindfulness. See DANIEL J. SIEGEL, THE MINDFUL BRAIN (hereinafter "SIEGEL, MINDFUL BRAIN") (2007); see also www.mindandlife.org for more references.

¹⁰⁰ This is a phrase coined by Buddhist psychoanalyst Jeffrey Rubin. Jeffrey B. Rubin, *Psychoanalysis is Self-Centered*, 79, 80 in SOUL ON THE COUCH, SPIRITUALITY, RELIGION AND MORALITY IN CONTEMPORARY PSYCHOANALYSIS (Charles Spezzano & Gerald J. Gargiulo eds., 2003).

¹⁰¹ The relevance of Buddhist meditation to mediation practice is discussed *infra* Part IV.C.

B. *Integration of Dimensions of the Self.*

Elements of Buddhism and other spiritual traditions were integrated with psychoanalytic developmental theory in the work of Faisal Muquddam and A.H. Almaas, who worked together for many years but ended their collaboration in the mid-1980s. According to their view, the ego, the conventional sense of self, is indeed created through the process Mahler and others have so carefully described.¹⁰² The human ego is rightfully regarded as a developmental achievement.¹⁰³

There are, however, “tremendous implications” to the fact that the sense of being an individual results from identifying with a certain structure or with certain images in the mind.¹⁰⁴ This is because fundamentally one’s true nature is not a psychological construction; one is a *being*.¹⁰⁵

The self is thus considered quite real, not an illusion in any sense. The child experiences her self and knows her self directly during infancy, particularly during the practicing period.¹⁰⁶ However, she does not recognize herself *as a self* because she lacks the capacity to be self-reflective.¹⁰⁷ By the time she becomes aware of herself as an individual, she is already experiencing herself within and

¹⁰² See A.H. ALMAAS, THE PEARL BEYOND PRICE, INTEGRATION OF PERSONALITY INTO BEING: AN OBJECT RELATIONS APPROACH (hereinafter, "ALMAAS, THE PEARL") 22 (1988).

¹⁰³ *Id.* at 25.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 27-28; Faisal Muquddam, Public Lecture with Lama Caroline Palden, Spirit Rock, California, March 3, 2006; available through www.instituteforspiritualityandpsychology.com. Each self is thus an individual being within the ground of being. *Id.* This emphasis on the self as a being may be compatible with the Buddhist notion that the self is an illusion if one reads the illusory self in Buddhism as the ego. *Id.*

¹⁰⁶ ALMAAS, THE PEARL, *supra* note 102, at 277-278. See also A. H. ALMAAS, THE POINT OF EXISTENCE, TRANSFORMATIONS OF NARCISSISM IN SELF-REALIZATION (hereinafter "ALMAAS, THE POINT") 59, 135, 208 and 211 (1996).

¹⁰⁷ ALMAAS, THE PEARL, *supra* note 102, at 59; see also A.H. ALMAAS, THE INNER JOURNEY HOME, SOUL’S REALIZATION OF THE UNITY OF REALITY 154, 166 (2004).

through the process of self-representation.¹⁰⁸ As a result, she is not able to recognize her self independently of psychological structure or self-representation.¹⁰⁹

From this perspective, psychoanalytic developmental theory accurately describes the process by which the self becomes identified with the ego during the process of childhood development.¹¹⁰ However, true individuation is not complete until the "essential" self is recognized and reintegrated. This requires a process of both psychological and spiritual work.¹¹¹

Psychoanalyst Mark Epstein, a practicing Buddhist, sounds similar themes. In discussing meditation, he asserts that "Eastern psychologies show us that growth need not stop at the so-called 'mature' personalities, but in moving beyond these personalities."¹¹² However, he also emphasizes that "Eastern methods must confront narcissistic attachments. . . ." ¹¹³ In his view, "[t]o understand this interaction is to recognize both the transformative power of meditation and the pervasive influence of narcissism."¹¹⁴

Significance for mediation. In these integrative perspectives, all aspects of the self, both the psychological and the nonconceptual, are seen as interacting in a dynamic equilibrium. Each person is understood to be greater than his or her ego-based identifications and sense of self. Yet the reality of the ego is acknowledged; psychoanalytic insight is used to help understand its many dimensions. These

¹⁰⁸ ALMAAS, THE POINT, *supra* note 106, at 59.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 42-43. (the basic accomplishment identified by object relations theory is "experiencing oneself as a separate individual, based on a self-image composed of memories.").

¹¹¹ *See, e.g.,* ALMAAS, THE POINT, *supra* note 106, at 107-108 (1996) (although depth psychology recognizes the importance of dissolving distorted self-images, one can go even further and dissolve even realistic self-images in order to access the essential self).

¹¹² MARK EPSTEIN, *Meditative Transformations of Narcissism*, 19, 39 in PSYCHOTHERAPY WITHOUT THE SELF, *supra* note 98.

¹¹³ *Id.*

¹¹⁴ *Id.*

perspectives suggest that ideally mediators will not only remember, and remind others, that one's identity is not contingent on the outcome of the negotiation. They will also remain cognizant of, and learn to deal effectively with, the realities of human psychological structure.

III. WORKING WITH ISSUES OF SELF AND IDENTITY IN MEDIATION PRACTICE.

As we have seen, theorists of self and identity tend to revolve around two poles. On the one hand, psychoanalysts have minutely analyzed how psychological structure, and with it the sense of self, materializes and functions. On the other hand, spiritual teachings and neuroscience emphasize the evanescent nature of the psychological structure(s) we routinely take to be who we are. To integrate these views, it has been proposed that true individuation takes place when we both acquire a stable sense of self and then develop the capacity to release or mature beyond it.

It is certainly the case that parties in conflict need a healthy sense of self. Why is this so important? Those with a stable sense of self are more likely to have the flexibility to hear and evaluate feedback more objectively.¹¹⁵ They can call on their innate “reflective” capacities,¹¹⁶ and their capacities for “self and object constancy”¹¹⁷ to weigh choices more maturely. Viewed from this perspective, much of mediation practice is useful precisely because it helps strengthen and restore a healthy sense of self.

The sense that one's identity is tied to the outcome of the conflict remains, however, one of the most serious impediments to conflict resolution.¹¹⁸

¹¹⁵ See discussion *supra* notes 76-77 and accompanying text.

¹¹⁶ See discussion *supra* notes 56-57, 61-62 and accompanying text.

¹¹⁷ See discussion *supra* notes 24-33 and accompanying text.

¹¹⁸ See discussion *supra* notes 3-5 and accompanying text.

Accordingly, other mediation practices either neutralize or mitigate the effects of the parties' psychological investments in the conflict.

A. *Paraphrasing, "Looping" and Reflecting Practice.*

Mediation practices that strengthen and restore the self generally involve some form of mirroring, a practice that, as we have seen, is one of the most basic ways of recognizing and supporting the integrity of another's self.¹¹⁹

One of the most common forms of mirroring involves the mediator's "looping," that is, reciting back or neutrally paraphrasing the statements of parties or counsel to make sure and to demonstrate publicly that she has understood them.¹²⁰ She may also encourage them to do so with each other.¹²¹

As parties feel mirrored and reflected, there is a sense of recognition, sometimes profound and sometimes mutual,¹²² which strengthens the sense that one's self has been seen. As a result, parties become less defensive and more able to discuss and respond to each other's interests.¹²³

Part of what is important in this practice is also what is *not* mirrored back: the party's underlying ego investment will not be mirrored back in the mediator's neutral recitation. Mirroring in this context thus encourages the party to consider his views, and those of others, with less psychological charge.

