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Ethical Mediation in an Unjust World: Claiming Bias and Negotiating Fairness

Jessica Halperin
CUNY School of Law, jessica.halperin@live.law.cuny.edu

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Erratum

This article was corrected in January 2021 to accurately reflect the author's affiliation with New Mexico Legal Aid.

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ETHICAL MEDIATION IN AN UNJUST WORLD: CLAIMING BIAS AND NEGOTIATING FAIRNESS

Jessica Halperin†

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I. INTRODUCTION

Mediation is continuing to emerge as a highly adaptable and effective method for resolving legal conflicts in the United States. Mediation provides disputants with pathways toward settlement or resolution for a wide variety of conflicts, from divorce to multi-party community-based disputes to the redress of unconstitutional discrimination. Though unique in the myriad benefits it affords participants, mediation has been critiqued by progressive practitioners and legal realist theoreticians, in part for its uncompromising requirement of neutrality in the mediator. Many mediators pursue neutrality because they believe it is the only measure of the fairness of a mediator or mediation. In the context of multidimensional race- and sex-based inequalities in society, however, neutrality is an impossible ideal and notions of "fairness" are complex. This Note inquires whether and how mediators ought to acknowledge bias and attempt to facilitate fair mediations.

Systemic oppression exists in many internalized, interpersonal, institutional, and cultural forms in the United States, and thus too often exists within and between mediations, mediators, and disputants as (unintentional or unwilling) embodiments of, rather than exceptions to, the world around them. Indeed, critics of mediation argue that the informal, individualizing benefits of mediation can also function to isolate, privatize, disaggregate, and moderate claims of collective injustice that, in their view,

† Jessica Halperin is a law clerk with New Mexico Legal Aid, a Unitarian Universalist minister, and a 2020 graduate of the City University of New York School of Law. This article was corrected in January 2021 to accurately reflect the author's affiliation with New Mexico Legal Aid.

would have been more fully addressed both on the interpersonal and societal levels by then-emerging progressive legal doctrines of the 1960s and 1970s.[1]

Much of the criticism mentioned above culminates with a preference for traditional doctrine-based legal processes over mediation. However, this Note departs from the critics' conclusions to find, in the malleable and evolving approaches to mediation, some ways of addressing these critical questions without disposing of the practice wholesale. Mediation can be used to interrupt and address systemic inequality. More so than traditional dualistic settings, such as the adversary legal model or the two-party political system, mediation's capacity to address multi-partied, multi-issued conflicts through "greater, wider and deeper participation in . . . legal decision making" can promote fairness between individuals and in society in general.[2]

In what follows, this Note will first explore questions of bias and neutrality in relation to individual mediators and the mediation process itself. Though the Model Standards of Conduct for Mediators ("Model Standards")[3] assume mediators can be impartial, as the products of their culture and environment, mediators should aspire to awareness of their personal and procedural biases rather than pure neutrality. This Note differentiates between practices of impartiality, neutrality, and avoidance of conflicts of interest, and will argue that, realistically, neutrality is an unhelpful ideal if mediators are ultimately interested in facilitating a fair process.

The second section delves more fully into notions of fairness. It will explore various definitions, differentiate between procedural and substantive conceptualizations of fairness, and take the position that, because actual procedural neutrality is so rare, mediators have some responsibility for the substantive fairness of the agreement crafted between disputants of unequal power.

This Note concludes by highlighting models and interventions that some mediators have used to improve the substantive fairness of their

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[1] *See, e.g.*, Robert A. Baruch Bush & Joseph Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO ST. J. ON DISP. RESOL. 1 (2012) (discussing the potential of mediation to produce "macro-level social justice"); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

[2] Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347, 357 (2005).

[3] AM. ARBITRATION ASS'N, SECTION OF DISPUTE RESOLUTION, AM. BAR ASS'N & ASS'N FOR CONFLICT RESOLUTION, MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), https://perma.cc/TLG2-QT39 [hereinafter MODEL STANDARDS].

mediations, and summarizes the critiques offered herein of the Model Standards.

