

Self-Determination, Needs Satisfaction and Moral Growth – in Mediation and Negligence Law: A Paradigm Shift in Underlying Worldviews

Robert A. Baruch Bush*

INTRODUCTION

Much has been written about the “fundamental principle” of self-determination in mediation, including several articles by this author.¹ In reality, however, this principle is honored as much in the breach as in the observance. That is, while all subscribe to the principle in theory, there is a considerable gap between theory and actual mediation practice.² This Article offers an explanation for this “gap,” through articulating the underlying values on which different approaches to mediation are based. It also suggests a justification for holding fast to the “fundamental principle” and explains the deep-seated reasons for its divergent treatment in mediation practice. In addition, the Article reveals a surprising parallel between underlying values in mediation theory and in the American law of negligence, and it shows how that parallel is an indication of an emerging paradigm shift in underlying values in the wider society.

* Harry H. Raines Distinguished Professor of Law, Maurice A. Dean School of Law, Hofstra University; Founder, Fellow and Board Member, Institute for the Study of Conflict Transformation. B.A., Harvard University, J.D., Stanford Law School. The Author thanks the Deans of Hofstra Law School for their support of the research behind this Article. He thanks Tara West, Dan Simon, Erik Cleven, and Robin Brzobohaty for their helpful comments on drafts of this Article. He also thanks Joseph Folger, his long-time scholarly partner and co-author, for the intellectual framework behind this Article. And he thanks Rabbi Abba Paltiel for his inspiration in the work involved in writing the Article.

1. See, e.g., Robert A. Baruch Bush & Dan Berstein, *Orienting Toward Party Choice: A Simple Self-Determination Tool for Mediators*, 2023 J. DISP. RESOL. 1 (2023); Robert A. Baruch Bush, *A Pluralistic Approach to Mediation Ethics: Delivering on Mediation’s Different Promises*, 34 OHIO ST. J. ON DISP. RESOL. 459, 496, 512 (2019) [hereinafter, *Pluralistic*]; Robert A. Baruch Bush, *Reclaiming Mediation’s Future: Re-Focusing on Party Self-Determination*, 16 CARDOZO J. CONFLICT RESOL. 741, 742 (2015) [hereinafter, *Reclaiming*]; Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85 (1981).

2. See, e.g., *Reclaiming*, *supra* note 1, at 745–48.

Part I describes two different approaches to the principle of party self-determination in actual mediation practice, each associated with a recognized “model” or approach to the mediation process overall. Part II identifies two divergent views of the human world as a whole—the Individualist and Relational worldviews—and shows how these larger views shape and explain the different approaches to self-determination in mediation practice. Part III shows how a significant divergence in legal theory has emerged that parallels the observed difference in mediation practice and stems from the same larger divergence of underlying worldviews. Part IV examines both the challenges and positive possibilities created by the divergence in practice, theory, and worldviews discussed in the earlier parts of the Article.

I. TWO APPROACHES TO SELF-DETERMINATION

Party self-determination is usually seen as a foundational and defining feature of mediation.³ In other processes, a third party—whether arbitrator or judge—makes decisions that control the process and the outcome. Only in mediation do the parties control both, at least in theory. In practice, however, party self-determination has a very different character in different approaches to mediation.⁴ The difference lies in whether party decision-making, while seen as important, can be limited or overridden by the mediator for certain reasons, or whether it is seen as essential to the process. In other words, is party self-determination a dispensable or indispensable element of the mediation process? This question is answered very differently in two major approaches to mediation. In one, self-determination is important, but not essential. In the other, it is not only essential but indispensable. The distinction becomes clear from a brief comparison of these two approaches, as follows.

A. *Self-Determination in Facilitative Mediation*

The most common approach to mediation is called *facilitative mediation*. In this approach or model, the goal of a mediator is to have the parties reach an agreement on the matters in dispute.⁵ It is assumed

3. See *supra* note 1 and accompanying text.

4. See *infra* text accompanying notes 5–20.

5. See, e.g., Dorothy J. Della Noce, *Communicating Quality Assurance: A Case Study of Mediator Profiles on A Court Roster*, 84 NOTRE DAME L. REV. 769, 786, 797–99. Della Noce’s study is one of the only empirical investigations that identifies which model of mediation is most frequently followed by mediators. The facilitative model’s focus on the goal of agreement was central to early research on mediator practices. See Christopher Honeyman, *Five Elements of Mediation*, 4 NEGOT. J. 149 (Apr. 1988)

that this is what the parties are seeking when they come to mediation, and for mediators using the facilitative approach, reaching an agreement of some sort is the purpose of mediation and the definition of success.⁶

In this approach to mediation, most mediators follow certain common practices. The mediator leads the parties through a sequence of stages: opening the session and setting ground rules, gathering information, defining issues, generating options, generating movement, and achieving agreement and closure.⁷ The labeling of these stages differs, but the commonalities are clear, as to both the goal and the means to achieve it. There are also generally accepted “best practices” or strategies for mediators to use in moving through these stages and securing an agreement. Those practices include: maintaining firm mediator control over the process throughout all the stages; using ground rules and turn-taking to control the flow of information; asking questions to elicit information about the matters in dispute; focusing discussion on future commitments and not past events and grievances; limiting strong emotional expression; focusing discussion on material rather than intangible matters; reframing parties’ comments to soften harsh language and sharp disagreements; and using separate meetings (caucuses) to work with each party alone to generate movement and explore solutions.⁸

[hereinafter Honeyman, *Five Elements*]; Christopher Honeyman, *The Common Core of Mediation*, 8 *MEDIATION Q.* 73 (1990). Honeyman’s work elaborated two main premises: first, that there is a “common core” of behaviors involved in the work of effective mediators; and second, that these behaviors are the means to an end that comprises the ultimate goal of mediation—achievement of an agreement that settles the parties’ dispute. Each of the elements studied is described in terms of its usefulness in promoting settlement, which is taken for granted as the goal of the mediators’ work. *See, e.g.*, Honeyman, *Five Elements*, *supra* at 153–55.

6. In the view of some, the aim is simply to reach any agreement that the parties themselves find subjectively acceptable; for others, the aim is seen as reaching an agreement that is not only acceptable to the parties, but also meets some objective standard of fairness, optimality, or other marker of quality. *See* Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 *VT. L. REV.* 85, 90–96 (1981); Leonard L. Riskin, *Mediation Training Guide*, in *DISPUTE RESOLUTION AND LAWYERS* 362, 365–74 (4th ed. 2009) (each author describing his approach to the mediation process, including its aim). For Stulberg, the only standard for an agreement is that it be mutually acceptable to the parties. For Riskin, the standard is that it be acceptable, that it satisfies the parties’ underlying needs, and that it be fair to the parties and affected outsiders. *See* Robert A. Baruch Bush, *One Size Does Not Fit All: A Pluralistic Approach to Mediator Performance Testing and Quality Assurance*, 19 *OHIO ST. J. ON DISP. RESOL.* 965 (2004) (documenting how tests for mediator competency almost always focus on measures related to success in generating agreements).

7. *See, e.g.*, JAMES J. ALFINI, SHARON B. PRESS & JEAN R. STERNLIGHT, *MEDIATION THEORY AND PRACTICE* 103–05, 109–37 (3d ed. 2013).