¹¹⁹ See, e.g., discussion *supra* notes 14, 42, 49, 53, 59, 89-92 and corresponding text.

¹²⁰ Looping is the term used by Gary J. Friedman and Jack Himmelstein to describe this process. For an example of looping in action, see Gary J. Friedman & Jack Himmelstein *Resolving Conflict Together: The Understanding-Based Model of Mediation* (hereinafter Friedman & Himmelstein, "*Resolving Conflict*"), 2006 J. DISP. RESOL. 523, 529-537 (2006); on "understanding-based" mediation, see also GARY J. FRIEDMAN & JACK HIMMELSTEIN, *CHALLENGING CONFLICT: MEDIATING THROUGH UNDERSTANDING* (2008).

¹²¹ *Id.*; see also ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 73-75 (2005) (importance of encouraging recognition between parties in transformative mediation).

¹²² See Barbara K. Eisold, *Profound Recognition: Where Does It Fit In Analytic Work?*, 35 CONTEMP. PSYCHOANAL. 107 (1999) on profound recognition; on mutual recognition see BENJAMIN, *supra* note 42 and discussion at *supra* Part I.B.

¹²³ ROGER FISHER, & WILLIAM J. URY, *GETTING TO YES, NEGOTIATING AGREEMENT WITHOUT GIVING IN* 40-55 (Bruce Patton, ed. 1983).

B. *Respect as Mediation Practice.*

The mediator's demonstration of respect for the parties addresses two levels of the self. It mirrors and validates the party on the fundamental level of being, as a human being. Yet it simultaneously addresses the psychological issue stimulated by interpersonal conflict – the validity, stability and value of the party's sense of self. This is why it is such a powerful practice.¹²⁴

Respect as a tool in peacemaking, and the related concept of “saving face,” date back to ancient Chinese culture,¹²⁵ a culture deeply committed to the peaceable mediation and resolution of human conflict.¹²⁶ For example, Confucius linked “respectfulness” and the capacity “to bring peace to others” in the sixth century B.C.E.¹²⁷

¹²⁴ For more on the importance of respect in mediation, see also *infra* Part V.G.

¹²⁵ See Peter H. Huang & Christopher J. Anderson, *A Psychology of Emotional Legal Decision Making: Revulsion and Saving Face in Legal Theory and Practice*, 90 MINN. L. REV. 1045, 1062 (2006) (concept of face originating in Chinese thought); compare with WM. THEODORE DE BARY, *LEARNING FOR ONE'S SELF, ESSAYS IN NEO-CONFUCIAN THOUGHT* ix-x (1991) (the emphasis on face in Confucian culture is based on their great sensitivity to personal feelings and the principle that one not needlessly damage another's self-respect.).

¹²⁶ See discussion in Albert H.Y. Chen, *Mediation, Litigation, and Justice: Confucian Reflections in A Modern Liberal Society*, in DANIEL A. BELL & CHAIBONG HAHM, *CONFUCIANISM FOR THE MODERN WORLD* (2003). As Confucius famously said:

"In hearing litigation, I am no different than any other man. But if you insist on a difference, it is, perhaps that I try to get the parties not to resort to litigation in the first place."

CONFUCIUS, *THE ANALECTS* (XII.13) quoted in Chen, *supra* at 259.

¹²⁷ CONFUCIUS, *THE ANALECTS*, Book 14.42, 171-172 (trans. Edward Slingerland, 2003). Confucius spoke repeatedly of the importance of treating others with respect in the performance of official duties. *Id.* at 12.2 at 126 (duty of respectfulness when in public) and 13.19 at 148 (when performing public duties, be respectful). For an excellent article on the Confucian sense of self, see Xinzhong Yao, *Self-Construction and Identity: The Confucian Self in Relation to Some Western Perceptions*, 6(3) *ASIAN PHILOS.* 1 (1996).

As the etymology of the word shows — respect comes from the Latin “respicere,” “to look back at”¹²⁸ — respect is a form of mirroring. However, it is *an adult form of mirroring*.¹²⁹ Accordingly, it elicits and fosters adult responses in the recipient. Paradoxically, it also allows one to more easily engage a wrongdoer or a tortfeasor in discussion because it tends to mitigate defensiveness.

C. *Empathy as Mediation Practice.*

We often think of empathy as a form of caring, but it also has a cognitive dimension.¹³⁰ Empathy may be produced, at least in part, by the mirror neurons;¹³¹ it produces a feeling of being understood.¹³² As a result, empathy helps reduce defensiveness and judgment.¹³³

Empathy may derive part of its power from the fact that it reminds us, unconsciously or in implicit memory,¹³⁴ of the early days of childhood when others focused on understanding our needs and the core sense of selfhood

¹²⁸ Sin Yee Chan, *The Confucian Notion of Jing (Respect)*, 56(2) PHILOS. EAST AND WEST 229, 240 (2006) (quoting from Robin Dillon, *Respect and Care: Toward Moral Integration*, 22 CANADIAN J. PHILOS. 108 (1992)).

¹²⁹ Jonathan R. Cohen, *When People Are the Means: Negotiating with Respect*, 14 GEO. J. LEGAL ETHICS 739, 741, 754, n. 38 (2001) (mutual respect is or should be exemplified in relationships among adults, quoting JEAN PIAGET, *SOCIOLOGICAL STUDIES* 119 (1995)).

¹³⁰ See generally Dorothy J. Della Noce, *Seeing Theory in Practice: An Analysis of Empathy in Mediation*, 15 NEGOTIATION J. 27, 281 *et seq.* (1999).

¹³¹ Rudiger J. Seitz & Janpeter Nickel, *Functional Modularity of the Medial Prefrontal Cortex: Involvement in Human Empathy*, 20(6) NEUROPSYCHOL. 743, 747 (2006).

¹³² Robert H. Mnookin *et al.*, *The Tension Between Empathy and Assertiveness*, 12 NEGOTIATION J. 217, 220 (July 1996) (the result of empathy is a reassuring sense of being understood and a grateful feeling of shared humanness with the one who understands).

¹³³ KENNETH CLOKE, *MEDIATING DANGEROUSLY* 26 (2001) (empathy disarms defensiveness and judgment).

¹³⁴ SIEGEL, *supra* note 94, at 29 (“Implicit memory involves parts of the brain that do not require conscious processing during encoding or retrieval.”).

developed.¹³⁵ That may be why empathy helps parties reconnect with a deeper sense of reflective functioning,¹³⁶ and capacity for insight.¹³⁷

It may also be why a party who is highly narcissistic, or who experiences the self as vulnerable during mediation, may be uncomfortable with empathy. In these cases, if one “empathize[s] with their reactions” they feel “the empathy further highlight[s] some humiliating lack in themselves that they did not already know.”¹³⁸ Empathy may then produce a sense of shame — which will be defended against — rather than a sense of support. Stated another way, while the inability to feel empathy for others is characteristic of narcissism,¹³⁹ narcissism may also cause some people to reject empathy from others.¹⁴⁰

One is most empathetic with these parties, ironically, if one decreases the sense of contact. Otherwise, one may elicit a response of narcissistic devaluation.¹⁴¹ However, an inner positive attitude may be helpful, and acceptable to them.¹⁴²

¹³⁵ See *supra* text accompanying notes 49-52.