II. BIAS AND NEUTRALITY IN MEDIATORS

In the field of mediation, impartiality and neutrality are widely referenced as ethical imperatives of the process and facilitator. Theorists have defined mediator impartiality as "freedom from favoritism, bias or prejudice."[4] Neutrality, a distinct but related concept, is the facilitator's practice of impartiality through a symmetrical disengagement with, or distance from, each party's interests or proposals.[5] Impartiality and related concepts are "so central to the mediation process that they have been codified in the Model Standards," which is a highly influential guide that informs the practices of individual mediators and has significantly shaped mediation ethical rules in most states.[6]

For more than 20 years, however, mediators have critiqued these ideals of impartiality and neutrality as unfeasible in a world characterized by social inequality. "Parties and mediators all come to mediation with complex systems of intersecting ideas, experiences, and perspectives that provide the lens through which each individual views the world."[7] Informed by the visible and invisible influences of their education, experience, and culture, absolute objectivity is generally unattainable for disputants and mediators. Having different cultural or personal experiences at the mediation table can be a rich benefit to the process if such diversity is recognized and utilized.

The ideal of neutrality often imposes a barrier to the recognition and utilization of such diversity. "The vision of the lawyer as an objective, detached practitioner of specialized knowledge has permitted us to remain non-self-aware communicators."[8] Mediators tend to come from cultures of privilege—they are disproportionately white, well-educated, and

[4] Michael T. Colatrella Jr., *Informed Consent in Mediation: Promoting Pro Se Parties' Informed Settlement Choice While Honoring the Mediator's Ethical Duties*, 15 CARDOZO J. CONFLICT RESOL. 705, 711 (2014).

[5] *See id.* at 712-13; Omer Shapira, *Conceptions and Perceptions of Fairness in Mediation*, 54 S. TEX. L. REV. 281, 304-05 (2012).

[6] *See* Colatrella, *supra* note 4, at 709.

[7] Susan Oberman, *Mediation Theory vs. Practice: What Are We Really Doing? Re-Solving a Professional Conundrum*, 20 OHIO ST. J. ON DISP. RESOL. 775, 798-99 (2005) (citing John A. Powell, *The Multiple Self: Exploring Between and Beyond Modernity and Postmodernity*, 81 MINN. L. REV. 1481, 1483 (1997)).

[8] Beryl Blaustone, *To Be of Service: The Lawyer's Aware Use of the Human Skills Associated with the Perceptive Self*, 15 J. LEGAL PROF. 241, 257 (1990).

higher-income[9]—and one of the effects of societal privilege is that it allows its holders to ignore or disparage underprivileged experiences or minority viewpoints. Privilege often creates a mirage of objectivity—an assumed universality of those privileged cultures and worldviews.[10] "Moreover, since mediators tend[] to be 'haves' themselves—educated, middle-class, non-minority individuals—they could lack sensitivity to the unfairness that a 'have-not' party might suffer in accepting a settlement induced by the mediator's efforts."[11]

If mediators try to suppress—rather than understand and appreciate—their particular perspective, they run the risk of perpetuating inequality and harm. Psychodynamic, socioeconomic, and political factors contribute to an individual's prejudices, often creating an experience of dissonance when contrasted with expressed public values of fairness, equality, and independent individuality.[12] This tension might make the mediator uncomfortable, though that discomfort may be only one of the many harms caused by their suppressed perspective:

> [Neutrality] hides hundreds of strategic judgments that must be made—each of which can practically affect the benefits achieved by any party. It hides the normative judgments that a mediator must make about what are good and bad agreements under the practical circumstances at hand. And it suggests a technical objectivity, an absence of responsibility, a "good guy" image of the mediator that actually *obscures* not only issues of power and representation, but the mediator's own active influence on the outcomes that may be achieved.[13]

Bias can be expressed in a variety of interpersonal, cultural, and institutional mechanisms, such that even well-meaning mediators may reproduce racist or sexist biases in a number of ways. This might include controlling the physical setting and timing of the mediation; affirming in-

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[9] David A. Hoffman & Katherine Triantafillou, *Cultural and Diversity Issues in Mediation*, *in* MEDIATION: A PRACTICE GUIDE FOR MEDIATORS, LAWYERS, AND OTHER PROFESSIONALS § 8.7 (2013).