8. *See* Robert A. Baruch Bush, *Mediation Skills and Client-Centered Lawyering: A New View of The Partnership*, 19 *CLINICAL L. REV.* 429, 436–39 (2013). Bush contrasts

It should be evident that most, if not all, of the practices just mentioned intrude on and even undermine the parties' exercise of self-determination. It is the mediator rather than the parties who determines the sequencing of the stages, the rules governing the discussion, the limits on what can be discussed, the degree of emotion expressed, etc. All these controlling practices are adopted because they arguably make it more likely—and in fact are seen as necessary—to reach the agreement that is the goal of the process. Indeed, if these practices were to be criticized as being too controlling or directive in a process supposedly based on self-determination, the likely response would be that the goal of agreement simply cannot be achieved without using them.⁹ In short, party self-determination, although it is called a “fundamental principle,” is actually treated as an aspiration that often must give way to the ultimate end of securing agreement (or some other goal such as justice). Parties cannot and do not determine all aspects of the unfolding of the mediation session. As often stated by facilitative mediators, “the parties control the outcome, but I control the process”—even though this directly contravenes the principle of party self-determination over process as well as outcome, as defined in major mediator ethics codes.¹⁰

these practices with the very different ones of the transformative model. *See infra* notes 11–20 and accompanying text. For example, he contrasts the centrality of direct and “probing” questioning of the parties in the facilitative model, with the practice of “reflection” in the transformative model, which almost completely avoids asking direct questions. However, there is some anecdotal evidence that facilitative mediators have begun to shift their practice toward greater use of reflection and less use of direct questioning. *See* Memo of conversation with mediator/trainer/writer Peter F. Miller (on file with author) (stating that facilitative mediation practitioners have begun to incorporate transformative practices like reflection to a greater degree in their practice) [hereinafter, *Miller Memo*]. Mediators/authors Dan Simon and Tara West expressed a similar view, based on their own experience and on research documenting the use of “reflecting strategies” by facilitative mediators in family and civil courts in Maryland. *See* DAN SIMON & TARA WEST, SELF-DETERMINATION IN MEDIATION: THE ART AND SCIENCE OF MIRRORS AND LIGHTS 80–82 (2022) (citing the Maryland research). So it is possible that the lines between these models of practice may have begun to blur, although this is not often reflected in published literature.

9. *See* Bush, *supra* note 6. Bush analyzes multiple mediator performance tests and shows that most include measures that focus on facilitative mediation. That is, mediators are most often evaluated in terms of their skills in facilitative mediation like those mentioned in the text, because these are the skills needed to generate agreements between the parties.

10. Deborah M. Kolb & Kenneth Kressel, *The Realities of Making Talk Work*, in *WHEN TALK WORKS: PROFILES OF MEDIATORS* 459, 470–74 (D.M. Kolb & Associates eds., 1994) (citing the practice of mediator process control, despite the importance placed on party self-determination in mediation theory); *Pluralistic*, *supra* note 1, at 480–98, *passim* (closely analyzing several mediation ethics codes, including the Family Code and Community Code).

B. *Self-Determination in Transformative Mediation*

An alternative to facilitative mediation emerged in the 1990s, labeled *transformative mediation*.¹¹ This model emerged partially from criticism of practices that intruded on party self-determination, and partially based on new perceptions about the value mediation holds for parties in conflict.¹² As regards the subject of this Article, it became clear over the next decades that transformative mediation took a very different approach to the principle of party self-determination.

A brief overview of this approach to mediation will provide some context for its different treatment of self-determination. In contrast to the facilitative model, the transformative model posits that the purpose and goal of mediation is not settlement or agreement per se (even though achieving agreement is a probable side-effect). Rather, the purpose is to directly address *the interaction between the parties* that has turned into a destructive and even demonizing one, and to help parties change that interaction back into a positive and humanizing one, even in the midst of conflict and whether or not an agreement is reached.¹³ As part of that purpose, the mediator's goal is to help the parties regain their inherent human capacities for agency and empathy—strength of self and compassion for other—both of which have been weakened due to the negative impact of the experience of conflict per se. The transformative approach claims that this positive change in conflict interaction is indeed what parties are seeking when they come to a mediator.¹⁴

11. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 81–112 (1994) [hereinafter, *PROMISE 1*].

12. *Id.* at 55–77.

13. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 49–53 (2d ed. 2005) [hereinafter, *PROMISE 2*]. This revised edition of *PROMISE 1*, written after 10 years of experience using the approach, presented far more specifics about both the theory and the practice of transformative mediation. Since its publication, this volume has become the authoritative text on the transformative mediation model, from which much of the literature draws. But the first edition published 10 years earlier addresses more directly the question of worldviews that is discussed in this Article. See *infra* text accompanying notes 23–50.

14. *Id.* at 51–53, 59–62. It is also claimed that if positive interaction is achieved, the parties will likely reach agreement on disputed issues without the need for mediator control or pressure. Other mediation approaches that focused on interaction rather than settlement also emerged in the 1980s and 1990s. See Robert A. Baruch Bush, *Staying in Orbit, or Breaking Free: The Relationship of Mediation to the Courts Over Four Decades*, 84 *NOTRE DAME L. REV.* 705, 744 nn.115–17, 746–48 (2008) [hereinafter, *Orbit*]. The most important of these, and the most utilized, is “restorative justice” or RJ mediation, which aims at restoring relationships damaged by conflict, especially in connection with criminal incidents and juvenile peer conflicts. See Robert A. Baruch Bush, *Beyond the Toolbox: Values-Based Models of Mediation Practice*, 24 *CARDOZO J. CONFLICT RESOL.* 255, 271–77 (2023) [hereinafter, *Toolbox*]. However, while it seems to

This claim rests on the core premise of transformative theory, that a dual sense of agency and empathy is central to human identity and wellbeing, and when that sense is compromised by destructive conflict, there is a powerful drive to recover it. This is what changing the interaction achieves, and why parties value it.¹⁵

In this approach to practice, the mediator intervenes only in ways that support party decision making. For example, rather than imposing ground rules and turn-taking, transformative mediators allow the parties to decide for themselves whether to have such rules, whether to take turns speaking, when to speak, when to interrupt each other, and so forth. Strong emotional expression, including anger and distress, is allowed and supported rather than suppressed. Parties decide for themselves what issues to address, including “intangibles” like racism or sexism, and in what order to address them. In all this, the mediator follows rather than leads the parties; in fact, there are no set “stages” but rather an evolving conversation of the parties’ choosing.¹⁶ Throughout this conversation, the transformative mediator uses specific practices that are careful to support the parties’ decision making and avoid intruding on it.¹⁷

have a similar purpose to the transformative approach, RJ mediation does not share the same emphasis on party self-determination, and instead uses many controlling interventions similar to those of the facilitative approach. *Id.* That is why it is not focused on in this Article. *See infra* note 50 and accompanying text.

15. *See* PROMISE 2, *supra* note 13, at 60–62 (providing a fuller but succinct statement of conflict transformation theory, including the dynamics of the shift from negative/destructive to positive/constructive conflict interaction); *see also infra* note 18.

16. PROMISE 2, *supra* note 13, at 66; Bush, *supra* note 8, at 435. The specific kinds of support offered are described in the text here. They are also presented in greater detail in Bush, *supra* note 8, at 439–46. They are described there as “interactional support skills” by contrast to the “problem solving skills” central to the facilitative mediation model. *See id.* at 436–39 (“In short, the essential work of the mediator is to *support* the parties’ *deliberation, communication, and decision-making*, rather than to direct them in any way. The reason for employing supportive rather than directive practices is that the aim of the process is party empowerment and interparty recognition—and thus positive interactional change—rather than resolution per se; and interactional change is most likely achieved through mediator support rather than mediator direction.” *Id.* at 435.).

17. For example: s/he listens closely to the parties’ comments, but without an agenda of his or her own based on problem identification or bargaining strategy; s/he regularly reflects a speaking party’s comments back to the speaker, but without reframing them to soften or filter them in any way; when parties engage directly s/he stays or backs out of their way, privileging their talk over her own; when the parties have engaged in an extended exchange, the mediator summarizes the exchange, but without organizing it for them, and making sure to highlight their disagreements and differences, not only “common ground”; as for asking questions, s/he only asks questions that “check in” with the parties about what they want to do at a certain point in the conversation, not to probe for more information; and the mediator accepts the parties’ decision on when to end the conversation and whether to make any agreements before doing so. *Id.* at 439–45. For concrete examples of the use of these skills in

All these practices stem directly from the purpose of helping parties regain their sense of strength and connection and thereby change their destructive interaction into a positive one—in what is called the “conflict transformation cycle.”¹⁸ Party self-determination is crucial in achieving that change, because it is the actual exercise of self-determination that revives the parties’ inherent sense of their own competence and capacity, which in turn opens them to consideration of each other.¹⁹ Put differently, party self-determination initiates and drives the conflict transformation cycle; by contrast, supplanting party decision-making stops the cycle and leaves destructive interaction in place. Therefore, if the transformative mediator is criticized for not doing enough to control the parties’ conversation, s/he will respond that giving the parties themselves control over the process is necessary to achieve the purpose—to support shifts toward greater strength and responsiveness and thereby change the quality of the conflict interaction. Thus, purpose drives practice for the transformative mediator, just as it does for the facilitative mediator. But since the purposes are very different, the practices are very different—especially as regards following the principle of party self-determination.²⁰

mediations, see Robert A. Baruch Bush & Joseph P. Folger, *Transformative Mediation: Core Practices*, in TRANSFORMATIVE MEDIATION: A SOURCEBOOK—RESOURCES FOR CONFLICT INTERVENTION PRACTITIONERS AND PROGRAMS 39–44 (Joseph P. Folger et al. eds., 2010); Robert A. Baruch Bush & Sally G. Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 PEPP. DISP. RESOL. L.J. 67 (2002) (both articles describing specific skills used in transformative mediation practice). For an extended case study illustrating all the skills discussed here in the text, see PROMISE 2, *supra* note 13, at 131–270.

