Alone in the Hallway: Challenges to Effective Self-Representation in Negotiation

Erica L. Fox†

I. Introduction

I met Tashana while interviewing tenants in the hallway of the Boston Housing Court (BHC). It was Thursday morning and, as usual, the docket listed hundreds of summary eviction cases. With her case among the majority sent to "mediation," Tashana sat waiting to negotiate over her residential security. She showed me pictures that she had brought of defects in her apartment. Images depicted her broken home: shattered windows the landlord "repaired" by taping paper over them, warping floors where months-old leaks had decayed the surface, holes in the walls. With the law on her side,[1] I imagined that Tashana would return with a commitment for genuine repairs. Instead, after negotiating in the hallway with the landlord's lawyer, she had agreed to pay outstanding rent and to vacate the apartment within three months. When I asked her about the windows and the floors, she said simply: "it didn't come up."

The experience left me wondering: How can I explain Tashana's negotiation and the hundreds like it? At least two defects seemed readily apparent. First, landlord-tenant law provides protections for tenants like Tashana that she did not receive in her negotiated outcome.[2] Second, negotiation places decision-making authority with

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† The author is an associate attorney of the Boston law firm Hill and Barlow, and a member of its ADR Practice Group. This Note was originally written to fulfill the author's Third Year Written Work Requirement at Harvard Law School. The author would like to acknowledge Duncan Kennedy, Sheila Heen, Michael Moffitt, Scott Peppet, Andrew Tulumello, John Richardson, Heather Shull, David Hoffman, Douglas Stone and Chuck Doron, for various contributions to this piece, with a special acknowledgment to David Seibel, her editor, for tireless editing and other support.

1. *See* Mass. Gen. Laws Ann. ch. 186, § 14 (1991) (providing for actual and consequential damages and attorney's fees for a landlord's breach of the implied warranty of habitability). Such damages may be claimed to offset rent owed. Landlords may also be fined or imprisoned for violations.

2. For a full discussion of the "revolution" in landlord-tenant law generally, see *infra* notes 14–22 and accompanying text.

the parties involved in a dispute rather than with an outside decision-maker. Ideally, final outcomes are co-constructed through participation by both parties.[3] Tashana's agreement did not reflect such co-construction. Upon reflection, a third flaw came into view. Negotiation aims to facilitate efficient resolution of disputes. True efficiency, however, includes not only fast-paced, short-term conclusions to cases but also their full and final resolution. Minimal co-construction undermines the durability, and therefore the efficiency, of negotiated agreements. Three primary goals of negotiation were therefore not achieved in Tashana's case: protecting legal rights, producing co-constructed agreements, and resolving conflict efficiently. This Note addresses what went wrong.

Viewed through the lens of current negotiation analysis, Tashana's outcome is surprising. The dominant discourse of negotiation analysis describes negotiation as a process through which people seek to satisfy their interests. Theoretically, negotiating parties assess their situation, consider the range of available outcomes, and choose among them. This decision-making process is presumptively based on the negotiator's determination of how best to satisfy his interests.[4] Tashana's negotiation does not illustrate this self-interested pursuit.

A more complete model for understanding Tashana's story comes not from dispute resolution sources but from a more traditional paradigm related to legal representation: agency. In the law, agency is a representational relationship an agent has with another, the principal. For example, a client, or "principal," often contracts with a lawyer, or "agent," to represent her interests in a dispute.[5] This Note uses agency in a broader way. Applying agency in negotiation settings, this Note argues that it is useful to analyze agency as it relates to the representational relationship clients have with themselves. I call this dynamic "self-agency."

In this Note I argue that negotiators do not necessarily feel legitimate representing themselves, or pursuing their interests through

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3. Negotiation and mediation are informal processes in which the parties themselves — not an external decisionmaker — try to reach a mutually-acceptable agreement. Particularly in mediation, the concept of mutual acceptability takes on special significance. In this context, the idea involves generating "co-constructed" agreements, meaning that good agreements reflect the joint participation of both parties as contributors to the substantive outcome.

4. Although a cooperative bargainer places value on meeting the other side's interests in addition to her own, any negotiator presumably pursues her own interests in the process.

5. *See* RESTATEMENT (SECOND) OF AGENCY § 1 (1957).

negotiation. Just as a client must authorize an outside agent, effective negotiation on one's own behalf requires authorization to act as an agent for oneself. If negotiators authorize themselves to identify and to prioritize their interests, as well as to pursue and to satisfy them, this Note describes them as having a high degree of "self-agency."

This Note explores the role of self-agency in negotiation. Self-agency functions across a broad range of negotiators and negotiation settings. However, it is easiest to notice in its relative absence. This Note therefore draws examples from landlord-tenant negotiations at the BHC, where the tenants' relative lack of self-agency is in high relief. Specific examples support several claims about self-agency, including that self-agency is not universal but instead functions along a continuum; varying degrees of self-agency can be identified by looking at communication patterns; and internal as well as external barriers constrain the effective use of self-agency.

Understanding self-agency dynamics helps to explain why, in a case like Tashana's, broken windows and decaying floors can fail to "come up." Appreciation for the role of self-agency will clarify the causes of many negotiation breakdowns, as well as suggest new ways to improve negotiators' effectiveness. On a more general level, this Note claims that greater rights protection, co-construction, and long-term efficiency can be achieved by attention to self-agency dynamics.

II. The Problem In Context

Before delving into the theory of self-agency, an introduction to the development of alternative dispute resolution (ADR), reforms in housing law, the parties at the Boston Housing Court and the physical space in which they negotiated situates this Note in its real world context.

A. *The Legal Background*

The predominance of negotiation and mediation as methods of case disposition at the BHC reflects the intersection of two important legal trends: the institutionalization of ADR and dramatic reform in landlord-tenant law.[6]

6. *See* Part V, *infra*, for a discussion of whether the purposes of the ADR movement and these legal reforms have been fulfilled.

Over the past few decades, the American judicial system has recognized the limits of focusing exclusively on the traditional adversarial litigation model.[7] As financial strain, time delays and overburdened dockets combined to result in diminished justice and parties' dissatisfaction, actors in many spheres of the dispute resolution industry became open to alternatives. Thus, "[b]eginning in the late 1960s, American society witnessed an extraordinary flowering of interest in alternative forms of dispute settlement."[8]

In 1976, at the Pound Conference on Popular Dissatisfaction with the Administration of Justice, Frank E.A. Sander presented a model of a comprehensive justice center, or "multi-door courthouse," that appealed to many in the legal community.[9] The basic notion was that alternative methods of dispute resolution could enable parties to reach mutually-beneficial agreements voluntarily, and at a more time and cost efficient pace, while remaining sensitive to the interpersonal needs of disputants.[10] Other central benefits included informality and flexibility, which could yield creative solutions.

