

Bargaining in the Shadow of the Mediator: A Communitarian Theory of Post-Mediation Contracts

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Mediation traditionally has been regarded as a private, extra-legal institution. Recently, however, legal regulation of mediation has evolved. Yet, under the conventional private approach, mediation law focuses almost exclusively on the mediator-parties relations, and leaves the internal relationship between the mediating parties and the post-mediation contract to be governed by conventional contract law.

In this article we challenge the conventional private, contractual approaches to mediation and advance, in their stead, an innovative communitarian theory of mediation that focuses not only on the mediation process, but also on the post-mediation contracts. Drawing on insights from social psychology and public policy, our analysis uncovers the substantial public components of mediation. We show that mediating parties perceive mediation as a community act that affects their self-identity as community members. We thus argue that the legal encouragement of mediation should be accompanied by the appropriate mechanisms to ensure procedural justice as well as fair outcomes.

Based on this communitarian theory, the article develops a new mediation regime designed to preserve mediation as an institution that is different from court litigation while preventing it from becoming a site of exploitation and injustice. The communitarian regime encompasses not only the mediator-parties' relationship but also the internal relationship between the mediating parties, thus offering a unique contractual regime that subjects mediation's procedural justice as well as its substantive outcomes to judicial review. Furthermore, while prevailing law separates mediators' duties from the internal relationship between the mediating parties, under the proposed regime, a violation of mediation law by the mediator could impact the legal validity of the entire mediation process, including the post-mediation contract.

The article also addresses, and then rejects, the standard objections to judicial review, which raise concerns that judicial review harms mediations' confidentiality and finality, thereby increasing their cost and discouraging litigants from participating in mediation. We propose a novel mechanism of optional ex ante substantive court approval of post-mediation contracts, demonstrating that, when properly used, this

mechanism together with the ex post special contractual regime are likely to enhance parties' willingness to participate in mediation.

I. INTRODUCTION

Over the past few decades, mediation has become a central tool of dispute resolution.¹ Traditionally, mediation was regarded as a private, extra-legal procedure. Recently, however, legal scholars have partially recognized the state's public responsibility to ensure that mediation proceedings, especially court-annexed mediation, are conducted in a fair and just manner,²

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¹ In a recent survey, data suggests that the trend today is definitely towards mediation with approximately half of the states having partial or total court-ordered mediation programs. See Peter S. Chantilis, *Mediation U.S.A.*, 26 U. MEM. L. REV. 1031, 1033 (1996). The use of mediation to resolve disputes is so prevalent "that litigation is the alternative way to resolve a dispute." See *id.* at 1034 (citing Roger Fisher, Comments, Harvard Negot. Workshop). In Florida in 1995, for example, over 75,000 cases were mediated through court-connected mediation. See Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 FLA. ST. U. L. REV. 903, 907 (1997); see also Sharon Press, *Institutionalization of Mediation in Florida: At the Crossroads*, 108 PENN ST. L. REV. 43, 55 (2003) (finding that over 76,000 cases were mediated in court-connected mediation in 2002). It is important to note that Florida's "official" statistics only tell part of the story because of the extensive use of private mediators across the state, even in cases of court-ordered mediation. See generally Earnestine Reshard, *Florida Mediation & Arbitration Programs: A Compendium*, DISP. RESOL. CTR. (19th ed. 2006), available at www.flcourts.org/gen_public/adr/bin/2006Compendium.pdf (gathering statistics on the caseload in court-annexed mediation programs).

² See, e.g., Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949 (2000) (arguing that court-ordered mediation should be subject to the constitutional due-process requirements); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASH. U. L.Q. 787 (2001) (arguing that mediation should offer disputants an experience of procedural justice).

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thus legal regulation of mediation has evolved.³ Yet, the dominant approach still perceives mediation as private and contractual.⁴ Following this dominant approach, mediation law focuses almost exclusively on mediator-party relations,⁵ and leaves both the relationship between the mediating parties and the post-mediation contract to be governed by conventional contract law.⁶

³ See, e.g., UNIFORM MEDIATION ACT §§ 1–17 (2003), available at <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.htm>; see also *infra* Part II.A.

⁴ See James R. Coben, *Gollum, Meet Smeagol: A Schizophrenic Ruminaton on Mediator Values Beyond Self-Determination and Neutrality*, 5 CARDOZO J. CONFLICT RESOL. 65, 66 (2004) (“The evolution of mediation, from empowerment/community roots to corporate/court sustenance, is no surprise given the nation’s journey through the Reagan revolution, the ideology of free markets, and the Supreme Court’s unbridled support for freedom to contract in disputing.”); Stephen N. Subrin, *A Traditionalist Looks at Mediation: It’s Here to Stay and Much Better than I Thought*, 3 NEV. L.J. 196, 215 (2002) (“One should also consider the attraction of the free market theories that have dominated the ideological landscape for the past twenty-five years, and their emphasis on individual agency and choice. Part of the attraction of mediation to lawyers and their clients is that they help choose the mediator, as opposed to being assigned randomly to a judge; they retain power over the final disposition of the dispute; and can leave the mediation at will.”).

⁵ See, e.g., CAL. R. CT. 1620, available at <http://www.mediationtools.com/rules/crc1620.html>; VA. STANDARDS OF ETHICS AND PROF’L RESP. FOR CERTIFIED MEDIATORS, available at <http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/soe.html>; MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), available at <http://www.abanet.org/dispute/news/ModelStandardsofConductforMediatorsfinal05.pdf>; FL. R. CERTIFIED & COURT-APPOINTED MEDIATORS (2000), available at http://www.flcourts.org/gen_public/adr/certrules.shtml; TEX. CIV. PRAC. & REM. CODE ANN. § 154 (Vernon 2005), available at <http://www.statutes.legis.state.tx.us/Docs/CP/htm/CP.154.htm>; see also THE UNIFORM MEDIATION ACT (2003) (dealing almost exclusively with mediation confidentiality and still refers in § 9 to the mediator’s duty to disclose conflicts of interest). See generally Jack M. Sabatino, *ADR as “Litigation Lite”: Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289 (1998) (discussing the procedural aspects of alternative dispute resolution processes); Paula M. Young, *Take It or Leave It. Lump It or Grieve It: Designing Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field*, 21 OHIO ST. J. ON DISP. RESOL. 721 (2006) (reviewing the regulation of mediators and the mechanisms for monitoring their performance).

⁶ Unlike the tendency of current law to ignore the unique features of the post-mediation contract, prevailing mediation law recognizes that the original mediation agreement—i.e., the agreement to go to mediation—should be enforced according to special rules. See generally Amy J. Schmitz, *Confronting ADR Agreements Contract/No*

Furthermore, as the existing law separates mediators' duties and the internal relationship between the mediating parties, at times, even gross violation of mediation law by the mediator has no impact on the legal validity of the post-mediation contract between the parties.⁷ Thus post-mediation contracts are enforced despite claims that the mediator made misrepresentations at the mediation,⁸ violated his neutrality,⁹ or coerced one of the parties into accepting the agreement.¹⁰ Needless to say, when mediation procedure is

Contract Conundrum with Good Faith, 56 DEPAUL L. REV. 55 (2006) (critiquing ambiguity regarding enforceability of ADR agreements).

⁷ See *infra* Part II.B.

⁸ See, e.g., *Brinkerhoff v. Campbell*, 994 P.2d 911 (Wash. Ct. App. 2000) (claiming that the mediator made statements based on mistaken beliefs about the policy limits); *Chitkara v. New York Tel. Co.*, 45 Fed. Appx. 53 (2d Cir. 2002) (post-mediation contract was enforced despite claims of misrepresentation by the mediator during mediation process). In *Chitkara*, the court ruled that

[t]he nature of mediation is such that a mediator's statement regarding the predicted litigation value of a claim, where that prediction is based on a fact that can readily be verified, cannot be relied on by a counseled litigant whose counsel is present at the time the statement is made.

Id. at 55; *Holmes v. Potter*, No. 2:05 cv 447 2007 U.S. Dist. LEXIS 18009 (N.D. Ind. Mar. 12, 2007) (post-mediation contract was approved by the court despite claims of misrepresentation by the mediator while meeting with Holmes). In *Holmes* the court ruled that:

[e]ven assuming that the mediator mistakenly represented to Holmes that this deduction would not be made in his case, and further assuming Holmes could clear the hearsay objections to this evidence, evidence of the mediator's conduct remains outside the scope of admissible evidence because this agreement is not ambiguous.

Id. at *16.

⁹ See, e.g., *Wolf v. Wolf*, No. B177351, 2006 WL 171513 (Cal. Ct. App. Jan. 25, 2006) (enforcing the post-mediation contract despite the fact that the mediator communicated privately only with one of the parties' attorney regarding the agreement details as the other party failed to establish the mediator's awareness of the fact that she had retained an attorney at the time). Even in cases like *Lehrer v. Zwernemann*, 14 S.W.3d 775 (Tex. App. 2000), where the mediator fails to disclose his relationship with a party's counsel, the other party can sue the mediator, but cannot under the existing legal regime challenge the validity of the post-mediation contract.

¹⁰ See, e.g., *In re Marriage of Banks*, 887 S.W.2d 160, 163-64 (Tex. App. 1994) (ruling that duress or undue influence can suffice to set aside a contract, but it is well-established that the action must originate from one of the parties to the contract, for courts will not invalidate contracts on grounds of duress when the alleged duress claim is made by a third person who has no involvement with the opposite party to the contract). The courts will, however, sometimes allow the nullification of an agreement in light of the mediator's conduct. See, e.g., *Vitakis-Valchine v. Valchine*, 793 So. 2d 1094 (Fla.

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followed, the post-mediation contract is enforced according to regular contract doctrines,¹¹ without special review of parties' reciprocal conduct or substantive scrutiny of the contract's contents.¹²

In contrast with the private conception of mediation, this article proposes a communitarian theory of mediation and post-mediation contracts. Drawing on insights from social psychology and public policy, our analysis uncovers the substantial public components of mediation. The social psychology claim is based on innovative theories dealing with the individual's identity in a group, particularly group value and interactional theories of procedural justice,¹³ and on empirical studies that focus specifically on the mediation process.¹⁴ Drawing on these theories and studies, we argue that in certain

Dist. Ct. App. 2001). Such instances, however, are still far and few between and there are no over-arching normative framework to give them force. *See also infra* Part IV.B.4.

¹¹ *See, e.g.,* Patel v. Ashco Enter., Inc., 711 So. 2d 239, 240 (Fla. Dist. Ct. App. 1998) ("While a settlement agreement may be a basis on which a judgment may be entered, it is also a contract between the parties, the enforceability of which is governed by the laws of contract."); *see also* Bateski v. Ransom, 658 So. 2d 630, 631 (Fla. Dist. Ct. App. 1995) ("Settlement agreements are governed by the laws of contracts . . ."). *But see* Peter N. Thompson, *Enforcing Rights Generated in Court-Connected Mediation—Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509, 550–55 (2004) (claiming that a subjective law should be applied to post-mediation contracts, which would reflect the true will of the parties and give effect to their self-determination, in contrast to classic contract law, which is based on objective tests); Steven Weller, *Court Enforcement of Mediated Agreements: Should Contract Law Be Applied?*, 31 JUDGES J. 13, 38–39 (1992) (proposing a different way of understanding the post-mediation contract due to mediation confidentiality and the presence of the mediator at the negotiations); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARVARD NEGOT. L. REV. 1, 86–92 (2001) (claiming that given the concern of improper conduct on the part of the mediator, which will prevent the parties from realizing their self-determination, it is appropriate to set a three-day "cooling-off" period from the point of signature of the mediation agreement until the formulation of an enforceable contract, during which each side can back out of the agreement).

¹² In many instances, the insistence on confidentiality renders public scrutiny of the post-mediation contract even narrower than what is allowed under conventional contract law, as it prevents details of what transpires in the mediation from being revealed. *See infra* Part IV.C.

¹³ *See* E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 230–42 (1988); *see also* Welsh, *supra* note 2 at 827–34 (applying the group value theory to the regulation of mediation); *infra* Part III.A.1.

¹⁴ *See, e.g.,* Tina Nabatchi & Lisa B. Bingham, *Expanding Our Models of Justice in Dispute Resolution: A Field Test of the Contribution of Interactional Justice* (2002), available at <http://ssrn.com/abstract=305205> (suggesting that an interactional model of

types of mediations, especially in court-annexed mediation, the mediator is perceived as a community representative. The presence of a mediator thus turns mediation into a public procedure in the eyes of the participants. Accordingly, mediating parties do not perceive mediation processes and outcomes as a private matter between disputants; rather, the mediation substantially affects their personal identity and sense of belonging within the general community.¹⁵ We further argue that full awareness of the impact of mediation on the parties' social identity should result in comprehensive regulation that encompasses not only the mediation proceedings and mediator-parties relations but also the post-mediation contract.

The public policy analysis adds another dimension to the communitarian vision of mediation in arguing that not only from the psychological-subjective perspective but also from objective public policy viewpoint, mediation involves substantive public components. We argue that public intervention in mediation, and, in particular, the law's promotion and validation of the proceeding, should lead to the state's shouldering moral responsibility for the fairness of the mediation process and its outcomes. Thus, we maintain that severe violation of the mediation rules by the mediator undermines the entire moral basis of the mediation, and hence both the process and its outcomes should be annulled. Furthermore, we assert that the modern regulation of the procedure of mediation¹⁶ is not sufficient in itself, and must be supplemented by a substantive review of the post-mediation contract fairness in order to prevent exploitation and injustice.

Within the existing law, we show that despite official denial of any link between the mediation process and post-mediation contract in a wide range of cases, the mediation context does in fact influence the legal regulation that governs the relations between the mediating parties. Unfortunately this impact takes an undesirable path, narrowing the legal monitoring of the parties' relationship and the mediation outcome, instead of deepening public supervision of the post-mediation contract. At times, for example, mediation confidentiality has prevented parties from making claims that are admissible

justice, which includes measures of empowerment and recognition, can explain participants' satisfaction with mediation); *see also infra* Part III.B.1.(b).