¹³⁶ See *supra* Part I.C., on reflective functioning.

¹³⁷ Cf. ALMAAS, *THE PEARL*, *supra* note 102 (compassion can assist a person to tolerate the difficult truth in a situation).

¹³⁸ Cynthia J. Shilkret, *Endangered by Interpretations: Treatment by Attitude of the Narcissistically Vulnerable Patient*, 23 *PSYCHOANAL. PSYCHOL.* 30, 32 (2006); see also Arnold H. Modell, *A Narcissistic Defense Against Affects and the Illusion of Self-Sufficiency*, 56 *INT'L J. PSYCHOANAL.* 275 (1976) *reprinted in* *ESSENTIAL PAPERS*, *supra* note 1, at 293, 302 (speaking in the context of therapy: "Where there is a precociously developed and fragile sense of self defended by fantasies of omnipotence and self-sufficiency, a[n] . . . alliance is not possible"); Bernard Apfelbaum, *Interpretive Neutrality*, 53(3) *J. AM. PSYCHOANAL. ASS'N.* 917, 926-931 (2005) (on shame reactions to interpretation in narcissistic clients).

¹³⁹ See *supra* note 71 (DSM IV criteria for Narcissistic Personality Disorder).

¹⁴⁰ However, the rejection of empathy may also be merely a strategic maneuver. See Bilyana Martinovski *et al.*, *Rejection of Empathy in Negotiation*, 16 *GROUP DECISION AND NEGOT.* 61, 73 (2007).

¹⁴¹ Devaluation is a frequent response to narcissistic vulnerability. See Otto Kernberg, *Factors in the Psychoanalytic Treatment of Narcissistic Personalities*, 18 *J. AM. PSYCHOANAL. ASS'N.* 51 (1970), *reprinted in* *ESSENTIAL PAPERS*, *supra* note 1, at 218-219,

Recent findings in cognitive neuroscience underscore the importance of retaining a clear sense of self and other while empathizing with parties. Imagining how others feel produces empathy. Imagining how one would feel in their place also produces empathy — but it is coupled with emotional distress.¹⁴³ In the latter case, the mediator would be more likely to lose her objectivity. The difference between the two experiences seems to depend largely upon one's capacity for self-other differentiation and cognitive appraisal.¹⁴⁴

D. *Using Evaluation and Encouraging Objectivity.*

It has been argued that mediation and evaluation are inherently contradictory.¹⁴⁵ There is truth in this perception. From the perspective of issues of self and identity, however, one of the mediator's primary goals is to encourage parties to engage their own reflective functioning¹⁴⁶ and capacity for objectivity, thus minimizing or neutralizing narcissistic investments in the conflict. To a certain extent, the airing of alternative views of the conflict, including the

222, 230, esp. 222 ("They need to devalue whatever they receive in order to prevent themselves from experiencing envy"); *see generally also* Stucke & Sporer, *supra* note 76.¹⁴² *See generally* Shilkret, *supra* note 138; *see also* Kohut, *supra* note 81, at 177 (in some cases, "only the analyst's willingness to be an attentive silent listener will be tolerable to the patient").

¹⁴³ C. Daniel Batson, *Perspective Taking: Imagining How Another Would Feel Versus Imagining How You Would Feel*, 23 PERS. AND SOC. PSYCH. BULLETIN 751 (1997); Clause Lamm *et al.*, *The Neural Substrate of Human Empathy: Effects of Perspective-taking and Cognitive Appraisal*, 19 J. COGNITIVE NEUROSCIENCE 42, 52, 56 (2007).

¹⁴⁴ Lamm *et al.*, *supra* note 143, at 55-56.

¹⁴⁵ Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996) (discussing differing approaches to mediation); *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003) (additional analysis of differences in styles of mediation); *see also* E. Patrick McDermott & Ruth Obar, *What's Going On in Mediation, An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit*, 9 HARV. NEGOT. L. REV. 75, 80-89 (2004), Kathy Douglas & Rachel Field, *Looking for Answers to Mediation's Neutrality Dilemma in Therapeutic Jurisprudence*, *ELAW JOURNAL* 13(2) 177 (2006).

¹⁴⁶ On reflective functioning, *see supra* Part I.C.

mediator's own, is necessary to move the dialogue to a level where this kind of thinking can take place.

As a preliminary matter, of course, one must make sure the parties understand the reasons for each other's actions.¹⁴⁷ This is the hallmark of reflective functioning.¹⁴⁸ However, a respectful discussion of weaknesses and strengths in the parties' positions and legal logic, when appropriate,¹⁴⁹ and when done in a safe setting,¹⁵⁰ may also help depersonalize the conflict and reduce self-enhancing biases.¹⁵¹

Evaluation may be a real service for those with narcissistic tendencies. Due to their grandiosity, they may have difficulty anticipating the adverse long-term consequences of their actions.¹⁵² Certain people, those whom analysts call the

¹⁴⁷ Peter H. Huang, *Reasons Within Passions: Emotions and Intentions in Property Rights Bargaining*, 79 OR. L. REV. 435, 449 (2000) ("Psychological evidence suggests that how much anger one feels in a given situation [such as bargaining] may depend not just on outcomes but also on attribution of intentions"); Keith G. Allred *et al.*, *The Influence of Anger and Compassion on Negotiation Performance*, 70(3) ORG. BEHAVIOR AND HUMAN DECISION PROCESSES 175, 185 (1997) (people can avoid excessively high anger by seeking to discover factors that may have influenced another's behavior); Pillutla & Murnighan, *supra* note 3, at 209 (anger and resentment are strongest when poor outcomes are inadequately explained).

¹⁴⁸ See *supra* Part I.C on reflective functioning.

¹⁴⁹ One may withhold one's opinions for many reasons; I do not believe there is a *duty* to evaluate. On discussing the law within the context of understanding-based mediation, see Friedman & Himmelstein, *Resolving Conflict*, *supra* note 120, at 548-549.

¹⁵⁰ One may wish to assure parties that one will not share adverse evaluative feedback with the other side. This reduces defensiveness and helps encourage candor about evaluations. One should also engage in all discussions with a respectful attitude and with an acknowledgement that one's opinions are, like all opinions, fallible.

¹⁵¹ Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 OHIO ST. J. ON DISP. RESOL. 281, 284-298 (2006) (discussing usefulness of various evaluative techniques to de-bias parties); Adler, *supra* note 5, at 172 (avoiding hasty judgments about our opponents' intentions requires realistic, clear thinking); De Dreu & van Knippenberg, *supra* note 4, at 355 ("[W]hen individuals are motivated to process information thoroughly, their self-enhancement tendencies are reduced.").

¹⁵² Michael Maccoby, *Narcissistic Leaders: The Incredible Pros, the Inevitable Cons*, HARV. BUS. REV. 2 (Jan.-Feb. 2000) (narcissists can court danger due to overconfidence); W. Keith Campbell *et al.*, *Narcissism, Confidence and Risk Attitude*, 17(4) J.

“thick-skinned” narcissists, are also insensitive to feelings.¹⁵³ Confrontation with them may actually be recommended.¹⁵⁴ Discussing goals, rather than feelings, will be most effective with these clients.¹⁵⁵

This is not meant to suggest that as a mediator one should focus on classifying parties¹⁵⁶ or “confronting” their psychological issues, as in therapy. However, in the actual moment of the mediation one can often feel and know what will be helpful for different people. When grandiosity or aggression appears to be a defense, mirroring and empathy may be most useful. At other times, especially with some of the tougher characters, evaluation or confrontation will be necessary.