Parties already had long used negotiation to broker private deals. Mediation, which is facilitated negotiation guided by a neutral

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7. This focus was previously exclusive in the sense of formal court treatment of disputes. Historically, conflicts have found a range of resolution venues, including direct verbal communication, interpersonal violence, speaking informally to a trusted friend or community leader, or not naming the conflict as an official dispute at all. *See* William Felstiner, Richard Abel and Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming and Claiming*, 15 L. & Soc'y Rev. 631 (1980-1981).

8. Frank E.A. Sander, *Dispute Resolution Within and Outside the Courts: An Overview of the U.S. Experience, in* Attorneys General and New Methods of Dispute Resolution 13 (Michael G. Cochrane ed., 1990). In their historical overview of ADR's growth, Goldberg, Sander and Rogers discuss the "civil rights strife" of the 1960s and 1970s as a contributing factor. In 1972, they point out, "the Community Relations Service of the Justice Department hired mediators to assist in resolving community-wide civil rights disputes, drawing on an earlier program set up by the Ford Foundation." Stephen B. Goldberg et al., Dispute Resolution 7 (1992).

9. *See* Sander, *supra* note 8, at 13. The proposed multi-door courthouse would have many doors through which individuals could proceed to the most appropriate dispute resolution forum. Options might include arbitration, mediation, and mini-trials. Initial screening of disputes according to established criteria would guide parties toward the procedure most likely to serve their needs. *See also* Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 Neg. J. 49, 50 (1994) (discussing which cases are best suited for a particular forum).

10. Scholarship of the early 1980s emphasized a human theme:

> A basic fact about negotiation, easy to forget in corporate and international transactions, is that you are dealing not with abstract representatives of the "other side," but with human beings. They have emotions, deeply held values, and different backgrounds and viewpoints; and they are unpredictable. So are you.

third party, had been used to resolve labor-management disputes but little else. With problem-solving allegedly trapped in a "litigation crisis," and civil unrest permeating the disposition of "justice," ADR proposed to address these prevalent ills.

Over time, scholars and activists raised strong critiques of ADR.[11] Notwithstanding the powerful scrutiny of theoretical issues related to ADR, enormous expansion occurred in practice. In many fora, like the BHC, the use of ADR became significantly institutionalized. Finally, in the last decade, Congress and state legislatures also became involved in efforts to expand uses of ADR.[12] By the 1990s, Frank Sander noted that new forms of dispute resolution had been used, at least on an experimental basis, "for almost every kind of dispute."[13]

At the same time that the American judicial system began moving away from near-exclusive reliance on litigation to resolve disputes, landlord-tenant law underwent significant changes. Before the 1970s, courts applied the doctrine of caveat emptor and treated landlord-tenant transactions under a contract model.[14] Courts construed the contractual obligations of landlord and tenant independently, meaning that tenants owed rent regardless of whether the landlord violated express promises. The tenancy included no warranties or duties of repair, and landlords faced few limits on their right

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ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 18–19 (2d ed. 1991). This "human ethic" became a foundational theme of mediation literature and training programs.

11. *See, e.g.*, RICHARD HOFRICHTER, NEIGHBORHOOD JUSTICE IN CAPITALIST SOCIETY: THE EXPANSION OF THE INFORMAL STATE (1987) (deeming ADR an expansion of state control through the "illusion" of community empowerment and characterizing "neighborhood justice" as state infiltration into community relations that leads directly to political and social control); Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993) (claiming ADR preferences harmony over justice, watering down rights and eliminating fault in the service of peace); Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, (1984) (questioning the premise that a lack of litigated disputes, or "settlement," is necessarily a social good). *But see* ROBERT A.B. BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994) (emphasizing the transformative effects of mediation and calling critiques that emphasize the potentially destructive effects of ADR "the Oppression Story" of the mediation movement).

12. *See, e.g.*, Administrative Dispute Resolution Act, 5 U.S.C. §§ 571–583 (1994) (encouraging federal agencies to use ADR to resolve disputes), Negotiated Rulemaking Act, 5 U.S.C. §§ 561-570 (1994) (promoting greater use of negotiation in the administrative rulemaking process), and Executive Order 12778 § 1(c), 3 C.F.R. 359, 360 (1991) (advocating the use of ADR to resolve federal litigation), *as cited in* GOLDBERG ET AL., *supra* note 8, at 10.

13. GOLDBERG ET AL., *supra* note 8, at 10.

14. *See* CHARLES M. HAAR & LANCE LIEBMAN, PROPERTY AND LAW 285–86 (1985).

to terminate the tenancy.[15] Under the "self-help" termination doctrine, the common law permitted landlords to remove tenants' belongings from the property, to terminate water or electricity, and to change the locks to regain possession of the property.[16]

The 1960s and 1970s ushered in widescale procedural and substantive protections for tenants. In 1970, Judge Skelly Wright's landmark opinion in *Javins v. First National Realty Corp.*[17] inaugurated a reversal of the legal presumptions of the former landlord-tenant regime. Noting the changing social dimensions of landlord-tenant relations, Judge Wright construed the leasehold like other contracts for goods and services and found an implied warranty of habitable premises.[18] In the years following *Javins*, almost every state adopted some version of the warranty of habitability.[19]

The new framework increased tenants' legal guarantees with regard to quality of housing and security of tenure. Courts also provided tenants with procedural protections. The most significant reforms restricted landlords' rights of termination, prohibited retaliatory eviction, permitted a defense of constructive eviction, and disallowed "self-help" eviction.[20] Indeed, many courts required formalized procedures to enact eviction.[21]

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15. *See* Deborah H. Bell, *Providing Security of Tenure for Residential Tenants: Good Faith as a Limitation on the Landlord's Right to Terminate*, 19 GA. L. REV. 483, 486 (1985).

16. *See* JOSEPH SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 646, 665–66 (1993).

17. 428 F.2d 1071 (D.C. Cir. 1970).

18. *See id.* at 1075–82.

19. *See* SINGER, *supra* note 16, at 748.

20. The prohibition against retaliatory eviction prevents landlords from terminating tenancies when tenants seek to enforce housing codes. *See* Edwards v. Habib, 397 F.2d 687 (D.C.Cir 1968), *cert. denied*, 393 U.S. 1016 (1969). The defense of constructive eviction allows tenants to stop paying rent and to move out when conditions in an apartment deteriorate to an extent as to render living there impossible. In such a case, the deteriorated conditions serve as the functional equivalent of physical eviction. For a full discussion of the "revolution" in landlord-tenant law, see Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 520–40 (1984); Mary A. Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 521–45 (1982).

21. *See* SINGER, *supra* note 16, at 695. These proceedings were intended to provide "relatively fast judicial determination of a landlord's claim of a right to regain possession of her property," *id.*, with less potential for the confrontation and violence common under a self-help system. It is worth noting that the summary procedures themselves constitute something of a contradiction. On the one hand, they grew out of a need to protect tenants from physical ejectment from their homes. Indeed, as this brief overview is intended to demonstrate, they are but one part of a trend to expand tenant protections. On the other hand, they are by their mandate intended to serve landlords. Specifically, summary process is designed to achieve eviction swiftly and

Housing caseloads increased dramatically following these reforms, in particular the requirement of a summary process action to evict a tenant. To accommodate the burgeoning caseload and to assure that housing cases received appropriate attention, many cities, including Boston, created a special court with jurisdiction over housing cases.[22] In an effort to manage the hundreds of cases docketed for a single day, the housing court instituted mediation with housing specialists. The goal of introducing ADR to the housing court was to increase the efficiency of the court system while protecting the legal rights created by landlord-tenant reform.