18. See PROMISE 2, *supra* note 13, at 53–58 (including a graphic that depicts this cycle). In this cycle, parties move from weakness to strength (the empowerment shift) and from alienation to connection (the recognition shift), changing positively their experience of both self and other. See also *supra* note 15.

19. See PROMISE 2, *supra* note 13, at 54–56, 67–68 (explaining how the shift from weakness to strength usually precedes and facilitates the shift from alienation to connection). See also Bush, *supra* note 8, at 435; *Orbit*, *supra* note 14, at 746–48 (explaining the connection between interactional change and supportive rather than directive intervention); see generally Dorothy J. Della Noce, Robert A. Baruch Bush & Joseph P. Folger, *Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy*, 3 PEPP. DISP. RESOL. L.J. 39, 50–51 (2002) (connecting the practices of transformative mediation to their theoretical bases).

20. At the same time, it is important to recognize that using transformative practices also makes reaching agreement likely, even if that is not the mediator’s primary purpose—and an agreement reached by the parties’ uncoerced choice will almost certainly be stronger and more lasting. See *Orbit*, *supra* note 14, at 747.

C. *Can the Divergent treatment of Self-determination be Explained?*

In sum, the two approaches to mediation treat the “fundamental” principle of party self-determination very differently. In facilitative mediation, although the principle is seen as an important and distinctive feature of the process, it is nevertheless ignored or overridden in many respects, for what are seen as good reasons. While in transformative mediation, the principle is seen as truly fundamental and indeed as a condition for ethical practice, no matter what other important goals are set aside. Can these very different approaches to the “fundamental principle” both be considered justifiable and legitimate? An answer to that question can be found by examining the values that underlie the two approaches to the mediation process.

II. TWO VIEWS OF THE HUMAN WORLD

In a volume published nearly 30 years ago, Bush and Folger described “four stories” or accounts of the mediation field and mediation practices, including the Satisfaction and Transformation stories. Those two stories portrayed mediation very differently—corresponding to the facilitative and transformative approaches discussed above.²¹ That volume, called *The Promise of Mediation* [hereinafter, *Promise 1*], introduced the transformative approach and launched it in the world of mediation theory and practice as an alternative to the prevailing facilitative approach.²²

Beyond describing the different purposes and practices of the two approaches, including their treatment of party self-determination, *Promise 1* argued that the two versions of this conflict resolution process were reflective of a much larger and general divergence in peoples’ views of the social world as a whole, or “worldviews.”²³ For purposes of this discussion, a worldview is defined as a coherent set of beliefs about the nature of the individual and the social environment, the role of societal institutions in relating the two, and the value that is seen as supreme in human social life. In the literature on transformative mediation beginning with *Promise 1*, the worldviews seen as underlying the different approaches to mediation practice are called the “Individualist” and the “Relational worldviews.”²⁴

21. PROMISE 1, *supra* note 11, at 16–18, 20–22.

22. *Id.* at 81–112.

23. *Id.* at 236–39. The term “worldview” was used in PROMISE 1, but both others and we ourselves have also used the term “ideology” to describe the beliefs people hold about themselves and the human social world. *See, e.g.*, Della Noce et al., *supra* note 19, at 49–51, 47 n.36.

24. *See* PROMISE 1, *supra* note 11, at 236–39, 242–48.

In distinguishing the two worldviews, recent literature has focused on the different conceptions, within each, of the individual and his/her motivations, capacities and “identities.”²⁵ But when *Promise 1* was written, the focus was on how these worldviews present two different views of the ultimate value of the human social enterprise. That is, the defining element of a worldview was seen as its identification of the highest value to be sought and achieved in human life.²⁶ This is what defines both the Individualist and the Relational worldviews and differentiates the two. It is not the conception of the “individual” or of “social structure” or any other concept that anchors these worldviews, but the value that each holds supreme. All else in each worldview flows from that value. In understanding the different treatment of party self-determination in the above approaches to mediation, this element of their underlying worldviews is the most important factor, so this is the focus of discussion here.

A. *The Value Held Supreme in the Individualist Worldview*

The *Individualist* worldview holds that the highest value in life is the satisfaction of human needs and the avoidance of human frustration and suffering.²⁷ And since no one can say objectively what produces satisfaction and what produces suffering for different people, it must be left to the individual to define satisfaction and suffering, by exercising self-determination. Social institutions must facilitate and coordinate individuals’ choices, leading to the greatest degree of satisfaction possible for all individuals.²⁸ Seen in this light, it is clear that *self-determination is not a value or end in itself* in this worldview, but rather an instrument or means to an end. The end being sought is optimal overall satisfaction, for which objective measures do not exist. The corollary is that sometimes, limitations of human cognition (or other factors) mean that self-determination will fail to produce satisfaction.²⁹ And if so, overriding self-determination is acceptable because this results in greater satisfaction than would be gained by

25. See PROMISE 2, *supra* note 13, at 59–62, 239–56; Della Noce et al., *supra* note 19, at 49–51; Robin Brzobohatý, *Some Thoughts About Individualism and Relationality* (2024) (unpublished manuscript) (on file with author).

26. PROMISE 1, *supra* note 11, at 236–37.

27. See PROMISE 1, *supra* note 11, at 237–39; Della Noce et al., *supra* note 19, at 48–49. The needs referred to here need not be materialistic or coarse; they may include lofty and refined experiences, such as friendship or appreciation of beauty.

28. See PROMISE 1, *supra* note 11, at 238–39; PROMISE 2, *supra* note 13, at 244–45.

29. See Robert A. Baruch Bush, “What Do We Need a Mediator For?: Mediation’s “Value-Added” for Negotiators, 12 OHIO ST. J. ON DISP. RESOL. 1, 6–12 (1996) (summarizing the literature on the pervasive strategic and cognitive “biases” that obstruct and undermine effective decision-making by supposedly rational actors).

respecting it. That is the logic behind the acceptance of mediator directiveness in the many variations of conventional mediation practice. Left to their own self-determined choices, parties will often act in ways that hurt themselves and each other. Therefore, mediators must step in and influence party choices to achieve genuine party satisfaction for all—the classic “win-win” solution.³⁰

This logic is strikingly similar to the arguments of economic theory—where the value sought is also satisfaction—in which the market is generally left to function without interference to coordinate and maximize satisfaction. However, when market imperfections and failures occur, external interventions are called for to repair market failures and guarantee achievement of maximum satisfaction.³¹ In fact, the marketplace is the classic embodiment of the philosophy and practice of the Individualist worldview, because it arguably comes as close as possible to achieving the value on which that worldview is based—universal individual satisfaction. Indeed, facilitative mediation theory is implicitly tied to principles of economics, in its emphasis on optimizing satisfaction of party needs through win-win outcomes, and its acceptance of directive mediator practices designed to overcome strategic and cognitive barriers to settlement.³²

The bottom line, for this discussion, is that “self-determination” is *not* a *sine qua non* of the Individualist worldview, but only one device for achieving its ultimate value and aim—optimal satisfaction of human needs. When self-determination fails to achieve or even obstructs that ultimate aim, it can and should be replaced by another device that will work better to achieve it.³³ In the Individualist worldview, therefore, self-determination is an instrumental but not a fundamental value. The underlying aim of satisfaction in this worldview

30. See Kolb & Kressel, *supra* note 10 (explaining how directive mediator interventions are justified by this logic); see generally ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (3d ed. 2011) (using this term to describe optimal outcomes obtained by “integrative” rather than “distributive” negotiation methods).

31. See, e.g., Alan Randall, *The Problem of Market Failure*, 23 NAT. RES. J. 131 (1983); Joseph E. Stiglitz, *The Invisible Hand and Modern Welfare Economics*, National Bureau of Economic Research Working Paper 3641 (1991).

