

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

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Abstract

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

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

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I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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reality that underpin cultural differences in cognition⁷—we are identifying commonalities that do not override individual human differences but do shape human ways of “seeing” and “being” in the world.

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

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

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

However, we can also take a compatibilist approach¹⁰ to the question of volition, thinking of it a “desire to self-organize experience and behavior and to have activity be concordant with one’s integrated sense of self”¹¹ that is able to recognize our choices as necessarily imposed upon us by our circumstances and our desires. In accepting that a person’s hopes and desires matter—and contribute to a person acting as they do—it is possible to

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

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

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

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

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