B. *The Boston Housing Court*

Primary research for this Note took place in the spring of 1995. Over the course of several months, I visited the BHC, which hears summary process actions on Thursday mornings. Summary process is the action a landlord files to evict a tenant. On a typical Thursday at the BHC, between two hundred and fifty and three hundred cases appear on the docket.[23] At the time of this study, one judge sat in the housing court,[24] and eighty percent of the scheduled cases were handled either through mediation with a housing specialist or through negotiation in the hallway.

When tenants arrived at court, an official directed most of them upstairs to mediation. I joined tenants up the stairs and sat with them in the hallways.[25] Tenants received little guidance through the process. The court officials gave no explanation of mediation, nor did

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smoothly, albeit formally. Thus it is paradoxical to perceive of summary process as pro-tenant, despite its conception in pro-tenant reform.

22. According to John Laurenti, Chief Housing Specialist at the BHC, a core motivation for the introduction of ADR in housing court was the sense that housing cases did not get sufficient attention at the district courts. Mr. Laurenti said that housing inspectors did not feel that the housing cases were being heard by the judge nor that the laws were being enforced. This created a strong push for a better mechanism for hearing these cases. Telephone Interview with John Laurenti, Chief Housing Specialist, Boston Housing Court (May 1, 1995).

23. In 1990, approximately 125 to 200 summary process actions were scheduled on the weekly calendar. *See* MAUREEN SMITH & TIM STUMPFF, MEDIATION OF SUMMARY PROCESS ACTIONS IN BOSTON HOUSING COURT 13 (1990) (on file with author).

24. Telephone Interview with John Laurenti, *supra* note 22.

25. Quotations throughout this Note are excerpted from informal conversations and formal interviews with such tenants, as well as from my observations of negotiations between landlords' lawyers and tenants. All quotations were approved by tenants for publication, and tenants' names have been modified slightly to protect privacy.

they mention its voluntary nature. Mediation was never distinguished from negotiation, the process in which most tenants participated. No information was available regarding the rights and responsibilities of landlords or tenants. Similarly, no one was available to answer questions. Finally, no screening was used to determine the appropriateness of mediation or negotiation in any particular case.

Upstairs, long benches lined several connected hallways. As nine o'clock approached, tenants and their children occupied the crowded space along the walls. Robert Lewis, Clerk Magistrate of the BHC, described the swollen space: "There's three to four hundred people up there, little kids crying, in summertime it gets real hot up there. Let's just say it's not a comfortable situation up there." The hallway was a noisy place, packed with the sounds of tenants, their children, and overworked housing specialists shouting out parties' names.

These hallways provide the primary setting for case disposition. Over several hours, most cases are negotiated in corners, corridors, and on the crowded benches themselves. Many landlords are management companies who hire one lawyer to handle all of their cases. Occasionally, the landlord is also present personally. Actual negotiations generally take fewer than ten minutes.

C. *The Parties*

Groups in the hallway are stratified by socio-economic class and authority with the court. In addition to visible discrepancies such as style of dress and color of skin, other palpable distinctions exist between those with more and less privilege:

> Rent court, more than most other courts, is a theater of class conflict in which businesses and their hirelings constitute a class of professional claimants exercising significant advantages over the individual defendants whom they bring before the court, who are poor and poorly situated with respect to the attributes that garner respectful hearing in court rooms.[26]

The "mediation" hallways at the BHC mirror the disparity of such courtrooms.

Despite this humble setting, the issues at stake carry grave weight. First, tenants face the threat of eviction. As a tenant named Antonia explained, "I know I ain't gonna go to no street — nobody

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26. Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in the Legal Process*, 20 HOFSTRA L. REV. 533, 557 (1992).

wants to get put out on the street, no woman, no woman with kids." In addition to the looming risk of homelessness, summary eviction tenants live in severe circumstances. These two issues relate, because eviction often results from requests for standard repairs. Luisa Ramirez explained why she faced eviction:

> [s]o many rats running around, and I got six babies, and every time I called to complain they complained that I kept complaining, they said I'm damaging their property putting holes in the walls, but those are rat holes . . . my children are as scared of the rats as I am, we stay on our chairs [and don't dangle our legs] . . . I'm too scared to let my little guys go into the kitchen to get a drink of water.

Tenant Dee Hopkins reported that her eviction resulted from requests to enforce existing law.[27] She said she was evicted "because of the lead, you know. I can't stay there, because of that lead. Not with my son, you know. I asked 'em to fix it. They won't. So now they're kicking me out, and I gotta go." These statements suggest that tenants could raise affirmative defenses to eviction.[28] Yet it is a rare tenant who does so.

With few exceptions, tenants negotiate directly with a landlord's lawyer, occasionally with their landlord also participating. Nevertheless, many tenants do not perceive that they play an active role in the process. Louis Jackson captured this when I asked him whether he felt nervous waiting for his name to be called. He answered with calm: "Me worried? Nah. You can't lose control over something you have no control over."

As this description shows, the ADR system at the BHC is far from ideal. Structural changes beginning with information resources and improved physical conditions would help. And yet, the defects apparent in these examples suggest a deeper problem. Although not unique to landlord-tenant negotiation, examples from the BHC provide a clear window into some underlying causes.

III. Self-Agency

In general, agency refers to the relationship between a principal party and her authorized representative. The law codifies agency as a relation which "results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to

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27. The Massachusetts Lead Law prohibits, *inter alia*, refusing to rent to families with children or evicting families with children because of lead paint, as opposed to remedying the problem. *See* Mass. Gen. L. ch. 111, § 197 (1996).

28. *See* Bell, *supra* note 15, at 484–91.

his control, and the consent by the other to so act."[29] If the authority held by a representative is sufficient, an agent's representations bind the principal.

Although lawyers frequently negotiate as agents on behalf of clients, legal negotiations often take place without traditional agents. In fact, a key purported advantage of negotiation is that parties can speak for themselves.[30] Theoretically, this enables parties to participate fully in the process and to co-construct an outcome that is tailored closely to their needs and interests. In such cases, parties must act as their own agents.

Unfortunately, Louis Jackson typifies negotiators who do not perceive themselves as autonomous agents with authority to influence decisions about their lives. Elaborating on his response about lacking control, Mr. Jackson commented, "Why should I worry about something I have no control over? The best thing to do is just show up, be quiet, and do what they tell you to." Although in theory Mr. Jackson is his own agent in this negotiation, functionally he does not have an agent because in practice he cannot represent himself effectively.

A. *A Model of Self-Agency*

Just as traditional agency rests on an authorization to act, a person acting as his own agent must be empowered. Self-agency thus requires negotiators to authorize themselves to self-represent. Such authority is required to negotiate effectively on one's own behalf.

