THE "BEHAVIORAL TURN" IN DISPUTE RESOLUTION: IMPLICATIONS FOR MEDIATION THEORY AND PRACTICE

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Abstract

Insights from behavioral fields such as behavioral psychology, behavioral economics, and social neuroscience raise valuable insights for the mediation process. Behavioral psychology has been a field familiar to mediators for several decades and supports many of the interventions that mediators use in their practice. The field of behavioral economics— popularized by Nobel-prize winning author Daniel Kahneman—challenges many of the assumptions of rationality that have been taken for granted for many decades. Both behavioral economists and management researchers have also examined the way humans engage with multiple options. And finally, the field of neuroscience—while providing data that can be challenging to a non-expert reader— tells us much about how the brain behaves in situations of stress or conflict and reinforces many of the findings of these other behavioral fields. These diverse but interrelated fields are referred to collectively in this paper as "behavioral fields" and we argue that the "behavioral turn" holds profound and ever-increasing influence on the theory and practice of mediation.

It is clear that this wealth of behavioral research offers much to mediators. It can help refine mediators' understandings of how humans behave in stressful conflict situations and provide additional tactics and strategies that form part of the "mediator's toolbox." However, behavioral insights also present an interesting dilemma for the mediator's professional identity as an agent of self-determination. This paper examines this potential challenge to the nature of mediation, in particular for conceptions about the role of the mediator in upholding the common professional value of participant autonomy.

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I.   INTRODUCTION

Insights from behavioral fields such as psychology, behavioral economics, and neuroscience are increasingly providing fascinating viewpoints on the nature of human behavior in conflict and the role of "choice architecture" in impacting how particular choices are made. Psychology, behavioral economics, and neuroscience are distinct but interrelated fields that we refer to collectively in this article as "behavioral insights." They have had impact beyond their own fields, thanks largely to their popularization in best-

selling books such as *Nudge*,[1] *Incognito*,[2] and *Thinking, Fast and Slow*.[3] While the non-academic nature of these behavioral best-sellers obscures considerable scientific detail, they are an accessible and popular way for non-experts to understand the key concepts and the practical application of research findings.

These behavioral insights hold particular appeal for people whose daily work is the business of managing conflict, human relationships, and decisionmaking. Professional mediators are therefore increasingly interested in accessing insights from these disciplines to develop their repertoire of techniques or to provide scientific justification for use of many techniques that mediators have intuitively chosen.[4]

At first glance it might seem that the "behavioral turn" does not challenge the knowledge and theories that inform mediation but merely sharpens or adds to the tools in the mediator's toolkit. In many instances, behavioral insights tend to reinforce practices that mediators intuitively have used for many decades. However, the objective of this article is to probe beyond only the "toolkit" approach to consider the implications of behavioral insights not just as a tool, but for their impact to the theoretical and structural dimensions of mediation. Specifically, we wish to highlight that there are some significant ontological implications of behavioral insights for mediation theory—especially for critical values of mediation such as self-determination.

To this end, Part I of the Article provides an overview of some significant shifts in worldview to give context to the current "behavioral turn," using the term "turn" to indicate a change of influencing worldview, not unlike the way in which Foucault used the term "episteme" to indicate a worldview.[5]

The Article then examines some of the most significant insights the behavioral turn has for the practice of mediation. It identifies ways of "seeing" and "being" that come from the behavioral fields and gives examples of how these ways of "seeing" and "being" can impact mediation practice.

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[1] *See generally* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

[2] *See generally* DAVID EAGLEMAN, INCOGNITO: THE SECRET LIVES OF THE BRAIN (2011).

[3] *See generally* DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

[4] *See* Jean Di Marino, *Neuroscience and Mediation–Is It All Lavender and Lemons?*, AUSTRALIAN DISPS. CTR. (2017), https://disputescentre.com.au/neuroscience-and-mediation-is-it-all-lavender-and-lemons/ [https://perma.cc/6QBT-DG2K].

[5] *See* MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES, at xxiii–xxiv (Tavistock Publ'ns trans., Routledge 2005) (1966).

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In Part II we then consider the implications for mediation theory of this "behavioral turn," focusing on the ontological consequences, pointing out that mediator identity compels a discussion of behavioral insights beyond just a "toolbox" approach. This Part explores the consequences for the principle of participant autonomy, a principle that if challenged could undermine mainstream thinking about the very nature of mediation. It describes the way in which the "behavioral turn" can impact upon professional identity by minimizing the notion of participant autonomy and its significance for mediation. In particular, it emphasizes how a worldview that significantly diminishes the genuineness of participant autonomy imposes greater ethical responsibility on the mediator. Finally, the Article briefly considers how mediators might meet this greater ethical responsibility, highlighting the role of "communities of practice" as one way of addressing these ethical responsibilities. It is not the aim of the article to advocate for a behavioral approach to be the sole basis of mediation practice and theory, however the authors propose that it is incumbent on mediators to at least consider these behavioral insights and recognize the ethical issues raised. It also encourages the creation of a deeper cross-disciplinary conversation between mediators and scientists in these behavioral disciplines to continue to align mediation practice and ethics with emerging scientific understandings of the human brain.

II.   THE "BEHAVIORAL TURN": NEW WAYS OF SEEING AND BEING

This article uses the term "behavioral turn" to describe a substantial change in worldview, one that marks a change in thought about how we as humans perceive and understand our own capacities for independent thought and action, and for exercising autonomy and self-determination in our decisionmaking. This is especially important in the field of dispute resolution—and mediation in particular—as practices have been built on the understanding that humans can, and do, exercise self-determination when they negotiate and either agree to terms to resolve a dispute or choose not to settle. The centrality of self-determination in mediation theory is encapsulated by the statement of Bush and Folger, two of the field's leaders, that "[e]mpowerment is the heart of the mediator's mission, and we value self-determination above all."[6]

In identifying specific worldviews—which can be thought of as a pervasive environment of historically situated, distinct approaches to life and

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[6] Robert Baruch Bush & Joseph P. Folger, *Reclaiming Mediation's Future: Re-Focusing on Party Self-Determination*, 16 CARDOZO J. CONFLICT RESOL. 741, 742 (2015).

reality that underpin cultural differences in cognition[7]—we are identifying commonalities that do not override individual human differences but do shape human ways of "seeing" and "being" in the world.