[10] *See generally* Tanya Kateri Hernandez, *Comparative Judging of Civil Rights: A Transnational Critical Race Theory Approach*, 63 LA. L. REV. 875 (2003) (asserting that unconscious racism influences judicial conduct, implicating the enforcement of U.S. civil rights laws and other topics).

[11] Bush & Folger, *supra* note 1, at 7-8.

[12] Delgado et al., *supra* note 1, at 1375-83.

[13] John Forester & David Stitzel, *Beyond Neutrality: The Possibilities of Activist Mediation in Public Sector Conflicts*, 5 NEGOT. J. 251, 260 (1989); *see* James R. Coben, *Gollum, Meet Smeagol: A Schizophrenic Rumination on Mediator Values Beyond Self-Determination and Neutrality*, 5 CARDOZO J. CONFLICT RESOL. 65, 73-74 (2004).

terpersonal or positional relationships of power between the parties; identifying agenda issues; choosing or affirming language and communication styles; rewarding certain behavior; moderating a party's demands or requests; and including or excluding participants in the mediation.[14] For example, a mediator who requires that parties communicate calmly may be drawing on a culturally specific perspective about professionalism and respect. Doing so may actually prevent an inchoately angry party from recognizing and articulating mediatable issues, which, beyond damaging the efficacy of the agreement, "may amount to nothing less tha[n] an act of violence."[15] Without minute vigilance to interpersonal, cultural, and institutional dynamics during the mediation, the systems of oppression that exist within and surrounding the process and participants will maintain or deepen inequality between the parties.

Many personal or cultural biases are subconscious or camouflaged as objective reality. A mediator with privilege therefore may never be invited to reckon with the aspects of themselves and their processes that exacerbate power differentials between parties. Even when mediators seek to recognize and monitor their biases, they are often guided by little other than their own self-assessment, likely based on highly subjective indices, such as treating parties with respect or preventing abusive behavior.[16] The mediator should not rely on the disputants to point out the mediator's biases. The emotional labor and potential costs to the party pointing out the mediator's biases are an inappropriate burden for a disputant. Additionally, parties may object to the mediator's most obvious missteps, but typically parties who are unrepresented or unfamiliar with mediation have difficulty identifying or proving a mediator's lack of impartiality or neutrality.[17]

Even if somehow the ideal of neutrality could be embodied by a mediator or in a mediation, the practice of even-handedness may itself be unfair. Given that the significant majority of disputes will involve some disparity of power between the disputants (whether it be racial, gendered, educational, economic, or professional), the "same treatment in circumstances in which the parties are not equal is, in itself, an improper favoritism—or partiality—toward the stronger party."[18] "[W]hen mediators do nothing or 'remain neutral,' the outcome will tend to conform with the

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[14] *See* CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 327-33 (2d ed. 1996); Coben, *supra* note 13, at 75; Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 68 (1995).

[15] Grillo, *supra* note 1, at 1572-73.

[16] Oberman, *supra* note 7, at 799, 802.

[17] *Id.* at 800.

