CULTIVATING COURAGEOUS COMMUNITIES THROUGH THE PRACTICE AND POWER OF DIALOGUE

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We need community to get things done.
Community rests on relationships.
Relationships grow from conversations.
Conversations cultivate community.

I. INTRODUCTION

I've been a gardener for years; for most of them, with hit-or-miss results. Sometimes a pretty good yield, sometimes mostly weeds. That all changed a couple of years ago when a woman at work taught me about soil. The key to good growth, she said, is good soil: attention paid to creating the best soil and tending to it was the most important and powerful thing I could do to have a predictably fruitful garden. I was dubious but I followed her advice, sifting in mulch and manure in the spring, adding fertilizer and breaking the tough ground as needed throughout the season. I was astonished at how my efforts paid off: healthy plants, huge vegetables, massive yield.

I think of the work of dialogue much as I think of the cycle of my garden; how the time I spend in preparation and tending deeply affects the quality and the yield. Now (spring) is the time when I decide what I will grow. I sit with the seed catalogues or browse the racks at my local nursery. In past years, I skipped a step: I went ahead and decided what to plant without checking in with family and neighbors about what they'd like to eat at harvest time. The result was a lot of wasted effort and food. Zucchini for the masses! So a first question to ask when planning a public engagement meeting is: What does this community want and need? What do we want to grow here? It's astonishing how often this question is neglected.

Once I'm clear about what to plant, I concentrate on the soil: which mix of soil and fertilizer will be the best for this particular garden? Then I design my garden space for the coming year, figuring out which plants go well together and which I should keep separate. The rest is tending: watering, fertilizing, and weeding, much as I do as facilitator of a meeting or a series of meetings. The effort I invest at every step affects what's possible to realize.

Though each garden and community is different, much is the same. After many years of working with troubled communities, there are several things across contexts and times that I hear people longing for:

- Visibility: to be seen as they see themselves; to be known for who they are apart from labels.
- Connection with others.
- Agency: to know that they can affect other people and their community.
- Possibility: restored hope for a preferred future.

Unfortunately, many attempts to engage the public—whether in small or large meetings—fail to address these longings. In fact, the design of many sessions invites division, disconnection, disempowerment, impersonal communication, and ultimately despair.

At the Public Conversations Project, we are interested in helping communities develop the connections and resources that will enable people to have honest, heartfelt, courageous conversations that build connection and resilience in the midst of even the deepest of differences. Dialogue is a powerful means of bringing people together across chasms of division in many contexts and on many subjects.[1] Some examples from our work include:

- In Massachusetts, leaders of organizations involved in the abortion controversy agreed to meet for four sessions in the aftermath of a shooting at a local women's reproductive health clinic. Their secret meetings stretched into five and a half years and resulted in a jointly written, three page op-ed in the *Boston Sunday Globe*[2] to inspire other opponents to engage in dialogue. Fifteen years later, they continue to speak in pro-life/pro-choice pairs about the power of their dialogue.
- In Montana, during dialogues about the currently volatile issue of guns,[3] 100% of pro- and anti-gun control partisans who participated agreed or strongly agreed that "I was able to listen to points different than my own." And 91% either agreed or strongly agreed

1. Robert R. Stains, Jr., *Repairing the Breach: The Power of Dialogue to Heal Relationships and Communities*, 10 J. PUB. DELIBERATION, Article 7, 1–4 (2014), http://www.publicdeliberation.net/jpd/vol10/iss1/art7.

2. Anne Fowler et al., *Talking With the Enemy*, BOS. SUNDAY GLOBE, January 28, 2001, at F1.

3. Judity Oleson & Robert Stains, Jr., Dialogues on Firearms in Montana: Rights, Responsibilities, and Community Safety (June 30, 2016) (unpublished manuscript) (on file with author).

that "I feel my views were heard." The Montana facilitation team is now being called on to lead conversations on other controversial issues such as land use, a Confederate memorial in the state capitol, and Syrian refugees.