In short, we will argue the "behavioral turn" with its tendency towards scientific determinism may alter theoretical conceptions of conflict mediation and affect the ethical understandings and practical behaviors of professional conflict mediators but does not need to completely erode the foundations of mediation theory and practice.

Behavioral approaches, at least at the outset, seem to undermine self-determination by adopting a deterministic and even a reductionist definition of "free will"—suggesting that parties have little genuine choice between the options before them. Instead, they are being compelled to act according to the strongest inclination that they have at the moment of choice,[8] and this inclination is itself created by the confluence of external factors.

According to this view, parties to a conflict cannot choose between competing alternatives through an independent, self-determined "act of will." When a participant in a conflict follows their inclinations, they may be acting with a sense of agency or volition, but the choice is already circumscribed by the antecedents such as genetics, culture, gender and environment, and is therefore not self-determined in the way that self-determination is commonly understood.[9]

However, we can also take a compatibilist approach [10] to the question of volition, thinking of it a "desire to self-organize experience and behavior and to have activity be concordant with one's integrated sense of self"[11] that is able to recognize our choices as necessarily imposed upon us by our circumstances and our desires. In accepting that a person's hopes and desires matter—and contribute to a person acting as they do—it is possible to

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[7] *See* Mark E. Koltko-Rivera, *The Psychology of Worldviews*, 8 REV. GEN. PSYCH. 3, 23 (2004).

[8] *See* JONATHAN EDWARDS, FREEDOM OF THE WILL 4–5 (Arnold S. Kaufman & William K. Frankena eds., Irvington Publishers 1982) (1969).

[9] *See* John Baer et al., *Introduction: Psychology and Free Will*, *in* ARE WE FREE?: PSYCHOLOGY AND FREE WILL 3, 7 (2008).

[10] A compatibilist approach means that humans still have responsibility for their actions, notwithstanding the fact that they lack autonomy.

[11] Edward L. Deci & Richard M. Ryan, *The "What" and "Why" of Goal Pursuits: Human Needs and the Self-Determination of Behavior*, 11 PSYCH. INQUIRY 227, 231 (2000).

distinguish between those of our behaviors that are largely according to our nature versus largely compelled by outside influences.[12]

The challenge of a purely deterministic worldview for a mediator is that they can no longer simply rely on the presence of a neutral mediator facilitating parties to independently decide how (or whether) they wish to settle their dispute. Instead, it suggests that parties have limited control of their decisionmaking processes, even if they believe that they have self-determination.

On the other hand, a more compatibilist approach accepts the limitations of completely independent decisionmaking but also accepts that the words and actions of the mediator still matter profoundly to the parties' capacity to reach a reasoned settlement decision. This applies to both guiding the parties systematically through the issues in dispute, and helping them navigate the options, but also in managing what Bader refers to as the cycles of narcissistic inflation, deflation, and identity release, as parties move through the stages of the conflict.[13]

What we have described in this section represents a substantial departure from earlier conceptions of human agency and culturally preferred ways of resolving conflict. Looking further back into history, however, it becomes clear that the behavioral turn is one of several fundamental shifts in societal views about human agency, conflict, and conflict resolution.

III.   HISTORICAL CONTEXT

Throughout history, humans' conceptions and worldviews have changed substantially, most commonly in response to developments in science, just as our contemporary scientific understanding has prompted a behavioral turn. Along with those changing worldviews, there have been corresponding changes in methods for resolving disputes. For example, the traditionalist, pre-Enlightenment, Western worldview was of an "Age of Faith" and this was reflected in dispute resolution options—for example, King's Courts dispensed judgment in accordance with the idea of the Divine Right of Kings.[14] Ordeals and other rituals were used to resolve criminal and civil disputes, based on the belief that God would make clear the party that

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[12] *See* John Baer, *Free Will Requires Determinism*, *in* ARE WE FREE?: PSYCHOLOGY AND FREE WILL 304, 306 (2008).

[13] Elizabeth E. Bader, *Self, Identity and the IDR Cycle: Understanding the Deeper Meaning of "Face" in Mediation*, 8 INT'L J. APPLIED PSYCHOANALYTIC STUD. 301, 301 (2011).

[14] RICHARD DEWITT, WORLDVIEWS: AN INTRODUCTION TO THE HISTORY AND PHILOSOPHY OF SCIENCE 168–179 (2d ed. 2010).

was in the right. [15] The "scientific turn" of the Enlightenment sought to privilege reason and individual autonomy, but still relied upon high status individuals to be the arbiter of disputes and enforce societal obligations. [16]

Another turn, the "modernist turn" of the nineteenth and twentieth centuries, had a more profound impact for modern mediation. Prior to this, disputes had been conceived as win-lose propositions where parties might face each other in court, out of court, or on the battlefield. The modernist worldview extended and adapted the scientific approach to attempts to understand the nature and psychology of man, and in so doing brought scientific fields such as psychology into the domain of dispute resolution. A common feature of this naturalist turn was a radical new hope in human reason and the elevation of the value of individual freedom. [17] Perhaps the high point of the modernist world view was the humanist psychology of Carl Rogers and Abraham Maslow with its emphasis on individual free will and self-actualization. [18]

In the field of dispute resolution, Mary Parker Follet was one of the first to apply social science and psychological findings to the study of conflict in the early twentieth century and, as the Cold War emerged, scientists attempted to explain dispute resolution through theories such as game theory, which sought to account for when humans might choose to collaborate or compete in a given situation. [19] Game theory relied on a particular perception of power as something that could be quantified, ceded, or gained—and mathematically computed. However, at the same time, the concept of "free will" was embraced in the Western naturalist and modernist worldview in a way not previously privileged in earlier worldviews, or in many non-Western cultures. This enthusiasm for free will was particularly evident in the dispute resolution approaches of the 1980s onward with the seminal work of Fisher and Ury laying the foundations for interest-based mediation, highlighting the

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[15] MORRIS B. HOFFMAN, THE PUNISHER'S BRAIN: THE EVOLUTION OF JUDGE AND JURY 233–34 (2014).