[18] Shapira, *supra* note 5, at 305-06.

dominant and familiar cultural myths."[19] Perhaps a mediation between disputants of identical situations and societal power would benefit from pure neutrality, but a blind evenhandedness toward an imbalance of resources and needs between parties would likely heighten those inequalities. Mediators, by acknowledging in their conduct and procedure an inequality between the parties, might, therefore, act more fairly than they would by adhering to pure neutrality.[20]

Indeed, express recognition of inequality between the parties and the cultural biases of mediators may function to increase the effectiveness and fairness of mediations. The mediator's expressly identified interest in a particular cultural approach to professionalism or fairness is more likely to allow parties to see it clearly and to opt in or out of such approach.[21] Invited thus to recognize and weigh their own cultural narratives, all mediation participants, including the mediator, may be offered an increased self-awareness and respect for each other amidst articulated and legitimized differences, rather than following unspoken mainstream traditions that exacerbate the inequalities of marginalization.

In a world with no power inequality between the parties, no history or culture of oppression through legal or procedural assumptions, and no bias in the mediator or the mediation process, the ideals of impartiality and neutrality might indeed help facilitate a fair process.[22] However, the American legal system has, since its founding, helped to create and perpetuate inequalities based on race, gender, and other markers.[23] Neither mediators, nor the culture in which most mediations operate, have been exempted from that heritage. Instead, through the lens of legal realism, mediators can effectuate inherited personal and procedural biases, and thereby too often worsen the inequalities between the parties. In addition, where parties are unequal in any substantive way, purely equal treatment by the mediator is its own bias. As will be investigated in the following section, mediators concerned with the fairness of the procedure may see in these realities the possibility of a legitimately ethical practice of disparate treatment.

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[19] Isabelle R. Gunning, *Know Justice, Know Peace: Further Reflections on Justice, Equality and Impartiality in Settlement Oriented and Transformative Mediations*, 5 CARDOZO J. CONFLICT RESOL. 87, 93 (2004).

[20] *See* Shapira, *supra* note 5, at 305-06.

[21] *See* Gunning, *supra* note 19, at 92, 94.

[22] *See* Oberman, *supra* note 7, at 795.

[23] From the Chinese Exclusion Acts and the waves of deportations of Latinx laborers to the institution of slavery, to the crisis of mass incarceration and beyond, the racist history of the United States legal system is undisputed and has not been wholly, or sometimes even partially, rectified by historical or contemporary justice movements or modern decisions by courts and legislatures. *See generally* JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA (3d ed. 2014).

Briefly, it is worth differentiating the avoidance of conflicts of interest from the Model Standards' mandate of neutrality. For example, the Colorado ethical guide for mediators does not require neutrality *per se*, but does require the disclosure of prior existing relationships that would explicitly bias a mediator in the eyes of the parties.[24] Unlike many forms of bias, conflicts of interest arise from conscious, purposeful, and, by definition, memorable conduct, or from a "relationship between a mediator and any mediation participant, whether past or present, personal or professional."[25] Critically, the Model Standards simply require disclosure of "all actual and potential conflicts of interest" such that the mediator may continue their involvement if the parties agree.[26] Regarding the far more nebulous and difficult standard, impartiality, the Model Standards simply require the mediator to withdraw if they are "unable" to be impartial.[27] Differences in treatment by the Model Standards aside, this Note does not intend to conflate the two practices or suggest that mediators are not obligated to disclose prior relevant relationships.

III. FAIRNESS IN MEDIATION

This section explores notions and dynamics of fairness in mediation and asserts that a more active pursuit of substantive fairness is a legitimate ethical choice for mediators. As set out in the Model Standards, many mediators pursue impartiality as an indicator of fair and successful mediations.[28] However, scholars have noted widespread difficulty in evaluating whether a mediation was successful.[29] What criteria should be used and what indices, factors, or goals should be used in those criteria?

> Broadly speaking . . .a mediatory episode can be referred to as successful if it achieves 'fairness,' or 'effectiveness,' or any one or a combination of a plethora of applicable concepts . . . .This creates many problems for anyone wishing to evaluate the effects

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[24] ROBERT E. BENSON, COLORADO AND FEDERAL ARBITRATION LAW AND PRACTICE: A GUIDE TO ARBITRATION, MEDIATION, AND OTHER ADR PROCEDURES § 24.5.3, 24.5.6 (3d ed. 2017).