- In Minnesota, The Respectful Conversations Project,[4] adapting Reflective Structured Dialogue, sponsored successful, state-wide conversations about a pending marriage amendment to the state constitution in an effort to avoid the kinds of division that these amendment drives had caused in other states.

This paper will examine the challenges to constructive public engagement and vibrant community and will present one useful alternative: the Reflective Structured Dialogue approach of the Public Conversations Project.[5]

II. CHALLENGES TO CONSTRUCTIVE PUBLIC ENGAGEMENT[6]

During the 2015 Symposium on Advanced Issues in Dispute Resolution hosted by Hamline University, participants noted challenges to constructive public engagement in the Twin Cities and the state of Minnesota. Many of the challenges named in Minnesota are the same that we see in other parts of our country that could be reduced or eliminated with a more dialogic approach to community engagement.

"FEWER OPPORTUNITIES FOR HUMAN CONNECTION." Robert Putnam[7] described the erosion of social capital as people have

4. *Respectful Conversations Project*, MINN. COUNCIL OF CHURCHES, http://www.mnchurches.org/respectfulcommunities/respectfulconversations.html (last visited Aug. 11, 2016).

5. *See* PUB. CONVERSATIONS PROJECT, http://www.publicconversations.org (last visited May 20, 2016). There are many other models of dialogue that are useful in different contexts. The reader would do well to spend time on the web site of the National Coalition for Dialogue and Deliberation to learn more. *See* NAT'L COAL. FOR DIALOGUE AND DELIBERATION, http://www.ncdd.org (last visited Aug. 11, 2016).

6. DISPUTE RESOL. INST., Symposium, *Session One Notes, An Intentional Conversation About Public Engagement and Decision-Making: Moving from Dysfunction and Polarization to Dialogue and Understanding* 1–2, MITCHELL HAMLINE SCH. L. (Oct. 23–24, 2015), http://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1030&context=dri_symposia.

7. *See generally* ROBERT PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000).

pulled away from involvement in social, civic, and religious organizations in recent decades. David Blankenhorn,[8] Bill Bishop,[9] and others have noted the phenomenon of "ideological migration": the physical movement of people toward those with similar identities and views, whether in a city or in the country as a whole. People move to be with their own, whether by changing churches or moving to a different part of the city or country. As these two processes have progressed, we have vanishing opportunities to engage others who are different from us in everyday, relational, and complex ways. When people do gather to wrestle with civic challenges, many do so as relative strangers. This raises barriers to clear communication, mutual understanding, trust, and willingness to collaborate.

"INCREASED PERCEPTION OF THREAT; FEAR DRIVES VIGILANCE FOR SIGNS OF DANGER, MISSING OPPORTUNITIES FOR AFFILIATION." Fear is a powerful motivator. Politicians have increasingly turned to fostering fear of "others"—portraying "them" as threats to identity, safety, way of life, etc., as a way of currying favor and consolidating votes. In this civic atmosphere and in the absence of multi-dimensional human connection—where those with different identities or perspectives are seen as threats to or even outside of "our community"—people are often left with thin, one-dimensional stories of "the other": what they can glean from news reports and from their own circle. People may approach the prospect of engagement with fear. According to neuropsychologist Richard Hanson,[10] the brain is "Velcro for the bad; Teflon for the good." It doesn't take much of a fearful experience to leave a long-lasting aversion to the source.

"STRUCTURES FOR PUBLIC ENGAGEMENT OF ISSUES ARE SET UP FOR CONFRONTATION." The physical setup of a public gathering often invites splitting and confrontation. Having a stage/podium and an "audience" elevates "the experts" and may invite challenge from "the rest of us." Seating people in rows and having a microphone on a stand in the audience reinforce this division and

8. David Blankenhorn, *Why Polarization Matters*, THE AMERICAN INTEREST (Dec. 22, 2015), www.the-american-interest.com/2015/12/22/why-polarization-matters/.