¹⁵ A few recent studies have revealed the importance of these theories to the regulation of mediation. *See, e.g.*, Welsh, *supra* note 2. The existing approaches apply those theories only to the procedural aspects of mediation and to the mediator-parties relationship.

¹⁶ *See supra* note 5.

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under conventional contract law, such as claims of bad faith,¹⁷ mistake, or misrepresentation as grounds for nullifying the post-mediation contract.¹⁸

Based on the communitarian theory, the article develops a detailed regulatory regime. Our proposed regulation regime translates procedural justice principles (such as informed consent, voice, respect, trust, and impartiality) into enforceable legal norms. Unlike existing regulation, the communitarian regime covers not only the mediator-parties' relationship but also the internal relationship between the mediating parties, thus offering a special contractual law regime that governs the post-mediation contract. This special contractual regime subjects the mediation process as well as its substantive outcomes to judicial review according to the merits of mediation. Furthermore, while existing law separates mediators' duties from the internal relationship between the mediating parties, under the proposed regime violation of mediation law by the mediator might impact the validity of the whole mediation, including the post-mediation contract.

We also address and reject the standard objections to judicial review of mediation which raise concerns that judicial review harms mediation confidentiality and finality, thereby increasing its cost and discouraging litigants from participating in mediation. We propose a novel mechanism of optional *ex ante* substantive court approval of post-mediation contracts. We demonstrate that when properly used, the *ex ante* approval mechanisms together with the *ex post* special contractual regime, are likely to enhance parties' willingness to participate in mediation. The article proceeds as follows: Part II describes the conventional approach that holds the post-mediation contract to be a private contract; Part III presents our communitarian conception of mediation, with its innovative approach to the post-mediation contract; and Part IV applies this approach and demonstrates its potential for improving existing law. The article concludes by arguing that the new mediation regime should preserve mediation as an institution that is separate from court litigation while preventing it from becoming a site of exploitation and injustice.

¹⁷ See, e.g., *Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc.*, 25 P.3d 1117, 1119 (Cal. Ct. App. 2003) (ruling that "[n]either a mediator nor a party may reveal communications made during mediation"); *In re Acceptance Ins. Co.*, 33 S.W.3d 443, 451-54 (Tex. Ct. App. 2000) (ruling that "the manner in which participants negotiate should not be disclosed to the trial court.").

¹⁸ See, e.g., *Vick v. Waits*, No. 05-00-01122-CV, 2002 WL 1163842, at *11 (Tex. App. June 4, 2002) ("The Texas ADR Act does not include an exception for claims of fraud, and this Court will not create an exception to the confidentiality provisions of the Texas ADR Act. Because all of the alleged misrepresentations were made during mediation, these statements are confidential . . .").

II. THE CONVENTIONAL APPROACH: THE POST-MEDIATION CONTRACT AS A PRIVATE AGREEMENT

A. *Mediation: Between Privatization and Regulation*

Mediation procedure has evolved considerably in the United States since about 1970.¹⁹ Traditionally, mediation had been conceived of as an extra-legal mechanism for dispute resolution, perhaps even in rivalry with the conventional legal system.²⁰ Ironically, however, despite its underlying extra-legal aspirations, over the last decades, mediation has gained increasing support from the legal system. The legal system, in particular legislatures and courts, has tended to encourage mediation in a number of ways, including through economic²¹ and legal²² incentives, and in many jurisdictions even compelling parties to try to resolve disputes through mediation.²³ The trend towards mediation has often been described as part of a broader privatization process,²⁴ which transfers government functions into private bodies.²⁵ Thus,

¹⁹ See Frank E.A. Sander, *The Future of ADR*, 2000 J. DISP. RESOL. 3, 4 (describing the evolution of ADR processes, especially mediation, over the last decades).

²⁰ See Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 253–61 (1995) (discussing the interrelationship between ADR and adjudication). See generally Michael Alberstein, *Forms of Mediation and Law: Cultures of Dispute Resolution*, 22 OHIO ST. J. ON DISP. RESOL. 321 (2006) (providing a map of mediation models and analyzing the intellectual context from which they emerged); Symposium, *Competing and Complementary Rule Systems: Civil Procedure & ADR*, 80 NOTRE DAME L. REV. 481 (2005).

²¹ See Wayne D. Brazil, *Should Court-Sponsored ADR Survive?*, 21 OHIO ST. J. ON DISP. RESOL. 241, 242–45 (2006) (discussing the reasons for court-sponsored ADR programs).

²² The first and foremost legal incentive is the confidentiality protection extended to information revealed during mediation. See UNIFORM MEDIATION ACT (2003); *infra* Part IV.C.

²³ See Holly A. Streeter-Schaefer, *A Look at Mandated Civil Mediation*, 49 DRAKE L. REV. 367, 372–77 (2001) (reviewing the legislation dealing with mandatory mediation).

²⁴ See, e.g., Chris A. Carr & Michael R. Jencks, *The Privatization of Business and Commercial Dispute Resolution: A Misguided Policy Decision*, 88 KY. L.J. 183 (1999) (criticizing the trend of privatization of business and commercial dispute resolution and suggesting proposals for reform); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1503 (describing the trend toward mediation in modern family law as part of the general privatization trend); Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241 (1996) (emphasizing the negative implications of privatized justice).

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the justification for the legal support of mediation is usually founded on a general ideology that supports privatization, in particular, the need to reinforce the parties' individual autonomy, reliance, and self-determination.²⁶ Additionally, mediation is justified by the general pragmatic consideration of reducing court congestion²⁷ and the psychological advantages of settling disputes by way of mediation rather than judicial ruling.²⁸

At some point, however, this trend towards encouraging mediation also led to concerns over unsuitable mediators²⁹ and inappropriate management of the mediation proceedings.³⁰ Opponents of mediation specifically fear that mediation can result in exploitation of power imbalances between the parties,³¹ externalities,³² and neglect of the court's role to safeguard public interests and promote social values in general.³³

²⁵ See Jody Freeman, Symposium, *Public Values in an Era of Privatization: Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1287 (2003) (dealing with various definitions of privatization).

²⁶ See generally Alex Wellington, *Taking Codes of Ethics Seriously: Alternative Dispute Resolution and Reconstitutive Liberalism*, 12 CAN. J. L. & JURISPRUDENCE 297 (1999) (supporting mediation from liberal, pluralistic, and democratic perspectives). See also Shawn P. Davison, *Privatization and Self-Determination in the Circuits: Utilizing the Private Sector Within the Evolving Framework of Federal Appellate Mediation*, 21 OHIO ST. J. ON DISP. RESOL. 953, 955 (2006) (arguing that "the advent of private mediation in the federal circuits is a positive development that has the potential to provide numerous benefits to parties, all a function of self-determination in the process").

²⁷ See George L. Priest, *Private Litigation and the Court Congestion Problem*, 69 B.U. L. REV. 527, 535–36 (1989) (analyzing the equilibrium effects of delay-reduction measures). See generally Edward A. Dauer, *Justice Irrelevant: Speculations on the Causes of ADR*, 74 S. CAL. L. REV. 83 (2000) (arguing that court congestion and litigation costs explain the advent of the dispute resolution trend).

²⁸ See generally Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea*, 10 PSYCHOL. PUB. POL'Y & L. 211 (2004) (arguing that mediation is litigators' preferred procedure).

²⁹ For example, there is debate over the question of whether the mediator should be a legalist. See, e.g., Matthew Daiker, *No J.D. Required: The Critical Role and Contributions of Non-Lawyer Mediators*, 24 REV. LITIG. 499 (2005) (arguing that non-lawyers should be allowed to mediate disputes).

³⁰ See Charles Pou, Jr., *Assuring Excellence, or Merely Reassuring? Policy and Practice in Promoting Mediator Quality*, 2004 J. DISP. RESOL. 303, 309–11 (mapping the ways in which the dispute resolution field has sought to define and assure mediator competence); Young, *supra* note 5 (discussing mechanisms for monitoring mediator performance).

³¹ See Richard Delgado, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1400 (concluding that informal dispute resolution is likely to disadvantage racial and ethnic minorities); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545,

The current regulation of mediation emerged as part of an effort to balance between the advantages and disadvantages of mediation.³⁴ Thus, in recent years, alongside the legal endorsement and encouragement of mediation, regulation has evolved that prohibits different types of mediator conduct and creates active mediator duties.³⁵ This regulation includes requirements for mediator qualifications and training,³⁶ monitoring of mediator performance,³⁷ and the mediator's duty to ensure the mediating parties' informed consent,³⁸ self-determination,³⁹ and access to legal

1551–54 (1991) (discussing mandatory custody mediation in California and its heightened risks for women). *See generally* Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 *BUFF. L. REV.* 441 (1992) (arguing against mediation in divorce cases and other family matters involving women); Eric Yamamoto, *ADR: Where Have the Critics Gone?*, 36 *SANTA CLARA L. REV.* 1055 (1996) (reviewing the critical scholarship on ADR).

³² *See, e.g.*, Robert Zeinemann, *The Characterization of Public Sector Mediation*, 24 *ENVTL. L. & POL'Y J.* 49 (2001) (discussing externalities in public environmental mediation).

³³ *See generally* Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073 (1984) (rejecting the call to develop ADR programs and to encourage settlements by emphasizing the public value of litigation).

³⁴ *See* Freeman, *supra* note 25, at 1285 (arguing that, in many respects, privatization eventually turns into “publicization,” which enables the law to regulate areas or activities that were not previously legally regulated).

³⁵ At times, there is disagreement as to the appropriate normative level of regulation of the mediation process in the context of these relations. *See, e.g.*, Richard C. Reuben, *The Sound of Dust Settling: A Response to Criticisms of the UMA*, 2003 *J. DISP. RESOL.* 99, 101–08 (responding to the criticism of the Uniform Mediation Act and explaining why disclosure should be not only an ethical obligation but also a statutory legal requirement).

³⁶ *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. 154.052 (Vernon 2008); FL. R. CERTIFIED & COURT-APPOINTED MEDIATORS, R. 10.100 (2000), available at http://www.flcourts.org/gen_public/adr/certrules.shtml. However, in the overwhelming majority of states, there is no need for a license to practice as a mediator and there are almost no regulatory entry barriers to the field. *See* Michael L. Moffitt, *The Four Ways to Assure Mediator Quality (and Why None of Them Work)*, 24 *OHIO ST. J. ON DISP. RESOL.* 191, 224 (2008) (questioning the government's ability to enforce any barrier to entry into the field of mediation).

³⁷ Young, *supra* note 5 (discussing mechanisms for monitoring mediators' performance).

³⁸ *See generally* Jacqueline Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision Making*, 74 *NOTRE DAME L. REV.* 775 (1999) (addressing the issue of informed consent in the general mediation context and emphasizing the role of mediators). *See also* Lela P. Love & John W. Cooley, *The Intersection of Evaluation by Mediators and Informed Consent: Warring the Unwary*, 21 *OHIO ST. J. ON DISP. RESOL.* 45, 47 (2000) (suggesting ways for mediators to “evaluate”

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counsel.⁴⁰ Additional types of regulation aim to ensure the mediator's impartiality⁴¹ as well as the implementation of other procedural justice principles in the mediation proceedings.⁴²

B. *The Private Conception of the Post-Mediation Contract*

The development of mediation regulation focused almost solely on mediator performance and the mediator-parties relationship, to the near-complete neglect of the central product of the procedure: the post-mediation contract. Thus, for example, current mediation law does not provide the court that enforces the mediation contract with any special tools for its scrutiny;⁴³ nor does it allow the mediating parties to challenge the agreement on any grounds that deviate from those recognized under prevailing contract law. Mediation law also fails to set any special interpretation rules for the mediation settlement agreement or special remedies for its breach.⁴⁴ Moreover, the case law has to a significant extent detached the regulation of the mediator-parties' relations from the regulation of the relations between the mediating parties. As a consequence, legislation and judicial rulings that deal with the former relationship are not generally applied to the latter. For

the dispute in a manner that is "most constructive to party self-determination, which is the first principle of mediation.").

³⁹ See, e.g., MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), available at <http://www.abanet.org/dispute/news/ModelStandardsofConductforMediatorsfinal05.pdf> ("A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.")

⁴⁰ See, e.g., UNIFORM MEDIATION ACT § 10 (2003) ("An attorney or other individual designated by a party may accompany the party to and participate in a mediation. A waiver of participation given before the mediation may be rescinded."); FL. R. CERTIFIED & COURT-APPOINTED MEDIATORS, R. 10.340(a) (2007), available at http://www.flcourts.org/gen_public/adr/certrules.shtml.

⁴¹ See, e.g., CAL. R. CT. R. 3.855 (b)(1) (2007) ("A mediator must make reasonable efforts to keep informed about matters that reasonably could raise a question about his or her ability to conduct the proceedings impartially, and must disclose these matters to the parties.").

⁴² See Welsh, *supra* note 2 (applying procedural justice principles to mediation).

⁴³ On the contrary, at times the monitoring is even reduced. See *infra* Parts III.C.

⁴⁴ See generally Peter Robinson, *Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should Be Embraced and Broadened*, 2003 J. DISP. RESOL. 135 (concretizing the application of prevailing contract law to the post-mediation contract by the division into common categories in contract law: contract-making, flaws in the contract-making, contract interpretation, invalidation of contract clauses, etc.).

example, courts validate post-mediation contracts when claims of misrepresentation are made against the mediator,⁴⁵ as well as claims of mediator coercion⁴⁶ or mediator prejudice during the proceedings.⁴⁷ As a general rule, the courts have treated the post-mediation contract in accordance with conventional contract law.

Mediation law thus includes two contradicting aspects. On the one hand, modern law distinguishes mediation from regular negotiations and subjects it to special regulation. On the other hand, the conventional wisdom persists that mediation is essentially a private process. The law therefore dichotomizes between the mediator-parties relations and the relations between the mediating parties themselves, detaching the procedural aspect of mediation from its substantive product. Under this approach, even if the mediator's presence justifies regulating the mediator-parties relationship,⁴⁸ mediation is still a private matter between parties and the post-mediation contract should still be governed by conventional contract law.