[16] William Bristow, *Enlightenment*, THE STANFORD ENCYCLOPEDIA OF PHIL. (Fall 2023), https://plato.stanford.edu/archives/fall2023/entries/enlightenment/ [https://perma.cc/5FW7-NME8].

[17] JEROME T. BARRETT & JOSEPH P. BARRETT, A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A POLITICAL, SOCIAL, AND CULTURAL MOVEMENT 210 (2004).

[18] *See* Leonard Geller, *The Failure of Self-Actualization Theory: A Critique of Carl Rogers and Abraham Maslow*, 22 J. HUMANISTIC PSYCH. 56, 56–57 (1982).

[19] See generally the Nobel Prize-winning work of Von Neumann and Morgenstern: JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (1944). *See also* THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT (1960).

focus on "expanding the pie" and using "objective criteria" to reach a solution.[20] Christopher Moore, around the same time, crystallized the model of an ideal mediation as a facilitative process in which there is an "intervention … by an acceptable, impartial, and neutral third party who has no authoritative decision-making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute."[21]

Still more recently, postmodernism and poststructuralism[22] have been critical of this modernist worldview as being both overly optimistic and simplistic. The postmodern perspective is critical of modernist worldviews as being overly optimistic and simplistic, unsatisfactory in its seeking of an "ought" from an "is," and naive and culturally exclusive for trying to derive objective human values or objective consensus on what is good.[23] The work of authors such as Bagshaw and Bogdanoski explore the implications of postmodernism for mediation practice, focusing on postmodern conceptions of power and how they differ from the modernist conceptions described above.[24] They both support postmodernism's rejection of the modernist approach to power in mediation as an unrealistically binary concept that holds that either a party has or doesn't have power.[25] As Bogdanoski observes, this is especially simplistic when thinking about power imbalances in mediation "because power is highly complex as it can manifest in many different and even contradictory ways."[26] Relatedly, Bagshaw highlights the contributions of postmodernism to mediation as including the idea that there is no single narrative, that "correct" approaches to mediation are situated from particular, often privileged, perspectives that can potentially support or sideline other perspectives, and challenges any claim of a mediator being neutral.[27]

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[20] ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (3rd ed. 2011). *See also* BARRETT & BARRETT, *supra* note 17.

[21] CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 14 (1986).

[22] While acknowledging that these are distinct perspectives, for current purposes we will refer to these collectively as the "postmodern worldview" seeing poststructuralism as a form of postmodernism.

[23] *See* PETER J. TAYLOR, MODERNITIES: A GEOHISTORICAL INTERPRETATION 18 (1999).

[24] *See* Tony Bogdanoski, *The "Neutral" Mediator's Perennial Dilemma: To Intervene or Not to Intervene?*, 9 QUEENSL. U. TECH. L. & JUST. J. 26, 28 (2009); Dale Bagshaw, *The Three M's—Mediation, Postmodernism, and the New Millennium*, 18 Mediation Quarterly 205, 205–06 (2001).

[25] *See* Bogdanoski, *supra* note 24; Bagshaw, *supra* note 24, at 206–07.

[26] Bogdanoski, *supra* note 24.

[27] *See* Bagshaw, *supra* note 24, at 209–10, 217.

IV.   THE BEHAVIORAL TURN

Finally, the most recent turn that we identify is the "behavioral turn," which we discuss in detail below. As we explain below, the behavioral turn highlights scientific approaches to questions of autonomy, bearing some similarities with modernism, but at the same time argues that autonomy is very much situated in context, which has some resonance with postmodernism. Additionally, as we discuss in Part II of this article, behavioral worldviews challenge, and could significantly undermine, notions of party autonomy in mediation.

Behavioral theories are drawn from a number of distinct primary fields, particularly psychology, neuroscience, and economics. In the past several years, there has been a proliferation of hybrid fields, to produce research fields such as social neuroscience, the psychology of the unconscious, behavioral economics, neuroeconomics, and so on. The following section discusses the three primary fields: behavioral psychology, behavioral economics, and neuroscience.

A. *Behavioral Psychology*

A foundational assumption of behavioral psychology is that behaviors are acquired through conditioning. Conditioning occurs through interaction with the environment and all our learning and behavior is a response to environmental stimuli.[28] A strict behavioral psychology approach considers cognition, emotions, and moods as too subjective to be considered in a scientific manner and instead focusses its field of study on behavior that can be observed.[29]

One of the most comprehensively observed behaviors is confirmation bias. Confirmation bias occurs when people subconsciously notice information that supports their worldview and beliefs, while discounting information that is not supportive[30]—for example, seeing positive news stories about one's own political party "everywhere." Confirmation bias can sometimes be a subconscious attempt to protect the self from psychological

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[28] *See* Jon E. Krapfl, *Behaviorism and Society*, 39 BEHAV. ANALYST 123, 124 (2016).

[29] Charles I. Abramson, *Problems of Teaching the Behaviorist Perspective in the Cognitive Revolution*, 3 BEHAV. SCI., 55, 58 (2013).

[30] *See* Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175, 176 (1998).

discomfort,[31] and so is often seen in mediation proceedings where a party may believe that the evidence unequivocally supports their position.[32] In other guises, confirmation bias may make parties unrealistically positive about their prospects at litigation, and correspondingly less willing to settle. Mediators have long been aware of this phenomenon, even if they do not necessarily label it as confirmation bias. The "mediator's toolbox" contains several strategies aimed at trying to bypass confirmation bias, for example, through the use of reframing information so that it is less-threatening, more aligned with a parties' beliefs, and hence more likely to be "heard." Use of physical props such as whiteboards and butchers' paper can help to make perspectives of the other party visually available, and the use of reality testing by the mediator is an attempt to help shift parties from an unrealistic perception of their likely success in litigation.

A further example is priming effect, which occurs when various "cues"—whether consciously introduced or not—influence someone's response to subsequent stimulus.[33] In a mediation setting, priming can have both negative and positive outcomes. For example, a mediation that is poorly managed and begins with aggression on the part of either party will "set the tone" for a more hostile process. A mediator has the opportunity, however, to apply priming deliberately by using cooperative body language, conciliatory tone of voice, establishing a calm and organized environment, and gently leading the discussion around initial offers. Everything that can be done to ensure a calm beginning to the mediation process is a step towards priming parties for a positive and cooperative experience.