32. See Della Noce et al., *supra* note 19, at 48–49 (arguing that theory underlying facilitative mediation is essentially economics-based, although facilitative mediation scholars and practitioners rarely acknowledge this).

33. See Robert A. Baruch Bush & Peter F. Miller, *Hiding in Plain Sight: Mediation, Client-Centered Practice, and the Value of Human Agency*, 35 OHIO ST. J. ON DISP. RESOL. 591, 614–19, 618 n.73 (2020) (arguing that if party agency or self-determination is seen only as an instrument to achieve some other goal, such as satisfaction or justice, it can be overridden if it “doesn’t work,” which not the case if it is seen as a goal in itself). In mediation, the “other device” is found in a variety of controlling interventions by the mediator as described above. See *supra* text accompanying notes 7–9.

explains why the principle of party self-determination can be set aside in practice, even though in theory it is called “fundamental.”

B. *The Value Held Supreme in the Relational Worldview*

The *Relational* worldview, by contrast to the above, posits that the highest value in life is not satisfaction of human needs, *but human moral growth and elevation*. As used here, the term “moral” refers to the realm of human life in which a person encounters and chooses how to engage with another person, whether in conflict or otherwise. Developmental psychologist Carol Gilligan and other scholars call this the “moral domain”³⁴ and study the nature of human moral behavior. For these scholars,³⁵ human life is a world of constant moral encounter between oneself and others, which offers the potential for balancing *regard for self* and *regard for other*. In these encounters, in Gilligan’s view, a strong stance of self-regard privileges one’s own autonomy and rights, while a strong stance of other-regard privileges relationship and caring for others.³⁶ But each stance by itself is seen as a partial and truncated form of living, producing either self-centeredness

34. See CAROL GILLIGAN, IN A DIFFERENT VOICE 1–4 (1982) [hereinafter, VOICE]; Carol Gilligan, *Prologue: Adolescent Development Reconsidered*, in MAPPING THE MORAL DOMAIN vii (C. Gilligan, J.V. Ward & J.M. Taylor eds., 1988).

35. See, e.g., VOICE, *supra* note 34; PROMISE 2, *supra* note 13, at 252–55 (citing multiple scholars whose work reflects this worldview in some degree, although not always labelling the underlying value as moral growth); see, e.g., Robert P. Burns, *Some Ethical Issues Surrounding Mediation*, 70 FORDHAM L. REV. 691, 709–10 (2001) (explaining the value of what Burns calls “moral conversation” or “moral discourse” that reflects the Relational worldview); Joel F. Handler, *Dependent People, The State, and the Modern / Postmodern Search for The Dialogic Community*, 35 UCLA L. REV. 999, 1070 (1987) (describing a view emerging in different fields that Handler calls “dialogism,” which parallels the Relational worldview in many ways); MICHAEL M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982) (presenting and explaining the “communitarian political philosophy” of joining self and other in community, that reflects the Relational worldview). Some suggest that “postmodernism” in general reflects the Relational worldview. See Robin Bzrobahaty & Erik Cleven, *Comments* (unpublished transcript) (on file with author). The Author questions that view, but this is a subject beyond the scope of this Article. Others comment that this worldview is also reflected in the work of certain religious philosophers, including Martin Buber and Emmanuel Levinas. See, e.g., Martin Buber, *Dialogue*, in BETWEEN MAN AND MAN 1 (Ronald Gregor Smith trans., 2003); EMMANUEL LEVINAS, THE LEVINAS READER (Seán Hand ed., 1989). While potentially illuminating, this connection is also beyond the scope of the present Article.

36. See, e.g., VOICE, *supra* note 34, at 19–21, 37–39. Gilligan labeled these the “morality of rights” and the “morality of connection,” *id.* at 19, and they have also been called the “voice of justice” and the “voice of care.” Gilligan’s identification of these two orientations arose originally from her research of girls’ and women’s sense of moral dilemmas, but she ultimately sees the two as general orientations rather than gender differences. Moreover, she argues that they can and should be integrated in human moral development. See *infra* notes 37–38 and accompanying text.

or self-submergence. Wholesome human morality and life involves the integration of both autonomy *and* connection, strength *and* compassion.³⁷

In the Relational worldview, achieving this kind of behavior is the highest value in human life, which could be called “relationality” or moral growth/maturity.³⁸ Consequently, acting morally or “relationally” is not evidenced by reaching a certain *outcome* favoring either self or other, nor by persisting in every *relationship* rather than ending it; rather, it is expressed in the *process* of always *giving regard or consideration to both self and other* in deciding what to do, whatever the situation and whatever outcome emerges. The assumption is that this process of dual regard is a freely chosen mode of behavior, not the product of any kind of external control or influence, because *forced* “regard” (for self or other) is not genuine regard at all.³⁹ Lastly, the elevated moral quality of dual regard is seen in its contrast to the opposite possibility—disregard of self, disregard of other, or both.

In sum, the morally mature human being has the capacity and desire for *giving regard to both self and other*, whatever the situation.⁴⁰

37. See VOICE, *supra* note 34, at 61 (“responsiveness to self and responsiveness to others are connected rather than opposed”), 169 (“[there is] an entirely different (and more advanced) approach to living...in which affiliation is valued as highly as...self-enhancement.... We can begin to envision a changed understanding of human development and a more generative view of human life”), 174; PROMISE 2, *supra* note 13, at 59–62, 252–56 (citing numerous sources that suggest a similar view of mature human morality). Gilligan’s work had a profound impact on the author of this Article and is indeed one of the core influences on his role in developing the transformative mediation approach. Gilligan connects this view with what she calls a “biblical” orientation toward relationships, and indeed one of the best-known passages within the Jewish tradition is a teaching of the sage Hillel that “If I am not for myself who will be for me? But if I am only for myself what am I?”, in which the integration of regard for self and regard for other is stated as a guiding moral principle. ETHICS OF THE FATHERS 4:7 (Yosef Marcus ed., 2009).

38. Understood in this way, relationality does not mean always putting relationships first, but rather always *giving consideration* to both the self and the others with whom it is interacting. The term “relational” as used by others has a significantly different meaning. See, e.g., SHEILA McNAMEE & KENNETH J. GERGEN, RELATIONAL RESPONSIBILITY: RESOURCES FOR SUSTAINABLE DIALOGUE (1999) (suggesting in part that relational actors always privilege relationships and find ways to continue rather than end them when difficulties arise, and connecting this stance with a social constructionist view of the human being *pe se*, according to which identify itself is not fixed or prior but rather constructed in and by relationships). Bush and Folger, in earlier work, seem to have reflected this view, although it does not fit well with the view presented here. See, e.g., Della Noce et al., *supra* note 19, at 50–51 & n.49. Regarding the meaning of the term “moral growth” as used throughout this discussion, see *infra* note 41.

39. This would apply to the many forms of persuasion used by intervenors—such as “role reversal”—to induce or pressure parties to offer regard to each other.

40. Hence the term “relational,” as distinct from the meaning in others’ usage. See *supra* note 38. The term as used here refers specifically to the behavior of *relating*

It is the attainment of this kind of behavior that is the underlying value of this worldview—a morally inclusive and elevated way of living. The value on which the worldview is based is not *the satisfaction people get* in life—but *the way people act and relate*, to themselves and each other. To make this formulation more concrete: *Regard for self* does not only (or necessarily) mean acting in one’s self-interest. It means acting with full-fledged agency, manifesting one’s highest capacities and strengths: behaving with clarity rather than confusion, confidence rather than doubt, decisiveness rather than uncertainty, resourcefulness rather than helplessness. Likewise, *regard for other* does not only (or necessarily) mean meeting another’s needs. It means treating the other with full positive regard: responding to them with attentiveness rather than coldness, civility rather than hostility, trust rather than suspicion, empathy rather than unconcern. Regard in both dimensions is a matter of *how one behaves* in the interaction, not *what result* the interaction produces.⁴¹

From all the above, the place of self-determination in this Relational worldview becomes clear. Self-determination is not just an *instrument* for achieving some other value, it is a *value in itself*—one essential part of the ultimate value of acting with dual regard, with integrated strength of self and compassion for other. Specifically, the exercise of self-determination is a manifestation of the higher moral level of strength and agency, compared to weakness and impotence. It is an end in itself, as mediation theorist Joseph Stulberg states: “Making decisions is essential” to being human.⁴² Equally apposite are Holocaust survivor Viktor Frankl’s powerful comments about prisoners making decisions in the concentration camps:

Every day, every hour, offered the opportunity to make a decision, a decision which determined whether you would or would not submit to those powers which threatened to rob you of your

and balancing regard for oneself and regard for other, both in one’s external actions and in one’s internal consideration. See PROMISE 1, *supra* note 11, at 242–44.