Self-agency is comprised of three components: the recognition that one's interests are legitimate; the recognition that it is legitimate to pursue one's interests; and the capacity to pursue one's interests. Ineffective self-representation in negotiation can result from a deficiency in any one of these three elements.

Fundamentally, exercising self-agency requires individuals to believe that their interests and preferences are relevant to decisions that affect them. That belief allows an individual to define his or her interests, to prioritize them, and to act assertively in order to satisfy them. It allows a negotiator to feel entitled to choose outcomes on the basis of those interests. Agentic legitimacy also helps negotiators to

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29. RESTATEMENT (SECOND) OF AGENCY § 1 (1957).

30. For a discussion of the benefits of agents, see Jeffrey Z. Rubin & Frank E.A. Sander, *When Should We Use Agents? Direct vs. Representative Negotiation*, *in* NEGOTIATION THEORY AND PRACTICE 81 (J. William Breslin & Jeffrey Z. Rubin eds., 1991).

find and use their voices in actual negotiations. The capacity element draws on the resources that empower people to represent themselves. In the legal system such resources include education, money, and familiarity with the legal system and its institutions. In negotiation, important resources include information, an understanding of the negotiation process, and communication skills. Although the third element — capacity — is critical, this element has received much attention and is therefore not the focus here.[31] Instead, I concentrate on the other two aspects — recognition of the legitimacy of interests and recognition of the legitimacy of the pursuit of interests — which I argue have received too little notice.

B. *Traditional Theory's Inattention to Self-Agency*

Over the past twenty-five years, negotiation analysts have produced a rich body of literature describing negotiation processes.[32] Nonetheless, the dominant discourse does not explicitly address the dynamics of self-agency. In this section, I present an overview of basic negotiation concepts that rest on the presumed presence of self-agency but fail to acknowledge its role.

First, negotiation literature often begins a step beyond the question of self-authorization by identifying negotiation as necessarily an act in pursuit of self-interest. For example, *Getting to Yes* asserts that "[e]very negotiator wants to reach an agreement that satisfies his substantive interests. That is why one negotiates."[33] This principle is broadly accepted. As Deborah Kolb points out, "one does not have to read very far in the negotiation literature to observe how deeply embedded an agency model of self-interest is — it is absolutely assumed."[34] According to conventional wisdom, the implicit

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31. The most helpful resource to most people dealing with the legal system is an outside agent or legal counselor. In this piece, the focus is how to understand and improve self-representation. This focus should not cloud the broader reality that the best way to help most self-agents is to provide legal aid. *See, e.g.*, Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557 (1988).

32. *See, e.g.*, FISHER ET AL., *supra* note 10; ROGER FISHER & SCOTT BROWN, GETTING TOGETHER: BUILDING RELATIONSHIPS AS WE NEGOTIATE (1988); DAVID A. LAX AND JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN (1986); Howard Raiffa, The Art and Science of Negotiation (1982); William Ury, Getting Past No: Negotiating Your Way from Confrontation to Cooperation (rev. ed. 1993); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

33. FISHER ET AL., *supra* note 10, at 19.

34. DEBORAH M. KOLB, NEGOTIATION THEORY: THROUGH THE LOOKING GLASS OF GENDER 9 (1994).

purpose of negotiation is to serve one's interests, and this is an appropriate goal for negotiators to pursue.

Second, analysts often frame the negotiation process in terms of a choice between the best "option" on the table and the best "alternative" away from the table.[35] This ignores the problems posed by a negotiator who lacks personal decision-making authority. If a negotiator does not believe that her preferences *should* matter, then she will not experience the negotiation as a choice between options and alternatives. A negotiator who has little self-agency may accept an agreement that is worse than her BATNA, not because her interests are met, but because it is the agreement offered to her and accepting it is the role she assumes. In short, not all negotiators experience themselves as legitimate participants in the bargaining process, nor do they feel sufficiently agentic to reject a deal if the terms are unsatisfactory to them. At the BHC, I frequently observed negotiators whose lack of self-agency led them to accept agreements seemingly worse than their alternatives.[36]

Third, the concept of negotiation power illustrates this presumption. Power involves the ability to alter an agreement toward one's preferred outcome, or, as sometimes defined, the capacity to impose one's will on another. According to the authors of *Getting to Yes*, "negotiation power is the ability to persuade someone to do something."[37] Theorists Lax and Sebenius capture the same idea in slightly different terms. For them, "power is associated with the ability to favorably change the bargaining set."[38] That is, power is the ability to alter the probability distribution of potential outcomes. Both conceptions of negotiating power — the "power to persuade" or the "capacity to impose one's will" — presuppose that a negotiator feels entitled to develop and use such a "will." Power conceived as the ability to alter outcomes according to one's preferences builds from a baseline in which negotiators presumably feel entitled to develop and use such preferences. The definition presumes the pre-existence of a

35. Options are outcomes generated through agreement with another party. Alternatives are outcomes available to a negotiator without agreement with the other party, the best of which is referred to as her BATNA, or Best Alternative To a Negotiated Agreement. *See* FISHER ET AL., *supra* note 10, at 100.

36. Negotiation fora do not include safeguards such as rules of evidence, extensive legal analysis, or a judge. The settlements produced there are acceptable in part because of the underlying assumption that if the parties had not been served by the terms, or had been able to do better for themselves in court, they would not have agreed to them. This conclusion rests firmly on the notion of universal self-agency.

37. FISHER ET AL., *supra* note 10, at 178.

38. LAX & SEBENIUS, *supra* note 32, at 250.

more rudimentary kind of power — the possession of self-agency, or self-authorization to pursue self-interest. In a basic sense, negotiating power originates with the belief that a person's own condition, experience, and preferences are relevant to the resolution of conflicts in which she is involved. Without self-agency, negotiation power is very limited.

Together, the above-mentioned insights represent some of the core contributions that negotiation scholarship has made to the understanding of negotiation dynamics.[39] Highlighting self-agency does not challenge their potency. Rather, it asserts that these insights function effectively only when both negotiators function above a floor threshold of self-agency capability.

IV. Self-Agency Explored: Private Expressions, Public Obstructions

Thus far, the discussion of self-agency has been largely theoretical. The dilemmas of self-agency become more concrete almost immediately upon arrival at the BHC. Two barriers to effective self-representation present themselves: either the tenant negotiator does not possess sufficient self-agency to represent herself effectively, or the forum punishes or ignores her self-representation, subverting its expression or sterilizing its use.

This Part explores both these internal and external barriers to the effective use of self-agency. It does so to support the claim that self-agency functions along a continuum. One way to see that continuum is to examine closely the negotiations as they took place at the BHC. Lawyer-tenant communication demonstrates that self-agency is not universal, but rather manifests in degrees through various forms of verbal and non-verbal expression. Looking for indicia of self-agency in communication patterns is useful because negotiators express self-agency, or a relative lack thereof, through communication during the course of negotiation.[40] Varying degrees of self-agency incline negotiators toward one form of expression or another. In places like the BHC, that disparity results in what Barbara Bezdek has called "the functional voicelessness of virtually all tenants in this forum."[41]

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39. *See* James K. Sebenius, *Negotiation Analysis: A Characterization and Review*, 38 Mgt. Sci. 18, 21 (1992).