In a similar vein, social norms can also be leveraged to encourage a cooperative atmosphere. Social norms are the accepted standards of behavior amongst a given group—they are "understood" and not necessarily enforced by law.[34] Social norms change depending on the group of people and these can vary significantly across cultures.[35] Mediators instinctively tend to consider the social norms that apply for the parties attending a mediation and can leverage these to encourage positive behaviors. For example, serving food and

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[31] *See* William B. Swann Jr. & Stephen J. Read, *Self-Verification Processes: How We Sustain Our Self-Conceptions*, 17 J. EXPERIMENTAL SOC. PSYCH. 351, 353 (1981).

[32] *See generally, e.g.*, Zoelle Mallenbaum, *Anger in Mediation*, 72 DISP. RESOL. J. 25 (2017).

[33] *See* Tanya L. Chartrand & John A. Bargh, *Automatic Activation of Impression Formation and Memorization Goals: Nonconscious Goal Priming Reproduces Effects of Explicit Task Instructions*, 71 J. PERSONALITY & SOC. PSYCH. 464, 464 (1996).

[34] *See* MUZAFER SHERIF, THE PSYCHOLOGY OF SOCIAL NORMS 9 (1936).

[35] *See id.*

drink to be shared sets an expectation for a hospitable and cooperative norm (contrast this with the social norms set for a professional fight, where opponents have their own corner and drink/food, and in-ring breaks are taken at opposite corners with backs facing their opponent). Moreover, the mediator's opening statement contains content that reinforces and leverages social norms—for example, by stating that mediation is a way for the parties to work cooperatively to find solutions, to have respectful conversations, and to reach agreement. All of these statements seek to reinforce the norm that mediation should be a civil and orderly exchange of views.

B. *Behavioral Economics*

Behavioral economics is an interdisciplinary field studying the effects of psychological, cognitive, emotional, cultural, and social factors on the decisions of individuals and institutions. This field draws insights from psychology and the social sciences to challenge mainstream economic assumptions about the behavior of "economic actors"[36] and special attention is given to the way in which real life decisions differ from those implied by classical economic theory.[37]

Behavioral economics yields further practical examples relevant to the mediation process. In particular, loss-aversion, endowment effect, and hyperbolic discounting merit discussion as indicative considerations.

Loss-aversion, as discussed by Kahneman and colleagues, describes the tendency of humans to be much more averse to loss than sensitive to gains[38]—that is, losing creates more psychological pain than winning creates psychological pleasure. For mediators, this means helping parties to come to a solution via objective criteria, where neither "loses." It can also mean framing the settlement differently; for example, framing a negotiated settlement payment as a certain gain in bringing the litigation to an end and allowing a focus on core business, as opposed to not settling and facing the loss of the opportunity to be freed from the litigation as well as a possible

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[36] For example, Kao and Velupillai have noted the history of behavioral economics dates back to the 1950s, with economists criticizing an observable mismatch between economic theory and human reality. *See* Ying-Fang Kao & K. Vela Velupillai, *Behavioural Economics: Classical and Modern*, 22 EUR. J. HIST. ECON. THOUGHT 236, 239 (2015).

[37] *See* Joshua C. Teitelbaum & Kathryn Zeiler, *Introduction*, *in* RESEARCH HANDBOOK ON BEHAVIORAL LAW AND ECONOMICS 1, 1 (Joshua C. Teitelbaum et al. eds., 2018).

[38] *See* Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 194 (1991).

future greater loss through a court order and legal costs in excess of the negotiated settlement payment.

Perhaps one of the reasons that people seek to avoid losing what they already have is the endowment effect, which tells us that people value what they already own much more than the same object that they do not own[39] (e.g., people value their own car more than the same car still in the dealership). The endowment effect can be helpful to mediators in navigating complex negotiations, by focusing more on helping parties retain what is most valuable to them. The IKEA effect is a related concept, where people value those things that they had a hand in "building"—hence agreeing on a fair process and actively involving parties in creating their own mediation solutions can trigger the beneficial influence of this effect.[40]

Finally, hyperbolic discounting is key for mediators in deciding the "bundle" of benefits as an outcome of the mediation process. Hyperbolic discounting occurs when people value immediate rewards over delayed rewards, even if the delayed rewards are worth more than the immediate rewards.[41] Mediators can support parties in making optimal decisions by "bundling" small, immediate rewards with larger, delayed rewards.

C. *Neuroscience*

Neuroscience as a broad field of study examines the structure and function of the human brain and nervous system. The subfield of social neuroscience specifying the influences between social and neural structures and processes,[42] and social cognitive neuroscience seeks to understand the links between inter-personal behaviors, what is occurring at a cognitive level, and how the brain functions at a neural level to undertake cognitive processes.[43]

The collective insights of neuroscience are fascinating for dispute resolution professionals,[44] especially to the extent they are used by individuals

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[39] *See id.*

[40] Michael I. Norton et al., *The IKEA Effect: When Labor Leads to Love*, 22 J. CONSUMER PSYCH. 453, 454 (2012).

[41] *See* David Laibson, *Golden Eggs and Hyperbolic Discounting*, 112 Q.J. ECON. 443, 445 (1997).

[42] John T. Cacioppo & Stephanie Cacioppo, *Social Neuroscience*, 8 PERSP. ON PSYCH. SCI. 667, 667 (2013).

[43] Kevin N. Ochsner & Matthew D. Lieberman, *The Emergence of Social Cognitive Neuroscience*, 56 AM. PSYCH. 717, 717 (2001).

[44] *See* Jeremy Lack & François Bogacz, *The Neurophysiology of ADR and Process Design: A New Approach to Conflict Prevention and Resolution?*, 14 CARDOZO J. CONFLICT RESOL. 33, 33–34 (2012).

arguing from a materialist or scientism worldview that our consciousness and free will are illusionary.