Furthermore, in order to encourage parties to participate in mediation, mediation law developed the "Finalization Principle" which limits the possible contractual ground for challenging post-mediation contracts.⁴⁹ The Finalization Principle, together with mediation confidentiality,⁵⁰ deepens the "private" conception of mediation. As a result, despite the apparently

⁴⁵ See, e.g., *Chitkara v. New York Tel. Co.*, 45 Fed. App. 53 (2d Cir. 2002); *Holmes v. Potter*, No. 2:05 cv 447, 2007 U.S. Dist. LEXIS 18009 (N.D. Ind. Mar. 12, 2007).

⁴⁶ See *Lype v. Watkins*, No. 01-98-00051-CV, 1998 WL 734429, at *1 (Tex. App. Oct. 22, 1998) ("Duress or undue influence can suffice to set aside a contract, but it is well-settled that these must emanate from one who is a party to the contract. Courts will not invalidate contracts on grounds of duress when the alleged duress derives from a third person who has no involvement with the opposite party to the contract."); see also *Zimmerman v. Zimmerman*, No. 04-04-00347-CV, 2005 WL 1812613 (Tex. App. Aug. 3, 2005) (affirming enforcement of a mediated divorce settlement despite allegations of mediator coercion); *Vela v. Hope Lumber & Supply Co.*, 966 P.2d 1196 (Okla. Civ. App. 1998) (enforcing the post-mediation agreement despite plaintiff's claim that her attorney, the mediator, and a third-party had all lied to and threatened her to obtain her consent to and signature on the agreement); *In re Marriage of Banks*, 887 S.W.2d 160, 163-64 (Tex. App. 1994). But see *Vitakis-Valchine v. Valchine*, 793 So.2d 1094 (Fla. Dist. Ct. App. 2001); *infra* part IV.B.4.

⁴⁷ See, e.g., *Wolf v. Wolf*, No. B177351, 2006 WL 171513 (Cal. Ct. App. Jan. 25, 2006).

⁴⁸ See *Reuben*, *supra* note 2 (proposing to regulate mediators in court-ordered mediation due to application of state action doctrine); *Welsh*, *supra* note 2 (applying procedural justice principles to mediation by regulating mediators).

⁴⁹ See *infra* part IV.B.3.

⁵⁰ See *infra* part IV.C.

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increasing regulation of mediation, the public supervision of post-mediation contracts is less extensive than the public supervision of regular contracts.

III. TOWARDS A COMMUNITARIAN THEORY OF THE POST-MEDIATION CONTRACT

In this part we present a communitarian theory of mediation that emphasizes the public role in mediation, in contrast with the private contract approach to mediation. In Section A, we ground this communitarian theory in social psychological and public policy approaches, while Section B demonstrates that this theory should be applied not only to the mediation proceedings and mediator-parties' relations but also to the regulation of the post-mediation contract.

A. A Communitarian Theory of Mediation

1. *The Social-Psychological Perspective: Mediation, Procedural Justice, and Group Value Theory*

The social psychological approach to mediation focuses on the importance of procedural justice in mediation to the identities of the individual parties. As opposed to conservative approaches to justice, which have traditionally focused on the individual's satisfaction with the outcome of any social interaction, the relatively new approach of procedural justice theory stresses the tremendous significance of fairness in the dispute resolution process (e.g., voice, equal treatment, trust, and respect for parties).⁵¹ Adopting this approach, numerous studies have examined the fairness and reasonableness of the litigation process in the state's courts, as perceived by the litigating parties.⁵² The social psychology of litigating

⁵¹ See, e.g., Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries* 94 VA. L. REV. 79 (2008) (challenging the dichotomy between criminal and civil procedure and emphasizing procedural law as a legal field); Welsh, *supra* note 2, at 817 (reviewing studies that show that from the perspective of the parties in dispute resolution proceedings, the fairness of the proceedings is as important as fairness of outcome, if not more so).

⁵² See, e.g., E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975). Great importance has been attributed to strict adherence to procedural justice principles in judicial proceedings, with many ramifications in a variety of contexts. See generally Laurens Walker, E. Allen Lind &

parties is two-pronged. The first prong represents the self-interest instrumentalist approach, according to which the application of procedural justice principles enables the individual to influence and control the dispute resolution process, thereby directing it to the best outcome for himself, and his personal welfare.⁵³ The second prong is the group value theory, which was developed primarily by Lind and Tyler.⁵⁴ This theory focuses on the impact of procedural justice principles on parties' self-identity in terms of their status in society. Under group value theory, the dispute resolution forum is a social institution that, for the disputing parties, represents the community in its entirety. Hence, what the parties experience during the dispute resolution process conveys a message to them regarding their social position and status in the community. The implementation of procedural justice principles, therefore, signals to the parties that they are respected, upstanding, and equal members of the community. A failure to apply procedural justice principles, on the other hand, conveys to the parties the sense that they are inferior members of the community or that they are not accepted and lack equal standing in the community. The parties are significantly impacted by these messages—it impairs their sense of belonging, the forging of their self-identity, and their self-respect and self-esteem.⁵⁵

The legal discussion of procedural justice and group value theory has, thus far, focused primarily on formal legal proceedings, with far less consideration of mediation proceedings. Recently, however, some scholars have begun to argue for the implementation of procedural justice principle in

John Thibaut, *The Relation Between Procedural Justice and Distributive Justice*, 65 VA. L. REV. 1401 (1979) (asserting that application of the procedural justice principles can, inter alia, impact parties' sense of the fairness of the process, not only from a procedural perspective but also from an outcome perspective, as well as enhance their satisfaction with the proceedings, acceptance of the outcome, and the extent of their commitment to that outcome); T.R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003) (noting that the application of the principles of procedural justice can have ramifications for the legitimacy of the social institution in which the dispute resolution is conducted—i.e., the way in which these principles are applied can influence the individual's attitude towards the community and its sources of authority). See also Welsh, *supra* note 2, at 817–20.

⁵³ See, e.g., THIBAUT & WALKER, *supra* note 52. On the basis of this approach, Lind & Tyler developed at a later stage the social exchange approach; see LIND & TYLER, *supra* note 52, at 222–30; see also Welsh, *supra* note 2, at 826.

⁵⁴ See LIND & TYLER, *supra* note 52, at 230–40; Welsh, *supra* note 2, at 827.

⁵⁵ See LIND & TYLER, *supra* note 52; Holly A. Schroth & Priti P. Shah, *Procedures: Do We Really Want to Know Them? An Examination of the Effects of Procedural Justice on Self Esteem*, 85 J. APPLIED PSYCHOL. 462 (2000) (discussing the effects of procedural justice on state-dependent self-esteem).

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mediation.⁵⁶ The justification for this rests on an analogy between the parties' subjective experience in the framework of mediation and parties' experience in court. Whereas the mediator is not authorized to decide the dispute, he nonetheless has a unique legal role and authority.⁵⁷ It is not surprising, therefore, that in many cases, the mediating parties and even lawyers view the mediator as an agent of the court and as performing a public function.⁵⁸ Thus, using group value theory, a mediator's violation of a procedural justice principle could impair parties' sense of belonging to the general community.⁵⁹ Going from theory to practice, Welsh, a prominent researcher in this area, advocates the application of procedural justice principles to mediation⁶⁰ and maintains that mediators should treat parties with particular dignity and respect while fostering dialogue between them. The mediator must also encourage the active participation of the parties themselves—not only of their lawyers—and ensure that they have adequate opportunity to tell their stories in the manner that best suits them, to argue their claims, and to present evidence. In addition, Welsh asserts that the mediator must make informed use of the option to conduct separate meetings (caucuses) with the parties, in order to ensure that their use does not conflict with the application of procedural justice principles in the mediation.⁶¹

⁵⁶ See, e.g., Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473 (2008) (employing two correlational studies to test the hypothesis that procedural justice, or fairness of process, plays a role in acceptance of agreements reached through bilateral negotiation); Dean G. Pruitt et al., *Long-Term Success in Mediation*, 17 LAW & HUM. BEHAV. 313 (1993) (applying procedural justice theory to mediation and finding that parties who perceived their mediation as fair were more likely to honor their agreement).

⁵⁷ See *infra* Part III.A.2.

⁵⁸ See, e.g., Wayne D. Brazil, *Hosting Mediation as a Representative of the System of Civil Justice*, 22 OHIO ST. J. ON DISP. RESOL. 227, 234 (2007) ("This level of involvement by the court in the provision of mediation and other ADR services increases the likelihood that parties who participate in court-sponsored mediations will view the mediator as an agent and representative of the court."). It should be noted that the legal treatment of the mediator's role can have constitutive significance for the social perception of that role. See Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984) (the law as constitutive of and structuring parties' perceptions).

⁵⁹ See, e.g., Welsh, *supra* note 2, at 831.

⁶⁰ See Welsh, *supra* note 2, at 838.

⁶¹ See Welsh, *supra* note 2, at 851; see also Hea Jin Koh, "Yet I Shall Temper So Justice with Mercy": *Procedural Justice in Mediation and Litigation*, 28 LAW & PSYCHOL. REV. 169 (2004) (comparing how mediation and litigation provide procedural justice to disputing parties).

Thus far we argue for legalizing the implementation of procedural justice principles in mediation, focusing on the parties' experience of mediation as a public-support process and their perception of the mediator as a representative of the community. We will now add another dimension to our communitarian conception of mediation by arguing that it encompasses substantive public components, not only from the psychological-subjective perspective, but also under objective public-policy analysis.

2. The Public Policy Perspective: Society's Moral Responsibility for Mediation

Mediation lies somewhere between direct negotiations among parties and traditional legal proceedings that culminate in a judicial decision. On the one hand, in mediation, similar to the classic contract context, and in contrast to public legal proceedings, the parties, not the court, are the final decisionmakers. On the other hand, there is a clear and significant difference between mediation and regular private contracting. A regular contract is made between the parties without the intervention of an appointed third party;⁶² in mediation, by definition, an external representative is involved, who, although he has no authority to decide the dispute, can nonetheless be regarded, in many respects, as serving a public function.⁶³ To begin with, the court sends the litigating parties to mediation, oftentimes compelling them to participate.⁶⁴ Secondly, in many instances, the mediator is in fact appointed

⁶² There are many theoretical approaches as to the proper conduct of mediators. See discussion *infra* Part IV.A.; see also 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, 27 (1996) (arguing that mediation improves the negotiation process by facilitating "an increased level of party participation in and control over decisions made in the process.").

⁶³ We are not referring, of course, to those situations in which the judge serves as mediator. *But see* Shelby A. Linton Keddie, *Outsourcing Justice: A Judge's Responsibility When Sending Parties to Mediation*, 25 PENN ST. INT'L L. REV. 717, 735 (2007) ("In order to determine what a judge's responsibility should be when outsourcing justice to mediators or other third party neutrals, the ABA could learn from the Bangalore Principles and do something as simple as expand the definition of 'judge' to include anyone who exercises judicial power. At first glance, this would certainly appear to apply to both court-appointed mediators and arbitrators.").

⁶⁴ See, e.g., Streeter-Schaefer, *supra* note 23 (reviewing the legislation dealing with mandatory mediation). At times, the legal system pays the mediator's fee. See Brazil, *supra* note 21. This issue, in itself, could have a significant impact on the identification of the mediator as filling a public role. See Mark H. Moore, *Symposium: Public Values in an Era of Privatization: Introduction*, 116 HARV. L. REV. 1212, 1213 (2003) (describing public funding as a restriction on privatization).

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by the court and in accordance with criteria set by law.⁶⁵ Thirdly, since mediator certification is regulated by the law, even when the parties turn to a certified mediator of their own initiative, they are doing so on the basis of recognition granted to that mediator by the law.⁶⁶ Fourthly, the legislature itself has extended special protection to the mediation process and the mediator in granting legal immunity to mediators that exceeds the immunity usually applicable in legal negotiations.⁶⁷ Finally, the courts conceive of and describe the mediator as filling a public role and as functioning as the “long arm” of the court.⁶⁸ The latter point is of legal and practical significance. For example, mediators are sometimes authorized and even required to report to the court regarding the parties’ attendance or absence from the mediation sessions⁶⁹ and, at times, are also authorized to report to the court on the parties’ conduct during the proceedings.⁷⁰ In some jurisdictions, the

⁶⁵ See, e.g., Robert K. Wise, *Mediation in Texas: Can the Judge Really Make Me Do That?*, 47 S. TEX. L. REV. 849, 852 (2006) (noting in Texas, the mediator is usually an attorney or retired judge selected either by the court or by the parties with the court’s approval).

⁶⁶ But see Frank E.A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1, 5–6 (2006) (distinguishing between different types of mediation procedures, including between court-related [public] mediation and out-of-court [private] mediation); see also Reuben, *supra* note 2 (applying the state action theory only in court-ordered mediation proceedings, in which the mediator can be considered as serving a public function and as a representative of the state). It should be noted that the federal Uniform Mediation Act does not distinguish between a mediation procedure that stems from a court order and mediation initiated with the parties’ consent.

⁶⁷ See generally Scott H. Hughes, *Mediator Immunity: The Misguided and Inequitable Shifting of Risk*, 83 OR. L. REV. 107 (2004) (reviewing the legislation on this matter).

⁶⁸ See, e.g., *Vitakis-Valchine v. Valchine*, 793 So.2d 1094, 1099 (Fla. Dist. Ct. App. 2001) (“During a court-ordered mediation, the mediator is no ordinary third party, but is, for all intent and purposes, an agent of the court carrying out an official court-ordered function. We hold that the court may invoke its inherent power to maintain the integrity of the judicial system and its processes by invalidating a court-ordered mediation settlement agreement obtained through violation and abuse of the judicially-prescribed mediation procedures.”); see also *Wagshal v. Foster*, 28 F.3d 1249, 1254 (D.C. Cir. 1994) (holding that a mediator in the superior court’s alternative dispute resolution [ADR] system performed judicial functions); *Brazil*, *supra* note 58, at 235 (“The court’s staff mediators are very likely to be viewed as agents and representatives of our court, and the court imposes duties on them that are rooted in that understanding.”).