40. There is no one direct way to measure self-agency. Monitoring communication strategies is one useful proxy: others might include interviewing the parties, measuring expectations, or measuring the effectiveness of outcomes.

41. Bezdek, *supra* note 26, at 535.

A. *Private Expressions: Degrees of Negotiation Self-Agency*

1. *Manifestation One: Silence*

A tenant named Arnold spent an hour and a half introducing himself to everyone sitting on the hallway benches, including to me. He told all of us about the decrepit state of his apartment, the way he told the landlord to fix it countless times, and that the landlord never did. When Arnold was a few days late paying his rent, the landlord served him with an eviction notice. Arnold spent the bulk of an hour telling us about the unfairness of his situation. Then the landlord's lawyer arrived:

> *Lawyer*: Are you Arnold Moses?
> (Arnold nodded.)
>
> *Lawyer*: You owe three hundred and fifty dollars. Is that correct?
> (Arnold nodded.)
>
> *Lawyer*: How long do you need?
> (Arnold shrugged.)
>
> *Lawyer*: Your landlord wants three hundred and fifty dollars over seven months. That's fifty dollars a month, March through September, the fifteenth of each month. Can you do that?
> *Arnold*: Okay.
> *Lawyer*: Okay, Mr. Moses. You wait here and I'll go write up an agreement.

The lawyer left and I turned to Arnold. I asked him why he had not told the lawyer what he had told us. Arnold said, "People here are afraid to talk. You know, you get that inner fear, and you're too afraid to say anything."

As a negotiator, Arnold had the capacity to make a persuasive case for himself. In fact, he had convinced an entire hallway of people that the landlord owed *him* something. He clearly believed that his interests were legitimate, and his soliloquy made it plain that legal justifications were available to defend his non-payment of rent. Yet Arnold lacked a belief in the legitimacy of pursuing his interests during the negotiation. The absence of the second element of self-agency undermined the negotiation, failed to ensure the protection of his legal rights, and prevented his participation in constructing a durable outcome.

Arnold did not participate actively in designing the agreement; his lack of self-agency manifested as silence. The lawyer therefore had no means to measure whether or not the settlement met any of his interests. Moreover, the outcome unilaterally-constructed by the

lawyer did not differ much from a decision rendered by a judge. Approximating an outcome dictated by an outside decision-maker, the outcome failed to achieve one of the primary purposes of negotiating in the first place.

For some tenants, literal silence was not the form of expressing a relative lack of self-agency. For them, lack of legitimacy was expressed through constructive silence, or degraded speech, which author bell hooks calls speech that is "audible but not acknowledged as significant speech."[42] Constructive silence, like its voiceless counterpart, expresses a minimal amount of self-agency.

As examples of constructive silence, some tenants spoke dozens of words in a very rapid manner, moving in and out of subjects, raising and lowering their volume, barely pausing to take a breath. Hooks identifies this speech pattern as "black women's silence." Describing her own experience, she wrote, "I was never taught absolute silence, I was taught that it was important to speak but to talk a talk that was in itself a silence."[43] She noted:

> Our speech [Black women's speech] . . . was often the soliloquy, the talking into thin air, the talking to ears that do not hear you — the talk that is simply not listened to. Unlike the black male preacher whose speech was to be heard, who was to be listened to, whose words were to be remembered, the voices of black women — giving orders, making threats, fussing — could be tuned out, could become a kind of background music.[44]

Some tenants, sitting on the benches for hours, talked endlessly to seemingly no effect. Although they spoke, their constructive silence exhibited little self-agency.

2. *Manifestation Two: Power-Correlated Speech*

Sitting between Tanya Johnson and her eighty-year old mother, I listened to Mrs. Johnson's conversation with a property management company attorney. The two were discussing the eviction and relocation of Mrs. Johnson and her mother.

> *Lawyer*: It has to be ninety days.
> *Mrs. Johnson*: I'm sorry. I can't do that. I mean, I don't think I can do that.
> *Lawyer*: I don't mean to be difficult, but ninety days is all I can do. Look over this and see if it's okay.

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42. BELL HOOKS, TALKING BACK: THINKING FEMINIST, THINKING BLACK 6 (1989).
43. *Id.* at 7.
44. *Id.* at 6.

Mrs. Johnson looked over the form agreement and nodded. When the lawyer went to the office to finalize the agreement, Mrs. Johnson turned to me: "If I could've had more days, I would've got more days. She said she could only do ninety days. You think she could've done more than that?"

Tanya Johnson and her mother got ninety days to vacate and relocate because Tanya had relatively little agentic legitimacy. Tanya was able to identify her interests: she told me that she wanted more time. Moreover, her first response to the attorney suggests she recognized that interest as legitimate. When offered ninety days, she responded immediately "I can't do that." Holding firm to that position, though, required recognition that it was legitimate for her to pursue that interest and to seek a different time frame in the settlement. At the moment when she needed to invoke the second element of self-agency, it was not there. As a result, Tanya quickly qualified her earlier statement: "I mean, I don't think I can do that." The absence of agentic legitimacy gave the attorney an opening to reassert the attorney's position as non-negotiable.

The lawyer's mode of expressing her ninety-day limitation directly influenced Tanya's reluctance to "bargain" for more time. The lawyer's confident and unqualified statement, "It has to be ninety days," leaves little doubt that this limitation should not be questioned. In contrast, Tanya's "hedge" or ambivalence about presenting her "I can't do that," position gave implicit permission to the lawyer to by-pass Tanya's statement that she could not find a new place and re-locate herself and her mother in the allotted ninety days. As a result of the lawyer's authoritative tone and language and Mrs. Johnson's deferential tone and language, the conversation ended in an agreement proposed by the lawyer but rejected by the tenant as unfeasible.

Previous research in socio-linguistics documents that speech patterns occur in both 'power' and 'powerless' modes. These modes refer to the style and purpose of communication. Power mode speech aims to transmit factual information. It features patterns of speech such as "succinct, declarative sentences and the ordering of unqualified propositions according to a linear logic."[45] Statements like the lawyer's "It has to be ninety days," fit this pattern of unqualified and authoritative speech. A power mode speech style produces an

45. Bezdek, *supra* note 26, at 583 (discussing Robin Lakoff's theory of speech and power). *See infra* note 47.

authoritative speaker to whom others grant legitimacy to speak and to control a situation.

In the powerless mode, speakers more often use speech neither to create nor to demonstrate authority, but rather to maintain connection with the listener. This speech includes deference to some other person, and is marked by speech gestures of deference or politeness. These include: "hedges" that qualify declarative statements ("you know", "kinda", "sort of"); statements with questions tagged on the end (". . .don't you think?," ". . .know what I mean?"); empty words (intensifiers and adjectives, such as "so much" or "very"); raised intonation at the end of statements; and round-about ways of expressing ideas.[46] Research has claimed that these speech patterns render a speaker's speech ambiguous and undermine the speaker's persuasiveness.