Neuroscience literally offers a glimpse into the human mind and can offer valuable insights for mediation. Of particular relevance for mediation are the ways in which the potentially high-emotion, stressful experience of mediation can lead to sub-optimal decisions. First, while the "analytical brain" utilizes the fronto-parietal region to assess both short- and long-term gains before making a decision, the "emotional brain" (or limbic system) has a preference for immediate rewards [45]—hence, similarly to the hyperbolic discounting discussed under behavioral economics, people may make decisions that disadvantage their long-term outcomes and wellbeing if feeling overly emotional during mediation. Fatigue has a similar effect, leading to poorer decisionmaking and outcomes[46] even for professionals accustomed to making decisions.[47]

Neuroscience also confirms that the unconscious biases discussed previously (e.g., loss-aversion, endowment effect, confirmation bias) are all more likely to take the place of rational thinking processes in situations of high cognitive and emotional load: that is, people make decisions based on mental shortcuts when they are tired, stressed, and overwhelmed. [48] Mediators therefore need to take steps to minimize cognitive load, emotional responses, and fatigue. There are a multitude of strategies available, such as ensuring familiarity with the steps of the mediation process before it begins, focusing on easy or low-stakes tasks if emotions do become heightened, reframing threats to reduce the likelihood of emotional responses, and keeping mediation sessions short and focused.

Finally, evolutionary biology and neuroscience both indicate that people are primed to notice negative elements and threats before positive elements and rewards. [49] This bias towards negativity means that any information, process, or outcome deemed threatening will be perceived as much "louder" by the parties involved, an insight that has clear application for the mediation context. Once again, simple methods such as careful framing of

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[45] Samuel M. McClure et al., *Separate Neural Systems Value Immediate and Delayed Monetary Rewards*, 306 Sci. 503, 503 (2004).

[46] *See* John Tierney, *Do You Suffer from Decision Fatigue?*, N.Y. Times (Aug. 17, 2011), https://www.nytimes.com/2011/08/21/magazine/do-you-suffer-from-decision-fatigue.html [https://perma.cc/3YKC-LBHX].

[47] *See* David Hirshleifer et al., *Decision Fatigue and Heuristic Analyst Forecasts*, 133 J. Fin. Econ. 83, 83–84 (2019).

[48] Paul R. Gibson, *The Impact of Brain Science on Conflict and Its Resolution*, 31 Sing. Acad. L.J. 547, 564 (2019).

[49] *See* Lack & Bogacz, *supra* note 44, at 54.

information by the mediator can help to ensure that small negatives do not "drown out" an overall positive mediation experience.

D.   *Worldview Implications*

For any worldview, it can be useful to consider whether it provides a coherent framework that is consistent with the world, helpful for a well-organized society, and useful to live a good life.[50] Applying these criteria, the challenge of the behavioral turn upon the traditional view of mediation quickly becomes apparent. Under a traditional view of mediation, mediation is good for society not just because it is usually more efficient than adjudication but because it supports values that are highly prized as part of dignity of the individual, including self-determination in which each party can make a voluntary and uncoerced decision. Arguments that a behavioralist worldview provides a coherent framework more consistent with the real world make it important to consider how the traditional view of mediation might need to be redefined or reimagined against this worldview.

V.   CONSEQUENCES FOR MEDIATION OF THE BEHAVIORAL TURN

As Part IV of this article has explained, behavioral insights have recast our understandings of what it means to make decisions as a human—and especially our vulnerability to being driven to particular decisions based on our circumstances, including from imperceptible external inputs from others. In this Part, we outline some of the practical and theoretical consequences of the behavioral turn for mediation, drawing on both our own observations and existing literature. We identify three types of implications, which we examine in turn for their positive and negative aspects: practical implications for individual mediators, structural implications for organizations providing mediation services, and ontological implications for the theories that underpin mediation.

A.   *Practical Implications for Mediation of Behavioral Insights: The Toolkit*

Mediators rely on a variety of tools they can use to support their role as facilitators, including powerful and accessible ways to explain conflict dynamics to the parties, and techniques to de-escalate conflict and ways to help move parties towards a settlement. These are often referred to as the mediator's "toolbox" or "toolkit."

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[50] *See* Clément Vidal, *Metaphilosophical Criteria for Worldview Comparison*, 43 METAPHILOSOPHY 306, 335 (2012).

Just as Section IV.A above has shown how common mediator techniques can be explained by behavioral understandings, so too these understandings can be used to add additional tools to the mediator's toolkit.

Will a significant number of the next generation of mediators supercharge their dispute resolution toolkit with behavioral insights that support party autonomy? For example, at intake sessions, mediators can explicitly address the idea of cognitive bias with the parties, foreshadowing some of the potentials for bias that may take place during the mediation session. Similarly, mediators can expressly highlight the impact of stress on reasoning, and techniques for stress reduction, priming participants to feel capable of mastering strong feelings during the process.

A mediator could then start the mediation itself in a familiar environment, with shared food and drink to encourage cooperation. The mediator could minimize stress and cognitive load by providing a clear structure and giving frequent breaks. Such actions may assist the parties to overcome their biases to choose the best objective outcome, especially if complemented by the use of other expert neutrals to generate multiple (but not too many)[51] options for resolution of the dispute.

Or will there be a darker picture? Concerns exist around nudges being paternalistic,[52] or even used to get people to behave in ways that suit the interests of the choice architect over what they themselves would have chosen.[53] A mediator concerned with efficiency might focus the intake less on minimizing stress and improving the cognitive abilities of the disputants and more on priming the parties for settlement—perhaps by emphasizing the immediate gains of reaching a settlement over the risk of not settling with the resultant immediate pain and potential large future losses of preparing for court. A mediator might wish to quickly take control of the agenda, playing upon their role as an authority figure. Using immediate social rewards for compliant comments or actions, the mediator can easily manipulate the parties,

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[51] See generally the work of Sheena Iyengar, much of which is drawn together in SHEENA IYENGAR, THE ART OF CHOOSING (2010). *See also* Ryan Jessup et al., *Leaving the Store Empty-Handed: Testing Explanations for the Too-Much-Choice Effect Using Decision Field Theory,* 27 PSYCH. & MKTG. 299, 315 (2009).

[52] *See generally* Evan Selinger & Kyle Whyte, *Is There a Right Way to Nudge? The Practice and Ethics of Choice Architecture*, 5 SOCIO. COMPASS 923, (2011).