Yet it may be a challenging experience. People with strong narcissistic tendencies often become devaluing or aggressive in response to feedback.¹⁵⁷ How one responds, internally and externally, will be a function in part of the extent to which one has worked through one's own narcissistic issues, and can stand one's ground and stay in one's role.

BEHAVIORAL DECISION MAKING 297 (Sept. 2004) (discussing grandiosity and overconfidence and authors' studies examining correlation between narcissism and risk taking).

¹⁵³ Shilkret, *supra* note 138, at 32.

¹⁵⁴ *Id.*

¹⁵⁵ I am indebted to the late Laura Farrow for pointing out that for some people goal-oriented discussions are more acceptable than other kinds of discussions.

¹⁵⁶ McGuigan and Popp argue parties should be classified as having instrumentalist (concrete, rule-oriented), affiliative (relationship-oriented) or self-authoring (capable of perspective-taking) mindsets. Richard McGuigan & Nancy Popp, *The Self in Conflict: The Evolution of Mediation*, 25(2) CONFLICT RESOL. Q. 221 (2007) (relying on Robert Kegan's work, especially *THE EVOLVING SELF: PROBLEM AND PROCESS IN HUMAN DEVELOPMENT* (1982)). These categories may sometimes be useful but may also encourage oversimplified views of other people.

¹⁵⁷ See notes *supra* 77 and 141 and related text.

IV. WORKING WITH THE MEDIATOR'S ISSUES OF SELF AND IDENTITY.

The mediator's ability to deal with narcissistic issues, both in herself and in others, is a key ingredient of a successful mediation. As a first principle, the mediator should expect that her own issues of self and identity will arise to varying degrees during every mediation.

A. *Dealing with the Mediator's Own Issues of Self and Identity.*

Knowledge of one's relationship to narcissistic defenses, such as aggression, is important. It is also helpful to have a sense of the nature of one's usual projections on others in order to try to adjust for the possibility of distortions in one's perceptions. For example, self-observation may reveal one party has become an idealized version of one's father while another faintly echoes one's mother, or sister, or brother. There are countless possible permutations.

Understanding these projections will allow one to clear the slate and communicate with others with more clarity. It will also help one unpack one's reactions and return to neutrality when parties become difficult or challenging. In many ways, this commitment to *inner neutrality* is an essential prerequisite to a truly well functioning outward neutrality.¹⁵⁸

B. *The Professional Ego Ideal.*

By analogy to the psychoanalytic literature on group therapy leadership, we know that the "grandiose professional ego ideal"¹⁵⁹ is one of the key narcissistic dangers for the group leader. This grandiose self may desire to be seen as a

¹⁵⁸ See also the discussion *infra* note 181 on neutrality.

¹⁵⁹ Robert L. Weber & Jerome S. Gans, *The Group Therapist's Shame: A Much Undiscussed Topic*, 53 INT'L. J. GROUP PSYCHOTHERAPY 395, 399 (2003).

“selfless helper.”¹⁶⁰ It may wish to be all powerful, all knowing and all loving as a defense to vulnerability.¹⁶¹

Paradoxically, the narcissistic leader in us may have the most difficulty tolerating the narcissism of clients, and may tend to devalue or avoid hearing them.¹⁶² Classifying others as narcissistic may provide a way to project one’s own narcissistic tendencies onto others and to defensively disown them by doing so.¹⁶³

Optimal functioning requires us instead to “accept that the grandiose ideal is an illusion and untenable . . . and to rebuild a more realistic professional ego ideal that accepts the limits of our power, knowledge and love.”¹⁶⁴

Ironically, when things become difficult in the mediation, it may actually be the capacity to release a grandiose self-image that is of most service to the parties.¹⁶⁵ The hallmark of the competent mediator will be a realistic professional ideal, accompanied by a steady commitment to clients during the mediation.¹⁶⁶

C. *Presence, Mindfulness and Release of Identity.*

During mediation, the parties experience the self of the mediator as her presence, on both a verbal and a nonverbal level. They continuously scan the mediator's presence, attempting to discern her strengths and weaknesses.¹⁶⁷

¹⁶⁰ Horwitz, *supra* note 1, at 222.

¹⁶¹ Weber & Gans, *supra* note 159, at 399.

¹⁶² Horwitz, *supra* note 1, at 231-232.

¹⁶³ *Id.* at 233.

¹⁶⁴ Weber & Gans, *supra* note 159, at 414.

¹⁶⁵ See discussion *infra* Part V.F.

¹⁶⁶ Horowitz, *supra* note 1, at 223-224.

¹⁶⁷ S.J. Blakemore & J. Decety, *From the Perception of Action to the Understanding of Intention*, 2 NEUROSCIENCE 561, 563-565 (2001) (“The medial prefrontal cortex is consistently activated by . . . tasks in which subjects think about their own or others’ mental states.”); STERN, PRESENT MOMENT, *supra* note 40, at 79 (the visual information we receive when we watch another gets mapped onto equivalent motor representations in our own brain by the activity of the mirror neurons.).

At the same time, the process moves very fast. It takes just one to ten seconds, according to Daniel Stern, "to make meaningful groupings of stimuli emanating from people, to compose functional units of our behavior performances, and to permit consciousness to arise."¹⁶⁸ Stern refers to this short "process unit" as the "present moment,"¹⁶⁹ or "the psychological present"¹⁷⁰ in therapy and in negotiation.¹⁷¹ Viewed from this perspective, mediation is a fast-moving performance art, one that takes place within the rapidly unfolding present moments of the mediation.¹⁷²

To help develop the capacity for moment-to-moment attunement, Professor Riskin and others have suggested that Buddhist mindfulness practice should be used by mediators, and included in the training curriculum.¹⁷³ In mindfulness practice, one remains "aware, moment to moment, without judgment, of one's bodily sensations, thoughts, emotions,

¹⁶⁸ STERN, *supra* note 40, at 41.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 50.

¹⁷¹ Stern drew an analogy between "present moment(s)" in therapy and negotiation in an article he published in an edition of the *Negotiation Journal* devoted to critical moments in negotiation. Daniel N. Stern, *The Present Moment as a Critical Moment*, 20 *NEGOTIATION J.* 365 (2004). I assume the analogy also extends to mediation.

¹⁷² See Carrie Menkel-Meadow, *Critical Moments in Negotiation: Implications for Research, Pedagogy, and Practice*, 20 *NEGOTIATION J.* 341, 346-347 (2004) ("Our practice as negotiators and mediators draws from many fields of insights and virtuosity. We seem to be adding an explicit focus on the performance as well, for we are indeed 'performers' too"); see also Lawrence Susskind, *Ten Propositions Regarding Critical Moments in Negotiation*, 20 *NEGOTIATION J.* 339-340 (2004) (likening skills in negotiation to jazz improvisation and acting skills).

