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

Elizabeth E. Bader\*

## INTRODUCTION

Issues of self-identity and self-esteem play an important role in negotiation and 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.<sup>1</sup> They may also be referred to as "narcissistic issues," a term that no longer necessarily connotes pathology.<sup>2</sup> 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 developmental theory considers these questions by analyzing the way the sense of self develops in childhood.<sup>3</sup> On the other hand, many spiritual traditions insist that however it develops, the

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1. See, e.g., Judith B. White et al., *Face Threat Sensitivity in Negotiation: Roadblock to Agreement*, 94 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 102 (2004) (discussing face saving in negotiation); Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 15-19 (1999) (discussing parties' frequent "egocentric" biases and positive illusions).

2. The term "narcissism" originally had an autoerotic, 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 (James Strachey et al. trans., 1966), reprinted in ESSENTIAL PAPERS ON NARCISSISM 17 (Andrew P. Morrison ed., 1986) [hereinafter ESSENTIAL PAPERS]. This is no longer the case. See Leonard Horwitz, *Narcissistic Leadership in Psychotherapy Groups*, 50 INT'L. J. GROUP PSYCHOTHERAPY 219-20 (2000) (explaining that, 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.").

3. See *infra* Part I.

ego, our usual sense of who we are, is actually an illusion, and a limitation.<sup>4</sup> In recent years, there have been some important attempts to bridge the gap between these two positions.<sup>5</sup> Yet, the nature of the self and its identity still remains a fundamental mystery.

This article considers the self from these perspectives, and others, including neuroscience<sup>6</sup> and social psychology,<sup>7</sup> within the context of mediation. On a psychological level, parties in mediation typically move through a cycle of narcissistic *inflation*, *deflation*, and then, hopefully, *realistic resolution*. I call this the IDR cycle.<sup>8</sup> This process demands strength of self on a basic, simple, healthy ego level, especially at the outset. Parties strive to be equal to the task.

However, during impasse and other “critical moments,”<sup>9</sup> if the parties wish to reach resolution, they may have to release their psychological investments in the outcome of the negotiation. Thus, the capacity to let go is also a critical aspect of the psychology of mediation.

The mediator’s own issues of self and identity will also arise during mediation. During critical moments, the mediator, too, may have to release the sense of narcissistic self-investment in the outcome. Thus, our usefulness as mediators will often depend on the extent to which we have learned to deal with issues of self and identity, not only in others, but in ourselves.

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

It is well established that issues of self and identity play an important role in negotiation and mediation.<sup>10</sup> “Whether anticipated or enacted,

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4. See *infra* Parts II.A, B.

5. See *infra* Part II.B.

6. See *infra* Part II.B.

7. See *infra* notes 15, 95-107, 146-147, 167 and accompanying text.

8. See *infra* Part IV.

9. Critical moments are turning points in negotiations, the points at which meaning shifts. See, e.g., Lawrence Susskind, *Ten Propositions Regarding Critical Moments in Negotiation*, 20 NEGOT. J. 339, 339-340 (2004).

10. Tom R. Tyler, *The Psychology of Disputant Concerns in Mediation*, 14 NEGOT. 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. EXPERIMENTAL SOC. PSYCHOL. 107, 109 (1968) (discussing early research on face saving); White, *supra* note 1, at 102 (noting importance of face “has long been recognized”). See also DOUGLAS STONE ET AL., *DIFFICULT CONVERSATIONS, HOW TO DISCUSS WHAT MATTERS MOST* 111 (1999) (“Difficult conversations threaten identity”); Madan N. Pillutla & J. Keith Murnighan, *Unfairness*, 184

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whether about deeply held values or irrelevant nonissues, conflict produces ego-threat,"<sup>11</sup> which greatly complicates conflict resolution.<sup>12</sup> When a party's pride is wounded during negotiation, even acceptable offers may be rejected out of spite.<sup>13</sup>

Much invaluable work on this subject has been done from behavioral or social psychological perspectives.<sup>14</sup> However, for the most part, these perspectives do not address the nature of the self, or why issues of self and identity arise in negotiation and mediation.<sup>15</sup> Developmental psychoanalytic theory can help address these questions, as discussed below.<sup>16</sup>

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*Anger and Spite: Emotional Rejections of Ultimatum Offers*, 68 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 208, 210 (1996) (discussing wounded pride and spite in negotiations).

11. 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).

12. Kenneth Cloke, *Mediation, Ego and I: Who, Exactly, Is in Conflict?*, in HANDBOOK OF CONTEMPORARY PSYCHOTHERAPY: TOWARD AN IMPROVED UNDERSTANDING OF EFFECTIVE PSYCHOTHERAPY 117, 118 (William O'Donohue & Steven R. Graybar eds., 2008) (issues relating to the "ego" and the "I" are the "central problem in conflict resolution").

13. See 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 10). See also Robert S. Adler et al., *Emotions in Negotiation: How to Manage Fear and Anger*, 14 NEGOT. J. 161, 173-174 (1998) (explaining that angry opponents may "hold to untenable positions that will cost them money or even provoke wars."); Pillutla & Murnighan, *supra* note 10, at 211 ("[P]erceptions that an offer is unfair can also lead to anger and wounded pride, and, ultimately, to a greater likelihood that an offer will be rejected."); Eric van Ginkel, *The Mediator as Face-Giver*, 20 NEGOT. J. 475, 479 (2004) ("[R]eduction in flexibility in the bargaining process may be an indication of a face concern."); Morton Deutsch, *The Face of Bargaining*, 9 OPERATIONS RES. 886, 896 (1961) (same). On issues of face generally in social interactions, a classic work is Erving Goffman, *On Face-Work: An Analysis of Ritual Elements in Social Interaction*, in INTERACTION RITUAL: ESSAYS IN FACE-TO-FACE BEHAVIOR 5-46 (Transaction Publishers ed. 2005) (1967).

14. See Max H. Bazerman et al., *Negotiation*, 51 ANN. REV. PSYCHOL. 279, 280-86 (2000) (tracing history of social psychological study of negotiation).

15. Additionally, these approaches do not focus on the importance of psychological differences between individuals. Cf. Bazerman, *supra* note 14, 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, 750 (2005) ("The self is as strange as psychological phenomena get.").

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

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

Sigmund Freud, the founder of psychoanalysis, developed his now famous theories regarding the importance of childhood experience for later development, largely by extrapolation, working backward from the analysis of adult memories and fantasies.<sup>17</sup> After Freud, a number of analytic theorists concentrated on direct observation of infants and children.

For example, Margaret Mahler and her colleagues began exploring the way the sense of self develops by observing infants interacting with their mothers beginning in the 1950s and for decades thereafter.<sup>18</sup> Mahler concluded that the infant is predominantly in a sleeplike “autistic” phase after birth.<sup>19</sup> Three to four weeks after birth, the infant experiences himself<sup>20</sup> and mother as enveloped within a common boundary in a symbiotic relationship.<sup>21</sup> “Mirroring” by the mother, and mutual cuing foster the beginning of identity formation.<sup>22</sup> Sensory discrimination between self and other begins to emerge in a rudimentary form at about four to five months in the early stages of the “differentiation subphase.”<sup>23</sup>

*The practicing subphase.* During the “practicing subphase,” the period from ten or twelve months to sixteen or eighteen months,<sup>24</sup> the infant explores the world with a sense of omnipotence derived largely from the sense that he shares in his mother’s powers.<sup>25</sup> The child walks freely with an

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17. JAY R. GREENBERG & STEPHEN A. MITCHELL, OBJECT RELATIONS IN PSYCHOANALYTIC THEORY 119 (1983).

18. See MARGARET S. MAHLER ET AL., THE PSYCHOLOGICAL BIRTH OF THE HUMAN INFANT, SYMBIOSIS AND INDIVIDUATION xxiii-xxv (1975) [hereinafter MAHLER ET AL., PSYCHOL. BIRTH]. A classic overview of Mahler’s work is contained in Greenberg & Mitchell, *supra* note 17, at 274-281.