Some scholars have concluded that these speech patterns correlate with social group membership. For instance, Robin Lakoff introduced the idea of power discrepancies in speech, finding speech patterns to be gendered.[47] Other scholars identified the same speech discrepancies but linked them to social status rather than to gender. In the studies of E. Allan Lind and William M. O'Barr, for example, socially marginalized groups used markedly different speech patterns than those used by more dominant groups.[48]

Rather than tie the styles directly to group membership, I suggest the two styles reflect degrees of agentic legitimacy. Linking speech patterns to agentic legitimacy sheds light not only on the spectral nature of self-agency but also on its broader applications outside of housing court.

Tying the communication form to legitimacy rather than to group identification highlights that in practice, men and women of all

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46. *See* E. Allan Lind & William M. O'Barr, *The Social Significance of Speech in the Courtroom, in* LANGUAGE AND SOCIAL PSYCHOLOGY 66, 71 (Giles and St. Clair, eds., 1979).

47. ROBIN LAKOFF, WOMEN AND LANGUAGE (1975). Lakoff proposed that speech styles distinguish men from women and directly impact their authority as speakers. The styles differ in their communication goal and speech form.

48. *See* Lind & O'Barr, *supra* note 46, at 71. In addition to negotiation, these findings apply in other types of legal fora. They have great import in the courtroom. *See, e.g.*, John M. Conley et al., *The Power of Language: Presentational Style in the Courtroom*, 1978 DUKE L.J. 1375 (1978). They have similar bearing on administrative hearings. *See, e.g.*, Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 2 (1990).

backgrounds possess varying degrees of self-agency when they negotiate for themselves. Men as a group may possess more agentic legitimacy than women, and people of privilege as a group may possess more than most less privileged people. At the same time, some very high status professional men have trouble asserting their interests in negotiation, while some underprivileged women forcefully pursue them. My conclusion is that self-agency functions along a continuum and is a factor to be considered in diagnosing negotiation dynamics independent of the group identity or other characteristics of the parties.

One could read about Tanya Johnson's negotiation and simply conclude that she is not a good negotiator — what she needs is better skills. Indeed, negotiators who use "powerless" mode speech can be described as lacking capacity. Yet, Tanya's lack of capacity to negotiate effectively for herself is intimately tied to the lack of legitimacy she feels in pursuing her interests. The point is that simply providing skills training to Tanya Johnson would not address the fundamental impediment to her effectiveness as a negotiator. Without a foundation of agentic legitimacy, she would not call on those skills in the critical moment, even if she had them. This example illustrates the importance of including agentic legitimacy as well as capacity in analyzing negotiation dynamics.

3. *Manifestation Three: Negative and Positive Discourse Positions*

Like so many of his peers in the hallway, Mr. White described the ruins of his apartment and the requests he had made for repairs. In this case, the landlord had agreed to do the repairs and then never did anything about them. When he lost his job, Mr. White missed the due date of his rent, and the landlord evicted him.

Lawyer: Are you Mr. White, 521 Sommer Street, number 602?
Mr. White: Yes I am.
Lawyer: How much do you owe?
Mr. White: Two-hundred sixty-five dollars.
Lawyer: When can you pay?

In this case, the attorney for the landlord assumed that Mr. White's non-payment meant that Mr. White was in the wrong. The attorney never inquired whether Mr. White had good reason to withhold payment. Instead, he attributed wrongdoing to the fact of non-payment. His direct questions received direct answers. Mr. White neither challenged nor changed his wrongdoer role, never mentioning the landlord's broken commitments or lack of repairs.

Mr. White was assigned a role in the negotiation — that of wrongdoer — based on partial information about his behavior. The process of assigning roles in a conversation has been described as assigning a "discourse position."[49] Discourse positions can be negative or positive. Positive positions are created "via the attribution of positive characteristics (loyal, hard-working, frugal) and the attribution of good intent ('I was only trying to help.')."[50] Negative positions are "constructed . . . via the attribution of negative characteristics (disloyal, lazy, and spendthrift) and bad intent ('He told me that to frighten me')."[51]

Upon hearing Mr. White's exchange with the lawyer, attention may instinctively go to his negotiation capacity. Experts will want to teach him the skills to interrupt and change the conversation's focus. But once again, capacity alone would not suffice to counter the lack of agentic legitimacy. Negative discourse positions are difficult to address even with strong skills. Indeed, placement in a negative discourse position undermines whatever sense of legitimacy a person may bring to a negotiation. This explains in part what makes it so difficult to overcome. As Sara Cobb has pointed out, "[s]ince legitimacy requires positive discourse positions, persons imprisoned in negative positions remain de-legitimized . . . [D]isputants that are unable to alter discourse positions are marginalized and disempowered."[52]

Changing one's assigned role in a conversation involves challenging the implicit assumption that one's interests are not legitimate despite discouraging suppositions from one's counterpart. This requires a strong sense that one's interests *are* legitimate *and* that it is appropriate to pursue them during an actual negotiation. Without such a belief in the legitimacy of his interests and the legitimacy of pursuing them, Mr. White would not initiate a dialogue about the landlord's duties to him, even if he possessed the skill to do so.

Invariably at the BHC, the landlord's lawyer opened the negotiation with an assumption that the tenant was in error — had not paid rent — and that the tenant should redress that situation. Admittedly, most cases did involve non-payment of rent. Nonetheless, tenants legally possess many affirmative defenses to non-payment,

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49. Sara Cobb, The Pragmatics of Empowerment in Mediation: A Narrative Perspective 22 (1994) (unpublished manuscript on file with the *Harvard Negotiation Law Review*).

50. *Id.* at 22–23.

51. *Id.* at 23.

52. *Id.*

among them housing code violations and retaliatory eviction. These and other landlord wrongs that justify non-payment are common among this population of tenancies. It may be true, then, that the tenant both had not paid rent and was not in the wrong. A negative discourse position disguises this complexity, making it difficult for tenants to raise the defects in their apartments or mistreatment by their landlords. In the extreme, a negative discourse position establishes a conversation course that leads to the tenants' agreeing to vacate premises and pay rent in cases in which a judge or a negotiator with higher self-agency would not.

Because it is so difficult to overcome, negative discourse position also decreases the likelihood of co-construction. Once the conversation develops narrative momentum around the tenant's delinquency, warranty of habitability violations and retaliatory eviction tend not to "come up." By assigning tenants negative discourse position at the outset, lawyers de-legitimize them, making it difficult for them to verbalize factors which might justify their actions.

The previous examples illustrate ways in which the elements of self-agency are expressed through communication techniques. A low degree of self-agency makes effective communication difficult and negotiated outcomes ineffective for protecting tenant rights or producing durable solutions.