[53] On the concerns of using nudging to achieve illegitimate goals, see generally Andreas T. Schmidt & Bart Engelen, *The Ethics of Nudging: An Overview*, 15 PHIL. COMPASS 1 (2020), https://compass.onlinelibrary.wiley.com/doi/epdf/10.1111/phc3.12658 [https://perma.cc/5KUL-HLJY].

giving praise for small steps toward settlement as a means of creating commitments, avoiding complexity at the risk of creating doubt before choosing or regret after choosing, or playing on cognitive biases such as the sunken cost fallacy. There is a very real challenge—how can ethical mediator behavior can be promoted if mediators adopt a strongly behavioral worldview that is ill-equipped to evaluate "what is good" beyond what yields settlement.[54] Indeed, the question of who decides what is "good" has long been a focus not just in behavioral economics, but in political science and moral philosophy.[55]

B. *Structural Implications for Mediation of Behavioral Insights: Choice Architectures and Their Consequences*

Similar considerations might arise at how the behavioral turn might impact decisions at the macro level of encouraging mediation within a civil justice system and impacting the manner in which mediation services are offered.

The nudging concept—popularized by Thaler and Sunstein[56]—is one that has clear resonance with mediation, especially in jurisdictions debating law reform to incorporate mediation as a mandatory or near-mandatory part of the civil justice system. For example, De Palo and Keller explain the Italian government's regulation of mediation in terms of choice architecture, pointing out that despite mediation statutes being first implemented in 1993, it was not until the 2008 European Directive on Mediation[57] that steps were taken to nudge Italian litigants towards an alternative to litigation.[58] They also describe the European Directive itself as an example of the European Union nudging national legislatures, and "serv[ing] as an impetus for change in member

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[54] The difficulties of defining success in mediation have already been considered by numerous authors. See, for example, Douglas A. Henderson, *Mediation Success: An Empirical Analysis*, 11 OHIO ST. J. ON DISP. RESOL. 105 (1996); Ciprian Sandu, *Mediation. Measuring the Success of Mediation*, 2 CONFLICT STUD. Q. 30 (2013); and the review of literature on the topic by Georg Stratemeyer, *Measuring Success in Mediation: An Outline* (Feb 14, 2020), https://mediate.com/measuring-success-in-mediation-an-outline/ [https://perma.cc/2DRG-WVYM].

[55] *See* Schmidt & Engelen, *supra* note 53.

[56] *See* THALER & SUNSTEIN, *supra* note 1, at 5–6.

[57] Directive 2008/52, of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, 2008 O.J. (L 136) 3, at ¶ 13, art. 5.

[58] Giuseppe De Palo & Lauren R. Keller, *The Italian Mediation Explosion: Lessons in Realpolitik*, 28 NEGOT. J. 181, 182 (2012).

states" through an expectation that member states offer mediation within their national legal structures.[59]

C. *Ontological Implications for Mediation of Behavioral Insights: Challenges to Voluntariness, Self-Determination, and Neutrality*

Mediation is typically described as a process that promotes voluntary decisionmaking by the parties to the dispute, with the support of an impartial third-party facilitator. This is terminology reflected across most jurisdictions, particularly through bodies such as the American Bar Association[60] and the Law Council of Australia.[61] For example, the opening standard of the Model Standards of Conduct for Mediators[62] adopted in 2005 by the American Arbitration Association, American Bar Association and Association for Conflict Resolution says, "A mediator shall conduct a mediation based on the principle of party self-determination," and describes self-determination as "the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome."[63]

We can define the "behavioral turn" as a materialist worldview that sees our behavior being highly interdependent and responsive to others as the natural result of our body acting within our environment, as opposed to our being individuals able to "freely" choose what we do.[64] Once we do this, operating within the behavioral turn not only challenges the concepts of mediator independence and party autonomy, but raises the ontological questions about "what it is to resolve conflict following the behavioral turn" and "what it is to be a party to a mediation under the behavioral turn?" If we discard traditional notions of mediator independence and party autonomy, we need to ask whether mediation is just a form of persuasion and, if so, whether a mediator should be using all persuasive techniques available to get the settlement that gives the most efficient outcome for society. If the mediator is not going to do this then why not? In our view, the behavioral turn necessitates discussion of whether a new approach to the ethics of mediation is required. Some possible directions for this new approach are described below.

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[59] *Id*.

[60] MODEL STANDARDS OF CONDUCT FOR MEDIATORS, at pmbl. (AM. ARB. ASS'N ET AL., 2005).

[61] ETHICAL GUIDELINES FOR MEDIATORS ¶ 1 (L. COUNCIL OF AUSTL. 2018).

[62] MODEL STANDARDS OF CONDUCT FOR MEDIATORS § 1.

[63] *Id.*

[64] *See infra* Part II.

D. *Incorporating the Behavioral Turn Within*
   a Critical Approach

The work of leading theorist Bernard Mayer does not explicitly refer
to the behavioral turn, but his work does challenge key concepts that are
progressively being undermined by behavioral insights.[65] For example, he
challenges over identification of conflict mediators with their role as a
"neutral," saying:

> We tend to rely heavily on a neutral stance to obtain trust and
> credibility, whereas disputants are more inclined to accept the
> procedural help of a nonneutral who brings other resources to bear
> and to doubt the practical usefulness of someone who is genuinely
> neutral. There are times when neutrality is essential, but conflict
> resolvers place too much reliance on it as a defining feature of the
> role we play.[66]

The voluntary nature of a mediation and the self-determination of the parties
is often seen as part of the "magic of mediation" that leads to better results
than court or tribunal resolution, including higher satisfaction with process and
outcomes, higher rates of settlement, and greater adherence to settlement
terms.[67] Mayer acknowledges most individuals, including parties to
mediation, support the values of empowerment, self-determination,
participatory democracy, and nonviolence.[68] However, Mayer has argued for
the need to take a few steps back and challenge some of our most cherished
assumptions and Mayer's approach to doing this can provide some guidance
for the challenges to mediator ethics posed by the "behavioral turn."[69]

E. *Highlighting Ethics in Party Decisionmaking—A Compatibilist*
   Approach

We consider the behavioralist turn to include a compatibilist definition
of "volition" in which decisions are the inevitable consequence of antecedents,
such as genetic and environmental influences, that are independent of the
human will but, where our actions follow our inclinations, we are acting with

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[65] BERNARD S. MAYER, BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN
CONFLICT RESOLUTION 17 (2004).