19. MAHLER ET AL., PSYCHOL. BIRTH, *supra* note 18, at 41 (defining the so-called “autistic phase”).

20. Gendered terms such as “himself” or “herself” are used at different times in this paper for the sake of linguistic efficiency.

21. MAHLER ET AL., PSYCHOL. BIRTH, *supra* note 18, at 44-45 (defining the so-called “symbiotic phase”).

22. MARGARET S. MAHLER, THE SELECTED PAPERS OF MARGARET S. MAHLER, VOL. II, SEPARATION-INDIVIDUATION 86-87 (1979) [hereinafter MAHLER, SELECTED PAPERS]. For example, mother sees her infant smile and reach for a toy. *Id.* Then, mother smiles in return and hands her infant the toy. *Id.* Mirroring would also include the familiar type of activity where mother responds to her infant’s vocalizations by repeating them back, or where she responds to the infant’s activity by engaging in the same or similar activity.

23. MAHLER ET AL., PSYCHOL. BIRTH, *supra* note 18, at 52-54; GREENBERG & MITCHELL, *supra* note 17, at 275.

24. MAHLER, SELECTED PAPERS, *supra* note 22, at 126.

25. *Id.* at 88.

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upright posture, is elated, and views “[t]he world [as] his oyster.”<sup>26</sup> The infant’s natural narcissism is at its peak.<sup>27</sup>

*The rapprochement subphase.* In the middle of his second year, the child begins to discover that “contrary to his earlier narcissistic sense of omnipotence, he is, in fact, a very small person in a very big world.”<sup>28</sup> These “terrible twos” are a time of struggle and conflict.<sup>29</sup> The child both wants and needs mother’s help, but also needs to deny that he is dependent upon others.<sup>30</sup>

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.<sup>31</sup> The child cannot yet understand others as complex people who will sometimes meet his needs but at other times frustrate them.<sup>32</sup> This is the “rapprochement crisis.”<sup>33</sup>

*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.<sup>34</sup> The child’s internal representation of a supportive mother becomes, in effect, a durable, mental “object,” an object upon which he can rely.<sup>35</sup> He will then become less dependent upon having his actual, physical mother with him.<sup>36</sup>

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26. MAHLER ET AL., PSYCHOL. BIRTH, *supra* note 18, at 71; MAHLER, SELECTED PAPERS, *supra* note 22, at 126.

27. MAHLER ET AL., PSYCHOL. BIRTH, *supra* note 18, at 70-71; GREENBERG & MITCHELL, *supra* note 17, at 276.

28. *Id.* at 277; MAHLER, SELECTED PAPERS, *supra* note 22, at 128.

29. GREENBERG & MITCHELL, *supra* note 17, at 278; MAHLER, SELECTED PAPERS, *supra* note 22, at 128 (noting infant’s “intense negativity” and “dramatic fighting” with mother during rapprochement).

30. GREENBERG & MITCHELL, *supra* note 17, at 278.

31. MAHLER ET AL., PSYCHOL. BIRTH, *supra* note 18, at 84, 229; GREENBERG & MITCHELL, *supra* note 17, 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., PSYCHOL. BIRTH, *supra* note 18, at 84, 99, 108.

32. MAHLER ET AL., PSYCHOL. BIRTH, *supra* note 18, at 98, 228-229.

33. *Id.* at 95-100, 228-229.

34. *Id.* at 109-10.

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

36. GREENBERG & MITCHELL, *supra* note 17, at 279.

It is thus 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”<sup>37</sup>—that resolves the rapprochement crisis.

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.<sup>38</sup> He acquires, in other words, the capacity for “self-constancy,” the capacity for self-representation and an understanding of himself as a separate person.<sup>39</sup>

Self and object constancy includes the capacity to integrate both positive and negative aspects of self and/or others into a whole.<sup>40</sup> Ideally, this resolves the splitting that took place during childhood.<sup>41</sup> Otherwise, the child may continue to mentally split others, to relate to them as all-bad or all-good, throughout his life.<sup>42</sup> Ideally, adults mature in object constancy throughout their lives.<sup>43</sup>

*Significance for mediation.* Mahler’s work suggests that the sense of identity is forged in the crucible of early conflict. It emerges by necessity as we are each forced to deal with conflict with the environment, including other people. It is not surprising, then, that our sense of personhood bears the stamp of its early, often frustrated, nonverbal origins. That is why we experience conflict as implicating the value and even the existence of the self.<sup>44</sup>

On the other hand, as Mahler’s work shows, the hallmark of human maturity is the capacity to hold a stable, mature view of oneself and others as

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37. William K. Hahn, *Developing Object Constancy in Group Psychotherapy*, 43 INT’L. J. GROUP PSYCHOTHERAPY 223 (1993) (citing G. ADLER, BORDERLINE PSYCHOPATHOLOGY & ITS TREATMENT (1985) and A. H. Modell, “*The Holding Environment*” and the Therapeutic Action of Psychoanalysis, 24 J. AM. PSYCHOANALYTIC ASS’N. 285 (1976)).

38. MAHLER ET AL., PSYCHOL. BIRTH, *supra* note 18, 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).

39. *Id.*; see also GREENBERG & MITCHELL, *supra* note 17, at 300-301 (discussing the self as self-representation in Mahler’s work).

40. Hahn, *supra* note 37, at 223 (object constancy includes the ability to integrate both positive and negative aspects of the self and nurturing other).

41. GREENBERG & MITCHELL, *supra* note 17, at 279 (“Libidinal object constancy presupposes the unification of good and bad representations of the object . . .”).

42. MAHLER ET AL., PSYCHOL. BIRTH, *supra* note 18, at 107-108 (linking splitting in rapprochement and borderline disturbances); GREENBERG & MITCHELL, *supra* note 17, at 279 (discussing same).

43. *Id.* at 279.

44. For more on the significance of the tension between the early, nonverbal experience of the self in infancy and the later development of the sense of self and ego, see *infra* notes 108-116 and accompanying text (discussing work of Muqaddam and Almaas).

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people with *both* positive and negative characteristics.<sup>45</sup> Since each party in conflict tends to view the other as the “all bad” adversary of the “all good” self,<sup>46</sup> understanding and learning to encourage “self and object constancy” is extremely important for mediators.

Finally, and perhaps most significantly, the later phases of the individuation process described by Mahler almost exactly parallel what I call “the IDR cycle,” the cycle of narcissistic inflation, deflation, and realistic resolution that typically occurs in mediation.<sup>47</sup> The similarity exists, I believe, because what Mahler describes—and what mediation epitomizes—is the process of reality testing as that process unfolds for human beings. It is in some sense always a dialectical and difficult process, and one that inherently involves narcissistic challenges.<sup>48</sup> The IDR cycle exemplifies this dialectical process.

### B. Intersubjectivity in Infancy and Beyond

Daniel Stern and other researchers also conducted observational studies, including frame-by-frame studies of face-to face play between mothers and infants. They criticized Mahler’s views, especially the view that the early infant is autistic and symbiotic.<sup>49</sup> Instead, they argued the early infant has a nonverbal sense of self even in the early days of infancy.<sup>50</sup>

45. GREENBERG & MITCHELL, *supra* note 17, at 279 (noting object constancy for Mahler presupposes capacity to integrate both good and bad representations of others).

46. Cf. John Gartner, *The Capacity to Forgive: An Object Relations Perspective*, 27 J. RELIGION & HEALTH, 313, 316 (1988) (discussing splitting and the importance of understanding others have both good and bad qualities).

47. See *infra* Part IV (discussing the IDR cycle).

48. “[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.” JESSICA BENJAMIN, LIKE SUBJECTS, LOVE OBJECTS 47 (1995) (emphasis added).