B. *Public Obstructions: Denial of Legitimacy by the Forum*

The dynamics of self-agency not only affect a negotiator's recognition of her interests as legitimate but also impact the forum's capacity to recognize a person as an agentic negotiator. The more a forum recognizes a person in this way, the more smoothly individual efforts to exercise self-agency will be received. In the extreme, as is often the case with tenants, a forum does not view the negotiator as legitimately agentic. As a result, attempts to exercise self-agency are perverted either through sanctions or distortions designed to meet the expectations held by those with authority. In this Part I discuss the external dynamics which affect self-agency — the process by which the forum responds to and creates the parties' lack of self-agency.

Even a fully self-agentic tenant may face a forum unwilling to recognize the legitimacy of that self-agency. In addition to requiring self-authorization, then, an effective negotiator needs the forum's authorization to act as a self-agent. Not all negotiators are privileged with the attribution of agentic legitimacy. As a result, obstacles inhibit their use of self-agency:

> Familiar cultural images and long-established legal norms construct the subjectivity and speech of socially subordinated persons as inherently inferior to the speech and personhood of dominant groups . . . These conditions . . . undermine the capacity of many persons in our society to use the procedural rituals that are formally available to them.[53]

In housing court, most tenants are not treated as legitimate self-agents.

The failure to treat tenants as legitimate self-agents manifests primarily in three obstructionist dynamics: the sanction effect, the subversion effect, and the silencing effect. In the sanction effect, tenants are punished for exercising self-agency assertively. In the subversion effect, tenants assert their interests, but their efforts are rebuffed or ignored. Because direct use of self-agency was ineffective, tenants often distort their agentic expression in order to protect their most fundamental interest — shelter. In the silencing effect, people of authority refuse to speak directly to tenants, confirming and reinforcing the tenants' lack of self-agency.

The sanction, subversion and silencing effects suggest that tenants have good reason to experience minimal self-agency in this forum. The reality that tenants possess limited control in negotiation stands in direct opposition to the presumed presence of agentic legitimacy so central to much negotiation theory.

1. *Manifestation One: The Sanction Effect*

Some tenants at the BHC do exercise self-agency. Perhaps they have learned from experience how the system works or have heard from peers what to expect at court. One woman, whose interview I discuss below, derived strength and legitimacy from her faith. These and other factors increase some tenants' sense of self and grant them entitlement to pursue their interests. Nonetheless, their attempts to exercise self-agency often do not succeed. Instead, such tenants are punished in response to their use of self-agency.

Maria's case illustrates the sanction effect. Maria's 19-year-old daughter Shyquelle faced the threat of eviction. Concerned about her daughter, and her two granddaughters, Maria felt a strong interest in attending the negotiation herself. Before interacting with the lawyer, she expressed to me both her determination to attend and the legitimacy of asserting this interest in the negotiation because she was the party's mother. When the landlord's lawyer called Shyquelle

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53. White, *supra* note 48, at 4.

to negotiate, Maria exercised self-agency to assert her intention to attend the session. Maria described the exchange that followed:

> *Lawyer*: You can't be here.
> *Maria*: Yes I can. I'm her family life advocate.
> *Lawyer*: I have a long list waiting.
> *Maria*: I don't want her to sign anything without me.
> *Lawyer*: You can't be in this meeting. Only those direct parties to the case.[54] I have a lot of other cases.

Maria told the lawyer that she would not leave her daughter alone and that she was permitted to stay as the "family life advocate." The lawyer then told her that they would both be waiting a long time, three to four hours, and that she should return to the hall.

Maria and Shyquelle did wait four hours as a result of Maria's assertion of self-agency. The lawyer threatened, and then imposed, a punishment for exercising self-agency. In this setting, tenants are not deemed to be legitimate users of self-agency. The sanction functions to diminish the impact of the assertion as well as to discourage tenants from exercising self-agency in the future. Moreover, it serves to strengthen the message to tenants about their expected role in the process: they should not insist on their rights in these negotiations.

Maria said that she perceived subtle dynamics at work. Explaining the situation to me, she first distinguished herself from most of the tenants at court. "They come in here blind as a bat. If they knew their rights they'd be more secure and landlords wouldn't treat them unfairly." She then explained her understanding of why the lawyer didn't conduct the session:

> She wouldn't talk to Shyquelle if I was there. She thought she was gonna misuse this 19-year-old and they got mad at that I was a restraint. She [Shyquelle] had all the receipts for all the rent paid. She's [the lawyer] gonna make her sit now. This is unfair, I want to go see a mediator.

When tenants do try to exercise self-agency in housing negotiation, they encounter the norms of compliance. That is, in this setting tenants are systemically treated as those who comply, not those who assert. Failure to make the attribution of legitimacy to tenants acts as a bar to their effective use of self-agency, and, therefore, to the effective pursuit of their interests.

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54. Note that by this criteria the lawyer could not stay in the room. Either the negotiation was only for the parties — Maria's daughter and the landlord — or advocates were allowed — Maria and the lawyer. The lawyer's argument does not logically produce a negotiation between Maria's daughter alone and the landlord's lawyer.

2. *Manifestation Two: The Subversion Effect*

When tenants negotiate with landlords and lawyers, their preferences and limitations are often rebuffed or ignored. Thus, in order to meet their most basic needs, tenants exercise self-agency in distorted forms. Latisha Tomas, like many tenants before her, encountered this subversion effect. She described her negotiation to me afterwards: "I told them what I could pay and they told me that wasn't good enough, it would take a year to pay that off. So what could I do?" Ms. Tomas agreed to pay a higher amount, though she had just told the lawyer she did not believe she could afford to pay more.

In addition to the high stakes motivating settlement, many tenants perceive that the lawyer with whom they negotiate has no intention of taking their preferences or limitations into account. Tenants understand what those with authority want from them. They also know what they absolutely need, and they will at times say what they must in order to meet those needs. Making commitments they cannot keep is one way to play their expected role of acquiescence, while justifying breaking that commitment. Hearing Ms. Tomas' story, another tenant on a nearby bench chimed in: "Look, people gonna do what they have to to survive, to keep a roof over their head."

Tenants sometimes exercise such subverted self-agency because those with authority reject or ignore tenants' straightforward attempts to assert themselves. For example, when tenants articulate their real limitations — "I can't afford more" — lawyers insist that those limits do not pertain to the final agreement — "you must pay more." This response forces tenants to distort the way they exercise self-agency in order to protect their most basic interests.

This approach to getting one's needs met is common to marginalized groups outside the dominant group in a culture. "Lies, secrets, silences, and deflections of all sorts are routes taken by voices or messages not granted full legitimacy in order not to be altogether lost."[55] Although a tenant may prefer to speak sincerely, the lawyer who negates her self-agency strips her of that option. In that case, she might use self-agency in a subverted form in order to protect herself and her children.

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55. Barbara Johnson, *Is Writerliness Conservative?, in* A WORLD OF DIFFERENCE 25, 31 (1987), *quoted in* White, *supra* note 48, at 2.