41. See PROMISE 2, *supra* note 13, at 54–62; PROMISE 1, at 242–48. In the years since PROMISE 1 was written, this foundational distinction has in some ways become less prominent, and one of the main purposes of this Article is to bring it back into clear focus. *Importantly*, in the view presented here moral “growth” or “development” includes *each* occasion on which a person chooses to include both self and other in consideration. Each such instance represents the choice of a higher moral path, by contrast to a lower one that considers *only* self or *only* other. “Growth,” in this sense, does not require permanent or all-encompassing change of character. In the moral realm, each upward move “counts” as growth, because each such move requires moral effort to make, regardless of what comes before or after.

42. Joseph B. Stulberg, *Mediation and Justice: What Standards Govern?*, 6 CARDOZO J. CONFLICT RESOL. 213, 230 (2005).

very self, your inner freedom.... A human being is not one thing among others; *things* determine each other, but *man* is ultimately self-determining....⁴³

In other words, self-determination is the practice of *agency*, which is a higher level of moral behavior, by contrast to submission to (or reliance on) the influence or control of others.

It is true that the exercise of self-determination *produces* strength, which seems to cast it as an instrument. However, it is an *essential* instrument, because any *external* control or influence would reinforce weakness rather than building strength. And without the strength that self-determination builds, there will be no opening of self to other, and therefore no integrating of regard for self with regard for other—no moral growth.⁴⁴

In short, in the Relational worldview self-determination is essential, not instrumental.⁴⁵ It is not simply a tool to be set aside if it “doesn’t work,” as the satisfaction-based Individualist worldview sees it.⁴⁶ That is why the emphasis put on self-determination here is very

43. VICTOR FRANKL, *MAN’S SEARCH FOR MEANING* 133–34 (2006). *But see* ROBERT SAPOLSKY, *DETERMINED: A SCIENCE OF LIFE WITHOUT FREE WILL* (2023) (arguing that our choices are determined by genetics, experience, and environment, and that human free will is an illusion). The debate over the reality of free will is longstanding and ongoing; however, it is beyond the scope of this Article.

44. *See* PROMISE 2, *supra* note 13, at 67–68 (“People are unlikely to extend themselves to others when they are still feeling vulnerable and unstable.... In the graphic representation of conflict transformation one might draw a third arrow moving diagonally back from ‘strength’ to ‘self-absorption’.... The diagonal represents the dynamic of an empowerment shift prompting a recognition shift, the virtuous circle discussed earlier.”)

45. Of course, exercising self-determination is not the *only* essential element at the core of this worldview. It is only through being balanced with compassion and care that self-determination produces full moral maturity. *See* FRANKL, *supra* note 43 (recognizing that the moral quality of the decisions made depends ultimately on whether they showed regard for others: “What [man] becomes – within the limits of endowment and environment – he has made out of himself.... In the concentration camps ... we watched and witnessed some of our comrades behave like swine while others behaved like saints. Man has both potentialities within himself; which one is actualized depends on decisions but not on conditions.” FRANKL, *supra* note 43); *see also* Robin Brzobohatý, *Taking Recognition Seriously: Social Ontology of Transformative Practice*, in *RECENT DEVELOPMENTS IN TRANSFORMATIVE THEORY AND PRACTICE* (forthcoming 2026) (explaining the basis of recognition/compassion in mature morality).

46. *See* Bush & Miller, *supra* note 33 and accompanying text. In that earlier article, Bush and Miller argue that the primacy of self-determination is based on its expression of agency—which they claim is itself an essential value in human life. That argument is distinct from the argument made in this Article that the primacy of self-determination stems from its being an essential element in moral growth and balance. The two claims are compatible but distinct, and the one made here is more consistent with the original vision of the transformative approach.

different from the Individualist view.⁴⁷ In the Individualist worldview self-determination is important but *dispensable* if need be; in the Relational worldview it is *indispensable* and *essential*. Of course, self-determination is not the *only* essential element at the core of this worldview; it is through being joined to regard for other that it produces full moral maturity.

To link this discussion directly to transformative mediation theory: the morality of dual regard for self and other is precisely what is meant by “transformation” in the term “transformative mediation” — a change in human interaction from a lower to a higher level of behavior, as regards the parties’ treatment of *both* self *and* other, and the resultant moral quality of their interaction.⁴⁸ In mediation based on the Relational worldview, moral growth is expressed by parties shifting *from* weakness and self-absorption, *to* strength and compassion.⁴⁹ Moral growth is evident in this shift because regard for *both* self *and* other is greater in the latter behaviors than in the former. Moral growth is also evident because in the latter behaviors *both* elements (regard for self and regard for other) are included and *related* to each other. Indeed, the stated goal of transformative mediation is moral growth in precisely this sense: the choice by parties to give consideration to both self and other in their interaction, *dual regard*, whatever the outcome.

Therefore, because transformative mediation is based firmly on the Relational worldview, it requires a commitment to nondirective mediator practices—because directive practices attenuate the essential element of self-determination, block the shift to positive and constructive interaction, and undermine the achievement of dual regard and moral growth. When mediators are willing to override self-determination, it is because their practices rest on a *different*, Individualist worldview that places supreme value on other values like satisfaction, or justice, or harmony—rather than moral growth.⁵⁰ When mediators strongly

47. Therefore, despite self-determination seeming to be an “Individualist” construct, it is actually central to the Relational worldview and does not detract from the character of that worldview; rather, understood as explained here, the principle of self-determination helps to constitute it.

48. See *supra* note 36–37 and accompanying text; see also *infra* notes 40–49 and accompanying text; see generally PROMISE 1, *supra* note 11, at 230–34, 242–48.

49. See PROMISE 2, *supra* note 13, at 49–50, 54–55. This shift can also be characterized in other ways, e.g., moving from helplessness and hatefulness, to competence and caring; from anomie and antipathy, to agency and empathy. Recognizing and identifying these shifts is a key subject in actual transformative mediation training courses. And as explained above, see *supra* note 41, each such shift represents “moral growth.”

50. See *supra* text accompanying notes 27–30. This is true even for other approaches to mediation and intervention that appear to be aimed at moral growth, such as Restorative Justice (RJ) processes. Thus, while RJ processes espouse seemingly moral goals and values such as forgiveness, healing, peace and reconciliation, they nevertheless accept or endorse achieving those goals through methods that ignore or

adhere to the “fundamental principle” of self-determination, as they do in the transformative approach, it is because their practices rest on a Relational worldview that places supreme value on achieving moral growth, even when doing so may override other important values. In short, transformative mediation theory valorizes moral growth; transformative mediation practice supports it. Both are clear manifestations of the Relational worldview.

C. *The Impact of the Divergence in Worldviews.*

The overarching point that emerges from the above discussion is that the different treatment of self-determination in mediation—as fundamental or not, dispensable or indispensable—rests on deeply rooted worldviews, and those worldviews are different for most facilitative and transformative practitioners. To answer the question posed at the outset of the Article, these different underlying worldviews explain and justify the very different practices of mediators regarding party self-determination. *Both* sets of practices make sense—facilitative and transformative—in terms of the worldview that underlies each. Viewed from within its underlying worldview, each approach to self-determination can be seen as legitimate and justifiable. Neither can be called inappropriate or unethical.⁵¹

At the same time, as also stated at the outset of this Article, the divergent approaches to self-determination in mediation do indeed reflect a larger divergence of underlying worldviews in the broader society. How to respond to that divergence is a significant challenge, especially since the divergence is also reflected in other arenas quite remote from the field of mediation. The following Part offers an example of such a divergence, remote from mediation, that also flows from the different worldviews just discussed.

undermine party self-determination. See, e.g., Jennifer Michelle Cunha, *Family Group Conferences: Healing the Wounds of Juvenile Property Crime in New Zealand and the United States*, 13 EMORY INT'L L. REV. 283, 301–09 (1999); see generally *Toolbox*, *supra* note 14, at 271–77. Professor Folger describes RJ and related processes as the “harmony” model of mediation, in which the “moral” goal of achieving harmony and peace among the parties regularly overrides party self-determination. Joseph P. Folger, *Harmony and Transformative Mediation Practice: Sustaining Ideological Differences in Purpose and Practice*, 84 NOTRE DAME L. REV. 823 (2008). In short, other approaches to mediation do not share the “dual regard” definition of moral growth/maturity as explained in this Article, in which self-determination is an essential element. Therefore, they can and do set aside self-determination to achieve other “moral” goals.