⁶⁹ See, e.g., FLA. R. CIV. P. 1.730(a); see also UNIFORM MEDIATION ACT § 7(b) (2003).

⁷⁰ See, e.g., DEL. CT. CH. R. 174.1(c)(1) (mediators may make recommendations regarding sanctions for bad-faith participation in mediation); E.D. MO. L. R. 6.04(A)

mediator's presence means that the mediation settlement can be submitted for court approval and thereby gain the force of a court order.⁷¹ Furthermore, courts are reluctant to accept ex-post arguments regarding flaws in the formation of the post-mediation contract, as they trust the mediators to prevent such flaws.⁷² Thus, the mediator's presence and involvement in the dispute resolution process are of public significance.⁷³ This distinguishes mediation from private negotiations and transforms it into negotiations conducted under the aegis of the court or the state.⁷⁴

It is important to stress at this juncture that, contrary to the prevailing view, even conventional contract law has a latent public aspect to it, manifested in the fact that the private contract is enforced by the public state.⁷⁵ From this perspective, contract law dictates the circumstances in which the state's autonomous authority will be exercised over the parties' relationship. This public dimension is manifested in, amongst other things, the state's decisions regarding the interpretation of contracts, the duty of

(creating an exception to confidentiality rule to permit mediators to file reports indicating compliance with good-faith requirements); NEV. REV. STAT. §40.680(6) (2002) (mediators' report of bad faith is admissible in evidence). It should be noted that, in many cases, such reporting by the mediator is prohibited. *See, e.g.*, CAL. EVID. CODE § 1121, Law Revision Comm'n cmt. (West 2002) ("[A] mediator should not be able to influence the result of a mediation or adjudication by reporting or threatening to report to the decision maker on the merits of the dispute or reasons why mediation failed to resolve it.").

⁷¹ *See, e.g.*, KAN. STAT. ANN. §5-514 (2001) (providing that a mediated settlement agreement can become a court order).

⁷² *See, e.g.*, *Commodity Futures Trading Comm'n v. Equity Fin. Group*, No. CIV. 04-1512 (RBK), 2007 WL 2139399 (D. N.J. July 23, 2007) (ruling that mediator's recommendation on the final settlement offer is an attestation to its reasonableness).

⁷³ *See, e.g.*, *Supreme Court Approves Ethical Guidelines for Mediators*, 68 TEX. B.J. 856, 856 (2005) ("[C]ounsel representing parties in the mediation of a pending case remain officers of the court in the same manner as if appearing in court . . . Counsel shall cooperate with the court and the mediator in the initiation and conduct of the mediation.").

⁷⁴ *See* Keddie, *supra* note 63 (holding the court responsible for mediator conduct and for the mediation proceedings in accordance with the provisions of the Model Code of Judicial Conduct); *see also* Leon E. Trakman, *Commentary, Appropriate Conflict Management*, 2001 WIS. L. REV. 919, 929 (2001) ("If the justice system is to leave institutions of conflict management to the 'private' sector, it ought not to ignore its responsibility to regulate that sector.").

⁷⁵ *See* *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (holding that enforcement of contract by the courts would constitute state action); *Morris R. Cohen, The Basis of Contract*, 46 HARV. L. REV. 553, 585-86 (1933) (stressing that contract law has a public law dimension, involving public policy choices, because it requires exercising the sovereign power of the state).

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disclosure set by the state, and public welfare rules that circumscribe the boundaries of contract enforcement.⁷⁶ The public aspect inherent to every contract intensifies in the context of mediation, where the negotiations themselves are conducted and monitored by a public representative.

Mediation's underlying public dimension can also be understood through relational contract theory.⁷⁷ This theory shows that there are a variety of relationships in which there is a particular need for the state to intervene and regulate the conduct of the parties in a more public way than in the case of other relationships.⁷⁸ These relationships are often typified by the fact that what transpires during and after the relations significantly impacts how the individual perceives himself as part of the community. Accordingly, the state should monitor and be involved, in significant way, in what occurs in the framework of such relationships.⁷⁹ As noted,⁸⁰ the presence of the mediator—the state's representative—at the mediation constitutes just such a relationship wherein the mediation framework influences how the parties perceive themselves as part of the general community. Applying relational contract theory to the mediation context,⁸¹ therefore, supports our argument in favor of special communitarian regulation of mediation.

⁷⁶ See Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CAL. L. REV. 1743 (2000) (arguing for public aspects within modern contract law).

⁷⁷ See generally Symposium, *Law, Private Governance and Continuing Relationships*, 1985 WIS. L. REV. 461 (1985); Symposium, *Law, Relational Contract Theory*, 94 NW. U. L. REV. 737 (2000); Panel Discussion, *Relational Contracting in a Digital Age*, 11 TEX. WESLEYAN L. REV. 675 (2005).

⁷⁸ See generally James W. Fox Jr., *Relational Contract Theory and Democratic Citizenship*, 54 CASE W. RES. L. REV. 1 (2003) (discussing the normative aspects of relational contract theory).

⁷⁹ In this context, labor relations are one of the most typical examples of relationships in which it is important that the state intervene and regulate what happens in their framework in a more communitarian and pervasive way than prevailing contract law. See *id.* at 44–53, (arguing that the field of labor offers a key context for exploring how a democratic citizenship theory can advance relational contract theory); see also Robert C. Bird, *Employment as a Relational Contract*, 8 U. PA. J. LAB. & EMP. L. 149, 158 (2005) (“Contract law, although not wholly incompatible with employment, does not fully account for the broad range of relational interests and contexts present in employment relationships.”).

⁸⁰ See *infra* Part III.A.

⁸¹ Many scholars have already asserted that insofar as contract disputes are concerned, their resolution by way of mediation fits well with the application of relational contract theory. See, e.g., Schmitz, *supra* note 6, at 62 (noting that Arbitration and ADR agreements may foster “relational” exchanges under Ian MacNeil’s relational contract theory); William C. Whitford, *Ian MacNeil’s Contribution to Contract Scholarship*, 1985 WIS. L. REV. 545, 551 (1985) (arguing that MacNeil’s theory favors greater reliance on

B. The Communitarian View and the Regulation of the Post-Mediation Contract

Above, we presented the social psychology and public-policy justifications for a communitarian approach to mediation and explained current trends in mediation law through the prism of this approach. However, as already noted,⁸² prevailing law focuses almost solely on the mediator-parties relationship and detaches the latter from the parties' internal relationship. At first glance, it seems that this separation between the two levels of relations can be justified even under a communitarian theory of mediation. First, from the social psychology perspective, until recently, procedural justice and group value theories focused primarily on court litigation. Hence, they assumed that the relationship between litigators and state representative—i.e., the judge—and not the internal relationship between the litigators themselves—is the determinative factor in litigators' self-respect and sense of belonging to the community.⁸³ If we apply this premise to the context of mediation regulation,⁸⁴ it seems that the parties' sense of belonging to the community can be sufficiently ensured by regulation solely of the mediator-parties relationship based on procedural justice principles. In contrast, since the internal relations between the parties are devoid of any such public-social ramifications, it suffices to regulate this sphere through conventional contract law. Second, from a public policy perspective, it is possible to argue that the state has no responsibility for the resulting contract because the mediator, as the state's representative in the mediation, is involved in conducting the negotiations, but not in determining their outcome.

As opposed to these modes of thought, we present below a novel approach that holds the mediator's presence at the mediation lends a communitarian dimension to the process in its entirety, including the internal relationship between mediating parties. We argue that this communitarian dimension justifies, in turn, special regulation of the parties' relationship and, in particular, the post-mediation contract. To ground this approach, we will revisit the social psychological and public policy foundations of our

procedures oriented towards mediation and less emphasis on adversary processes looking towards adjudication).

⁸² See *supra* Part II.B.

⁸³ See Tom R. Tyler & E. Allen Lind, *A Relational Model of Authority in Groups*, 25 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 115 (1992) (suggesting that it is the relationship with the person implementing the dispute resolution procedure [the third party] that creates the feelings about self-identity and group status).

⁸⁴ For emphasis of this matter, see Welsh, *supra* note 2.

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communitarian theory of mediation and demonstrate that they cannot be realized solely in the sphere of the mediator-parties relationship. We therefore call for a collapsing of the existing dichotomies and the adoption of a comprehensive communitarian approach to mediation law.

1. *The Social-Psychology Perspective and the Post-Mediation Contract*

a. *The Impact of Mediator Violations of Procedural Justice on the Post-Mediation Contract*

The procedural justice approach stresses the great significance of fairness (e.g., voice, equal treatment, and respect) in the dispute resolution process. Group value theory reveals that implementing procedural justice principles sends a message to the parties regarding their social situation and status in the community. These theories support the emerging regulation of the mediator-parties relationship, to guarantee the implementation of procedural justice principles and prevent the serious psychological effects of violations of these principles. Nevertheless, as long as the remedy for such violations amounts only to administrative procedures against the mediator,⁸⁵ while the flawed mediation continues to proceed and eventually results in a valid and enforceable contract, the severe psychological consequences that group-value theory predicts will persist. Hence, we believe that at least in cases of gross violation of procedural justice principles by a mediator, the mediation proceeding in its entirety should be invalidated, including its “poisonous fruit,” the post-mediation contract.⁸⁶

b. *Procedural Justice Violations by the Mediating Parties*

Updated research examining procedural justice and mediation added further important layers to group value theory. This field of research, known as interactional justice theory,⁸⁷ found that parties’ satisfaction, self-esteem, and sense of belonging are influenced not only by their direct interaction

⁸⁵ See Young, *supra* note 5 (describing sanctions used against mediators for violations of mediation rules).

⁸⁶ See discussion *infra* Part IV.

⁸⁷ See Robert J. Bies & Joseph S. Moag, *Interactional Justice: Communication Criteria of Fairness*, in RESEARCH ON NEGOTIATION IN ORGANIZATIONS 43, 44–45 (Roy J. Lewicki et al. eds., 1986) (developing interactional justice, which involves the personal exchanges between people).

with the mediator but also, and sometimes even more so, by their reciprocal interaction and the general atmosphere prevailing during the mediation.⁸⁸ In other words, even if it is one of the parties, and not the mediator, who behaves inappropriately in violation of procedural justice requirements (voice, respect, trust, etc.), the injured party experiences the mediation as a failure in its entirety, accompanied by all adverse psychological effects derived from this.

The negative outcome of a party's improper conduct during mediation would seem to result also in direct settlement negotiations between the parties.⁸⁹ Upon closer scrutiny, however, a substantive difference emerges between mediation and direct negotiations in this respect. In the context of mediation, the presence of the mediator, the state's representative, infuses the negotiations with a public dimension so that *everything* that transpires in the framework of the negotiations has a meaningful impact on how the participating individual regards himself or herself as a respected, equal member of the community and as an equal resident of the democratic state.⁹⁰ Therefore, even when it is one of the mediating parties who violate procedural justice principles, the mere fact that it transpired during the mediation and that the mediator did not prevent it adds a communitarian dimension to the private reciprocal relationship between the parties. It is in light of these communitarian aspects of the relationship between the mediating parties that we oppose the current pure private-contractual regulation of their relationship. We assert that a special contract law regime that balances between the communitarian and private aspects of the parties'

⁸⁸ See Nabatchi & Bingham, *supra* note 14 (finding that disputants' satisfaction with mediation in the U.S. Postal Service Redress program was best explained by their perceptions of their interactions with one another); Tina Nabatchi, Lisa Blomgren Bingham & David H. Good, *Organizational Justice and Workplace Mediation: A Six-Factor Model*, 18 INT'L J. CONFLICT MGMT. 148 (2007) (discussing the importance of interactional justice in mediation).

⁸⁹ Hollander-Blumoff & Tyler, *supra* note 56 (analyzing the effect of procedural justice principles on regular negotiations); see also Dan Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417 (2004) (understanding the morality of contracts by reference to a relation of community that arises among the persons who enter into contracts, whereby each participant respects the other participants by granting them a form of authority over her future conduct).

⁹⁰ Psychological studies show that the involvement of a third party in any relationship (in our case, the mediator's involvement in the mediation negotiations between the mediating parties) can lead to a redefinition of the relationship and the implications of the parties' performances in the framework of that relationship. See, e.g., Wayne Regina, *Bowen Systems Theory and Mediation*, 18 MEDIATION Q. 181 (2000) (applying Bowen's triangle theory to mediation).

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relationship should govern the post-mediation contract. In Part IV below, we present our proposed application of such a legal regime.

c. Procedural Justice and Fairness of the Mediation Outcome

Despite the fact that group value theory originated in the field of procedural justice,⁹¹ it is important to recognize that an unfair outcome resulting from a public or semipublic proceeding impacts also the way in which the individual regards himself as part of the community and as a legitimate resident of the democratic state, with all that this entails.⁹² Specifically in the context of mediation, new research found that a fair outcome, in addition to, and in conjunction with procedural justice principles, is vital for party satisfaction.⁹³ Communitarian regulation of mediation thus should go beyond the procedural aspects of mediation and also oversee the substantive fairness of the post-mediation contract.⁹⁴

2. The Public Policy Perspective: State Responsibility for the Post-Mediation Contract

From the public policy perspective as well, application of procedural principles should not be limited to the mediating parties' relationship.

a. Public Responsibility for Flaws in the Mediator's Performance

In many instances, the mediator's inadequate performance is likely to impact the relations between the parties themselves as well as the post-mediation contract. For example, a mediator who misleads one of the parties as to the hypothetical legal outcome of the case pushes him too aggressively towards settlement, or conducts the mediation session in an unbalanced

⁹¹ See *infra* Part II.A.1.