49. DANIEL N. STERN, THE INTERPERSONAL WORLD OF THE INFANT 240 (2000) [hereinafter STERN, INTERPERSONAL WORLD] (Mahler’s ideas regarding early symbiosis are “problematic”). See also *id.* at xiii (arguing 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*, in THE LANGUAGE OF EMOTIONS, DEVELOPMENT, PSYCHOPATHOLOGY & TECHNIQUE 69, 74 (Salman Akhtar & Harold Blum eds., 2005) [hereinafter LANGUAGE OF EMOTIONS] (discussing rejection of autistic and symbiotic labels). 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. PSYCHOANALYTIC 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* 189



In this view, the infant is primed from the beginning to be interested in others.<sup>51</sup> The infant's developmental task, then, is not so much separation from mother, as the creation of ties with others,<sup>52</sup> including mother. The development of the capacity for mutual recognition between mother and infant is particularly emphasized.<sup>53</sup>

As Jessica Benjamin, a leading intersubjective theorist argues, this "amplifies [Mahler's] separation-individuation theory by . . . stressing the simultaneity of connection and separation."<sup>54</sup> This is a "psychology of mutually sensitive minds."<sup>55</sup>

*Significance for mediation.* The intersubjective perspective emphasizes the importance of understanding the self, not in isolation, but within the context of human interaction. As a result, it yields interesting insights about conflict and its resolution.

For example, intersubjective theorists point out that during therapeutic impasse the therapist may be required or may wish to make a frank admission to the client of the therapist's inability to resolve the impasse for the client. This confession of powerlessness helpfully returns the responsibility to the client to decide whether to commit to moving forward with the process. Often, this is exactly what is needed to move to resolution. A similar principle is also applicable to impasse in mediation.<sup>56</sup>

### 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

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*Separation-Individuation: Revisited, Reevaluated, and Refined*, 52 J. AM. PSYCHOANALYTIC ASS'N 511 (2004) (responding to critics of Mahler).

50. STERN, INTERPERSONAL WORLD, *supra* note 49, at xiv, xviii.

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

52. STERN, INTERPERSONAL WORLD, *supra* note 49, at xiii.

53. BENJAMIN, *supra* note 48, at 35.

54. *Id.* (noting, however, that Daniel Stern sees more difference between intersubjective theory and Mahler's theories).

55. STERN, PRESENT MOMENT, *supra* note 51, at xvi, 85. See also Colwyn Trevarthen, *The Concept and Foundations of Infant Intersubjectivity*, in INTERSUBJECTIVE COMMUNICATION AND EMOTION IN EARLY ONTOGENY 15, 16 (Braten Stein ed., 1998).

56. For a detailed discussion of this point, see *infra* notes 178-189 and accompanying text, especially note 187.

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psychologists call “securely attached” infants were visibly, but not acutely, distressed when their mothers left the room and would greet them happily when they returned. Others would either become anxious or, alternatively, avoidant, refusing even to recognize their mothers’ absence or return.<sup>57</sup> Later research has also identified a disorganized style of attachment, in which there is no clear coping strategy.<sup>58</sup>

Peter Fonagy and his colleagues have emphasized that with secure attachment the infant receives caregiving that implicitly treats the child as an agent,<sup>59</sup> which fosters a sense of self. For example, the caregiver might approach the child to ask, “Do you want your diaper changed?” or similar questions.<sup>60</sup> This enables “the child to find in the caregiver’s mind . . . an image of himself as motivated by beliefs, feelings, and intentions.”<sup>61</sup> Through this process, a core sense of selfhood develops.<sup>62</sup> Maternal mirroring also helps the infant learn to recognize and differentiate himself from others.<sup>63</sup>

Over time, the child begins to realize that his mind mediates and interacts with his experience; this is the development of “mentalization.”<sup>64</sup> This develops “reflective functioning,” the capacity to distinguish and understand mental states both in one’s self and others.<sup>65</sup>

57. M. AINSWORTH ET AL., PATTERNS OF ATTACHMENT 31-33, 59-63 (1978); *see also* ALAN E. KAZDIN, 1 ENCYCLOPEDIA PSYCHOL. 284, 287 (2000) (discussing attachment generally).

58. Mary Main & Judith Solomon, *Procedures for Identifying Infants as Disorganized/Disoriented During the Ainsworth Strange Situation*, in ATTACHMENT IN THE PRESCHOOL YEARS 121, 123 (M.T. Greenberg, D. Cicchetti & E.M. Cummings eds., 1990).

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

60. *Id.* at 53.

61. *Id.* at 55.

62. *Id.* at 54.

63. Mirroring in this context may include not only pure reflection but also signaling about the difference between the self and other. For example, when the infant 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. *Id.* at 177, 201-02. 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.* at 145-202. Similarly, through pretend play the infant learns to distinguish between reality and appearance, as, for example, the difference between a real bear and a pretend one. *Id.* at 54, 258-89, 304-06, 308-12.

64. *Id.* at 3 (“Mentalization . . . is the process by which we realize that having a mind mediates our experience of the world.”); *id.* at 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.”).

65. *Id.* at 23.

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.”<sup>66</sup> Research has confirmed the link between coherent mental functioning and attachment.<sup>67</sup>

*Significance for mediation.* Fonagy and his colleagues emphasize that 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.”<sup>68</sup> The capacities for reflective functioning and mentalization thus constitute an important “potential mediator of psychosocial risk.”<sup>69</sup>

#### 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 even active destruction of a child’s young self.<sup>70</sup> The child needs, instead, a form of mirroring that supports her

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66. *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. The IIM is probably located in the medial prefrontal cortex. *Id.* at 131-132.

67. 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. Peter Fonagy et al., *Maternal Representations of Attachment During Pregnancy Predict the Organization of Infant-Mother Attachment at One Year of Age*, 62 *CHILD DEV.* 891, 901 (1991). This was true even if the mothers’ own childhoods had been difficult. *Id.* By analyzing the mothers’ level of verbal coherence 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 would later be securely attached. *Id.* This demonstrates the link between coherent mental functioning and attachment. Conversely, with inaccurate mirroring and inadequate attunement, a false or alien self may be internalized. FONAGY, *supra* note 59, at 11-12. See also 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 49, at 83.

68. FONAGY, *supra* note 59, at 62.

69. *Id.* at 16.

70. HEINZ KOHUT, *THE ANALYSIS OF THE SELF: A SYSTEMATIC APPROACH TO THE PSYCHOANALYTIC TREATMENT OF NARCISSISTIC PERSONALITY DISORDERS* 120 (1971) (stating “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.”).

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exhibitionistic displays,<sup>71</sup> although ultimately she must mature beyond them.<sup>72</sup>

When a child's parents are too cold and self-involved or humiliate her for failures during the process of individuation, she may develop a sense of inadequacy and shame, or a belief she is loved only if she performs adequately for them.<sup>73</sup> 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.<sup>74</sup> In short, she develops a troubled relationship to the self, which is potentially a forerunner of a narcissistic disorder.<sup>75</sup>

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.<sup>76</sup> When entitlement is threatened, aggression and hostility are characteristic.<sup>77</sup> Compassion and conscience may also be almost entirely missing. Other characteristics of the disorder

71. *Id.* at 116.

72. *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 in this article. For a discussion of this issue, see Arnold M. Cooper, *Narcissism*, in AMERICAN HANDBOOK OF PSYCHIATRY 297 (S. Arieti ed., 1959), reprinted in ESSENTIAL PAPERS, *supra* note 2, 135-139.

73. Arnold Rothstein, *The Theory of Narcissism: An Object Relations Perspective* 66 PSYCHOANALYTIC REV. 35 (1979), reprinted in ESSENTIAL PAPERS, *supra* note 2, 309, 314-16 [hereinafter Rothstein, *Theory*] (in response to mothering which is not empathetic, the toddler “feels a possibility of love only when he performs adequately in a manner that will elicit a maternal smile”); 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 156 (2003).

74. Rothstein, *Theory*, *supra* note 73, at 316-17.

75. 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, *supra* note 59, at 10-12. See also Otto Kernberg, *Identity: Recent Findings and Clinical Implications*, LXXV PSYCHOANALYTIC Q. 969, 980-81 (2006) (inaccurate mirroring may predispose to Narcissistic Personality Disorder; the importance of the early capacity for differentiation between self and other must be emphasized).