[66] *See generally id.*

[67] Timothy Hedeen, *Coercion and Self-Determination in Court-Connected
Mediation: All Mediations Are Voluntary, but Some Are More Voluntary than
Others*, 26 JUST. SYS. J. 273, 275 (2005) (referencing Shack and Wissler for reviews
of empirical research).

[68] MAYER, *supra* note 65, at 21.

[69] *Id.*

a sense of agency or volition despite our choice being already determined by the antecedents.[70]

What is important to acknowledge is that ethical concepts form part of the antecedents that contribute to the actions of the parties. The neuroscientist Gazzaniga emphasizes our brains are limited in the choices they can make—potentially down to making the only choice it could ever make—including by limitations emerging from the brain's own activity such as beliefs, thoughts, and desires that both emerge out from brain activity and constrain further brain activity.[71] Gazzaniga also argues that, parallel to this, groups of people following social rules create an emergent social context contributing to the environmental limitations requiring individuals to make this environmentally-determined choice.[72] This social context allows for a sense of agency that provides compatibility between what some describe as the self-evident truth that people are both free and responsible and, in the last analysis, always acting subject to causation.[73] However, this social context—including words, concepts, ideals, and hopes that began with some people and prompt the actions of others—is not the product of a single individual but is being produced and refined by everyone through their membership of a society that operates as a teaching, learning, and living community.[74]

What this means for "what it is to be a party to mediation under the behavioral turn?" is that the party to the mediation cannot be looked at as an individual able to voluntarily choose to reject or accept a proposed settlement as a spontaneous act of will.[75] Instead, the parties and the mediator all form part of a conflict resolving group with each person responding to the other in ways that cannot help but influence each other and contribute to each action taken, not only in the ultimate settlement or otherwise of the conflict but in every step of the process.[76] What emerges is a picture of mediation that can no longer sensibly refer to an "independent mediator" and "voluntary decisionmaking."

The ethical framework forms part of decisionmaking under the behavioral turn. However, for this ethical framework to be useful and coherent, it seems important to move from the fiction of neutrality or self-determination

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[70] *See* John Baer et al., *supra* note 9, at 8–9.

[71] *See* MICHAEL S. GAZZANIGA, WHO'S IN CHARGE? FREE WILL AND THE SCIENCE OF THE BRAIN 107 (2011).

[72] *See id.* at 193.

[73] *See* HANNAH ARENDT, BETWEEN PAST AND FUTURE 142 (2006).

[74] See GAZZANIGA, *supra* note 71, at 136.

[75] See *id.* at 137.

[76] *Id. See also* ROBERT B. CIALDINI, INFLUENCE: THE PSYCHOLOGY OF PERSUASION (2006).

in a traditional sense towards some reformulation that takes account of notions of scientific determinism and the associated group dynamic.

The development of a useful and coherent ethical framework for mediation under the behavioral turn can be expected to take some time and build upon existing work that shows a drift away from a focus on neutrality and individual self-determination towards a behavioral worldview emphasizing the relations between parties. The model of contextual ethics articulated by Rachel Field is useful in its consideration of a more relational view of self-determination. In this model "it is the mediator's role, in upholding party self-determination, to support the active and direct participation of parties in communicating and negotiating; to facilitate party choice and control over the substantive norms that guide their decisionmaking."[77] However, this "self-determination" is "distinctive because it is relational grounded in connection, cooperation and collaboration. This concept of self-determination is very different from an atomistic notion of autonomy that emphasizes privacy and self."[78] According to Field and Crowe:

> An atomistic conception of self-determination arguably underpins the adversarial legal system, because each party is encouraged to advocate single-mindedly for their own interests. In mediation, by contrast, party self-determination does not exist on an individual level; rather, it is holistic and relational, encompassing the needs and interests of both parties. If only one party experiences self-determination, the process has not succeeded in its aims.[79]

This relational understanding of promoting self-determination could align, from a behavioralist perspective, with mediators who intervene according to what Taylor and Sunstein speak of in terms of a "libertarian paternalism," in which choice architecture is used to help avoid sub-optimal decision that have been based on cognitive biases and other errors in rationality.[80]

Further, and also acknowledging the interdependence of the parties and conflict mediator, the work of Jon Crowe regarding mediator communities

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[77] Rachael Field, *Exploring the Potential of Contextual Ethics in Mediation*, in ALTERNATIVE PERSPECTIVES ON LAWYERS AND LEGAL ETHICS: REIMAGINING THE PROFESSION 193, 197 (Francesca Bartlett et al. eds., 2011).

[78] *Id.*

[79] Rachael Field & Jonathan Crowe, *The Central Role of Party Self-Determination in Mediation Ethics*, THE AUSTRALIAN DISP. RESOL. RSCH. NETWORK (Dec. 19, 2017), https://adrresearch.net/2017/12/19/the-central-role-of-party-self-determination-in-mediation-ethics/ [https://perma.cc/7DCQ-4552].

[80] THALER & SUNSTEIN, *supra* note 1, at 5–6.

of practice in the tradition of Alisdair MacIntyre shows promise.[81] Crowe talks of a community of practice that acts across snap judgments and subsequent reflection and discussion to form a layer of practical knowings.[82] This layer of practical knowings (possibly even describable as communal "virtues" within the MacIntyrian tradition) would operate to bound and constrain behavior within mediation practices—effectively as one of the emergent layers to which Gazzaniga refers.[83]

In a similar vein, party decisionmaking could be usefully and positively influenced through explicit acknowledgment of ethical issues by the parties as part of a moral dialogue included in the mediation. From an ethical perspective, rather than the parties being slaves to their own inflated ego in a conflict scenario, it could become a role of the mediator to lead explicit moral dialogues to take the parties beyond the deadlock common of parties seeking to maximize their own affairs, and into decisions that follow from ethical or religious values with which the parties identify.[84] This would broadly follow the suggestion by Zhao to use moral dialogues within the mediation to take the parties beyond the deadlock of maximizing their own affairs and help the parties to "think and communicate in a frame of mind familiar from their daily lives and provide the strongest common ground for reaching mutually acceptable resolutions."[85] In this vein, Hardy and Rundle have put forward a process for mediators to engage in their own ethical dialogue and reflective practice.[86]

F. *Re-Thinking Mediation as Teaching or Learning*

Mayer has already suggested moving beyond neutrality to refer to the conflict resolution professional as a "conflict specialist" instead of a "mediator" or "neutral," and the "behavioralist turn" may ultimately result in

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[81] *See* Jonathan Crowe, *Two Models of Mediation Ethics*, 39 SYDNEY L. REV. 147, 156 (2017).