⁹² See LIND & TYLER, *supra* note 52, at 230–31; see also E. Patrick McDermott & Danny Ervin, *The Influence of Procedural and Distributive Variables on Settlement Rates in Employment Discrimination Mediation*, 2005 J. DISP. RESOL. 45, 48 (claiming that parties must have control over the outcome of mediation).

⁹³ Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 672 (2004) (noting that disputants want procedural justice and resolution).

⁹⁴ For legal mechanism of substantive fairness review see *infra* notes 156–57.

manner might eventually lead the parties into an unjust contract. Yet, although regular contract law includes such doctrines as duress,⁹⁵ mistake,⁹⁶ and misrepresentation,⁹⁷ it lacks an appropriate remedy when the mediator, who is not a party to the post-mediation contract, misleads or coerces the parties to the contract.⁹⁸ Needless to say, regular contract law also offers no remedy for other flaws in mediator conduct, such as mediator partiality or failure to ensure that the parties' voices are heard. In such circumstances, regulating only the mediator-parties relationship without supplementary regulation of the parties' interrelationship and the post-mediation contract in a manner that deviates from conventional contract law will undermine the moral responsibility of the state and courts for what transpires in mediation.

b. Public Responsibility for Parties' Conduct During Mediation

We have described the mediator as a representative of the public and community and therefore, explained the community's moral responsibility for the mediator's performance and the need to regulate it. But this public responsibility relates to *all* that transpires during mediation, not only to the conduct of the state's representative in the process. In court litigation, procedural law regulates the parties' conduct in the sphere of their internal relations, for example, by setting broad disclosure duties,⁹⁹ and does not regulate only the judge's conduct towards the parties. In mediation as well, the state's moral responsibility for what transpires during the process should extend to the parties' internal relations and the post-mediation contract. From a moral perspective, when the individual is injured in a context in which there is public responsibility towards him, it is hard to justify a distinction between injury caused by the public's representative and injury caused by another individual, without the former, who is in charge of the process, preventing or at least remedying that injury.

Thus, the public-policy analysis demonstrates that it is not sufficient to regulate only the mediator-parties relationship, but rather, there is a need for special regulation of the internal relationship between the parties and of the post-mediation contract.

⁹⁵ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 174–75 (1981).

⁹⁶ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 152(1).

⁹⁷ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 162–64.

⁹⁸ See *supra* notes 8–10 and Part II.B.

⁹⁹ See Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 AM. J. COMP. L. 277 (2002) (discussing the pretrial discovery rules in America and abroad).

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IV. THE COMMUNITARIAN APPROACH IN PRACTICE

A. *From Partial Regulation of Mediators to Comprehensive Regulation of Mediation*

Thus far, we have proposed a communitarian theory of mediation grounded on social-psychological and public policy approaches. Following our communitarian theory, the discussion has underscored the need for special regulation of mediation focusing specifically on the post-mediation contract. In this Part, we proceed to lay down the foundations for such communitarian regulation and expand on the practical legal ramifications that arise from this proposed regime. Communitarian regulation begins with the mediator. In contrast with the private conception of mediation, our theory emphasizes the public role of mediators as community representatives.¹⁰⁰ Hence, we advocate a regulatory system that creates barriers to entry into the mediation field,¹⁰¹ as well as regulation of mediator conduct during the mediation process. Thus, we recommend to enact procedural justice principles such as voice, impartiality, neutrality, dignity, and respect into enforceable legal norms in the mediation context.¹⁰² Today, some of these principles exist as voluntary norms but not as governmental regulation.¹⁰³ And even where governmental regulation does exist, it is often loosely enforced.¹⁰⁴ Our theory would entail the elaboration of the existing regulation of mediator conduct and to bolster its enforceability.

¹⁰⁰ This theory is at least true in court-related mediation. *See supra* note 66.

¹⁰¹ *See* Young, *supra* note 5 (reviewing the regulation of mediators and discussing proposals for certifying mediators); *see also* Moffitt, *supra* note 36 (doubting the possibility of the state *enacting* barriers to entry into the field and discussing proposed alternatives).

¹⁰² Our approach converges on this point with Welsh. *See* Welsh *supra* note 2. Yet, in light of our communitarian approach, we recommend here more comprehensive and enforceable legal norms.

¹⁰³ *See, e.g.,* Young, *supra* note 5, at 736 n.48 (“Only 17 states or states supreme courts currently require certain mediators to comply with mandatory ethics standards.”); *see also* Moffitt, *supra* note 36 (emphasizing that the Model Standards are not governmental regulations).

¹⁰⁴ *See* Young, *supra* note 5, at 775 (“As a sanction, regulators are more likely to require a mediator to take additional training or to learn from experienced mediators by observing them, working under their supervision, or co-mediating with them.”); *see also* Michael Moffitt, *Suing Mediators*, 83 B.U. L. REV. 147, 153–54 (2003) (stating that it is extraordinarily difficult to sue a mediator successfully for her mediation conduct).

Our practical recommendations for the appropriate regulation of mediator conduct in many aspects converge with other approaches.¹⁰⁵ Yet while other models for regulating mediator conduct focus solely on the mediator-parties relations, our theoretical approach shows that this is not sufficient. Under our communitarian regime, a violation by the mediator of his duties would impact, in certain circumstances, the validity of the post-mediation contract. Moreover, our communitarian theory demonstrates the need for the regulation of a post-mediation contract which encompasses the interrelation between parties involved in mediation. Section B below lays out the cornerstone for a contract-law regime based on such considerations. Section C addresses and rejects standard objections to judicial review, and then suggests ways to adapt existing mediation rules (specifically, those related to mediation confidentiality) to our proposed regulation model.

B. Communitarian Regulation of the Post-Mediation Contract

A communitarian regulation regime for the post-mediation contract would integrate communitarian application of existing contract law doctrines with developing special contractual doctrines. This communitarian theory of mediation has ramifications for the regulation of every stage of the mediation: the preliminary stages, the mediation proceedings, the procedure for court approval of the post-mediation contract, and any later litigation over the agreement. It also shatters the dichotomy between the mediator-parties' relations and the parties' interrelations, and thus, creating a link between mediator conduct and the post-mediation contract. In this Part, we will elaborate on some of these ramifications.

1. A Duty of Disclosure at the Preliminary Stages of Mediation

In the regular contract setting, the level of the duty of disclosure expresses society's moral expectations of the contractual partners during the course of negotiations. Classic contract law theory focuses on party rivalries and sets a low disclosure requirement. Modern contract law, in contrast, emphasizes also the solidarity and cooperation between the parties and is more open to raising the level of disclosure required.¹⁰⁶ Yet even modern contract law does not prescribe a general disclosure duty, nor does it impose

¹⁰⁵ See, e.g., Reuben, *supra* note 2; Welsh, *supra* note 2; Young, *supra* note 5.

¹⁰⁶ See, e.g., Melvin A. Eisenberg, *Disclosure in Contract Law*, 91 CAL. L. REV. 1645 (2003) (developing a basic principle that should govern disclosure in contract law).

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a sweeping altruistic burden on the negotiating parties to disclose every piece of information to the other side.¹⁰⁷

In the context of mediation, the influence of the conventional private approach seems to have led to a narrow application of the disclosure duty in the proceedings.¹⁰⁸ However, our communitarian conception of mediation entails a quite different outcome. From the social-psychological perspective, integrating group value and interactional justice theories, our model emphasizes the importance of interpersonal relations and communication between the mediating parties,¹⁰⁹ pointing specifically to truthfulness, mutual respect,¹¹⁰ and informed consent.¹¹¹ Our public policy analysis shows that due to the presence of the mediator as a community representative and due to the legal promotion of mediation, deception and violations of trust cause far more damage than they would in private negotiation.¹¹² Hence, unlike the prevailing trends within current law, we advocate imposing a heightened duty of disclosure on the mediating parties, and when this duty is violated, the post-mediation contract should be voidable.¹¹³

Beyond the *ex post* invalidation of the post-mediation contract in cases of disclosure violations, we suggest also imposing a special *ex ante* disclosure requirement. Under this requirement, which would be similar to disclosure duties in court litigation, the mediator will be authorized to require that the parties submit certain items of information that are central to the substantive points of the dispute.¹¹⁴ A party's failure to provide these items would be

¹⁰⁷ See Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 70 (1993) (stressing the disclosure duty as part of the duty of good faith in contractual negotiations).

¹⁰⁸ See, e.g., *Wheatcraft v. Wheatcraft*, 825 N.E.2d 23 (Ind. Ct. App. 2005) (validating post-mediation contract despite husband's alleged fraudulent misrepresentation of valuation of business).

¹⁰⁹ See *supra* Part III.B.1.

¹¹⁰ See Bies & Moag, *supra* note 87.

¹¹¹ See Love & Cooley, *supra* note 38; Nolan-Haley, *supra* note 38.

¹¹² See *supra* Part III.B.2.

¹¹³ See, e.g., *Boyd v. Boyd*, 67 S.W.3d 398 (Tex. App. 2002) (ruling that a mediation divorce settlement agreement is unenforceable when one spouse intentionally withholds information about community property assets).

¹¹⁴ See, e.g., ME. REV. STAT. ANN. 39-A §313 ("The mediator may require that the parties appear and submit relevant information"); John Lande, *Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 129-30 (2002) (proposing detailed list of documents that should be exchanged by the parties before mediation); Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is? "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863 (2008) (suggesting that courts may require mediators to ask some or all of the

considered bad-faith participation and would entitle the other party to the appropriate legal remedy.¹¹⁵ From an incentive point of view, as long as such disclosure requirements would not exceed the disclosure duty in court, it would not, in our opinion, undermine willingness to participate in mediation. On the contrary, it would deepen the trust in the procedure and increase willingness to participate. Moreover, it would reduce the occurrence of situations in which parties come to the mediation with the objective of gleaning information from their adversary, with no intention of disclosing any information of their own, or cooperating.

2. Good Faith Conduct in the Mediation Proceeding

Although American law imposes an explicit duty of good faith in contract performance,¹¹⁶ it is not at all clear whether there is also an implied pre-contractual duty to negotiate in good faith.¹¹⁷ In the context of mediation, a communitarian model emphasizes both the psychological effect of unfair negotiations and the fact that public responsibility for procedural justice relates to *all* that transpires during the mediation process, not just mediator conduct. Thus, while there is significant dispute within the legal scholarship as to whether parties to mediation should bear such a duty of good faith, our theory strongly supports its imposition.¹¹⁸

mapping and setting questions in pre-mediation conversations or during mediation sessions).

¹¹⁵ See *infra* Part IV.B.2.

¹¹⁶ See U.C.C. § 1-203 (1994) (“Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.”); RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981); Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810 (1982) (discussing the application of the good faith duty in court).

¹¹⁷ See Eisenberg, *supra* note 76 (arguing that modern contract law is familiar with the general duty to behave in good faith during negotiations).

¹¹⁸ The literature is filled with a great many responses and approaches to the question of whether a duty of good faith should be imposed on parties to mediation. See generally Roger L. Carter, *Oh, Ye of Little [Good] Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations*, 2002 J. DISP. RESOL. 367 (discussing the prospect of requiring “good-faith” participation in mediation and suggesting normative recommendations); Carol L. Izumi & Homer C. LaRue, *Prohibiting “Good Faith” Reports Under the Uniform Mediation Act: Keeping the Adjudication Camel Out of the Mediation Tent*, 2003 J. DISP. RESOL. 67 (stating arguments against good-faith participation requirements in mandatory mediation); Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575 (1997) (arguing for a detailed good faith standard); Lande, *supra* note 114 (suggesting procedural requirements to assure a fair

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A partial adaptation of this application of our theory already exists in current law, as many states impose a duty of good faith in mediation,¹¹⁹ but in limited form, applying only to preliminary procedural requirements that arise prior to the substantive negotiations.¹²⁰ Accordingly, the courts have deemed parties to have acted in bad faith when they failed to appear at the mediation proceedings,¹²¹ sent a representative who lacked full settlement authority,¹²² or failed to produce the requested position paper detailing their factual and legal versions and stances regarding the dispute or documents related to the dispute.¹²³ Beyond these preliminary procedural applications of the good faith duty, the courts have almost completely refrained from setting

process and leaving good faith duty as a last resort); Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591 (2001) (proposing a standard for a good-faith participation requirement in private ADR, while balancing the competing policy concerns attending such an obligation).

¹¹⁹ See, e.g., COLO. REV. STAT. ANN. § 13-22-311(3) (West 2001); MINN. STAT. ANN. §§ 115B.414(3)-(4), 583.26(5)(c)(1), 583.27 (West 2001); Lande, *supra* note 114, at 78 (reviewing statutes, court rules, mediation referral orders, and common law that establish good-faith requirements in mediation).

¹²⁰ See, e.g., *Nick v. Morgan's Foods, Inc.*, 99 F. Supp. 2d 1056, 1060-61 (E.D. Mo. 2000) (finding a good faith requirement in ADR based on Rule 16 of the Federal Rules of Civil Procedure and the court's inherent authority to preserve the integrity of the judicial proceedings). There are those who maintain that the court has the authority to order the parties to behave in this manner without any need to resort to the general standard of good faith. It also should be noted that failure to appear at the mediation proceedings has been recognized as bad faith even when the mediation was initiated by the parties and not court-ordered. See *Pueblo of San Ildefonso v. Ridlon*, 90 F.3d 423 (10th Cir. 1996).

¹²¹ See, e.g., *Segui v. Margrill*, 844 So. 2d 820, 820 (Fla. Dist. Ct. App. 2003) (ruling that a party's obligation to obey a court order to attend mediation is not fulfilled by the presence of counsel at the mediation with full authority to settle).