[25] MODEL STANDARDS Standard III.A. Some scholars have noted cultural and other variations in the identification and impact of conflicts of interest. *See* Carrie Menkel-Meadow, *The Evolving Complexity of Dispute Resolution Ethics,* 30 GEO. J. LEGAL ETHICS 389, 405 (2017); Omer Shapira, *A Critical Assessment of the Model Standard of Conduct for Mediators (2005): Call for Reform*, 100 MARQ. L. REV. 81, 130-32 (2016).

[26] MODEL STANDARDS Standard III.C.

[27] MODEL STANDARDS Standard II.C.

[28] *See id.*; *see also* Jacob Bercovitch, *Mediation Success or Failure: A Search for the Elusive Criteria*, 7 CARDOZO J. CONFLICT RESOL. 289, 291-93 (2007).

[29] *See generally* Bercovitch, *supra* note 28 (noting the nebulous meaning of "success" in mediation).

> of mediation. How do we know justice has been achieved? Who defines it? An observer, a scholar or the parties themselves? And what if they disagree about what constitutes justice or fairness?[30]

Many have sought clarity on these questions by distinguishing between mediation process and outcome, arguing that there are different criteria for each, and sparking a field-wide debate regarding whether mediators ought to be responsible for any notion of outcome fairness, in addition to procedural fairness.[31]

Procedural or "formal" fairness indicators include practices such as evenhandedness, "process neutrality, disputant control," and "consistency with accepted norms."[32] Other scholars highlight the requirement for diligent scheduling and avoidance of conflicts of interest.[33] Some scholars also include indicators such as disputants' access to information and opportunity for self-expression during the mediation itself.[34] However, these concrete practices "mean little to parties in conflict if they themselves do not think the proceedings are fair."[35] The perception of fairness or unfairness, then, is a fluid and subjective standard and likely more important than any more measurable criteria.[36] Perceived fairness has been measured by other standards of mediation success not at issue in this Note, including effectiveness of the agreement, efficiency, and disputant satisfaction.[37] If mediators pursue neutrality simply for procedural fairness, they may be better served by seeking more observable criteria such as satisfaction and effectiveness to measure how procedurally fair their facilitation was, rather than using the vague and difficult standard of neutrality itself.

As distinguished from procedural fairness, "wide" or "outcome" or "substantive" fairness considers the mediation's final agreement in the context of social justice issues in addition to the immediate dynamics between the individual disputants.[38] Substantive fairness takes into account the social contexts, interests, and systems that impact and surround parties and mediators.[39] Scholars have suggested many parameters for evaluating substantive fairness, including equity, unconscionability, legality of the

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[30] *Id.* at 291.

[31] *See id.* at 291-92; *see generally* Gunning, *supra* note 19; Shapira, *supra* note 5.

[32] Bercovitch, *supra* note 28, at 292; *see* Shapira, *supra* note 5, at 284-85.

[33] Shapira, *supra* note 5, at 284.

[34] Bercovitch, *supra* note 28, at 292.

[35] *Id.*

[36] *Id.* at 292-93.

[37] *Id.* at 293-94.

[38] Shapira, *supra* note 5, at 293; Gunning, *supra* note 19, at 88-89; Bercovitch, *supra* note 28, at 293.

[39] *See* Shapira, *supra* note 5, at 293.

agreement, effect on third parties, and benefit to the parties in comparison with their prior position.[40] For example, "empirical studies make clear that if you compare monetary outcomes between mediation and small claims court, minority participants were worse off in mediation. However, minority parties were often quite satisfied with the process and the ability to tell their own story in their own voice."[41] Advocates for substantive justice should be concerned not only with the parties' opportunities for self-expression, but also with the perpetuation of economic inequality effectuated by these mediations.