[82] *Id.*

[83] Specifically, these values and beliefs can operate as emergent mental states that in turn constrain and influence subsequent decisions. *See generally* GAZZANIGA, *supra* note 71, at 107, 135.

[84] See generally GAZZANIGA, *supra* note 71, regarding the ability of values and beliefs to constrain subsequent thinking, and regarding the use of moral dialogues in mediation, see generally Tony Zhao, *Moral Dialogues in Mediation,* 71 DISP. RES. J. 173 (2016).

[85] Zhao, *supra* note 84, at 178.

[86] *See generally* Samantha Hardy & Olivia Rundle, *Applying the Inclusive Model of Ethical Decision Making to Mediation*, 19 JAMES COOK U.L. REV. 70 (2012).

conflict mediators being seen as "coaches," "teachers," or "persuaders" instead of "neutrals" fostering party self-determination.[87]

The concept of a party being able to make free and informed choices as part of a mediation is widely viewed a critical element of mediation as we know it, even in the context where participation in mediation is mandated by a court.[88] The "behavioral turn" leads to a redefinition of "free will" to take away the concept of someone being able to make choices, almost to the extent that "free will" is doing whatever you were always going to do anyway—short of someone else placing you in chains and dragging you kicking and screaming in the opposite direction—bringing to mind Jonathan Edwards' redefinition of "free will" as our nature of always acting according to the strongest inclination we have at the moment of choice.[89] This fits with the compatibilist definition of volition and allows for differentiation in our responsibility if we do not have free will if seized by a group of people and forced to act in a certain way, but we do have free will if not physically restrained, even though there is only one possible choice that can flow from our circumstances and disposition.

For conflict mediators, the problem is that the concept of spontaneous free choice is typically part of the environment of current mediations and any replacement of this concept by an overly behavioralist, scientist, or deterministic worldview will fundamentally alter the environment and dynamics of mediation. This worldview cannot help but impact on how the mediation process works and is likely to impede successful mediation if parties take the view that the role of the mediator is to manipulate them into a settlement.

One way to reconcile mediation theory with a somewhat hollowed-out concept of autonomy might be to rethink what it is we do as mediators. For example, we can view a mediator not as an impartial mediator merely facilitating a process, but as an expert guide who can help participants identify their own emotions and define and deploy their own responses to the conflict. In this regard, the mediator becomes more of a teacher, educator, and guide to conflict resolution and, in doing so, may potentially be able to take more of the role that Freire describes as a liberating praxis of problem-posing education.[90] This discussion has been part of academic and practitioner debate for many years, including prominently through the work of leading theorist Hilary Astor, who advocates for mediators to be aware of their "situatedness"

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[87] See generally MAYER, *supra* note 65, especially relating to Mayer's advocacy for professional conflict mediators to move away from identifying strictly as "mediators" or "neutrals."

[88] See Bush & Folger, *supra* note 6, at 742.

[89] *See* EDWARDS, *supra* note 8, at 7.

[90] PAULO FREIRE, PEDAGOGY OF THE OPPRESSED 81–87 (1972).

to maximize party control, rather than relying on unattainable notions of neutrality.[91]

VI.   CONCLUSION

Mediators have always had a great interest in the human condition, and the behavior of humans in conflict. It is therefore no surprise that behavioral insights are of great interest to those who practice mediation.

The greatest tool of the mediator is themselves, including the way they both explicitly and implicitly communicate with the disputing parties as they guide them through the mediation process. As mediators assist parties to resolve conflicts, some part of the mediator's worldview will inevitably influence their interventions. One of the great challenges for mediation theory and practice has been to reconcile the notion of mediator influence with mediation's fundamental commitment to neutrality and the commitment to enhancing party autonomy and self-determination.

The "behavioral turn" is not limited to mediation, nor is it the only "turn" to have influenced mediation practice in recent decades.[92] However, the behavioral turn in mediation raises more fundamental, epistemic questions about the role of the mediator. In this article we have explored the "behavioral turn" as a worldview that challenges some convenient ethical assumptions we often make about the values reflected in the practice of mediation as a way of facilitating out-of-court settlements. While the time for a radical recharacterization of mediation appears distant, we do consider the "behavioral turn" reinforces the need to move away from neutrality as a foundational concept of mediation. We have then made some initial suggestions of productive avenues for investigation for the development of a stronger ethical framework for mediation that can handle the materialist worldview of the "behavioral turn" that can no longer view people as individuals able to "freely" choose what that do. This involves accepting a more paternalistic conception of the mediator role and judging the acceptability of mediator interventions in a different way, perhaps taking cues from privileging communal virtues in the MacIntyrian tradition, adopting a contextual ethics approach as put forward by Field, or building on the ideas of Zhao, Hardy, and Rundle to allow each mediation instance to set its own

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[91] *See generally* Hilary Astor, *Mediator Neutrality: Making Sense of Theory and Practice*, 16 SOC. & LEGAL STUD. 221, 230 (2007).

[92] The "cultural turn" of the social sciences was a phrase coined by Steinmetz in the 1990s. *See generally* STATE/CULTURE: STATE-FORMATION AFTER THE CULTURAL TURN (George Steinmetz & David Laitin eds., 1999).

foundation through explicit ethical dialogue and reflective practice by both the mediator and the parties.

A sophisticated worldview must allow for the significance of our decisions as well as our circumstances. However, the "behavioral turn" prevents us from naively accepting the convenient fictions of mediator neutrality and participant autonomy within conflict resolution activities. We consider that—unless there is a clear articulation of strong ethical foundations for mediation under the "behavior turn"—that there is great risk the processes of resolving conflict by mediation will be abused as simply another "technique" without understanding of what it is to resolve conflict well.