¹²² There is a decided lack of consensus on this subject amongst the courts. Compare *Nick*, 99 F. Supp. at 1062 (sending a representative lacking full settlement authority constitutes bad faith); with *In re Acceptance Ins. Co.*, 33 S.W.3d 443, 452 (Tex. App. 2000) (rejecting the claim of bad faith in a similar situation). See also *Ins. Co. of North America v. Gains*, 765 So. 2d 139, 139 (Fla. Dist. Ct. App. 2000) (despite the fact that a representative with full settlement authority had not been sent, no sanction was imposed since the court that had referred the parties to mediation had not given an explicit order for the participation of such an authorized representative).

¹²³ See, e.g., *Nick*, 99 F. Supp. at 1061; see also E.D. WASH. LOC. R. 16.2(c)(2)(b)(3)(C) (requiring parties to provide a pre-mediation memo); *Francis v. Women's Obstetrics & Gynecology Group*, 144 F.R.D. 646, 647 (W.D.N.Y. 1992) (asserting that the requirement to be prepared to participate at pretrial conferences derives from the provision in Federal Rule of Civil Procedure 16(f)); *supra* Part IV.B.1 (discussing the disclosure requirement).

any substantive good faith conduct requirements in mediation,¹²⁴ thereby opening the door to exploitation of the process. Our theory and existing law diverge here. Under our proposed regime, good faith in mediation should entail not only attending the mediation proceedings, but also party conduct during the mediation. Thus, in our regime, at least in voluntary mediation, attending a negotiations session but refusing to conduct negotiations in a substantive fashion would amount to bad faith conduct.¹²⁵ Furthermore, when mediation negotiations have reached an advanced stage, a party's refusal to fulfill the formal requirements for making the settlement agreement enforceable could be deemed bad faith participation in mediation in the concrete circumstances of the case.¹²⁶ The need for a substantive good faith standard was well illustrated by the circumstances of the California case of *Simmons v. Ghaderi*.¹²⁷ There, an oral settlement agreement was reached in mediation based on negotiations between the parties. As the formal requirements for validating the agreement were not completely satisfied, the California Supreme Court refused to enforce the agreement, despite the fact that it had been recorded in writing by the mediator.¹²⁸ The circumstances in

¹²⁴ See *Graham v. Baker*, 447 N.W.2d 397, 399 (Iowa 1989) (“the parties’ mere appearance at the mediation sessions is sufficient.”); see also *Stoehr v. Yost*, 765 N.E.2d 684, 686–88 (Ind. Ct. App. 2002) (ruling that usually it is sufficient that the parties attend the mediating sessions, albeit there could be special circumstances in which parties will be deemed as acting in bad faith even when they do attend the mediation).

¹²⁵ In one exceptional case, the court adopted a stricter approach, *Tex. Dep’t of Transp. v. Pirtle*, 977 S.W.2d 657, 658 (Tex. App. 1998) (demanding substantive participating in consensual mediation); see also FLA. STAT. § 627.745(d) (requiring all parties to mediate in good faith).

¹²⁶ For bad-faith participation outside of the context of mediation see *E. Me. Med. Ctr. v. NLRB*, 658 F.2d 1, 10, 13 (1st Cir. 1981) (adopting substantive interpretation of the good-faith duty in the advanced stages of negotiations). Under our approach, a similar policy should also be considered in mediation.

¹²⁷ *Simmons v. Ghaderi*, 187 P.3d 934 (Cal. 2008).

¹²⁸ Another well-known and widely discussed example in this context is the Minnesota law, in effect up until a few years ago, that conditioned the enforcement of mediation settlement agreements on written form and parties’ signature, as well as explicit indication in the body of the agreement that it is a binding contract and that the contracting parties have received written counsel regarding the following: (1) the mediator is under no duty to protect the parties’ interests or inform them of their legal situations; (2) the parties’ signature on the settlement agreement will impact and, most likely, change their legal situations; and (3) the parties have the right to consult with legal counsel before signing the agreement. MINN. STAT. ANN. § 572.35 (West 1998) (the statute originated in 1983, when the Minnesota Civil Mediation Act was legislated). In accordance with this, Minnesota courts refused to enforce mediation contracts that failed to meet *all* these formal requirements, even when a contract had been made according to

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Rizk v. Millard,¹²⁹ a Texas case, were similar, involving an oral arrangement formulated between the parties towards the end of the mediation proceedings. The court noted that the mediator had summoned the parties and their lawyers, and in the presence of all, the parties had orally confirmed their consent to the arrangement, and a written preliminary draft was even drawn up. However, although neither of the sides voiced any objection to the arrangement at that point, the work was not completed, and the mediation settlement agreement was not signed by the parties. Later on, one of the parties announced that he was revoking his consent to the agreement and would neither sign nor honor it.¹³⁰ Following the conventional procedural application of the good faith duty, the court ruled that the late withdrawal from the negotiations and refusal to sign the agreement did not amount to a breach of good faith. We certainly support formal requirements for post-mediation contracts. However, in our view, late withdrawal from negotiations without relevant justification,¹³¹ alongside other techniques lawyers employ to drag out the mediation, without any intention of resolving the dispute through the negotiations,¹³² violates trust, respect, and dignity and, as such, should be considered bad faith conduct and entitle the other

regular contract law. Such was the case, for example, in *Haghigi v. Russian-Am. Broad. Co.*, 173 F.3d 1086 (8th Cir. 1999). However, in the wake of *Haghigi*, the Minnesota law was amended in 1999 to allow enforcement of mediation settlement agreements even when they failed to explicitly note the fulfillment of the requirements. 1999 Minn. Sess. Law. Serv. 190 (West). However, the law still requires proof that the information was brought to the parties' attention in some other way.

¹²⁹ *Rizk v. Millard*, 810 S.W.2d 318 (Tex. App. 1991).

¹³⁰ Since Texas law at the time applied strict formal requirements as conditions for enforcing mediation settlement agreements, the court refused to enforce the agreement without the parties' signatures, as required under the law.

¹³¹ Such late withdrawal seems to be quite frequent. See William J. Caplan, "Deal or No Deal": Prevent Your Mediated Settlement from Being Just Another Round of Litigation, 51 ORANGE COUNTY LAWY. 35 (2009) (reviewing such situations and recommending practical conclusions).

¹³² See Julie Macfarlane, *Culture Change? Commercial Litigators and the Ontario Mandatory Mediation Program*, 2002 J. DISP. RESOL. 241, 267 (quoting a Toronto litigator: "[I]f . . . I act for the Big Bad Wolf against Little Red Riding Hood and I don't want this dispute resolved, I want to tie it up as long as I possibly can, and mandatory mediation is custom made. I can waste more time, I can string it along, I can make sure this thing never gets resolved because . . . I know the language. I know how to make it look like I'm heading in that direction. I make it look like I can make all the right noises in the world, like this is the most wonderful thing to be involved in when I have no intention of ever resolving this. I have the intention of making this the most expensive, longest process but is it going to feel good. It's going to feel so nice, we're going to be here and we're going to talk the talk but we're not going to walk the walk.").

party to legal remedy. Thus, when one of the parties prevents the fulfillment of a formal requirement without justification, a remedy for breach of good faith should be available to the injured party.

Before concluding this section, two important qualifications are called for. The first relates to the tension between a substantive good faith requirement and the requirement for confidentiality in mediation.¹³³ We will discuss this concern below as part of our broader discussion of the communitarian theory approach to the confidentiality requirement. The second point of concern is that a substantive good faith duty in mediation might trigger “satellite litigation.” Namely, the parties may come to the mediation with one dispute and leave with another—regarding what transpired during the course of the mediation. In light of this risk, we recommend limiting the substantive review of parties’ conduct during mediation to special circumstances so as to minimize the satellite litigation effect. A substantive good faith requirement should be applied in those special circumstances, despite the potential satellite litigation effect, for in the absence of such a standard, mediation is open to manipulation and exploitation of power disparities in a way that undermines trust, respect, and dignity, all necessary elements of the communitarian concept of mediation.¹³⁴

¹³³ See generally Maureen A. Weston, *Confidentiality’s Constitutionality: The Incursion on Judicial Power to Regulate Party Conduct in Court-Connected Mediation*, 8 HARV. NEGOT. L. REV. 29 (2003) (arguing that courts should use their reservoir of judicial authority to sanction misconduct in court-connected ADR programs, even in situations of statutes prohibiting mediation disclosures). *But see* Michael Patrick Dickey, *ADR Gone Wild: Is It Time for a Federal Mediation Exclusionary Rule?*, 25 OHIO ST. J. ON DISPUTE RESOL. ___ (forthcoming 2010) (calling to increase the confidentiality in mediation by recognizing a narrow mediation exclusionary rule).

¹³⁴ It should be noted that despite the apparent clear disadvantage, increased litigation can also have a significant advantage. One of the arguments against mediation is that it is an attempt to fight court congestion and is no more than an effort on the part of the legal system to lighten its caseload. Yet the justification for mediation that arises from the appropriate regulation of the procedure in fact rests on mediation values and not on some need to remedy the court’s ailments. Indeed, the increase in litigation will in fact convey an important message that mediation is a desirable product that should be used. This could significantly reinforce public trust both in mediation and in the courts.

3. *From Mediation to Settlement Agreement: Judicial Review of the Post-Mediation Contract*

Under prevailing contract law, aside from a few concrete contexts,¹³⁵ a contract's validity is not usually conditioned on form requirements,¹³⁶ and certainly in most areas of contract law, there is no procedure set for *ex ante* judicial approval of agreements. From an *ex post* perspective, classical contract law called only for limited state intervention in contracting parties' relations and dogmatically insisted on enforcing agreements and the sanctity of the contract.¹³⁷ Modern contract law,¹³⁸ however, opened the door to *ex post* judicial review of contractual formation by expanding the criteria for accepting claims of mistake,¹³⁹ coercion,¹⁴⁰ and unconscionability.¹⁴¹ In the context of mediation, in certain jurisdictions, special formal requirements have been set for enforceability of the post-mediation agreement.¹⁴²

¹³⁵ See, e.g., 9 U.S.C. § 2 (1999) (writing requirement in arbitration agreements); U.C.C. § 2-201 (1998) (establishing a writing requirement for sales of goods priced at or above \$500); RESTATEMENT (SECOND) OF CONTRACTS § 110 (1981) (providing a modern equivalent of the statute of frauds).

¹³⁶ See, e.g., Mich. Reg'l Council of Carpenters v. New Century Bankcorp, 99 Fed. App'x 15, 21 (6th Cir. 2004) (relying on general contract law to enforce settlement contract that was not set forth in writing).

¹³⁷ See, e.g., Larry A. DiMatteo, *Equity's Modification of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law*, 33 NEW ENG. L. REV. 265 (1999) (discussing the equitable reformation of contract law that transpired during the twentieth century).

¹³⁸ See *id.*

¹³⁹ See, e.g., Melvin A. Eisenberg, *Mistake in Contract Law*, 91 CAL. L. REV. 1573 (2003) (developing the legal rules that should govern mistake in contract law on a functional basis).

¹⁴⁰ See, e.g., Meredith R. Miller, *Revisiting Austin v. Loral: A Study in Economic Duress, Contract Modification and Framing*, 2 HASTINGS BUS. L.J. 357 (2006) (discussing economic duress).

¹⁴¹ See Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967) (distinguishing between procedural and substantive arguments regarding unconscionability); see also Shahar Lifshitz, *Distress Exploitation Contracts in the Shadow of No Duty to Rescue*, 86 N.C. L. REV. 315, 329–36 (2008) (describing the doctrine of unconscionability).

¹⁴² See, e.g., COLO. REV. STAT. ANN. §13-22-308(1) (West 1997) ("If the parties involved in a dispute reach a full or partial agreement, the agreement upon request of the parties shall be reduced to writing and approved by the parties and their attorneys, if any. If reduced to writing and signed by the parties, the agreement may be presented to the court by any party or their attorneys, if any, as a stipulation and, if approved by the court, shall be enforceable as an order of the court."); TEX. CIV. PRAC. & REM. CODE ANN.

However, even where such legislated requirements do exist, the courts sometimes enforce the mediation settlement agreement despite failure to meet these requirements, on the grounds that, under regular contract law, an oral contract was made between the parties.¹⁴³

These particular formal procedural requirements notwithstanding, the post-mediation contract is enforced according to regular contract law despite its public nature. Moreover, in contrast with our communitarian approach to mediation, which supports increased regulation and judicial review of the mediation contract, the existing regulatory arrangement in many states goes in the opposite direction, drawing the contractual regime governing the parties' relations closer to classic contract law and emphasizing the precedence of freedom of contract in its formal sense. Thus, many courts adopt the principle of settlement finality as a guiding principle, thereby setting a barrier for parties to retroactively challenge a mediation settlement agreement.¹⁴⁴ As a result of this policy, the ability to challenge the contract-making procedure in mediation is currently more limited than was the case under the prevailing standard in conventional contract law.¹⁴⁵ Moreover, while courts tend to refrain from substantive review of the fairness of post-mediation contracts,¹⁴⁶ mediation settlement agreements are sometimes submitted to the court. In these cases, the agreements acquire the force and

§154.071(a) (Vernon 2001) ("If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract."); see also Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U.C. DAVIS L. REV. 33, 51–56 (2001) (reviewing the writing requirements in mediation laws).

¹⁴³ See, e.g., *Few v. Hammack Enter., Inc.*, 511 S.E.2d 665, 670–71 (N.C. Ct. App. 1999) (undercutting both evidentiary and writing requirements for mediated agreements by deciding that these rules did not overturn the state contract rule permitting enforcement of settlements reached by oral agreement); see also Deason, *supra* note 142, at 57–58.

¹⁴⁴ See, e.g., *Sponga v. Varro*, 698 So. 2d 621, 625 (Fla. Dist. Ct. App. 1997) ("The finality of it once the parties have set down their agreement in writing is critical.").

¹⁴⁵ See, e.g., *Tilden Groves Holding Corp. v. Orlando/Orange County Expressway*, 816 So. 2d 658 (Fla. Dist. Ct. App. 2002) (demonstrating the decreased level of scrutiny in the mediation context); *Ghahramani v. Guzman*, 768 So. 2d 535, 537 (Fla. Dist. Ct. App. 2000) (same).