Because the criteria used to measure substantive fairness are complex and often limited, theorists disagree on whether mediators should be held responsible for the substantive fairness of a mediated agreement. Responding to those who claim responsibility for substantive justice, Joseph Stulberg and others have argued that such interventions would violate the mediator's obligation of neutrality.[42] Stulberg proposes that "[i]f the outcomes are acceptable to the parties, then the process has succeeded," and he equates "party acceptability" with fairness.[43] Regardless of standards or rules embraced by others, Stulberg argues that parties in a mediation "shape the outcome they find acceptable," thus increasing "the probability that the outcome comports with [their] considered judgments about fair treatment."[44] From this perspective, parties will not engage voluntarily, access meaningful decision-making, or consensually relinquish their fundamental liberties should the mediator ostensibly become an arbitrator and impose requirements of justice that do not emanate from the parties themselves.[45] Departing from his more conservative followers, Stulberg does not argue that procedural fairness requires pure fairness, only that the mediator's obligation, and most essential and unique role, is to facilitate a mutually acceptable agreement between the disputants.[46] Stulberg's commitment to that central principle is echoed in the Model Standards' disinclination to place the mediator in any position of judgement as to the fairness of the agreement.[47]

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[40] Shapira, *supra* note 5, at 293; Gunning, *supra* note 19, at 88-89; Bercovitch, *supra* note 28, at 293.

[41] Gunning, *supra* note 19, at 88-89.

[42] Bush & Folger, *supra* note 1, at 11.

[43] Joseph B. Stulberg, *Mediation and Justice: What Standards Govern?*, 6 CARDOZO J. CONFLICT RESOL. 213, 214-15 (2005).

[44] *Id.* at 216-18.

[45] *See id.* at 228.

[46] Bush & Folger, *supra* note 1, at 11 (citing Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 88-91 (1981)).

[47] Colatrella, *supra* note 4, at 714.

In contrast, Lawrence Susskind, Leonard Riskin, and Isabelle R. Gunning, representing "the dominant view in the field," have advocated for increased responsibility for fairness of outcome rather than just a mutually acceptable agreement.[48] In the ethical codes of some states, mediators may be required to pause or end a session when participants are approaching an "unconscionable" agreement or when a participant is "using the mediation process to gain an unfair advantage."[49] This approach has become known as "facilitative," "narrative," or "activist" mediation, and includes strategies to help disadvantaged parties address issues of substantive unfairness and to balance the power between disputants.[50] As discussed above, some progressive legal thinkers have argued against the widespread use of mediation because its individualizing or informal nature can harm parties who would benefit from formal legal tribunals or from alignment with larger movements against injustice. Susskind and his peers have engaged substantively with these critiques, claiming that more actively justice-oriented interventions by mediators can help avoid these pitfalls by engaging with legal standards, opening the mediation to other affected parties, or helping parties to contextualize their conflict in the historical, political, or economic environment.[51]

Though promoting substantive fairness may threaten a mediator's neutrality, making these biases explicit may promote greater, not less, participation by parties:

> [U]sing an intervention technique could certainly create the appearance of bias to one party or another . . . but . . . mediators can be viewed as biased through silence and non-intervention as well. Openly discussing the importance of values like equality and justice as part of the mediation process should work as some mitigation of this.[52]

In addition to nuancing a mediator's relationship with bias, this approach also offers a revision of the Model Standards' requirement of neutrality:

> The real issue is how does the mediator's concern for justice in the outcome [i.e. the mediator's lack of neutrality] interact and

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[48] Bush & Folger, *supra* note 1, at 11-12.

[49] *Id.* at 14-15 (citing MODEL STANDARDS OF PRACTICE FOR FAMILY & DIVORCE MEDIATION, Model Standard XI.A (Ass'n of Family & Conciliation Courts 2000), https://perma.cc/8KA5-CAVG).

[50] Gunning, *supra* note 19, at 89.

[51] Bush & Folger, *supra* note 1, at 11, 21.

[52] Gunning, *supra* note 19, at 92.