¹⁷³ Leonard L. Riskin, *Mindfulness: Foundational Training for Dispute Resolution*, 54(1) *J. LEGAL EDUC.* 79 (2004). Buddhism has had a profound impact on mediation. For example, in recent years Zen Buddhist priest and author Norman Fischer has participated in mediation training programs held at the Center for Mediation in Law with Gary J. Friedman and Jack Himmelstein. A forum at Harvard and part of an issue of the *Harvard Negotiation Law Review* were devoted to the subject. See Symposium, *Mindfulness In the Law and ADR*, 7 *HARV. NEGOT. L. REV.* 1 (2002).

and consciousness.”¹⁷⁴ This disciplined form of reflective functioning¹⁷⁵ can help inhibit reactivity in situations of conflict.¹⁷⁶

From the perspective of issues of self and identity, the great value of mindfulness practice, or other forms of meditation,¹⁷⁷ is that, as long as they are used judiciously and appropriately,¹⁷⁸ they can help release the usual sense of self-identity.¹⁷⁹ The transient nature of habitual thoughts and feelings becomes more evident when set against a backdrop of awareness.¹⁸⁰ Attitudinal and other biases also become more evident. This can help mediators maintain neutrality.¹⁸¹

¹⁷⁴ Riskin, *supra* note 173, at 83; *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 (Spring 2002).

¹⁷⁵ Cf. SIEGEL, MINDFUL BRAIN, *supra* note 99, at 205 (drawing an analogy between mindfulness and reflective functioning in secure attachment, citing Peter Fonagy & Mary Target, *Attachment and Reflective Function: Their Role in Self-Organization*, 9 DEVELOPMENT AND PSYCHOPATHOLOGY 679 (1997)).

¹⁷⁶ Kirk Warren Brown *et al.*, *Mindfulness: Theoretical Foundations and Evidence for its Salutory Effects*, 18(4) PSYCHOL. INQUIRY 211, 225 (2007) (reviewing research).

¹⁷⁷ A variety of meditation practices, Western and Eastern, are discussed in DANIEL GOLEMAN, *THE MEDITATIVE MIND* (1977), although the perspective is largely Buddhist.

¹⁷⁸ On some of the dangers to the self that may attend the inappropriate use of spiritual practice, and particularly the dangers of self-deception in groups, *see* Frances Vaughn, *A Question of Balance, Health and Pathology in New Religious Movements*, 265, 273 in *SPIRITUAL CHOICES* 265, 272-273 (Dick Anthony *et al.* eds., 1987).

¹⁷⁹ *See* Brown *et al.*, *supra* note 176, at 216 (in mindfulness, there is an "introduction of a mental gap between attention and its objects, including self-relevant contents of consciousness. This de-coupling of consciousness and mental content . . . means that self-regulation is more clearly driven by awareness itself, rather than by self-relevant cognition.").

¹⁸⁰ MARK EPSTEIN, *The Deconstruction of the Self*, 48-52 in *PSYCHOTHERAPY WITHOUT THE SELF*, *supra* note 98; CLAUDIO NARANJO & ROBERT E. ORNSTEIN, *ON THE PSYCHOLOGY OF MEDITATION* 86-87 (1971) (discussing this aspect of mindfulness meditation).

¹⁸¹ "Mindfulness, cultivated through meditation allows a mediator to approach neutrality in discourse through a strengthened ability to recognize personal bias when it occurs and reduce the influence of such bias on his speech and actions." Evan M. Rock, Note, *Mindfulness Meditation, The Cultivation of Awareness, Mediator Neutrality, and the Possibility of Justice*, 6 CARDOZO J. CONFLICT RESOL. 347, 363 (Spring 2005); *see also*

In the ideal case, a sense of reverence and respect for one's self and others is also developed through meditation and similar practices. In other words, one develops not only the capacity for mindful awareness but also the ability to reach into the moment of the mediation with an affirmative sense of respectful presence.¹⁸²

To the extent this happens, parties will more readily experience the mediator's presence as a source of support and objectivity. This is a positive aspect of the social brain.¹⁸³

Psychological insight is undoubtedly an important ingredient in developing these capacities.¹⁸⁴ However, the development of psychological practice or a capacity for psychological insight that ignores the importance of presence — the temporal and psychological location in which real contact occurs¹⁸⁵ — may cause one to simply miss the importance of establishing an authentic, credible presence during mediation.

Brach, *supra* note 98, at 30 (discussing the usefulness of the mindful negotiator taking the observer's perspective during negotiation).

¹⁸² In Confucian terms, "[t]he attitude of reverent composure [may then become] the *experiential* common ground linking the still and active phases of the mind." Joseph A. Adler, *Zhu Xi's Spiritual Practice as the Basis of his Central Philosophical Concepts*, 7(1) *DAO: J. OF COMP. PHILOS.* 57, 65 (2008) (on Zhu Xi (1130-1200), one of the most important Confucians).

¹⁸³ See *supra* Part II.A. on the social brain. See also DANIEL GOLEMAN, *SOCIAL INTELLIGENCE, THE NEW SCIENCE OF HUMAN RELATIONSHIPS*, 43 (2006) (discussing the motor neurons: "This triggering of parallel circuitry in two brains lets us instantly achieve a shared sense of what counts in a given moment. . . . Neuroscientists call that mutually reverberating state 'empathic resonance,' a brain-to-brain linkage. . . .") For Gallese's view of this phenomenon, see note 229, *infra*.

¹⁸⁴ Cf. ALMAAS, *THE PEARL*, *supra* note 102, at 16-17 (by understanding ego, rather than only transcending it, we *actualize the reality of what it is to be a human being).

¹⁸⁵ *Id.* at 88-89 (discussing presence as an element of contact).

The integration of all of these different aspects of the self is important. Otherwise, one may find oneself rapidly shifting between the state of open awareness achieved through meditation and one's customary state of egocentric functioning with seemingly no stop in between.¹⁸⁶ This is confusing for oneself and for others, including clients. From this perspective, the great value of mediation is precisely that it continually challenges the mediator to achieve higher levels of awareness and integration.

V. THE "IDR CYCLE": SELF AND IDENTITY IN THE PROCESS OF MEDIATION

One of the most well-documented ways that issues of self and identity impact mediation is that parties come to the mediation table primed with self-enhancing biases regarding the likely possible negotiation outcomes.¹⁸⁷ This means that in many cases, the process of negotiation will inevitably bring disappointment before it brings resolution. As a result, in many, if not most mediations, the parties experience a psychological cycle of inflation, deflation and resolution, or what I call the "IDR cycle."

The IDR cycle bears some marked similarities to the later stages of the separation/individuation process described by Mahler: a period of initial inflation precedes a phase of disappointment and power struggle and culminates finally in resolution.¹⁸⁸ The similarity exists, I believe, because what Mahler describes — and what mediation epitomizes — is the process of reality testing as that process

¹⁸⁶ Cf. discussion of the nature of the self in Muquddam, *supra* note 105.

¹⁸⁷ See discussion *infra* Part V.B.

¹⁸⁸ See *infra* Parts V.B-I.

unfolds for human beings. It is in some sense always a dialectical and difficult process, and one that inherently involves narcissistic challenges.¹⁸⁹

For that reason, self and object constancy, the capacity to accept both strengths and limitations in oneself and others, will often be the key to resolution.¹⁹⁰ It represents a mature working through of disappointment, the release of narcissistic self-images, and an acceptance of the limits of the situation.