76. AARON T. BECK ET AL., *Narcissistic Personality Disorder*, in COGNITIVE THERAPY OF PERSONALITY DISORDERS 242-52 (2003).

77. *Id.* at 245.

include: fantasies of unlimited success or power, interpersonal exploitiveness and arrogant, haughty behaviors and attitudes.<sup>78</sup>

Everyone has these tendencies to some degree.<sup>79</sup> As Kohut and Wolf have observed, however, the degree of stability and coherence of the sense of self can differ widely in different people.<sup>80</sup> For example, while narcissists have a stable but grandiose sense of self, those with “identity diffusion” lack a clear sense of themselves and others.<sup>81</sup> One person may have a self strong enough to remain firm in the face of conflict, another may not.<sup>82</sup> Research in social psychology supports these observations,<sup>83</sup> and the finding that narcissists become aggressive in response to ego threat.<sup>84</sup>

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78. 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.

AM. PSYCHIATRIC ASS'N DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 717 (4th ed. 2006) (punctuation as in original).

79. Horwitz, *supra* note 2, at 219-20; Constantine Sedikides et al., *Are Normal Narcissists Psychologically Healthy? Self-Esteem Matters*, 87 J. PERS. & SOC. PSYCHOL. 400 (2004) (discussing normal narcissism).

80. Heinz Kohut & Ernest Wolf, *The Disorders of the Self and Their Treatment: An Outline*, 59 INT'L J. PSYCHOANALYSIS 414 (1978), *reprinted in* ESSENTIAL PAPERS, *supra* note 2, 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.”).

81. Kernberg, *supra* note 75, 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.”).

82. Kohut & Wolf, *supra* note 80, at 414 (noting that a strong self allows us to tolerate victory or defeat, success or failure).

83. See 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. 194

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### *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.”<sup>85</sup> It is also, roughly, what Margaret Mahler calls “self and object constancy,”<sup>86</sup> and what intersubjective theorists describe as the capacity for mutual recognition,<sup>87</sup> that is, the capacity for recognition, not just of one’s self, but of others.<sup>88</sup> This is especially important during conflict.<sup>89</sup> Stated in practical terms, those who are able to function with adequate objectivity about themselves

PERS. & SOC. PSYCHOL. 219, 227-28 (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 J. PERS. & 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. PERSONALITY 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.”).

84. Bushman & Baumeister, *supra* note 83, at 227; *see also* Tanja S. Stucke, *Who’s to Blame? Narcissism and Self-Serving Attributions Following Feedback*, 17 EUR. J. PERSONALITY 465, 466 (2003) (“after negative feedback narcissistic individuals are prone to negative reactions directed toward others”).

85. *See supra* notes 62-65, 68-69 and accompanying text.

86. JOYCE EDWARD ET AL., *SEPARATION/INDIVIDUATION: THEORY AND APPLICATION* 154 (2d ed. 1992) (“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. . . .”). *See also supra* notes 34-40 (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. *Communication with William Singletary* (Dec. 2007). *See also* Gergely, *supra* note 49, at 1214-22 (integrating Mahler’s concept of object constancy with recent psychoanalytic theory, including the work of Fonagy).

87. *See supra* notes 48-52 (discussing mutual recognition in intersubjective theory).

88. For similar concepts in the work of Kohut and Kernberg, *see, e.g.*, HEINZ KOHUT, *HOW DOES ANALYSIS CURE?* 52, 70, 77, 79 (Arnold Goldberg & Paul E. Stepansky eds., 1984); Kernberg, *supra* note 75, at 981 (emphasizing the importance of “the early capacity for differentiation between self and other”).

89. *See supra* notes 39-46, 56, 68, 82-84 and accompanying text.

and others—or who can be encouraged to do so—will do better in mediation.<sup>90</sup>

Another significant theme is the importance of mirroring.<sup>91</sup> Through mirroring and its intersubjective correlate, mutual recognition,<sup>92</sup> 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 supports the view that much of the hostility and sense of insult parties exhibit in mediation is a defensive reaction to underlying feelings of shame or vulnerability.<sup>93</sup>

Due to the primacy of issues of self and identity, the process of mediation is 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.<sup>94</sup>

## II. OTHER VIEWS OF SELF AND IDENTITY

In considering questions of self and identity, most of us assume that the person we refer to as “I” or “me” is a unified, central, executive self. While psychoanalysis generally endorses this assumption, it has been questioned by others, as discussed below.

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90. A similar point is made in two recent perceptive studies of mediation. See Cloke, *supra* note 12, at 127 (drawing on the work of Sigmund and Anna Freud, among others, and noting “our purpose as mediators is . . . to develop [parties’] sense of self and other”). See also Richard McGuigan & Nancy Popp, *The Self in Conflict: The Evolution of Mediation*, 25 CONFLICT RESOL. Q. 221 (2007) (discussing the “authoring mindset,” which, as distinguished from the “affiliative” or “instrumental” mindsets, is more able to take into consideration the views of self and other. McGuigan and Popp rely on constructive developmental theory, *id.* at 223, as articulated in Robert Kegan’s work. See ROBERT KEGAN, *THE EVOLVING SELF: PROBLEM & PROCESS IN HUMAN DEVELOPMENT* (1982). Kegan sought to establish a tradition outside of classical psychoanalysis, based largely on the work of Jean Piaget, *id.* at 3-4, but which could be used to augment the work of various psychoanalytic theorists, including Mahler. *Id.* at 4. He argued his approach would be useful for therapists and counselors. *But see* K. Eriksen, *The Constructive Developmental Theory of Robert Kegan*, 14 FAM. J. 290 (2006) (arguing Kegan’s work has not received wide enough acceptance in the counseling community).

91. See *supra* notes 22, 63, 71-72.

92. 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 & SEXUALITY 251-55 (2000). *Cf.* Gergely, *supra* note 49, at 1206-10 (discussing points of similarity and difference in concepts of mirroring in Mahler and recent theorists).

93. See *supra* notes 70-84 and accompanying text.

94. See *infra* Part IV.

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*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.”<sup>95</sup> These neurons map the visual information we receive when we watch another’s behavior on equivalent motor representations in our own brain.<sup>96</sup> 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.<sup>97</sup>

The finding of mirror neurons and other, similar neurological systems<sup>98</sup> 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.<sup>99</sup> It seems, then, that our selves are fundamentally social selves, subtly wired for human interconnection from the earliest days.<sup>100</sup>

Scientists have attempted to locate mechanisms in the brain that relate to the self. However, this has resulted in 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

95. This discovery was first made by accident while scientists were studying macaque monkeys. Vittorio Gallese et al., *Intentional Attunement: Mirror Neurons and the Neural Underpinnings of Interpersonal Relations*, 55 J. AM. PSYCHOANALYTIC ASS’N 131, 134-35 (2007). Scientists now agree that a similar mechanism exists in humans. *Id.*

96. STERN, PRESENT MOMENT, *supra* note 51, at 78-79.

97. *Id.* at 79.

98. As an example of these other systems, Stern speaks about the discovery of “adaptive oscillators,” which act like clocks within our body, and are constantly reset so their rate of firing can be adjusted to match the rate of an incoming stimulation. STERN, PRESENT MOMENT, *supra* note 51, at 80-81. “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.” *Id.*

99. Gallese, *supra* note 95, at 143, 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).

100. See Daniel J. Siegel et al., *Mind, Brain and Behavior*, in BEHAVIOR & MEDICINE 3 (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 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).



memory,<sup>101</sup> and different self-related functions.<sup>102</sup> They have posited the existence of different types of selves.<sup>103</sup> They have not found a unified self.<sup>104</sup> 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.<sup>105</sup>

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 phenomena “continuously arising.”<sup>106</sup> An interesting alliance has developed between Buddhism and neuroscience.<sup>107</sup>

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

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

103. SIEGEL, *supra* note 101, at 230 (“As we can see, both developmental studies and cognitive science appear to suggest that we have many selves”); Northoff, *supra* note 102, at 441 (“What remains unclear, however, is what unites these distinct concepts of self allowing us to speak of a self in all cases.”).