> intersect with the mediator's concern for the parties' self-determination? When a mediator considers intervening to prevent bullying, stop lying or provide information in order to increase the chances of a just outcome, it is not at all clear that such interventions violate party self-determination.[53]

In summary, given that a mediator's conduct could evidence bias whether they speak or stay silent—and especially because neutrality is not only elusive, but also a harmful goal—this Note finds that mediators who engage substantively to pursue just outcomes are acting in a responsible, ethical capacity. The Model Standards' call for impartiality and neutrality seems rooted in two honorable principles: the promotion of disputants' self-determination and agency, and the fairness of the process and outcome. However, the most important components of procedural fairness are more effectively considered through the subjective standards of the parties and the efficacy of the agreement, and mediators can honor and engage the agency of disputants by connecting their stories to larger societal contexts, explicitly advocating for values like integrity and justice, and otherwise intervening to promote substantive fairness.

IV. Conclusion

If the goal of the Model Standards' impartiality requirement is the facilitation of a fair process, a more helpful standard would identify resources for mediators' self-reflection and self-evaluation, and require disclosure rather than automatic withdrawal.[54] Given the realities of inequality, bias, and unconscious prejudice, the current Model Standards, if taken at face value, hobble the practice of mediation by requiring withdrawal from every mediation in which there is a cultural, gender, or other demographic difference between any of the disputants and/or the mediator. Given its potential for effective and just resolutions of conflict, the field of mediation ought not be so limited.

Diverging in theory and practice from ideals of neutrality and impartiality, some practitioners have begun to embrace mediation's capacity for addressing substantive fairness. As mentioned above, these practices include mediators disclosing potential cultural and procedural biases; openly discussing values such as equality or justice; ending a process based on the unconscionability of the agreement; or recognizing the con-

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[53] *Id.* at 93.

[54] *See generally* Shapira, *supra* note 5 (leveraging a significant review of mediation literature in support of numerous proposed changes to the Model Standards, including the impartiality principle).

flict's larger contexts of inequality or history. Other mediators have identified innovative interventions that are still only modest interruptions to the process, for example including in an opening statement "a phrase from the more 'value explicit' peacemaker model like, 'affirm that we all have the same need for self-respect, autonomy and pride.'"[55] Mediators have also used a "check-in" to remind the parties to articulate their needs around fairness or justice regarding an aspect of the agreement.[56] Some mediators offer legal and other forms of advice to unrepresented or uninformed parties (or recommend that they seek such information) before reaching any agreement, or even identify specific proposals for the fairness dimensions of the agreement itself.[57] These techniques—which openly address the inequalities between parties and their social or historical contexts, rather than ignoring and exacerbating them in the name of procedural evenhandedness—embody the increasingly common perspective that mediators are responsible for the substantively fair outcomes of their mediations.[58]

This Note affirms that the increasingly common practice of attending to the substantive fairness of an agreement is a legitimate ethical practice of mediation. Engaging with important critics of mediation, mediators who advocate for substantive fairness during mediation take seriously the likelihood of mediator and procedural biases in mediation, and the field's perpetuation of historical inequalities. Because mediators are each endowed with a specific perspective and culture, likely ones which are privileged and falsely universalized, mediators' commitments to neutrality and impartiality actually undercut, rather than ensure, fairness. In combination with ethical principles such as party self-determination, disclosure of conflicts of interest, and other standards of "mediation success" not at issue here, a more realistic engagement with mediator and procedural bias would create significant gains toward an ethic of mediation that is both procedurally and substantively fair. If mediators did more to articulate their own perspectives and address the disparate resources and needs of the disputants, mediation would continue to evolve to effectively meet the needs of disputants and help create more sustainable, effective, and meaningful resolutions to conflicts large and small.

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[55] Gunning, *supra* note 19, at 94.
[56] *Id.* at 95.
[57] Bush & Folger, *supra* note 1, at 13.
[58] *Id*. at 11.