51. See *Pluralistic*, *supra* note 1, at 531–35 (showing how different mediator ethics codes can coexist and be applied separately to mediators following different approaches to practice).

III. A SURPRISING PARALLEL: PERSONAL INJURY LAW AND THE TWO
WORLDVIEWS

It may seem surprising, in an article about mediation, to introduce a discussion of the law of personal injury or “torts” —the rules of liability for accidentally caused injury. But connections found between different arenas often reveal broader patterns. This is the reason for turning here to the law of “negligence,” because the insights revealed by doing so help enrich the above discussion of the different treatments of self-determination in mediation, and their underlying basis in divergent worldviews.

A. *Current Doctrine: The Negligence Rule*

For much of the past 50 years, legal scholars have maintained that the rule of liability for negligently caused injury is based largely on a “deterrence” rationale, i.e., that law should function to deter the infliction of avoidable injury.⁵² Thus liability is imposed, and compensation awarded, only when an injury could have been avoided by “reasonable or due care.” Otherwise the injurer’s conduct is deemed “faultless,” and there is no liability for causation of injury alone, without fault.⁵³ The value served by this rule of liability only for fault, according to most scholars, is the “efficient” use of society’s limited resources in order to deter waste and maximize societal welfare.⁵⁴ Simply put, where

52. See, e.g., Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972). Beginning with this much-cited article, Posner became the leading exponent of “law and economics” theory, which has offered economics-based explanations for legal rules in many common law fields, including not only torts but contracts, property, and others. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (9th ed. 2014). Posner and others note that establishing liability under the negligence theory requires proving several elements, only one of which goes to the “reasonable person” standard of care expected of the injurer. The discussion here concerns that specific element, which is itself called “negligence.”

53. While the fault principle has dominated for roughly a century, the situation before that was more ambiguous. Some argue that strict liability, or liability without fault, was the common rule early on; some argue that the prior norm was a “no liability” rule effectuated through limitations on duties to others and other legal devices. See Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 959 (1981). Moreover, there are still limited areas in which a rule of strict liability is followed. See Posner, *A Theory of Negligence*, *supra* note 52, at 76; Rabin, *supra*, at 926, 959–60.

54. See Posner, *A Theory of Negligence*, *supra* note 52. Regarding the goal of the negligence rule, Posner famously suggested that “[i]t is time to take a fresh look at the social function of liability for negligent acts. The essential clue, I believe, is provided by Judge Learned Hand’s famous formulation of the negligence standard [in] an attempt to make explicit the standard that the courts had long applied. In a negligence case, Hand said, the judge (or jury) should attempt to measure three things: the magnitude of the loss if an accident occurs; the probability of the accident’s occurring; and the

it would cost more to avoid an accident than to suffer the loss caused by it, tolerating the accident is economically preferable for society as a whole, even if the victim suffers.⁵⁵ In the “Common Law” system followed in the United States, where rules of tort law are generated from prior court decisions or “precedents,” tort scholars have long argued that this kind of economic logic was central to early decisions imposing liability only for failure to exercise “reasonable” or “due” care, or “prudence.” This view of the basis of the so-called “reasonable person standard” is widely accepted today. The value underlying the negligence rule is seen as the achievement of economic efficiency, meaning maximization of societal welfare; and the practical application of the rule involves an economic cost-benefit analysis balancing the benefit of safety against the cost of accident avoidance.⁵⁶

B. *A Novel View of the Negligence Rule*

Recently, however, there has been a significant challenge to this view. Professor Heidi Li Feldman, in an article published in 2000, suggests a reinterpretation of the early court decisions and scholarly commentary that usually defined negligence using terms such as “prudence” and “due [or ordinary] care.”⁵⁷ Her view is that those terms were not meant

burden of taking precautions that would avert it. If the product of the first two terms exceeds the burden of precautions, the failure to take those precautions is negligence. Hand was adumbrating, perhaps unwittingly, an economic meaning of negligence. Discounting (multiplying) the cost of an accident if it occurs by the probability of occurrence yields a measure of the economic benefit to be anticipated from incurring the costs necessary to prevent the accident. The cost of prevention is what Hand meant by the burden of taking precautions against the accident. It may be the cost of installing safety equipment or otherwise making the activity safer, or the benefit forgone by curtailing or eliminating the activity. If the cost of safety measures or of curtailment—whichever cost is lower—exceeds the benefit in accident avoidance to be gained by incurring that cost, society would be better off, in economic terms, to forgo accident prevention.” Posner, *supra*, at 32–33.

55. *See id.* at 33 (“Perhaps, then, the dominant function of the fault system is to generate rules of liability that if followed will bring about, at least approximately, the efficient—the cost-justified—level of accidents and safety.”).

56. *See id.* at 34 (“[T]he judgment of liability depends ultimately on a weighing of costs and benefits.”); *see also* Stephen G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015, 1020 (1994) (characterizing the Hand formula as a “cost-benefit approach” to evaluating negligence). For a good example of a court explicitly using such a cost-benefit analysis, *see* *Andrews v. United Airlines, Inc.*, 24 F.3d 39 (9th Cir. 1994).

57. *See* Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI.-KENT L. REV. 1431, 1441–43 (2000). Feldman points to commentaries by Professor Terry and Professor Seavey, each of which *seems* to define negligence in terms of risk-benefit balancing. *See* Henry T. Terry, *Negligence*, in *SELECTED ESSAYS ON THE LAW OF TORTS* 261, 263–64 (1924); Warren A. Seavey, *Principles of Torts*, 56 HARV. L. REV. 72, 89 (1942); *see also* *Brown v. Kendall*, 60 Mass. (6 Cush) 292 (1850) (generally recognized as one of the first court decisions defining negligent conduct and

to imply economic reasoning or “risk-benefit” balancing at all. Rather, she argues that in the context of the period when they were decided, the early courts and commentators meant something quite different by this language. By *prudence*, according to Feldman, the courts and commentators meant the exercise of the “virtue” that classical philosophers like Aristotle called “practical wisdom,” in order to discern and capture opportunities to advance *one’s own interests and prospects*.⁵⁸ At the same time, the concept of “due care” implied the virtue of *benevolence toward others* who might be affected by an actor’s conduct in pursuit of his/her own interests.⁵⁹ Taking these terms together, Feldman argues, the early courts and commentators were defining negligence as the failure to act *virtuously* by balancing prudence and benevolence—concern for self and consideration for others—in deciding whether and how to undertake a given course of action.⁶⁰

In other words, rather than a weighing of the *economic* impacts of conduct, Feldman argues, the early courts and scholars saw this balance as a *moral* one, demanding and representing the expression of “virtue” in human conduct. And the intended function of tort law, in Feldman’s view, was not to deter conduct that was inefficient in *economic* terms, but rather to induce conduct that was virtuous in *moral* terms. Put differently, the goal of the law was not to produce maximum satisfaction or social utility, but instead to inculcate virtue in actors, and thereby produce virtuous citizens and a virtuous society. Feldman’s moral view of the basis of tort law, in short, is wholly different from the conventional economic view. Moreover, for Feldman, the meaning of virtue as a basis for tort law is essentially the same as the meaning of moral growth as the basis for mediation practice—the balancing and integration of regard for self and regard for other, which are reflected in the balance of prudence and benevolence in tort law.⁶¹

doing so in terms of the failure to use “ordinary care”). Feldman argues that the language used by the commentators and courts was not meant to imply economic reasoning at all.

58. See Feldman, *supra* note 57, at 1441–43 (citing ARISTOTLE, THE BASIC WORKS OF ARISTOTLE 1026 (Richard McKeon ed., 1941)).