104. STERN, *PRESENT MOMENT*, *supra* note 51, at 39.

105. ANTONIO DAMASIO, *THE FEELING OF WHAT HAPPENS: BODY AND EMOTION IN THE MAKING OF CONSCIOUSNESS* 190-91 (1999) (deconstructing the view of the self as a little internal “homunculus” but acknowledging that “[w]hether 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 added); see also Francis Crick & Christof Koch, *The Unconscious Homunculus*, 2 *NEURO-PSYCHOANALYSIS* 3-11 (2000).

106. 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*, in *PSYCHOTHERAPY WITHOUT THE SELF: A BUDDHIST PERSPECTIVE* 55, 63 (2007) (quoting XIV Dalai Lama, TENZIN GYATSO, *KINDNESS, CLARITY AND INSIGHT* (1984)); see also Darshan Brach, *A Logic for the Magic of Mindful Negotiation*, 24 *NEGOT. J.* 25, 38 (2008) (discussing the Buddhist concept of co-dependent arising); KAREN ARMSTRONG, *THE GREAT TRANSFORMATION: THE BEGINNING OF OUR RELIGIOUS TRADITIONS* 283-84 (2006) (discussing the doctrine of *anatta* or no-self).

107. For example, conferences have been held with neuroscientists and Buddhist monks, with the XIV Dalai Lama himself attending. Experiments have been performed where Buddhist meditators are linked 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, available at <http://www.pnas.org/content/104/27/11483.full.pdf+html>. See also DANIEL J. SIEGEL, *THE MINDFUL BRAIN: REFLECTION AND ATTUNEMENT IN THE CULTIVATION OF WELL-BEING* (2007) [hereinafter SIEGEL, *MINDFUL BRAIN*] (exploring the neuroscience of mindfulness). See also Mind and Life Institute, <http://www.mindandlife.org> (last visited Dec. 21, 2009). The principal area of shared interest has been the neuroscience of mindfulness. See *infra* Part IV.C.

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*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 Muqaddam 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.<sup>108</sup> The human ego is rightly regarded as a developmental achievement.<sup>109</sup>

There are, however, “tremendous implications” to the fact that the sense of being an individual results from identifying with a self-image in the mind.<sup>110</sup> This is because fundamentally one’s true nature is not a psychological construction; one is a *being*.<sup>111</sup>

Thus, the self is considered quite real, and not an illusion in any sense. The child experiences her self and knows her self directly during infancy, particularly during the practicing period.<sup>112</sup> However, she does not recognize herself *as a self* because she lacks the capacity to be self-reflective.<sup>113</sup> By the time she becomes aware of herself as an individual, she is experiencing herself within and through the process of self-representation.<sup>114</sup> As a result, she is not able to recognize her self independently of psychological structure or self-representation.<sup>115</sup>

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

109. *Id.* at 25.

110. *Id.*

111. *Id.* at 27-28; Faisal Muqaddam & Lama Caroline Palden, Dialogue Between Buddhist & Diamond Logos Teachers, held by Institute for Spirituality and Psychology (Mar. 3, 1996), available at [www.instituteforspiritualityandpsychology.com/mp3s/audio.asp#sp2006](http://www.instituteforspiritualityandpsychology.com/mp3s/audio.asp#sp2006). 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.*

112. ALMAAS, THE PEARL, *supra* note 108, at 277-278. See also A. H. ALMAAS, THE POINT OF EXISTENCE, TRANSFORMATIONS OF NARCISSISM IN SELF-REALIZATION 59, 135, 208, 211 (1996) [hereinafter ALMAAS, THE POINT].

113. ALMAAS, THE PEARL, *supra* note 108, at 59. See also A.H. ALMAAS, THE INNER JOURNEY HOME, SOUL’S REALIZATION OF THE UNITY OF REALITY 154, 166 (2004).

114. ALMAAS, THE POINT, *supra* note 112, at 59.

115. *Id.*

According to this view, true individuation is not complete until the “essential” self is recognized and reintegrated. This requires a process of both psychological and spiritual work.<sup>116</sup>

Psychoanalyst Mark Epstein, a practicing Buddhist, sounds similar themes. He also emphasizes that “Eastern methods must confront narcissistic attachments . . . .”<sup>117</sup> In his view, “[t]o understand this interaction is to recognize both the transformative power of meditation and the pervasive influence of narcissism.”<sup>118</sup>

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

Yet, it is also true that parties can have a more or less expanded sense of who they are during the process. They can lock in, psychologically, to one or more of the items on the bargaining table, or they can let go.

To the extent these approaches articulate a more expanded, “non-self-centric” vision of the self,<sup>119</sup> they may be helpful to support mediators in one of their most crucial tasks: remembering, and reminding others, that one’s identity is not contingent on the outcome of the negotiation.<sup>120</sup>

If the mediator can also actually embody a deeper, more authentic sense of self, that too is very useful. The parties will often experience this as *respect*, a profound validation of who they are in the midst of the conflict.<sup>121</sup>

### III. WORKING WITH THE MEDIATOR’S ISSUES OF SELF AND IDENTITY

The mediator’s ability to deal with issues of self and identity is thus a key ingredient of a successful mediation. These issues arise not only for the parties but for the mediator as well.

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116. See, e.g., ALMAAS, *THE POINT*, *supra* note 112, at 107-08 (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).

117. Mark Epstein, *Meditative Transformations of Narcissism*, 18 J. TRANSPERSONAL PSYCHOL. 143-158 (1986), *reprinted in* PSYCHOTHERAPY WITHOUT THE SELF, *supra* note 106, at 39.

118. *Id.*

119. This is a phrase coined by Buddhist psychoanalyst Jeffrey Rubin. Jeffrey B. Rubin, *Psychoanalysis Is Self-Centered*, in *SOUL ON THE COUCH, SPIRITUALITY, RELIGION AND MORALITY IN CONTEMPORARY PSYCHOANALYSIS* 79, 80 (Charles Spezzano & Gerald J. Gargiulo eds., 1997).

120. The relevance of meditation to this aspect of mediation practice is discussed *infra* Part III.C.

121. For more on respect in mediation, see discussion *infra* at notes 159-61, 190-91, 194 and accompanying text. See also *infra* Part IV.E.

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

As a first principle, one should expect that one's own issues of self and identity will arise to varying degrees during mediation. 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.

For example, self-observation may reveal one party has become an idealized version of one's father, while another faintly echoes one's mother, sister, or brother. There are countless possible permutations.

Understanding these projections will help to 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.<sup>122</sup>

*B. The Professional Ego Ideal*

By analogy to the psychoanalytic literature on group therapy leadership, we know that the "grandiose professional ego ideal"<sup>123</sup> is one of the key narcissistic dangers for the group leader. This grandiose self may desire to be seen as a "selfless helper."<sup>124</sup> It may wish to be all powerful, all knowing and all loving as a defense to vulnerability.<sup>125</sup>

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.<sup>126</sup> 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.<sup>127</sup>

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."<sup>128</sup>

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122. See also *infra* note 145 (discussing neutrality).

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

124. Horwitz, *supra* note 2, at 222.

125. Weber & Gans, *supra* note 123, at 399.

126. Horwitz, *supra* note 2, at 231-32.

127. *Id.* at 233.

128. Weber & Gans, *supra* note 123, at 414.

Ironically, when things become difficult during mediation, it may actually be one's capacity to release a grandiose self-image that is of most service to the parties.<sup>129</sup> The hallmark of the competent mediator will be a realistic professional ideal, accompanied by a steady commitment to clients during the mediation.<sup>130</sup>

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

During mediation, the parties continuously scan the mediator's presence, attempting to discern her strengths and weaknesses.<sup>131</sup> This happens very quickly. For example, 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."<sup>132</sup> Stern refers to this short "process unit" as the "present moment,"<sup>133</sup> or "the psychological present"<sup>134</sup> in therapy and in negotiation.<sup>135</sup> Viewed from this perspective, mediation is a fast-moving performance art, one that takes place within the rapidly unfolding present moments of the mediation.<sup>136</sup>

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.<sup>137</sup> In mindfulness practice, one remains "aware, moment to

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129. See discussion *infra* Part IV.E.