¹⁴⁶ See, e.g., *Crupi v. Crupi*, 784 So.2d 611, 613 (Fla. Dist. Ct. App. 2001) (rejecting the claim that mediated divorce settlements should be set aside because of "unreasonableness" or "unfairness").

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validity of a court decision and are almost completely immune to invalidation due to flaws in their formation.¹⁴⁷

Our communitarian theory, in contrast, leads to a very different legal regime. First, well-considered and informed consent are necessary for ensuring procedural justice. Hence, alongside the regular contractual rules, our theory seeks additional mechanisms aimed at ensuring the parties' willingness to enter into a binding contract. This is similar to the approach of those jurisdictions that insist on formal requirements as a condition for the validity of the post-mediation contract.¹⁴⁸ Unlike the regime in most of these jurisdictions, however, our model requires a remedy for a party's bad-faith refusal to meet those requirements.¹⁴⁹

Second, our analysis emphasizes that procedural justice principles such as voice, informed consent, and self-determination are crucial in mediation, not only in the context of the mediator-parties relationship but also in the context of the internal relations between the parties.¹⁵⁰ Our analysis further demonstrates the state's heightened responsibility for the fairness of mediation process and its outcomes.¹⁵¹ Violations of procedural justice principles in mediation often breed claims of duress, mistake, or unconscionability.¹⁵² Thus, rejecting the application of the principle of

¹⁴⁷ See, e.g., *Commodity Futures Trading Comm'n v. Equity Fin. Group*, Civil No. 04-1512 (RBK), 2007 WL 2139399, at *1 (D.N.J. July 23, 2007) (ruling that mediator's recommendation on the final settlement offer is an attestation to its reasonableness).

¹⁴⁸ There are, of course, many other justifications for formal requirements for the post-mediation contract. See, e.g., *Vernon v. Acton*, 732 N.E.2d 805 (Ind. 2000) (refusing to enforce an oral agreement reached during mediation because of court rules of confidentiality). Another reason for the existence of formal requirements for the post-mediation contract is that it is regarded as constituting consent between parties that are in the process of court litigation, i.e., as part of court proceedings. See, e.g., Margo Ahern, *Agreements in Crisis: The Stinging Effects of Texas Rule of Civil Procedure 11 on Settlement Agreements and the Alternative Dispute Resolution Process*, 31 TEX. TECH. L. REV. 87 (2000) (discussing courts' application of the formal contract-making requirements in procedural contexts to the post-mediation contract).

¹⁴⁹ See *supra* Part IV.B.2.

¹⁵⁰ See *supra* Part III.B.1.

¹⁵¹ See *supra* Part III.B.1(c).

¹⁵² See, e.g., *Patsky v. Suprenant Cable Corp.*, No. 972527A, 2001 WL 1029642, at *2 (Mass. Aug. 2, 2001) (discussing claims of duress, with one of the parties asserting that he felt pressured when the mediator "said she had another commitment at 5 p.m. and insisted on the settlement decision"); *Ghahramani v. Guzman*, 768 So. 2d 535, 537 (Fla. Dist. Ct. App. 2000) (stating that a mediated settlement agreement should not be set aside on grounds of unilateral mistake); *Kendrick v. Barker*, 15 P.3d 734, 740-42 (Wyo. 2001) (enforcing personal injury settlement, while rejecting the claim that unforeseen injuries made the agreement unconscionable).

settlement finality, our communitarian theory calls for judicial review of the post-mediation contract, whereby the court's application of the existing contractual doctrines will exceed its usual intervention in contract settings.¹⁵³

In certain circumstances, we support substantive review of the fairness of the post-mediation contract. Substantive review of the fairness of contracts is recognized today in certain contractual settings, especially those settings that are characterized by a significant power disparity between parties.¹⁵⁴ In light of the state's moral responsibility for the product of mediations, we believe that such fairness review is vital also regarding the post-mediation contract.¹⁵⁵ Objective criteria to measure the unfairness of the contracts, such as the disproportionate distribution of the gains among the parties, or the gap between the contractual and regular market terms,¹⁵⁶ should also be applied to mediation law. Yet, taking into account the uniqueness of mediation and its emphasis on creative solutions and future interests,¹⁵⁷ the post-mediation settlement should not necessarily reflect the hypothetical court decision in the particular case. Hence, according to our proposed regime, courts might validate even settlements in which one of the parties waived his legal rights—as long as they are convinced that the settlements reflect the authentic interest of the parties¹⁵⁸ as opposed to an exploitation of a significant disparity in power.¹⁵⁹ In other words, our proposed regime

¹⁵³ Cf. Nancy Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001) (rejecting the idea of modifying the presumption against coercion, because, inter alia, fewer people might be willing to serve as mediators).

¹⁵⁴ For the distinction between procedural and substantive arguments see Leff, *supra* note 141; see also *United States v. Martinez*, 151 F.3d 68, 74 (2d Cir. 1998) (“Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”); Melvin A. Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 754–63 (1980) (based on the considerations of efficiency and fairness, classifying distress exploitation as a type of unconscionability).

¹⁵⁵ See *supra* Part III.B.2.

¹⁵⁶ See F. H. Buckley, *Three Theories of Substantive Fairness*, 19 HOFSTRA L. REV. 33, 40–49, 56–59 (1991); James Gordley, *Equality in Exchange*, 69 CAL. L. REV. 1587, 1631–37 (1981).

¹⁵⁷ See generally ROGER FISHER AND WILLIAM L. URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981) (describing the differences between past oriented litigation to future oriented settlements).

¹⁵⁸ See Joseph B. Stulberg, *Mediation and Justice: What Standards Govern?*, 6 CARDOZO J. CONFLICT RESOL. 213 (2005) (discussing fairness standards in mediation).

¹⁵⁹ See Lifshitz *supra* note 141, at 329–32 (describing the pendulum effect between procedural and substantive review of contracts in general).

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establishes a pendulum effect between procedural and substantive review of post mediation contracts: when procedural justice in the mediation is followed, the courts should narrow, albeit not giving up completely, the fairness review of the content of the settlement.

In contrast with our approach, proponents of settlement finality assert that strong judicial intervention in mediation settlement agreements will increase mediation cost and inhibit people from participating in mediation. However, in our view, the very opposite will be the case, as a more communitarian regime will make mediation a more protected procedure and thus promote its use. Moreover, the proposed model would ex-ante encourage all the participants in the mediation to ensure the proper administration of the proceedings.

However, although we do not regard settlement finality to be a decisive consideration, we nonetheless agree that certainty as to the mediation outcome is, indeed, an important objective. This leads us to our final recommendation, namely, the implementation of a substantive mechanism for court approval of the post-mediation contract. Under our proposed mechanism, mediators will have the option of submitting the post-mediation contract to the court for approval. The court will then have the authority to review the application of procedural justice in the mediation as well as the fairness of the post-mediation contract.¹⁶⁰ Should the court approve the contract, it could be enforced in a quicker and easier procedure without any need for further action. In such cases, the finality principle will come into effect and the ability to make claims against the contract's validity will be limited to cases in which new evidence comes to light revealing extreme duress, exploitation, or misrepresentation.

4. Mediator Conduct and the Post-Mediation Contract

Thus far, we have discussed how our communitarian regulation regime would address independently the mediator-parties relations and the mediating parties' internal relationship. However, our communitarian theory also

¹⁶⁰ See Ellen E. Deason, *Procedural Rules for Complementary Systems of Litigation and Mediation Worldwide*, 80 NOTRE DAME L. REV. 553 (2004) (noting that in many jurisdictions, procedural leniencies are granted to allow the parties to apply to the court for summary enforcement of post-mediation contract). Yet, in contrast to the existing procedural leniencies that lead to summary enforcement, we suggest that the judicial approval procedure include an examination of whether the parties exercised free will and their understanding of the contract, a retroactive examination of whether the proper procedures were implemented during the mediation, and even preliminary scrutiny of the contract's contents.

collapses the dichotomy separating these two spheres. In this part we demonstrate how a mediator's violation of procedural justice rules should impact the validity of the post-mediation contract.

Under prevailing contract law, the recognized grounds for contract nullification due to flaws in contract formation are usually restricted to flaws originating in the conduct of the opposing party or his or her representative.¹⁶¹ Conventional application of those contractual doctrines to mediation means that when the mediator's conduct, rather than the opposing party's conduct, causes flaws in the contract making, the post-mediation contract will be enforced. It is not surprising, therefore, that post-mediation agreements are enforced despite claims of mediator misrepresentation¹⁶² or mediator coercion entering into the settlement agreement.¹⁶³ Our proposed communitarian regime, in contrast, calls for an expansion of the existing contractual doctrines and for enabling parties to void the post-mediation contract also when the flaws in the contract-making derived from the mediator's conduct.¹⁶⁴

Furthermore, regular contract law does not cover all possible violations of procedural justice principles by the mediator, such as imbalanced treatment of the parties, not allowing parties to speak, and disrespectful conduct toward one or both of the parties. Thus, in addition to the expansion of existing contractual doctrines, our communitarian theory proposes developing special contractual doctrines that provide the parties with suitable protection against improper mediator conduct.¹⁶⁵ The common cases of extreme and invasive legal evaluation of a dispute by the mediator are illustrative of how vital this protection is.¹⁶⁶ Under our communitarian

¹⁶¹ See RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981) ("If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.").

¹⁶² See, e.g., *Chitkara v. N.Y. Tel. Co.*, 45 Fed. App'x 53 (2d Cir. 2002); *Brinkerhoff v. Campbell*, 994 P.2d 911 (Wash. Ct. App. 2000).

¹⁶³ See *In re Marriage of Banks*, 887 S.W.2d 160, 163-64 (Tex. App. 1994).

¹⁶⁴ See *Vitakis-Valchine v. Valchine*, 793 So. 2d 1094 (Fla. Dist. Ct. App. 2001).

¹⁶⁵ Thus, in contrast to current law, see, for example, *Wolf v. Wolf*, No. B177351, 2006 WL 171513 (Cal. Ct. App. Jan. 25, 2006), under our regime, claims of mediator partiality should impact the validity of the post-mediation contract.

¹⁶⁶ In mediation literature, there is resistance to mediator evaluations of disputes. See, e.g., Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71 (1998) (arguing that the definition of mediation should not include evaluative services); Kimberlee K. Kovach & Lela P. Love, "Evaluative" Mediation Is an Oxymoron, 14 ALTERNATIVES HIGH COST LITIG. 31 (1996) (arguing that the acts of evaluation and of mediation contradict one another); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV.

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theory, the public regulation of the mediating parties' relationship should include not only a restriction of the mediator's authority to provide a legal evaluation of the dispute,¹⁶⁷ but must also provide contractual remedies in the context of the parties' internal relationship in the event of a violation of this restriction. For example, when the mediator expresses a firm legal opinion of the dispute, predicts the court's decision, and leads the parties to settle the case on the basis of this prediction, there should be a legal premise of a flaw in the formation of the subsequent post-mediation contract, making it voidable by the parties. There could, of course, be exceptions to this presumption. One exception, for example, could be when the mediator made his evaluation with the advance formal and informed consent of both the mediating parties.¹⁶⁸ A second exception could be when court approval has been given to the settlement agreement after careful review of its fairness.¹⁶⁹ The premise could also fall if the mediating parties were effectively represented¹⁷⁰ by counsel during the negotiations and at the time of the contract making. And finally, when no causal link exists between the

937, 937-38 (1997) (analyzing why evaluative activities are inconsistent with the mediator's role); E. Patrick McDermott & Ruth Obar, "What's Going On" in *Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit*, 9 HARV. NEGOT. L. REV. 75 (2004) (finding that both claimants and respondents rate facilitative mediation more favorably than evaluative mediation). Moreover, a great many of those scholars who do not oppose mediator evaluations nonetheless insist on subjecting them to conditions and restrictions. See, e.g., John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839 (1997) (claiming that it is impossible to remove the evaluation from the definition of the mediation procedure, but it is important that it be performed only with the parties' consent); L. Randolph Lowry, *To Evaluate or Not: That Is Not the Question!*, 38 FAM. & CONCILIATION CTS. REV. 48 (2000) (expressing awareness of the limitations of mediator dispute evaluation, while making concrete proposals for its implementation); Donald T. Weckstein, *In Praise of Party Empowerment—and of Mediator Activism*, 33 WILLAMETTE L. REV. 501 (1997) (claiming that mediation evaluation can be allowed, but subject to guaranteeing the parties' self-determination in the mediation); Welsh, *supra* note 2 (supporting "soft" versions of mediator evaluation and that it be performed only at an advanced stage of the mediation).

¹⁶⁷ See, e.g., MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (2000), available at <http://www.mediate.com/articles/afccstds.cfm> (emphasizing in its overview that Family mediation is not a substitute for the need for family members to obtain independent legal advice).

¹⁶⁸ For the justification for setting formal requirements for post-mediation contracts, see *supra* Part IV.B.3.

¹⁶⁹ This exception would require this would entail a deeper examination by the courts. See *supra* Part IV.B.3.

¹⁷⁰ See Welsh, *supra* note 2, at 838.

mediator's evaluation and the formation of the post-mediation contract, the contract will be enforceable.

C. Judicial Review, Confidentiality and the Unique Nature of Mediation

Our proposed communitarian regime results, overall, in heightened judicial review of mediation. Above we addressed the concern that such a regime could potentially generate satellite litigation and suggested a mechanism for minimizing this phenomenon.¹⁷¹ In this section, we turn to the other concern we raised: the potential clash between *ex post* judicial review and the confidentiality requirement in mediation.

The mediation confidentiality requirement is intended to prevent the disclosure and revealing of information regarding what occurred in the mediation proceedings¹⁷² and to inhibit mediators from testifying about the mediation in court.¹⁷³ This requirement is of considerable importance in the legal regulation of the mediation procedure;¹⁷⁴ indeed, the majority of the current regulation of mediation focuses on confidentiality.¹⁷⁵ Undoubtedly, confidentiality plays an important role in mediation, as it allows the parties to express themselves candidly and to raise possible resolutions to the dispute without fear of ramifications for future litigation.¹⁷⁶ Confidentiality also contributes to the parties' self-determination, mutual trust, and the perception of mediators as neutral.¹⁷⁷ Our proposed regulation regime would seem, on

¹⁷¹ See *supra* Part IV.B.2.