59. See *id.* at 1444–46.

60. *Id.* at 1439 (“A prudent person sees opportunities for betterment or gain and ways to realize those opportunities. A duly careful person notices his own and others’ vulnerability to injury that he might inadvertently cause, and takes steps to reduce that vulnerability. A person who is both prudent and duly careful is simultaneously sensitive to opportunities for gain and to reducing the risk of injury to others and himself.”). Connecting this to the central torts concept of the “reasonable person standard,” Feldman views “reasonableness” as a key trait that human beings use to reason about risks and benefits or opportunities, but she does not focus on it in the cited article. *Id.* at 1432 & n.4.

61. See *supra* text accompanying notes 39–42.

C. *The Parallel with Mediation Theory*

It is here that the parallel with the earlier discussion of mediation emerges. In that discussion, it was shown that the conventional approach to mediation practice is based on the Individualist worldview in which the supreme value is optimal satisfaction of human needs; while the transformative approach is based on the Relational worldview in which the supreme value is moral growth that includes dual regard for both self and other. This divergence between the two mediation approaches, and the worldviews and ultimate values underlying each, is strikingly similar to the contrast Feldman makes between the conventional economic view of the negligence rule, and what she suggests are the virtue-based principles of negligence liability originally intended by the early court decisions. The cost-benefit calculus of the modern reasonable person standard rests on an economic rationale that expresses the Individualist worldview and the satisfaction value.⁶² But according to Feldman, a truer interpretation of the early courts' and scholars' language rests on a "virtue ethics" rationale that expresses the Relational worldview and the value of moral integration.⁶³ This parallel supports the argument made above, that divergent approaches to law and law-related processes reflect a larger divergence in the underlying worldviews on which these principles and processes are based.

In a further echo of the divergence of mediation practice and premises, Feldman sketches out the analysis that courts and juries would be asked to undertake under a virtue ethics standard of care.⁶⁴ In current law, juries and courts apply an algebraic "calculus of risk" weighing the social costs and benefits of given conduct.⁶⁵ Under Feldman's "virtue" test, the jury would be asked to determine negligence by

62. See Feldman, *supra* note 57, at 1433; see also *supra* text accompanying notes 27–33.

63. See *id.* at 1434, 1439–43, 1451 ("[T]he basic claim stands: issues of justice and efficiency have dominated tort theory of the late twentieth century, with the result that tort theorists have not attended to the virtues of prudence and due care for other people's safety, the virtues specified in the tort law's actual negligence standard."). See also *supra* text accompanying notes 34–39.

64. See Feldman, *supra* note 57, at 1462–64. Interestingly, in Bush and Folger's original account of the "value of transformation" in the mediation context, they illustrated the "moral balancing" at the heart of that value by giving examples of actual people who personified this kind of "virtuous" behavior—balancing regard for self and regard for other. Examples included tennis player Arthur Ashe, civil rights leader Martin Luther King, and Holocaust rescue hero Raoul Wallenberg. In other words, they identified "virtuous" behavior by citing actual persons as examples. See PROMISE 1, *supra* note 11, at 230–34.

65. See *supra* note 55 and accompanying text.

employing an “imaginative exercise.” In that exercise, the jury would imagine an ideal person of virtuous character, and then ask how that person would act, balancing prudence and benevolence, in the situation presented. The standard would remain fact-based and concrete, but the evaluative rubric would be moral and virtue-based rather than economic. In all respects, the foundation of negligence law would shift from economic measures to the assessment of conduct in terms of human morality and virtue. In keeping with this shift, the practice of lawyers would necessarily move away from cost-benefit analysis toward moral narrative, i.e., making cases by presenting courts and juries with “stories” that depict what a virtuous actor would do in a given situation. As with the practices used in mediation, legal argumentation based in the Relational worldview would shift away from a focus on “optimal outcome” and toward a focus on the moral quality of an actor’s conduct.

D. “Virtue Ethics” and the Relational Worldview

Feldman’s recasting of torts principles in moral rather than economic terms is part of a larger movement in legal theory called “virtue jurisprudence,” which seeks to explain and justify legal rules and institutions on the basis of “virtue ethics.”⁶⁶ In this movement, scholars offer new understandings of not only negligence law, but also other legal subjects including criminal law, property law, contract law, and the judicial process. In all of these legal subjects, the “virtue scholars” see the proper function of law and legal institutions as inculcating virtuous conduct rather than promoting economic welfare.⁶⁷ They trace the roots of this theory to Aristotelian philosophy, and they see recent work on legal theory as taking an “aretaic turn” toward the Aristotelian focus on virtue rather than optimal needs satisfaction as the proper goal of the law.⁶⁸

66. See Lawrence B. Solum, *Virtue Jurisprudence: Towards an Aretaic Theory of Law*, in *ARISTOTLE AND THE PHILOSOPHY OF LAW: THEORY, PRACTICE AND JUSTICE 1* (Liesbeth Huppel-Cluysenaer & Nuno M.M.S. Coelho eds., 2013); Lawrence B. Solum, *Virtue Jurisprudence: An Aretaic Theory of Law* (working paper, Oct. 2007 Draft) [hereinafter, Draft].

67. See Colin Farrelly & Lawrence B. Solum, *An Introduction to Aretaic Theories of Law*, in *VIRTUE JURISPRUDENCE 1*, 1–4 (Colin Farrelly & Lawrence B. Solum eds., 2008) (“For virtue jurisprudence, the final end of law is not to maximize preference satisfaction or to protect some set of rights or privileges: the final end of law is ... to enable humans to lead excellent lives....*The fundamental concepts of legal philosophy should not be welfare, efficiency, autonomy, or equality; the fundamental notions of legal theory should be virtue and excellence.*”).

68. See *id.* at 3 (“What is the aretaic turn in legal theory? The word for virtue or excellence in classical Greek was *arête*, from which we derive the English word

The suggestion of this Article is that, as with Feldman's tort theory, virtue ethics and virtue jurisprudence in general express an underlying Relational worldview in which moral growth is the ultimate value. The specific parallel with transformative mediation is not as clear here as in Feldman's alternative negligence theory, because in broader virtue theory, the definition of virtue is itself not always clearly linked to "dual regard for self and other"—the common link between Feldman's work and transformative mediation theory. So, while inculcating virtuous conduct is seen as the proper function of law in virtue jurisprudence, the specific conduct aimed at is conceived and expressed differently by different scholars. It is possible that across the range of definitions of virtue, there is a common theme of moral balance, but tracing that link is beyond the scope of this Article.

IV. FROM INDIVIDUALIST TO RELATIONAL: INDICATIONS OF AN EMERGING PARADIGM SHIFT

Two main conclusions flow from the discussion above, if that discussion is generalized and projected beyond the specific cases of mediation and tort law.⁶⁹ First, it was shown that theory and practice in each of these two law-related fields follow significantly different paths, and the differences in those paths flow from two underlying worldviews—the Individualist and Relational worldviews. Thus, both in mediation theory and practice, and in tort theory and practice, scholars hold very different conceptions of their fields, and practitioners can and do employ very different practices. And the differences within each of these fields, at the levels of theory and practice, stem from different worldviews that prioritize and privilege very different

"aretaic," of, or pertaining to, excellence or virtue. Virtue jurisprudence is one way that legal theory can execute a move already made by moral philosophy and epistemology—the aretaic turn. On one hand, the aretaic turn represents a renewed concern with human excellence as a unifying normative and explanatory concept. On the other hand, the turn towards human excellence is a turn away from the reductive programs of both consequentialist and deontological legal theory." The same shift toward virtue theory can also be found in other scholarly fields such as political science and psychology. In those fields, the shift is not characterized as a shift toward Relational theory as such, but the shift in values is quite similar. *See supra* note 35 and accompanying text.

69. For parallels in professional fields beyond mediation, *see, e.g.*, Bush, *supra* note 8 (lawyering); Robert A. Baruch Bush & Tara West, *Relational Values and Practices in Medical Professions* (unpublished draft) (on file with author) (2024) (doctoring and nursing). For parallels in legal doctrine beyond torts, *see, e.g.*, Avery W. Katz, *Virtue Ethics and Efficient Breach*, 45 SUFFOLK U. L. REV. 777 (2012) (contract law); Eric R. Claeys, *Virtue and Rights in American Property Law*, 94 CORNELL L. REV. 889 (2009); Antony Duff, *Virtue, Vice and Criminal Liability*, in VIRTUE JURISPRUDENCE, *supra* note 66, at 193 (criminal law); *see also supra* note 35 (discussing how the Relational worldview is reflected in yet other fields).

values—either human needs satisfaction, or human moral refinement. The implications of this conclusion are quite significant.