130. Cf. Horowitz, *supra* note 2, at 223-24 (noting effective therapists seek to maintain a steady commitment to clients not their own gratification or an unrealistic sense of their own prowess).

131. Sarah-Jayne Blakemore & Jean Decety, *From the Perception of Action to the Understanding of Intention*, 2 NATURE REVIEWS NEUROSCIENCE 561, 563-65 (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 51, at 79 (explaining that 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).

132. STERN, PRESENT MOMENT, *supra* note 51, at 41.

133. *Id.*

134. *Id.* at 50.

135. 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 NEGOT. J. 365 (2004). I assume the analogy also extends to mediation.

136. See Carrie Menkel-Meadow, *Critical Moments in Negotiation: Implications for Research, Pedagogy, and Practice*, 20 NEGOT. J. 341, 346-47 (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 arts as well, for we are indeed 'performers' too."). See also Susskind, *supra* note 9, at 339-40 (likening skills in negotiation to jazz improvisation and acting skills).

137. Leonard L. Riskin, *Mindfulness: Foundational Training for Dispute Resolution*, 54 J. LEGAL EDUC. 79, 86-88 (2004). Buddhism has had a profound impact on mediation. For example,

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moment, without judgment, of one's bodily sensations, thoughts, emotions, and consciousness."<sup>138</sup> This disciplined form of reflective functioning<sup>139</sup> can help inhibit reactivity in situations of conflict.<sup>140</sup>

From the perspective of issues of self and identity, the great value of mindfulness practice, or other forms of meditation,<sup>141</sup> is that, as long as they are used judiciously and appropriately,<sup>142</sup> they can help release the usual sense of self-identity.<sup>143</sup> The transient nature of habitual thoughts and feelings becomes more evident when set against a backdrop of awareness.<sup>144</sup> Attitudinal and other biases also become more evident. This can help mediators maintain neutrality.<sup>145</sup>

in recent years Zen Buddhist priest and author Norman Fischer has participated as a trainer 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 mindfulness. See Symposium, *Mindfulness in the Law and ADR*, 7 HARV. NEGOT. L. REV. 1 (2002).

138. Riskin, *supra* note 137, 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 (2002).

139. Cf. SIEGEL, *supra* note 101, at 205 (drawing an analogy between mindfulness and reflective functioning in secure attachment and citing Peter Fonagy & Mary Target, *Attachment and Reflective Function: Their Role in Self-Organization*, 9 DEV. & PSYCHOPATHOLOGY 679 (1997)).

140. Kirk Warren Brown et al., *Mindfulness: Theoretical Foundations and Evidence for Its Salutary Effects*, 18 PSYCHOL. INQUIRY 211, 225 (2007) (reviewing research).

141. See DANIEL GOLEMAN, *THE MEDITATIVE MIND: THE VARIETIES OF THE MEDITATIVE EXPERIENCE* (1977) (discussing a variety of meditation practices, Eastern and Western, although the perspective is largely Buddhist).

142. 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 Vaughan, *A Question of Balance: Health and Pathology in New Religious Movements*, in SPIRITUAL CHOICES 265, 272-73 (Dick Anthony et al. eds., 1987).

143. See Brown et al., *supra* note 140, 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.").

144. EPSTEIN, *The Deconstruction of the Self*, in PSYCHOTHERAPY WITHOUT THE SELF, *supra* note 106, at 48-52; CLAUDIO NARANJO & ROBERT E. ORNSTEIN, *ON THE PSYCHOLOGY OF MEDITATION* 86-87 (1971) (discussing this aspect of mindfulness meditation).

145. "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 (2005). See also Brach, *supra* note 106, at 30 (discussing the usefulness of the mindful negotiator taking the observer's perspective during negotiation).

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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 a positive sense of affirmation.

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.<sup>146</sup>

#### IV. THE IDR CYCLE: SELF AND IDENTITY IN THE PROCESS OF MEDIATION

From the perspective of self and identity, the most basic and important psychological dynamic in mediation is the IDR cycle. This is the cycle of narcissistic *inflation*, followed by *deflation* and, ideally, *realistic resolution* that occurs in most mediations. Impasse is a critical moment<sup>147</sup> during the cycle, one which can best be understood if one understands the psychological underpinnings of the cycle as a whole.

##### A. Pre-Mediation Overconfidence

It is well established that parties generally enter mediation with overconfident expectations. This finding has been replicated in hundreds of research studies.<sup>148</sup> It has been called “[o]ne of the most robust findings in research on social perceptions and cognition over the last two decades.”<sup>149</sup> It is consistent with my experience and that of many mediators, even if one accounts for posturing.<sup>150</sup>

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146. See *supra* Part II.A (discussing 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 *infra* note 190.

147. The meaning of this term is discussed *supra* note 9.

148. Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 OHIO ST. J. ON DISP. RESOL. 281, 284-98 (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 Birke & Fox, *supra* note 1, 15-19 (1999) (also discussing positive illusions such as overconfidence).

149. Korobkin, *supra* note 148, 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)).

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

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Unfortunately, “[n]o problem in judgment and decision making is more prevalent and more potentially catastrophic than overconfidence.”<sup>151</sup> 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.<sup>152</sup> Overconfident negotiators set unrealistic reservation points. As a result, they close fewer deals.<sup>153</sup>

### B. *Why Overconfidence?*

The findings regarding overconfidence are by no means self-explanatory or obvious. Parties to mediation consistently experience a great deal of anxiety prior to the mediation. These anxieties are amplified by the fact that the mediation occurs in a group setting. The likelihood of narcissistic vulnerability increases in a group because a person must perform in front of observers and must confront other people with their own needs and priorities.<sup>154</sup> How is it, then, that by the time parties arrive at the mediation table they are overconfident?

Overconfidence is a type of grandiosity; it may be correlated with narcissism<sup>155</sup> and “inflated, positive views of the self.”<sup>156</sup> One chooses to experience an idealized sense of one’s negotiating possibilities (and implicitly one’s self) in part as a defense to the sense of vulnerability and anxiety attendant upon participation in negotiation and mediation.<sup>157</sup> One’s

151. Don Moore & Paul J. Healey, *The Trouble with Overconfidence*, 118 PSYCHOL. REV. 2, 502 (2008) (citing S. PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* (1993)).

152. *Id.*

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

154. Brown, *supra* note 10, at 119 (noting 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 (2000) (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) (same).

155. *See* W. Keith Campbell et al., *Narcissism, Confidence and Risk Attitude*, 17 J. BEHAV. DECISION MAKING 297 (2004).

156. Birke & Fox, *supra* note 1, at 15.

157. *See* De Dreu & van Knippenberg, *supra* note 11, at 346 (noting conflicts involve threats, which causes a drop in positive affect; “to escape this uncomfortable state, people engage in self-



natural aggression and sense of strength are also important sources of fuel for this dynamic.<sup>158</sup>

Stated another way, 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.

### C. Offer and Counteroffer as Narcissistic Injury

Generally, the first real assault on a party's overconfident hopes and expectations is the opening offer or the first counteroffer. Depending upon how great the expectations have been, the disappointment at this time may be intense. The mediator's responses at this time are crucial. They may include the following:

*Respect.* The mediator's demonstration of respect for the parties addresses two levels of the self. It mirrors and validates each 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.

The word “respect” comes from the Latin *respicere*, “to look back at.”<sup>159</sup> Respect is indeed a form of mirroring, which, as we have seen is one of the most basic ways of recognizing and supporting the integrity of another's self.<sup>160</sup> Respect is, however, *an adult form of mirroring*.<sup>161</sup> Accordingly, it elicits and fosters adult responses in the recipient.

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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”).