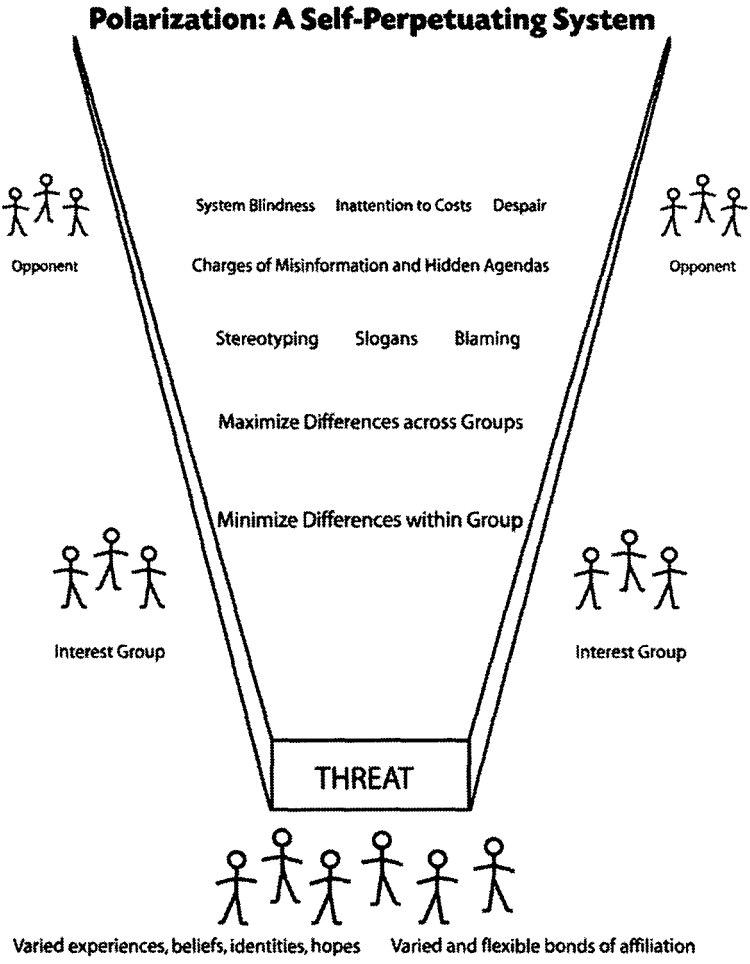
9. BILL BISHOP, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART (2008).

10. RICK R. HANSON, HARDWIRING HAPPINESS: THE NEW BRAIN SCIENCE OF CONTENTMENT, CALM, AND CONFIDENCE 19–31 (2013).

point people away from engaging with one another. The sense of division is furthered when partisans/advocates who will address the whole are seated opposite from, rather than next to, one another on stage or in the front of the room. The sequence of speakers, audience questions, speaker responses with few or no guidelines for comments, no interaction among audience members, etc., shape what kinds of speech are invited and discouraged. Finally, the meeting invitation and design, as well, can invite confrontation. One recent meeting intended for constructive engagement was advertised as "No holds barred!" It's easy to imagine who showed up and what happened.

"POLARIZATION." Many people in the symposium noted dynamics of destructive polarization that characterize public discussion of many of the thorny issues of our time. Maggie Herzig,[11] drawing on years of the Public Conversations Project's experience of working with people who are polarized on public issues, represents the development of polarized patterns of communication this way:

11. Maggie Herzig, *Polarization Graphic*, PUB. CONVERSATIONS PROJECT (2002).



In healthy daily community life, people are connected in a variety of ways in civic, social, religious, political, and other contexts. They're aware of how their values intertwine and overlap and they collaborate on shared interests as a matter of course. When, however, an issue or a development arises that raises threat—especially threats to cherished beliefs, commitments, or identities—people naturally want to feel safer, gathering with their own and separating from their opponents. They start to define themselves not just in terms of what they're for, but also who they are against.