3. *Manifestation Three: The Silencing Effect*

The relative lack of self-agency which manifests in Arnold Moses' and others' silence reflects the negotiation environment.[56] People with authority, such as officers of the court and landlords' lawyers, signal to tenants that their perspectives may not be welcome there. One way they do that is through silence. Thus, silence takes on a dual and reinforcing role in the dynamic between court officers and lawyers and tenants. When those with more self-agency failed to treat tenants as worthy of being spoken to, tenants tended to respond with silence.

Authority-holders' silence comes in the form of not speaking to tenants except during a negotiation itself. This includes not speaking to them to explain the process, to provide information about their rights, or to answer questions about the procedures. Indeed, those with authority tended not to speak to tenants even as they walked past them in the hall, and at times, even when tenants had asked them a question.

Many tenants interpret the silence of authority-holders as a commentary on their status in the court. Abe Carter complained to me that "nobody told me anything," including "why I'm upstairs, where to sit, what's going to happen." Abe said that he asked a uniformed court official where to go, but she did not want to talk to him. "She said, 'I don't work here.' Does she think I'm stupid or something?" Some tenants internalize the non-speech as a message about the legitimacy of their concerns and capabilities.

Failure to answer a question in the hall may not seem significant. Nonetheless, "[t]hat [this] informal sanction might appear trivial does not mean [that it] will not be as influential in changing behavior as sanctions that might on their face appear more severe."[57] The consistency with which those with authority literally do not speak to tenants contributes to the ways tenants speak when they negotiate. This failure to speak in turn reflects the de-legitimization tenants have internalized.

Without access to unrestricted self-agency — in particular to assertions which are neither punished nor rejected — tenants can neither protect their legal entitlements nor act as co-participants in resolving their conflicts. Consideration of these dynamics leads to a

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56. For a discussion of Arnold's situation, see *supra* Part IV A.

57. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1556–57 (1991).

disturbing conclusion, that "functionally, rights are not rights where they cannot be spoken or heard."[58]

V. So What? Assessing the ADR and Housing Law Revolutions

Three core problems emerge from a look at the BHC negotiation system. Individuals' legal rights are not protected. Agreements are not co-constructed. Settlements are not efficient. Each of these failings arises at least in part from a relative absence of self-agency or from limited receptiveness to expressions of higher degrees. This is troublesome because these factors represent some of the primary gains of both the ADR movement and landlord-tenant legal reforms.

After a quarter-century revolution in landlord-tenant law, tenant protections and landlord obligations are quite substantial.

> Decisions and statutes imposing a warranty of habitability reflect the current view that a tenant is justified in expecting the landlord to provide a dwelling that is suitable for use as a home. Antidiscrimination laws, the retaliatory eviction defense, and just cause eviction requirements reflect the notion that landlords should not be permitted to deprive a tenant of his home for vindictive, coercive, or unjust reasons.[59]

This "network of protective devices" reflects both changed legal norms and social attitudes.[60] Thus, decades of reform produced guarantees for tenants of decent living conditions and non-arbitrary or punitive eviction. Protection of these rights should not be forfeited when negotiation is used as a courtroom substitute.

The last twenty-five years also have witnessed the explosion of non-litigation alternatives. In contrast to judicially-imposed decisions, the ADR movement placed decision-making authority with the parties. The intention was to create non-compulsory systems through which parties could reach mutually-acceptable solutions. "The most significant effect of the process is the production of voluntary settlement of the dispute."[61] As Frank Sander and others have noted, "[c]ompared to processes using 'third parties,' negotiation has the advantage of allowing the parties themselves to control the process and the solution."[62]

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58. Bezdek, *supra* note 26, at 600.
59. Bell, *supra* note 15, at 504.
60. *See id.* at 501.
61. Bush & Folger, *supra* note 11, at 2.
62. Goldberg et al., *supra* note 8, at 3.

ADR models also seek to personalize an often cold bureaucratic court system. Increasing the use of negotiation and mediation should render courts more "user-friendly."[63] Ideally, "the user will leave the temple of justice with dignity intact, assured that someone listened and responded with courtesy, respect, and sensitivity."[64]

Finally, another advantage of using ADR is increased efficiency. Indeed, the primary motive for implementing ADR is often to address a massive case burden. At present, ten-minute landlord-tenant negotiations do provide immediate relief to the bottleneck in the hallway. However, this mechanism, so lacking in co-construction, undermines the likelihood of full and final settlement of disputes. Durability and some probability of compliance are necessary for real efficiency to be achieved.

Consider just a few of the negotiations described above. Luisa Ramirez who complained about the rats quite possibly suffered retaliatory eviction. Arnold Moses who remained silent during his negotiation made no contribution to his settlement. And Tanya Johnson, at the moment of formation of her agreement, said she could not perform its terms. If a party cannot fulfill the terms of the agreement, the case is likely to be back in court to resolve the breach. Moreover, tenants do not experience negotiation as a respectful, dignified process. Recall Abe Carter who felt court officials consciously ignored him, or Maria who perceived that the lawyer refused to proceed because she could not exploit her daughter in her presence.

Inattention to the self-agency continuum results in these defects. The private expressions and public obstructions that manifest themselves in the examples offered above support this claim.

VI. Conclusion

Authorization to represent oneself is a critical step toward effective self-representation in negotiation. Such authorization is conferred both privately and publicly. It comes from inside a negotiator in the form of legitimacy and capacity to act as one's own agent. It comes from outside as those with authority treat the negotiator as a legitimate party to the negotiation. These factors are the core requirements for effective use of self-agency.

Conventional thinking treats self-agency as universal. Yet, in fact, negotiators possess self-agency in degrees, which can fluctuate

63. *See* Reinventing Justice: 2022, Report of the Chief Justice's Commission on the Future of the Courts 11 (1992).

64. *Id.*

in different contexts even for the same person. The assumptions of traditional negotiation analysis function accurately only for negotiators functioning above a threshold of self-agency capability.

In the Boston Housing Court, tenant negotiators do not exercise self-agency effectively. Both internal and external obstacles produce this result. Even without supporting data, it seems a likely hypothesis that this phenomenon occurs generally when disadvantaged people negotiate in formal settings. This may result from the frequent denial of their agentic legitimacy by more privileged people. Or perhaps it results from messages they have internalized from a variety of sources about their legitimacy as interest-pursuing self-agents. For instance, I asked the tenant who said he had no control why he had no control. Mr. Jackson answered, "because I'm not a lawyer, not a doctor, I don't have anything, I can't kick anybody out of their home." To my ears, Mr. Jackson answered that it is an integral part of being poor that one is not self-agentic.

Nonetheless, problems associated with low self-agency are neither confined to housing court nor to disadvantaged groups. Rather, they could manifest among any population. Self-agency functions along a continuum, and all negotiators — male and female, younger and older, more and less economically-privileged — find themselves at different places along that spectrum. It seems likely that even those perceived as the most privileged or most skilled negotiators — executives, lawyers, diplomats — experience trouble when they negotiate for themselves. Indeed, at one point or another, most people find themselves negotiating "alone in the hallway." Understanding the challenges of self-agency sheds light on their relative success.