Not all mediations follow the IDR cycle, but many do. In my experience, it is more pronounced when the dispute is hotly contested, and involves high stakes litigation. However, it also occurs in smaller cases, especially when issues of pride and face predominate. What follows is a discussion of this cycle and its “critical moments.”¹⁹¹

A. *Psychological Pressures on Parties Prior to Mediation.*

The psychological pressure on a party preparing for mediation is intense. The pressure related to the underlying conflict is, of course, a major source of anxiety, especially if the underlying dispute involves trauma, injury, or interpersonal relationships. There may also be pressure related to the litigation, to relationships with or between parties and counsel, and to other factors.¹⁹²

The fact that the mediation occurs in a group is a source of increased pressure. The likelihood of narcissistic vulnerability increases in a group as a

¹⁸⁹ “[T]he wish to absolutely assert the self and deny everything outside one’s own mental omnipotence *must* sometimes crash against the implacable reality of the other.” BENJAMIN, *supra* note 42, at 47 (emphasis supplied).

¹⁹⁰ On object constancy as the ability to incorporate both positive and negative aspects of the object, *see* discussion *supra* at Part I.A, especially the text at notes 29-31.

¹⁹¹ The meaning of this term is discussed *infra* note 223.

¹⁹² These may include (1) time pressures, such as an impending trial date; (2) the difficulty for lay people in dealing with complex legal concepts; (3) cultural issues arising from factors such as gender, race and class; and (4) financial pressures or difficulty in dealing with monetary issues.

person must perform in front of observers and must confront other people with their own needs and priorities.¹⁹³

The tendency in our society to judge others by their external success, for example, by how much money they make, contributes to the pressure to “succeed” in mediation. For the more narcissistic, or the more externally focused person, the weight of this pressure is significant. It should not be underestimated.

While parties in mediation most often do not regress in the technical sense of returning to earlier age levels, nevertheless, even people who are stable under normal conditions may find themselves clinging to narcissistic defenses, such as hostility, grandiosity and entitlement. Human beings activate defensive systems in the face of threat.

B. *Pre-Mediation Overconfidence.*

In spite of the pressures people face, or as I will argue, because of them, parties typically enter mediation with overconfident expectations. The finding that parties have unrealistically high expectations prior to entering negotiations has been replicated in hundreds of research studies.¹⁹⁴ It has been called “[a]mong the most robust findings in research on social perceptions and cognition over the last

¹⁹³ Brown, *supra* note 3, at 119 (There is a greater sensitivity, and thus more potential for wounded pride and spiteful retaliation, “when bargainers feel they have been made to look foolish or weak before a salient audience. . . .”); Jerome S. Gans & Robert L. Weber, *The Detection of Shame in Group Psychotherapy: Uncovering the Hidden Emotion*, 50 INT’L. J. GROUP PSYCHOTHERAPY 381, 392 (public nature of groups intensify transference reactions of shame); William K. Hahn, *Resolving Shame in Group Psychotherapy*, 44 INT’L. J. GROUP PSYCHOTHERAPY 449, 459 (1994).

¹⁹⁴ Korobkin, *supra* note 151, at 284, and *see* 284-298 (2006) (extensive discussion of overconfidence, which is viewed by the author as the most significant psychological impediment to settlement, and other self-enhancing biases); *see also* Richard Birke & Craig R. Fox, *Psychological Principles In Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 18 (1999) (also discussing positive illusions such as overconfidence).

two decades.”¹⁹⁵ It is consistent with my experience and that of many mediators, even if one accounts for posturing.¹⁹⁶

Unfortunately, “[n]o problem in judgment and decision making is more prevalent and more potentially catastrophic than overconfidence.”¹⁹⁷ Overconfidence has been linked to entrepreneurial failure, unsuccessful corporate mergers and acquisitions, war, excessively high trading in the stock market, labor strikes and, of course, litigation.¹⁹⁸ Overconfident negotiators set unrealistic reservation points. As a result, they close fewer deals.¹⁹⁹

Overconfidence may be viewed as a type of grandiosity; it may be correlated with narcissism²⁰⁰ and “inflated, positive views of the self.”²⁰¹ One chooses to experience an idealized sense of one’s negotiating possibilities (and implicitly one’s self) in part, I believe, as a defense to the inevitable sense of vulnerability and anxiety attendant upon participation in negotiation and

¹⁹⁵ Korobkin, *supra* note 151, at 284, quoting David A. Armour & Shelly E. Taylor, *When Predictions Fail: The Dilemma of Unrealistic Optimism*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 334 (Thomas Gilovich *et al.* eds., 2002).

¹⁹⁶ *Id.* at 291 (taking posturing into consideration).

¹⁹⁷ Don Moore & Paul J. Healey, *The Trouble with Overconfidence* 3, available at <http://ssrn.com/abstract=1001821> (2007) (citing S. PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* (1993)).

¹⁹⁸ *Id.*

¹⁹⁹ Birke & Fox, *supra* note 194, at 15-16; *see also* Margaret A. Neale & Max H. Bazerman, *The Effect of Reframing and Negotiator Overconfidence on Bargaining Behaviors and Outcomes*, 28(1) *ACAD. MANAGEMENT J.* 34, 38-39, 46 (1985).

²⁰⁰ *See* Campbell *et. al.*, *supra* note 152.

²⁰¹ Birke & Fox, *supra* note 194, at 15.

mediation.²⁰² One's natural aggression and sense of strength are also important sources of fuel for this dynamic.²⁰³

Unfortunately, overconfidence sets the stage for disappointment later in the mediation when one's hopes and expectations are not satisfied.

C. Offer and Counteroffer as Narcissistic Injury.

Generally, the first real assault on a party's overconfident hopes and expectations is the opening offer and/or the first counteroffer. Depending upon how great the expectations have been, the disappointment at this time may be intense. Anger or other defensive reactions will result. Evaluation at this time is probably not appropriate; the party's relationship with the mediator has not arrived at the point where it will be welcome.

As the process continues, the sense of injury and counter-injury may accumulate, but ideally it is neutralized at least in part by the mediator's skills. Most importantly, the mediator must demonstrate her respect for each party, while maintaining a focus on objective thinking.

D. Psychological Power Imbalance.

As the parties struggle through the process of offer and counteroffer, a psychological power imbalance may surface. As Kohut and Wolf noted, people differ in the degree of stability and coherence of their sense of self.²⁰⁴ Obviously,

²⁰² See De Dreu & van Knippenburg, *supra* note 4, at 346 (noting conflicts involve threats, which causes a drop in positive affect; "to escape this uncomfortable state, people engage in self-enhancement"); DEEPAK MALHOTRA & MAX H. BAZERMAN, *NEGOTIATION GENIUS: HOW TO OVERCOME OBSTACLES AND ACHIEVE BRILLIANT RESULTS AT THE BARGAINING TABLE AND BEYOND* 135 (2007) (overconfidence caused by need to "keep us feeling good about ourselves").

²⁰³ Cf. ALMAAS, *THE PEARL*, *supra* note 102, at 211-213 (discussing the natural sense of strength).

²⁰⁴ See discussion *supra* notes 73-75.

some differences are normal,²⁰⁵ but sometimes the differences assume dramatic proportions. When one side is greatly more vulnerable or susceptible to collapse and the other takes a rigid self-serving stance, a psychological power imbalance may arise.²⁰⁶ A party may be weaker financially but stronger psychologically, or vice versa.

One thing that can be done to adjust for the imbalance is to make sure that the legitimate boundary-delimiting relationships of the weaker party are respected and supported. By this, I mean, of course, the attorney-client relationship, but other relationships, especially those of friends or colleagues, may also be included.