¹⁷² See, e.g., Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. ON DISP. RESOL. 239, 243–52 (2002) (providing background on the importance of confidentiality in the mediation setting and outlining competing values that can justify disclosure of mediation communications in subsequent litigation proceedings).

¹⁷³ See, e.g., UNIFORM MEDIATION ACT § 6(c) (2003) (allowing the mediator to decline to testify or otherwise provide evidence). *But see* *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110 (D.Cal. 1999) (allowing the mediator to testify in the special circumstances of the case).

¹⁷⁴ See UNIFORM MEDIATION ACT (2003) (preamble and legislative commentary).

¹⁷⁵ See Joseph B. Stulberg, *The UMA: Some Roads Not Taken*, 2003 J. DISP. RESOL. 221 (asserting that due to its focus on mediator confidentiality, the UMA failed to address other important issues).

¹⁷⁶ See UNIFORM MEDIATION ACT, Prefatory Note (2001) (candor during mediation is encouraged by maintaining the parties' and mediators' expectations regarding confidentiality of mediation communications).

¹⁷⁷ See Scott H. Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 MARQ. L. REV. 9, 68 (2001) (discussing confidentiality and self-

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its face, to undermine the confidentiality doctrine in advocating *ex post* judicial review of the mediation proceedings. Yet the harm generated by our proposal would be less than what would initially appear to be assumed, and moreover, this harm could be minimized with the adoption of certain mechanisms.

First, even today, contractual claims between parties are recognized in many jurisdictions as exceptions to the confidentiality principle.¹⁷⁸ Thus, our model, in this context, conforms to the existing trend.¹⁷⁹

Second, a significant portion of our proposal addresses mediator conduct. Mediator misconduct is a well-accepted exception to the confidentiality principle even today.¹⁸⁰ Our model steps beyond prevailing law in arguing that mediator conduct should not only be disclosed in cases of claims against mediators, but also in cases regarding the post-mediation. Yet mediator conduct is not fully protected even today.¹⁸¹

determination in mediation); Izumi & La Rue, *supra* note 118 (discussing the core values of mediation: party self-determination, confidentiality, and third-party neutrality).

¹⁷⁸ See UNIFORM MEDIATION ACT § 6(b)(2), Reporter's Notes (2001) ("This exception is designed to preserve traditional contract defenses to the enforcement of the mediated settlement agreement that relate to the integrity of the mediation process, which otherwise would be unavailable if based on mediation communications."); see also *Damon v. United Parcel Service*, No. 04-CV-746S, 2009 WL 67368, at *1 (W.D.N.Y. Jan. 9, 2009) (referring to claims regarding party conduct during mediation, without treating the information as confidential in light of the district court's local rules); James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation about Mediation*, 11 HARV. NEGOT. L. REV. 43, 48 (2006) (noting that courts often consider evidence of what transpired during mediation); Dickey, *supra* note 133 (reviewing cases in which the court permitted disclosure regarding the mediation process despite confidentiality rules and calling for increased confidentiality in mediation through recognition of a narrow mediation exclusionary rule).

¹⁷⁹ See ME. R. EVID. 514 (2009), available at http://www.courts.state.me.us/rules_forms_fees/rules/MREvid%20Amend514-10-22.pdf (leaving the exchanges of parties in joint mediation sessions open for admissibility in litigation). However, these rules were withdrawn on January 1, 2010. (http://www.courts.state.me.us/rules_forms_fees/rules/MREvid408514Amend.pdf).

¹⁸⁰ See, e.g., UNIFORM MEDIATION ACT § 6(a)(5) (2003) ("There is no privilege under Section 4 for a mediation communication that is: . . . (5) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator."); see also *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110 (N.D.Cal. 1999) (allowing mediator to testify regarding mediation); Coben & Thompson, *supra* note 178 (reviewing sixty-seven opinions detailing or alluding to direct testimony or affidavits from mediators).

¹⁸¹ See Hughes, *supra* note 177, at 64–66 (noting that under the UMA, while a mediator may testify in a judicial proceeding arising from a complaint of mediator malpractice, none of the parties can call the mediator in an action involving contractual

Third, there are a number of possible mechanisms that could minimize the harm to mediation confidentially in circumstances of *ex post* judicial review of the post-mediation contract. For example, when a party to the mediation makes claims regarding what transpired during the mediation, these claims should not be deliberated by the judge who sent the parties to mediation and to whom they are supposed to return.¹⁸² Another option would be to conduct both our proposed *ex ante* substantive judicial approval as well as the *ex post* judicial review behind closed doors.¹⁸³ Finally, should our proposal be adopted, it would significantly diminish *ex post* litigation over mediation and minimize the damage to confidentiality.

We do concede that some tension exists between the mediation confidentiality principle and intensified judicial review that results from our communitarian approach. Yet we maintain that the harm to confidentiality is necessary and justified in light of the public responsibility for mediation. It is of greater concern to us, instead, that unrestricted confidentiality will turn mediation into a haven for law breakers, likely leading to exploitation of power imbalances, undermining of social values, and externalities.¹⁸⁴

The criticism of mediation confidentiality intensifies substantially in the context of the regulation of the post-mediation contract. The insistence on confidentiality makes the public scrutiny of the contract sometimes even narrower than what is allowed under conventional contract law, as it prevents details of what transpires in mediation from being revealed. Consequently, mediation confidentiality is likely to preclude even conventional contract nullification grounds due to flaws in the contract making.¹⁸⁵

misconduct, but “[a]n astute lawyer, upon examining these two provisions [6(a)(5) and 6(b)(2)], will naturally conclude that the mediator needs to be joined as a co-defendant. If a plaintiff is unable to depose the mediator in a simple lawsuit against the other party, this problem can easily be overcome by suing the mediator as well. After joining the mediator, all of the individuals in the mediation, mediator included, can be deposed.”)

¹⁸² See Weston, *supra* note 133, at 77–78 (suggesting such a mechanism).

¹⁸³ See, e.g., UNIFORM MEDIATION ACT § 6(b)(2) (2003).

¹⁸⁴ See Christopher R. Drahozal & Laura J. Hines, *Secret Settlement Restrictions and Unintended Consequences*, 54 KAN. L. REV. 1457 (2006) (evaluating the likely consequences of restrictions on secret settlements); David Luban, *Settlement and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995) (asserting that settlement reduces the public’s role in dispute resolution, reduces the use of rules and precedents, and leads to an erosion of the public realm); cf. Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995) (contesting Luban’s proposition that democratic discourse requires full disclosure of legal dispute information).

¹⁸⁵ See *In re Acceptance Ins. Co.*, 33 S.W.3d 443, 451–54 (Tex. App. 2000) (“[T]he manner in which participants negotiate should not be disclosed to the trial court.”); see

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Mediation confidentiality conflicts with a communitarian theory that seeks to bolster public responsibility for mediation. Our model is consistent with new trends towards softening mediation confidentiality in general,¹⁸⁶ while including a specific assertion that contractual claims that challenge the moral basis of mediation should be heard despite the requirement for confidentiality.

Before concluding, we would like to address another possible concern, namely, that deep regulation and intense judicial review will blur the difference between mediation and court litigation and undermine the unique character of mediation. We do agree with the aspiration to construct mediation as an autonomous procedure, distinct from the conventional legal procedure. Yet in our opinion, judicial review of mediation and the post-mediation contract, if implemented properly, will not undermine mediation's core values. Quite the contrary, a central factor that distinguishes mediation from other judicial procedures is that it highlights the parties' autonomy and fosters their ability to formulate agreement that is suited to their preferences. This is in contrast with the general legal rules which operate in a "one-size-fits-all" manner. The procedural justice principles, especially the parties' self-determination and their opportunity to participate in the decisionmaking process, are conditional and necessary for the implementation of mediation objectives.

also Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc., 25 P.3d 1117, 1119 (Cal. 2001) ("Neither a mediator nor a party may reveal communications made during mediation."); *Vick v. Waits*, No. 05-00-01122-CV, 2002 WL 1163842, at *3 (Tex. App. June 4, 2002) ("The Texas ADR Act does not include an exception for claims of fraud, and this Court will not create an exception to the confidentiality provisions of the Texas ADR Act. Because all of the alleged misrepresentations were made during mediation, these statements are confidential..."); Annalisa L.H. Peterson, *When Mediation Confidentiality and Substantive Law Clash: An Inquiry into the Impact of In re Marriage of Kieturakis on California's Confidentiality Law*, 8 PEPP. DISP. RESOL. L.J. 199 (2007) (discussing *In re Marriage of Kieturakis* and noting that the court decision both upheld California's historically strict standard of confidentiality and reduced the scope of the state's presumption that unequal marital settlements were achieved through undue influence). However, courts often do not refrain from a discussion of claims regarding improper conduct or flaws in the contract-making in mediation, and in doing so, setting aside the requirement of confidentiality and allowing the parties to bring evidence and testimony regarding what transpired over the course of the mediation proceedings. See *supra* note 178.

¹⁸⁶ See *supra* notes 178–79; see also Robert Timothy Reagan, *The Hunt for Sealed Settlement Agreements*, 81 CHI.-KENT L. REV. 439 (2006) (finding that in practice, settlement agreement confidentiality in mediation and in general is adhered to only with respect to financial details).

As this article has shown, the existing regulation of mediation does not enable substantive enforcement of procedural justice rules. In fact, it is the existing regulation that might harm the mediation vision.¹⁸⁷ In contrast, the legal regime we offer, grounded on both procedural and substantives justice principles and on inclusive legal supervision of their implementation, will lead to the realization of the mediation goals.

V. CONCLUSION

The emergence of mediation as a prevalent dispute resolution procedure has given rise to great debate between mediation's proponents and opponents. We are numbered with the former camp. Our support for mediation is based not only on such instrumental reasons as reducing court congestion, but also, and mainly, on mediation's unique character, in particular its emphasis on party autonomy and freedom. Our support for mediation overlaps with a general pluralistic viewpoint that calls for a multiplicity of public institutions¹⁸⁸ and, specifically, dispute resolution institutions.¹⁸⁹

From a communitarian and judicial pluralism perspective, we recognize that unrestricted privatization of social and legal institutions might lead to harm being inflicted on society's weaker segments.¹⁹⁰ In a similar vein, we are concerned that, without regulation and judicial review, powerful parties will abuse mediation to further their needs and the voices of weak and inexperienced parties will not be heard. Therefore, this article joins in the call for more scrupulous regulation of mediation.

Under conventional approaches, the regulation of mediation is still an exception, and mediation, as a whole, particularly the post-mediation contract, is perceived as private. Our analysis shows that the principles of finality and mediation confidentiality have eroded judicial review of the post-

¹⁸⁷ See, e.g., Riskin & Welsh, *supra* note 114, at 867 (discussing the gap between aspiration and reality in court-oriented mediation).

¹⁸⁸ See Shahar Lifshitz, *Married Against Their Will? Toward a Pluralist Regulation of Spousal Relationship*, 66 WASH. & LEE L. REV. 1565 (2010) (arguing that the law should encourage diversity of spousal institution).

¹⁸⁹ See Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869 (1988) (describes legal pluralism); see also Bryan Caplan & Edward P. Stringham, *Privatizing the Adjudication of Disputes*, 9 THEORETICAL INQ. L. 503 (2008) (supporting the privatizing of dispute resolution).

¹⁹⁰ See, e.g. Susan M. Okin, *Feminism and Multiculturalism: Some Tensions*, 108 ETHICS 661 (1998) (opposing multiculturalism from feministic perspective).

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mediation contract to an even lesser level than judicial review of regular private contracts.

In contrast with the conventional approach, this article, resting on social-psychological and public policy analyses, proposes a communitarian conception of mediation and the post-mediation contract. Our analysis demonstrates that the parties perceive mediation (specifically court-annexed mediation) as a community act that has a huge impact on their status in the group and on their self-identity. Our analysis also reveals the moral responsibility of the community for the mediation procedure and its consequences. Based on a communitarian theory, this article proposes a comprehensive model for public regulation of mediation. Unlike the current regulatory regime, we present coherent regulation that relates both to the mediator-parties relations and to the mediating parties' internal relationship, including the post-mediation contract.

The proposed regulation does not deny the unique character of mediation and ignore the difference between mediation and court procedures. Rather, it offers communitarian legal regulation that is suited to mediation and its unique qualities. Hence, the article suggests a unique contract law regime to deal with post-mediation contracts. This regime expands the duty to participate in good faith beyond what currently exists in prevailing law. We also offer more possibilities for nullifying post-mediation contracts in instances of procedural justice violations, even when these violations are not covered by standard contract law doctrines regarding flaws in contract formation. In addition, the communitarian theory connects between the mediator-parties relations and the mediating parties' internal relationship. Thus, in certain circumstances, the parties could invalidate both the mediation and the post-mediation contract due to violations on the part of the mediator. Finally, we have offered here an innovative mechanism giving the parties the option to submit the post-mediation contract for court approval. We showed that adopting such a mechanism would minimize the harm that could be caused to mediation finality and confidentiality, without forfeiting public supervision of mediation.

The days in which mediation was perceived as threat to the legal system are long gone. Today, modern law, including the conventional judicial system, encourages mediation in many ways. We support this trend. However, we believe that the legal promotion of mediation must be complemented by enhanced public responsibility for the process. In our view, modern law cannot send people to mediation and then close its eyes to violations of procedural or substantive justice within its framework. Therefore, the challenge of modern mediation law is to preserve the uniqueness of mediation as an autonomy-based mechanism distinct from

formal litigation while ensuring community responsibility for its contents. The regulatory regime laid out in this article is a first step towards meeting this challenge.