A. *The Challenge of Working in Divided Fields*

At one level, the differences discussed above within each field pose a risk of dividing these fields. They make it challenging to find consensus about what legal rules and law-related institutions should “look like,” what function they should serve for clients and for society, and how they should operate. Indeed, rather than finding consensus, the underlying differences in worldviews make it likely that strong and deep differences will persist about the propriety of particular legal rules, specific institutional structures and policies, ethical standards, professional training, and other crucial questions. This may mean that these fields ultimately experience a kind of split between different paths, such that thinkers and practitioners on each path “do their own thing” and share little in common with those on the other path.

For theorists, this kind of “pluralism” may be not only tolerable but useful, as new insights are developed and old concepts revised. Feldman’s work, for example, and other work suggesting new ways of viewing old and established principles, may help in the development of the common law as a whole. And the same may be true for the impact of transformative conflict theory on the conflict resolution field.⁷⁰ For practitioners, however, this split into two paths is harder to navigate. In torts practice, narrative moral argument has not yet forged a new path for practicing lawyers, distinct from risk-utility analysis under the reasonable person standard. So far, therefore, torts practice remains unified, and it can’t be predicted how legal argumentation may change. But in the mediation field, the emergence of different paths is already under way, and problems already have surfaced.

For mediation practitioners and policymakers, divergence in approaches to mediation stemming from different worldviews presents some thorny practical problems. For example, how can ethical standards be formulated to guide mediators whose work is based on fundamentally different views of the goals of practice? As shown above, the underlying worldviews lead to very different ways of understanding the supposedly “fundamental” obligation to respect party self-determination.⁷¹ If so, there is no uniform standard to guide mediators dealing with situations

70. See *Miller Memo*, *supra* note 8; SIMON & WEST *supra* note 8 (both suggesting that the transformative approach is having a significant influence on mediation practice generally).

71. See *supra* text accompanying notes 27–49.

where other goals might lead them to override party decision-making. Nor is there an overall consensus in the field on how to deal with such ethical questions. The same is true for establishing a common framework and contents for mediator skills training. Although policymakers and regulators agree on the need for such training, how can the required content be generalized when the skills needed for the facilitative approach differ from those needed for the transformative approach,⁷² and these differences stem from the divergent worldviews underlying each, as discussed earlier? As long as the development of the different approaches continues, reflecting the different worldviews, this separation within the field will persist and even widen. Suggestions have been made regarding how to respond to this separation, some of them by this author himself,⁷³ but thus far there is no consensus on a given strategy to address this divergence of paths.

B. *The Possibility of a “Paradigm Shift”*

A second major conclusion—or implication—of this Article is more speculative but perhaps more hopeful, and certainly more important. That is, the discussion of the two fields that were examined—mediation and tort law—revealed that in each field, recent developments reflect a shift in the worldview underlying theory and practice. In the mediation field, that shift is embodied in transformative mediation, which seeks to improve the quality of human interaction, in moral growth terms, rather than solely to reach agreements that provide party satisfaction.⁷⁴ In tort law, the shift is evident in the work of scholars arguing for a reformulation of the negligence rule, and other rules, to focus on inculcating virtue rather than deterring inefficient resource use.⁷⁵ In both fields, the shift points toward a concrete change of worldview in a single direction—away from the Individualist worldview and toward the Relational worldview.

Finding a similar shift in two fields that are quite distinct and even distant from one another arguably reflects the emergence on a larger societal level of greater interest in the Relational worldview. This Article offers at least initial evidence of such broader interest,

72. See Bush, *supra* note 8.

73. See, e.g., *Pluralistic*, *supra* note 1; Bush, *supra* note 6.

74. See *supra* notes 34–42 and accompanying text; see also *Toolbox*, *supra* note 14, at 271–77 (noting that the Restorative Justice approach to mediation also aims to achieve goals beyond getting agreements per se, as do other new approaches such as Understanding-Based Mediation, see *Orbit*, *supra* note 14). But see *supra* note 50 (discussing how these approaches persist in practices that undermine self-determination, because they continue to place other goals above moral growth as defined in this Article).

75. See *supra* text accompanying notes 56–60.

and it suggests the value of searching in other fields for similar shifts. Pursuing that search could be a very meaningful enterprise not just for law-related arenas, but for society in general. Thirty years ago, In *Promise of Mediation*, Bush and Folger argued that the Relational worldview was emerging as a new “paradigm,” and that this new paradigm would represent a positive change in human consciousness, in which moral development would replace self-satisfaction as the highest goal of life.⁷⁶ Others have echoed this hope, suggesting that the Relational worldview presents “an entirely different and more advanced approach to living,” “a changed vision of human development and a more generative view of human life.”⁷⁷ Three decades further on, many are still searching for signs of this wider shift, not only in theory and practice in specific fields, but in underlying ideology and worldviews across society generally.

Bush and Folger also suggested that there may be a symbiotic or reciprocal relationship between concrete changes in specific practices, and broader changes in worldviews.⁷⁸ For example, the adoption of relational practices in mediation could be the *result* of a shift from the Individualist to the Relational worldview, but at the same time it could be one of the factors that collectively *cause* such a shift to gain momentum—even if it involves only a minority of practitioners. Therefore, for those who see this larger shift as a positive phenomenon, joining others in adopting specific “minority” relational practices, as well as developing “minority” relational legal and political theories, could be a way to advance a paradigm shift to the Relational worldview.

Since *Promise 1* was published in 1994, thousands of mediators have been trained in an approach to mediation that focuses on helping parties change negative interactions and relationships by shifting from weakness to strength and from alienation to compassion, supporting moral growth rather than simply seeking agreements.⁷⁹ Those mediators have served many more thousands of parties who likely grew more interested, through their experience in these mediations,

76. See PROMISE 1, *supra* note 11, at 3–4, 253–54 (defining a “paradigm” as a dominant or widely accepted worldview and suggesting that the Relational worldview could be emerging today as a new paradigm).

77. See *supra* note 37.

78. PROMISE 1, *supra* note 11, at 258–59.

79. See Della Noce et al., *supra* note 19, at 52–53 & nn.63–64 (describing the transformative mediation training done for roughly 3,000 mediators as part of the USPS’s nationwide REDRESS workplace mediation program beginning in 1997; and noting the founding of the Institute for the Study of Conflict Transformation in 1999, a nonprofit entity that has sponsored multiple trainings that have reached many hundreds of mediators since then).

in the way they were interacting with each other rather than what needs they might satisfy from resolution of the conflict. The relational experience of those mediations—for both the mediators and their clients—could be having a cumulative impact in moving the participants toward the Relational worldview in their lives in general.⁸⁰ This is one example of how specific relational practices may be adding momentum to a larger shift to the Relational worldview.⁸¹ This Article suggests that it would be very useful to document the type and extent of the Relational impacts that transformative mediation is having, even anecdotally, in the lives of mediators and their clients.

When *Promise of Mediation 1* was first published as part of a series on conflict resolution, series editor and social psychologist Jeffrey Rubin wrote, “In a conflict resolution culture characterized by the importance of reaching settlement, the authors [of *Promise 1*] have the temerity to insist that agreement is a side issue in a more important agenda.”⁸² That agenda, it can be said today, is furthering the paradigm shift explored and exemplified in this Article, which has been emerging in very distinct fields such as mediation and personal injury law, and indeed more widely.⁸³ The analysis of this Article is intended to encourage all those who are interested in gathering more evidence of, and participating in, this larger shift toward the Relational worldview in society generally. It is also intended to strengthen the commitment of mediators who use relational, transformative practices, and encourage them to recognize and appreciate the moral value and impact of the work they are doing.

80. See Robert A. Baruch Bush & Joseph P. Fogler, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO ST. J. ON DISP. RESOL. 1, 47–48 (2012) (suggesting how participation in transformative mediations can have “spillover effects” in the lives of parties afterwards, as implied in the text here).

81. Similar impact might be projected from other widely used approaches that are Relationally oriented, such as Restorative Justice mediation. See *supra* notes 14 and 74. But see *supra* note 50, for clarification that these approaches still allow or encourage the attenuation of self-determination.

82. Jeffrey Z. Rubin, *Foreword*, in PROMISE 1, *supra* note 11, at xi–xii.

83. See *supra* note 35 and accompanying text.