For the more powerful, more rigidly defended person, evaluation may also help to adjust the imbalance if it neutralizes unrealistic overconfidence. While many mediators prefer to encourage parties to negotiate with each other directly, this may be a situation where that is ultimately counterproductive and unfair to the psychologically weaker party.²⁰⁷

E. *Impasse: Crisis of Mutual Recognition.*

Painful as it may sometimes be, as the process continues, the parties begin to acquire greater resilience and more and more information about the other side's interests and positions. They also begin to learn just what in their own previously overconfident assessments was unrealistic.

²⁰⁵ Mnookin *et al.*, *supra* note 132, at 222 *et seq.* (describing different negotiating styles).

²⁰⁶ Cf. Ben Bursten, *Some Narcissistic Personality Types*, 54 INT'L. J. PSYCHOANAL. 287 (1983) *reprinted in* ESSENTIAL PAPERS, *supra* note 1, at 377, 381-382 (discussing different personality types, noting for example, for the borderline personality, the primary task is to prevent disintegration and dissolution while narcissists have a firmer and more stable ego); *cf. also* Mnookin *et al.*, *supra* note 132, at 225 (savvy competitors can exploit the accommodator's desire to preserve the relationship and to minimize disagreements.).

²⁰⁷ This point is supported by a recent study that finds that plaintiffs in employment mediation who participated in EEOC mediations without counsel were at a decided disadvantage, particularly in evaluative mediation. McDermott & Obar, *supra* note 145, at 107. Presumably, these parties tend to be more vulnerable psychologically than their opponents, given the nature of the subject matter.

Eventually, the parties stretch to a point where an impasse, or at least what seems like an impasse, occurs. Impasse may have an objective basis,²⁰⁸ or a subjective basis,²⁰⁹ or it may be a combination of both. Part of the mediator's role will be to determine whether the impasse is due to objective factors, in which case it may be best to end the mediation, or to subjective factors, in which case it should generally proceed.

Up to this point, each party has focused her mind's eye on her desired negotiating outcome. Now, the view must include a fuller sense of the picture — with its possibilities for loss, not just gain, and for continued litigation. This is the beginning of a type of object constancy, as each party moves to a more comprehensive view of the situation and the other party, including the other's interests and positions, positive and negative.²¹⁰ Each must also acknowledge the weaknesses, not just the strengths, of his or her own position. This is increased reflective functioning, and a more intersubjective, reality-based view of the conflict.²¹¹

²⁰⁸ This occurs when the settlement value the plaintiff places on her claim is objectively reasonable, given the facts and the law, but the defendant cannot or will not settle for that amount at that time.

²⁰⁹ Impasse may be said to have a subjective basis when the parties refuse to settle a given claim, even though they can do so and it would be objectively reasonable to do so, for reasons such as pride, insult or other subjective issues.

²¹⁰ See discussion of object constancy *supra* in Part I.A and text accompanying notes 29-31.

²¹¹ As Jessica Benjamin points out, the attempted, but "failed" destruction of the other is an implicit part of the process of mutual recognition. When the other survives, one is forced to "carry [] on a relationship with the other who is objectively perceived as existing outside the self, an entity in her own right." BENJAMIN, *supra* note 42, at 39. "It is this appreciation of the other's reality that completes the picture of separation, and points toward the establishment of shared reality." *Id.* at 40. This is important because, as she notes, "[i]t is the loss of balance between the intrapsychic and intersubjective, between fantasy and reality, that is the problem." *Id.* at 40.

I see this as analogous to the situation in mediation when the parties have attempted to assert their will and dominance, yet ultimately must recognize each other's interests to move through impasse.

At the same time, this is a deeply disappointing time for the parties because settlement is going to be more difficult than they had hoped. Yet it is a time of possibility and growth. They grow into the possibility of settlement.

The parties' defenses become less dense during this time. They will now become more open to the interventions of the mediator. For example, they may consider or even accept a "mediator's proposal" because they are now convinced that their own previous goals are not reachable.

F. *The Mediator's Inner Work During Impasse.*

One of the signals that the time of impasse has come may be the surfacing of the mediator's own narcissistic issues. This may take different forms, such as the fear of failure, or of not "performing." This part of the process tests one's capacity to let go of the narcissistic image of oneself as a great or effective mediator.²¹² In the ideal case, one experiences a deep sense of "letting go," a reminder that one's true value and identity are not determined by the result of the mediation. When this happens, a kind of peacefulness may be experienced even in the midst of the conflict. The release has made it possible.

Jessica Benjamin writes of a similar dynamic during psychoanalytic impasse. The analyst confronts her own shame during the time of impasse but must remember that "breakdown and repair are a part of a larger process."²¹³ This "surrender means a deep acceptance of the necessity of becoming involved in . . . impasses" because breakdown and repair are inevitable parts of human relationships.²¹⁴ It is a "surrendering rather than [a] submitting."²¹⁵ It "puts an

²¹² See also *supra* Part IV.B on this point.

²¹³ Jessica Benjamin, *Beyond Doer and Done To: An Intersubjective View of Thirdness*, LXXIII PSYCHOANAL. Q. 5, 29 (2004).

²¹⁴ *Id.* at 29. Benjamin also speaks of the psychoanalytic concept of thirdness, a concept that is not discussed here.

²¹⁵ *Id.* at 32.

end to the buck passing” wherein a “member of [a] dyad tries to put the bad into the other.”²¹⁶

Daniel Stern, too, notes that during certain crucial moments in therapy (and in negotiation/mediation),²¹⁷ “there is an immediate sense that the existing intersubjective field is threatened. . . .”²¹⁸ Something is needed to resolve the condition of suspense that has been created,²¹⁹ but the “therapist feels disarmed and the level of anxiety rises because he or she really does not know what to do.”²²⁰ The situation demands something beyond a “neutral, technical response,” it requires an authentic response to the situation.²²¹ What is needed is a “moment of meeting,” a moment of true interpersonal contact²²² to resolve the crisis.

This happens in mediation when the mediator’s sincere belief that the dispute may indeed not settle is conveyed on a nonverbal level to the parties (as well as on a verbal level as appropriate). This reinforces for them that now is the time of personal responsibility; they must indeed decide whether or not to bring the matter to resolution. During this critical moment,²²³ to paraphrase Jessica Benjamin, the mediator herself is the first to change, and it is her change that ultimately makes the client’s change possible.²²⁴

²¹⁶ *Id.* at 33.

²¹⁷ On Stern's analogy between therapy and negotiation, see *supra* note 171, at 367.

²¹⁸ STERN, *supra* note 40, at 167.

²¹⁹ Stern, *supra* note 171, at 370.

²²⁰ *Id.*

²²¹ STERN, PRESENT MOMENT, *supra* note 40, at 168.

²²² *Id.* at 172.

²²³ Critical moments are turning points in negotiations, the points at which meaning shifts. Susskind, *supra* note 172, at 339-340. The Negotiation Journal devoted a special issue to Critical Moments in Negotiation. See 20 NEGOTIATION J. (2004).

²²⁴ Benjamin, *supra* note 213, at 32. The intersubjective view acknowledges the importance of change in the mediator or analyst, not just change in her clients. This complements but is distinct from the emphasis in some mediation approaches on changing the parties or their interactions. See *e.g.*, BUSH ET AL., *supra* note 121, at 233. (discussing importance of transforming parties' conflict interactions).