158. Cf. ALMAAS, *THE PEARL*, *supra* note 108, at 211-13 (discussing the natural sense of strength).

159. Sin Yee Chan, *The Confucian Notion of Jing (Respect)*, 56 *PHILO. E. & W.* 229, 240 (2006) (quoting from Robin Dillon, *Respect and Care: Toward Moral Integration*, 22 *CANADIAN J. PHILO.* 108 (1992)).

160. See, e.g., discussion *supra* notes 22, 50, 59-60, 69, 93-97 and accompanying text. Cf. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 73-75 (2005) (explaining the importance of encouraging recognition between parties in transformative mediation).

161. Jonathan R. Cohen, *When People Are the Means: Negotiating with Respect*, 14 *GEO. J. LEGAL ETHICS* 739, 741, 754, n.38 (2001) (explaining that mutual respect is or should be exemplified in relationships among adults) (citing JEAN PIAGET, *SOCIOLOGICAL STUDIES* 119 (Leslie Smith ed., 1995)). For more on respect, see *supra* note 121 and accompanying text, and see *infra* note 186 and Part IV.F.

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*Looping & Reframing.* Mediator interventions such as “looping,”<sup>162</sup> or reframing are also useful, primarily because they constitute a form of mirroring. Through these practices the parties feel a sense of recognition, sometimes profound and sometimes mutual,<sup>163</sup> which encourages them to become less defensive.<sup>164</sup>

Also important in these practices is 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.

*Empathy.* The mediator’s empathy also helps parties reconnect with a deeper sense of reflective functioning and capacity for insight. This may be because empathy reminds us, unconsciously or in implicit memory,<sup>165</sup> of the early days of childhood when the core sense of self developed as a result of others focusing on and understanding our needs.<sup>166</sup>

For parties who are highly narcissistic, or who experience the self as vulnerable during mediation, empathy may be problematic. For them, “empathy further highlight[s] some humiliating lack in themselves that they did not already know.”<sup>167</sup> Empathy may then produce a sense of shame—

162. Looping is the term used by Gary J. Friedman and Jack Himmelstein to describe the process of the mediator’s reciting back or neutrally paraphrasing the statements of parties or counsel in order to demonstrate understanding. Gary J. Friedman & Jack Himmelstein, *Resolving Conflict Together: The Understanding-Based Model of Mediation*, 2006 J. DISP. RESOL. 523, 529-537 (2006) [hereinafter Friedman & Himmelstein, *Resolving Conflict*] (discussing and demonstrating practice of looping). See also GARY J. FRIEDMAN & JACK HIMMELSTEIN, CHALLENGING CONFLICT: MEDIATING THROUGH UNDERSTANDING 68-76 (2008) (discussing theory more extensively). For a philosopher’s view of this practice, see also JACOB NEEDLEMAN, WHY CAN’T WE BE GOOD? 58-81 (2007) (demonstrating and discussing the same practice, although without using the term “looping”).

163. On mutual recognition, see *supra* Part I.B. On profound recognition, see Barbara K. Eisold, *Profound Recognition: Where Does It Fit in Analytic Work?*, 35 CONTEMP. PSYCHOANALYSIS 107 (1999) (describing the importance of profound recognition, the experience of feeling deeply comprehended and acknowledged).

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

165. SIEGEL, *supra* note 101, at 29 (“Implicit memory involves parts of the brain that do not require conscious processing during encoding or retrieval.”).

166. See *supra* notes 59-62 and accompanying text.

167. Cynthia J. Shilkret, *Endangered by Interpretations: Treatment by Attitude of the Narcissistically Vulnerable Patient*, 23 PSYCHOANALYTIC PSYCHOL. 30, 32 (2006). See also Arnold H. Modell, *A Narcissistic Defense Against Affects and the Illusion of Self-Sufficiency*, 56 INT’L J. PSYCHOANALYSIS 275 (1975), reprinted in ESSENTIAL PAPERS, *supra* note 2, at 293, 302 (speaking in the context of therapy: “Where there is a precociously developed and fragile sense of self

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,<sup>168</sup> narcissism may also cause some people to reject empathy from others.<sup>169</sup> A response of narcissistic devaluation may be elicited instead.<sup>170</sup> However, an inner positive attitude may be helpful to these clients, and acceptable to them.<sup>171</sup>

#### D. *Impasse: Crisis of Mutual Recognition*

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

Eventually, the parties stretch to a point where an impasse, or at least what seems like an impasse, occurs. 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.<sup>172</sup> Each must also acknowledge the weaknesses, not only the strengths, of her own position. This is increased reflective functioning and a more intersubjective, reality-based view of the conflict.<sup>173</sup>

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defended by fantasies of omnipotence and self-sufficiency, a[n] . . . alliance is not possible.”); Bernard Apfelbaum, *Interpretive Neutrality*, 53 J. AM. PSYCHOANALYTIC ASS'N 917, 926-931 (2005) (discussing shame reactions to interpretation in narcissistic clients).

168. See *supra* note 78 for DSM IV criteria for Narcissistic Personality Disorder.

169. *Id.* 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 & NEGOT. 61, 73 (2007).

170. Devaluation is a frequent response to narcissistic vulnerability. See Otto Kernberg, *Factors in the Psychoanalytic Treatment of Narcissistic Personalities*, 18 J. AM. PSYCHOANALYTIC ASS'N 51 (1970), reprinted in *ESSENTIAL PAPERS*, *supra* note 2, at 218-19, 222, 230 (“They need to devalue whatever they receive in order to prevent themselves from experiencing envy.”); see generally Stucke & Sporer, *supra* note 83.

171. See generally Shilkret, *supra* note 169. See also KOHUT, *supra* note 67, at 177 (noting that in some cases, “only the analyst’s willingness to be an attentive silent listener will be tolerable to the patient”).

172. See discussion of object constancy *supra* Part I.A and text accompanying notes 34-37.

173. As Jessica Benjamin points out, the attempted, but “failed” destruction of the other is an implicit part of the process of mutual recognition. BENJAMIN, *supra* note 48. 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.” *Id.* at 39. I see this as analogous to the situation

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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 growth. They grow into the possibility of settlement.

The parties' defenses become less dense during this time. 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.

### *E. The Mediator's Inner Work During Impasse*

As the time of impasse arrives, the mediator's own narcissistic issues may begin to surface. This may take different forms, such as the fear of failure, or the fear of not "performing." Accordingly, this part of the process tests the mediator's capacity to release the professional ego ideal,<sup>174</sup> to let go of the self-image of the great or effective mediator.

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 release happens, a kind of peacefulness may be experienced even in the midst of the conflict. The release has made it possible.

Intersubjective theorist Jessica Benjamin writes of a similar dynamic during psychoanalytic impasse. The analyst confronts her own shame but must remember that "breakdown and repair are a part of a larger process."<sup>175</sup> This "surrender means a deep acceptance of the necessity of becoming involved in . . . impasses" because breakdown and repair are inevitable parts of human relationships.<sup>176</sup> It is a "surrendering rather than [a] submitting."<sup>177</sup> It also "put[s] an end to the buck passing" wherein a "member of [a] dyad tries to put the bad into the other."<sup>178</sup>

Daniel Stern, too, notes that during certain crucial moments in therapy (and in negotiation/mediation)<sup>179</sup> "there is an immediate sense that the

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.

174. See also *supra* Part III.B (discussing the professional ego ideal).

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

176. *Id.* Benjamin also speaks of the psychoanalytic concept of thirdness, a concept that is not discussed in this article. *Id.*

177. *Id.* at 32.

178. *Id.* at 33.

179. On Stern's analogy between therapy and negotiation, see Stern, *supra* note 135, at 367.

existing intersubjective field is threatened. . . .”<sup>180</sup> Something is needed to resolve the condition of suspense that has been created,<sup>181</sup> but the “therapist feels disarmed and the level of anxiety rises because he or she really does not know what to do.”<sup>182</sup> The situation demands something beyond a “neutral, technical response.”<sup>183</sup> What is needed is a “moment of meeting,” a moment of true interpersonal contact, to resolve the crisis.<sup>184</sup>

This “moment of meeting” happens in mediation when the mediator’s sincere belief that the dispute may indeed not settle is conveyed to the parties. 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, 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.<sup>185</sup>

#### F. *Respect and the Moment of Meeting: Critical Moments in the Mediation*

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 weigh their options more clearly. In the ideal situation, the mediator’s deep respect for the client arises as a natural, attuned response to the client’s dilemma at this time.<sup>186</sup> 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. However,

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180. STERN, PRESENT MOMENT *supra* note 51, at 167.

181. Stern, *supra* note 135, at 370.

182. *Id.*

183. STERN, PRESENT MOMENT, *supra* note 51, at 168.

184. *Id.* at 172.

185. Benjamin, *Beyond Doer*, *supra* note 178, at 32. The intersubjective view acknowledges the importance of change in the analyst, not just change in her clients. *Id.* This may include the analyst’s recognition of his or her own inability to find a solution for the clients, which may, ironically, help both client and therapist reach a resolution. *Id.* at 38-41. Assuming similar principles are applicable in mediation, this complements, but is distinct from, the emphasis in some approaches on changing the *parties* or their interactions. *See, e.g.*, BUSH & FOLGER, *supra* note 160, at 233 (discussing the importance of transforming parties’ conflict interactions).

186. 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 . . . [n]o, 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 prepare the ground from which this respect will naturally arise.

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the mediator must, at the same time, maintain an appropriate, safe and respectful distance.<sup>187</sup>

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.”<sup>188</sup>

Yet the goal is not merely therapeutic. It is equally important to try to help the client disengage the sense of self-identity from the issues at stake in the negotiation, and to promote objective thinking. Ideally, in psychoanalytic terms, the mediator’s attuned mirroring and encouragement of reflective thinking at this time helps the party to engage his own reflective function.<sup>189</sup> 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.<sup>190</sup>

### G. *The Role of Evaluation*

Although evaluation at the early stages of the mediation may not be appropriate, hopefully by the time of impasse the party’s relationship with the mediator has arrived at the point where it will be welcome.

Some have argued that mediation and evaluation are inherently contradictory.<sup>191</sup> Seen from the perspective of issues of self and identity,

187. Eisold, *supra* note 163, at 111 (“Space, the maintenance of respectful distance, along with the clear sense of the making of connection . . . are requisite aspects of [profound] recognition.”).

188. Gianni Nebbiosi, *Organizing Patterns in a Dyad and in a Group: Theoretical and Clinical Implications*, 23 *PSYCHOANALYTIC INQUIRY* 750, 756 (2003) (quoting R.D. STOLOROW & G.E. ATWOOD, *CONTEXTS OF BEING: THE INTERSUBJECTIVE FOUNDATIONS OF PSYCHOLOGICAL LIFE* (1st ed., 1992)).

189. See *supra* Part I.C (discussing reflective functioning).

190. Communication with Faisal Muquddam (Mar. 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 146 (discussing empathic resonance). See also Gallese, *supra* note 95, at 161-62.

191. See 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); Leonard L. Riskin, *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) (summarizing views of evaluation).

however, the mediator's primary task is to encourage parties to engage their own reflective functioning<sup>192</sup> 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, sometimes including the mediator's own views, 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.<sup>193</sup> This is the hallmark of reflective functioning.<sup>194</sup> However, a respectful discussion of weaknesses and strengths in the parties' positions and legal logic, when appropriate,<sup>195</sup> and when done in a safe setting, may also help depersonalize the conflict and reduce self-enhancing biases.<sup>196</sup>

Evaluation may be particularly helpful for those with narcissistic tendencies. Due to their grandiosity, they may have difficulty anticipating the adverse long-term consequences of their actions.<sup>197</sup>

Certain people, those whom analysts call the "thick-skinned" narcissists, are also insensitive to feelings.<sup>198</sup> Confrontation with them may be recommended.<sup>199</sup> Discussing goals, rather than feelings, will be most effective with these clients.<sup>200</sup>

Yet it may be a challenging experience. People with strong narcissistic tendencies often become devaluing or aggressive in response to feedback.<sup>201</sup>

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192. See *supra* Part I.C (discussing reflective functioning).

193. Keith G. Allred et al., *The Influence of Anger and Compassion on Negotiation Performance*, 70 *ORG. BEHAV. & 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 10, at 209 ("[A]nger and resentment are strongest when poor outcomes are inadequately explained.").

194. See *supra* Part I.C (discussing reflective functioning).

195. 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 162, at 548-49.

196. Korobkin, *supra* note 148, at 284-98 (discussing usefulness of various evaluative techniques to de-bias parties); Adler, *supra* note 13, at 172 ("[A]voiding hasty judgments about our opponents' intentions requires realistic, clear thinking."); De Dreu & van Knippenberg, *supra* note 11, at 355 ("[W]hen individuals are motivated to process information thoroughly, their self-enhancement tendencies are reduced . . .").

197. Michael Maccoby, *Narcissistic Leaders: The Incredible Pros, The Inevitable Cons*, 2 *HARV. BUS. REV.* 69-77 (2000) (narcissists can court danger due to overconfidence); Campbell, *supra* note 153 (discussing grandiosity and overconfidence and authors' studies examining correlation between narcissism and risk taking).

198. Shilkret, *supra* note 167, at 32.

199. *Id.*

200. I am indebted to the late Laura Farrow for the point that with some people, goal-oriented discussions are more effective than any other kind of discussion.

201. See *supra* notes 84, 170-172 and accompanying text.

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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.

#### *H. Release of Identity in the Process of Resolution*

Something akin to a renegotiation or release of identity may occur for one or more of the parties during the process of working through impasse. 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.<sup>202</sup>

This release of identity is a critical moment, indeed perhaps *the* critical moment, in the mediation.<sup>203</sup> When it occurs, there will be clearer thinking and reflective functioning.<sup>204</sup>

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,<sup>205</sup> disidentification,<sup>206</sup> or “letting go”<sup>207</sup> in the language of spiritual or psychological<sup>208</sup> practice. For others, it will be a less profound and less exacting experience.

202. 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).

203. See *supra* notes 9 and 135-136 (discussing the concept of critical moments in negotiation).

204. See *supra* Part I.C (discussing reflective functioning).

205. Elizabeth J. Harris, *Detachment and Compassion in Early Buddhism*, BUDDHIST PUBLICATION SOC'Y (1997), [http://www.bps.lk/bodhi\\_leaves\\_library/bodhi\\_leaves\\_pdf/bl\\_141.pdf](http://www.bps.lk/bodhi_leaves_library/bodhi_leaves_pdf/bl_141.pdf).

206. ALMAAS, THE PEARL, *supra* note 108, 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, *supra* note 103, at 48.

207. Brach, *supra* note 106, at 35-36, 43 n.11 (citing JACK KORNFELD, A PATH WITH HEART, A GUIDE THROUGH THE PERILS AND PROMISES OF SPIRITUAL LIFE 112 (1993)) (discussing “letting go”).

208. Cf. Jeffrey R. Martin, *Mindfulness: A Proposed Common Factor*, 7 J. PSYCHOTHERAPY INTEGRATION 291, 292, 296-310 (1997) (arguing terms such as “deautomatization,” “detachment,” 213



### I. Resolution

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

In other cases, resolution arrives 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.

### J. 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 consummate the settlement will in part depend upon whether they can maturely accept the corresponding deflation without taking it to be a reflection on who they are.

Their ability to accept a compromise will also depend in part upon whether they can relinquish the urge to demonize the other party, to split the conflict solely into a battle between the “good me” and the “evil other.” These are components of mature “object constancy.”<sup>209</sup>

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.

## V. 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, the nature of the self and its identity will always remain a fundamental mystery, the mystery of who we are.

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“decentering,” and “nonattachment,” used by some authors in the literature on psychotherapy, also refer to a type of psychological freedom found in mindfulness).

209. See *supra* Part I.A (discussing object constancy as the ability to incorporate both positive and negative aspects in the object and resolve splitting). See also *supra* notes 40-42 and accompanying text.