G. *Release of Identity as a Critical Moment in the Process of Resolution.*

The mediator's respect and affirmation of the parties may now play a crucial role in helping them to release their ego investments in the dispute and to clearly weigh their options. In the ideal situation, one's deep respect for the client arises at this time as a natural, attuned response to the client's dilemma.²²⁵ This allows one inwardly to support the client on the level of his or her true value and identity, which is not contingent on what others think or the result of the mediation. This must be done, however, while also maintaining an appropriate, safe and respectful distance.²²⁶

These "moments of meeting" may be therapeutic moments, if, as the intersubjective theorists have it, "each significant affective context in the life of an individual can potentially create transformations, not because previous attitudes (conscious or unconscious) are modified but because new organizing principles are established."²²⁷

Yet one is not merely trying to help the client feel seen. One is also trying to help him disengage his self-identity from the issues at stake in the negotiation.

²²⁵ In Confucian terms, the naturalness of the respect demonstrates its authenticity. "[W]hen I am *aware* of a respect for you, I am much more likely to be piously fatuous or perhaps self-consciously embarrassed . . . No, the authenticity of the mutual respect does not require that I . . . focus my attention on my respect for you; it is fully expressed in the correct live and spontaneous performance of the *act*." HERBERT FINGARETTE, CONFUCIUS — THE SECULAR AS SACRED 9 (1972). Nevertheless, one's training as a mediator is important precisely because it helps one to prepare the ground from which this respect will naturally arise.

²²⁶ Eisold, *supra* note 122, at 110. ("Space, the maintenance of respectful distance, along with the clear sense of making connection . . . are requisite aspects of [profound] recognition.")

²²⁷ Gianni Nebbiosi, *Organizing Patterns in a Dyad and in a Group: Theoretical and Clinical Implications*, 23 PSYCHOANAL. INQUIRY (2003) 750, 756, quoting R.D. STOLOROW & G.E. ATWOOD, CONTEXTS OF BEING: THE INTERSUBJECTIVE FOUNDATIONS OF PSYCHOLOGICAL LIFE (1992).

Ideally, in psychoanalytic terms, the mediator's attuned mirroring and encouragement of reflective thinking helps the party to engage his reflective function²²⁸ and objective thinking about the difficult situation at hand. Or in the terms of Almaas and Muquddam, ideally the mediator's respect facilitates a sufficient release of ego activity to activate a deeper sense of self and objectivity.²²⁹

Something akin to a renegotiation or release of identity may occur at this point for one or more of the parties. Faced with the impossible, painful, practical dilemmas inherent in the conflict, they come to see that their situation is exacerbated by the linkage in their minds between the outcome of the mediation and their own identities. Under the pressure of the conflict, they manage to question and perhaps even to cut the link between the two.²³⁰

This release of identity is a critical moment, indeed perhaps *the* critical moment in the mediation.²³¹ When it occurs, there will be clearer thinking, and reflective functioning.²³² This is the time when an evaluative discussion or a collaborative inquiry about the value of various courses of action may be most welcome and most effective.

²²⁸ On reflective functioning, see *supra* Part I.C.

²²⁹ Faisal Muquddam, personal communication with the author, March 2007. In neuroscientific terms, if the empathic resonance is deep enough, the mediator's respect may actually help the party gain access to his own self-respect through the mirror neurons. See *supra* note 183 on empathic resonance and Gallese, *supra* note 88, at 161-162 ("when a therapist reacts with attuned responses (i.e., empathic understanding) that [will] allow the patient to find his or her own experience in the therapist's response, and, at the same time, facilitate the patient's capacity to reflect on and transform that experience." In such a case, "what is internalized is not simply a representational replica of the patient's own behavior but already a transformation of that behavior.").

²³⁰ I believe this point corresponds to what Gary Friedman and Jack Himmelstein call reaching the core of the conflict. Gary Friedman & Jack Himmelstein, *Getting to the Heart of the Matter*, Center for Mediation in Law (May, 2004).

²³¹ On the concept of critical moments in negotiation, see *supra* notes 171-172 and 223.

²³² On reflective functioning, see *supra* Part I.C.

This process may sound complicated, but it can be quite simple. A party may simply decide not to suffer or struggle any longer about the last remaining item on the table during the negotiation. Inwardly — and without necessarily saying so — there has been a letting go.

One should not, however, underestimate this achievement. For some, it represents the release of an aspect of the identity, akin to what would be called nonattachment,²³³ disidentification,²³⁴ or “letting go”²³⁵ in the language of spiritual or psychological²³⁶ practice. For others, it will be a less profound and less exacting experience.

H. *Resolution.*

The release of identity is itself often the signal event that accomplishes resolution. The party decides to move from a position that has previously seemed immovable, and the case resolves.

In other cases, resolution may arrive in a different form. Someone comes up with a new idea to bridge the gap. The mediator dares to raise a possibility that previously would have been dismissed, but now is seen as workable. From the space created by the release of expectations and identity, the resolution has had room to emerge. This is the magic of mediation.

²³³ ELIZABETH J. HARRIS, *DETACHMENT AND COMPASSION IN EARLY Buddhism* (1997).

²³⁴ ALMAAS, *THE PEARL*, *supra* note 102, at 60. (“The work on inner realization, however, requires that one bring to consciousness all the ego identifications which are used for identity, and that one then gradually (or sometimes abruptly) disidentify from this mental content”); Epstein, *Psychotherapy without the Self*, *supra* note 98, at 48.

²³⁵ Brach, *supra* note 98, at 35-36 and 43, n. 11, citing JACK KORNFIELD, *A PATH WITH HEART, A GUIDE THROUGH THE PERILS AND PROMISES OF SPIRITUAL LIFE* 112 (1993) (on “letting go”).

²³⁶ Cf. Jeffrey R. Martin, *Mindfulness: A Proposed Common Factor*, 7(4) J. PSYCHOTHERAPY INTEGRATION 291, 292, 296-310 (1997) (terms such as “deautomatization,” “detachment,” “decentering,” and “nonattachment,” used by some authors in the literature on psychotherapy, refer to a type of psychological freedom also found in mindfulness).

I. *After Resolution – Toward Object Constancy*

Assuming the parties do indeed settle their dispute, they will often be somewhat disappointed because they have not achieved their previously desired goals. The ability to accept this, and to consummate the settlement, will in part depend upon whether one can maturely accept the corresponding deflation without taking it to be too much a reflection on one's self.

One's ability to accept a compromise will also depend in part upon whether one can relinquish the urge to demonize the other party, to split the conflict solely into the "good me" and the "evil other." These are components of mature "object constancy."²³⁷

Strangely enough, in multi-party litigation, this is frequently more difficult, or less attractive, for those with relatively less at stake in the litigation, that is, for the more minor players. Since they have known all along that they are in a less vulnerable position than others in the mediation, it will often be harder for them to accept the closure of their negotiating opportunity.

VI. CONCLUSION

Issues of self and identity are implicated in all aspects of the resolution of human conflict. Thinking from different disciplines can help us understand the way they impact mediation. Yet ultimately, they remain part of a fundamental mystery, the mystery of who we are.

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²³⁷ On object constancy as the ability to incorporate both positive and negative aspects the object, and to resolve splitting, *see* discussion *supra* Part I.A., especially the text at notes 29-31.