In the process, their opponents are viewed in increasingly narrow, depersonalized, and negative ways. Communication is fueled by stereotypes, characterized by accusations and often takes

place only in public fora, competing letters to the editor, or in online comments. As positions harden, conflicts may erupt or simmer under the surface, fostering a polarization or fractionalization of a previously more unified community. The process sustains itself as participants become blind to the dynamics they are caught in and attend only to data that reinforce their ideas about "others," missing the damage being caused. This can make collaboration difficult or even impossible.

There are huge costs to the polarization that so dominates our discourse and discourages people from participating actively in civic life. When members accede to group forces that push for stereotyping, demonization, and polarization, they are left divided and impoverished in their ability to make meaningful connections, work through differences, and carry out the missions of their organizations. They are separated from what is best in them and encouraged to offer the worst. In the thick of partisan acrimony, the first casualty is the humanity of the "other" and, eventually, one's own. "Enemies" are stripped of their complexities and reduced to a one-dimensional identity rendered in a sound-bite: Baby-killer. Woman-hater. Radical. Obstructionist. People often argue from conclusions they have drawn without understanding the person and perspective of those whom they perceive to be the enemy. The loudest, most extreme voices dominate. Folks in the middle are drowned out and all parties lose as the focus turns to destroying the enemy or keeping one's head down instead of seeking to understand difference. Everyone involved feels victimized and eventually demoralized as destructive interactions corrode a sense of community that may have been built up over years, even lifetimes.

One example is from a town in Massachusetts in which a charter school (independent schools that receive public funding) initiative separated citizens into proponents who saw charter schools as ways of better educating their children and opponents who viewed them as threats to the funding of public schools. In this town, the fight was vociferous and spilled over onto many other aspects of public life. People who had previously worked as allies viewed each other as enemies, refusing to collaborate on other local initiatives. Friendships were affected as people increasingly viewed their opponents as misguided, wrong-headed, or dangerous, and pulled away from one another. Even at a basic level of civic courtesy, citizens who would normally greet one another in the

supermarket instead chose another aisle. Getting other things done in town became much more difficult.

Out of this conflict a self-sustaining dialogue project was created which addressed the polarization and helped people to move forward and is now, two years later, being engaged to convene meetings on waterfront development and the siting of public art among other issues.[12]

David Blankenhorn, in his recent article on "Why Polarization Matters"[13] summarizes the costs in this way:

> What self-government presupposes and fundamentally depends upon is precisely what polarization corrodes. Less trust in our political institutions and in each other. Less empathy. More separation. More inequality. More anger. Poorer thinking. Dumber public discourse. Stuck politics. Together, these fruits of American polarization reflect nothing less than the diminishment of our civic capacity. Few problems we face are more dangerous than this one.

III. TRACING THE ROOTS OF POLARIZATION

A. *Neurophysiological Responses*

As noted above, polarized dynamics often begin when people feel threatened. Much has been written in the field of interpersonal neurobiology[14] about the ways that people react to threat—especially when they feel their identity may be at stake—with predictable neurobiological reactions and characteristic sequences of behavior toward the perceived source of the threat.[15] Hanson,[16] drawing on the work of Jaak Panskepp, Lucy Biven,[17] and others, states that our brains evolved three basic "operating systems": avoid harm, approach rewards, and connect to others in order to meet

12. GLOUCESTER CONVERSATIONS, http://www.gloucesterconversations.org/ (last visited Aug. 11, 2016).

13. Blankenhorn, *supra* note 8, at 7–8.

14. DANIEL SIEGEL, POCKET GUIDE TO INTERPERSONAL NEUROBIOLOGY: AN INTEGRATIVE HANDBOOK OF THE MIND (2012).

15. David Rock, *SCARF: A Brain-Based Model for Collaborating With and Influencing Others*, 1 NEUROLEADERSHIP J. 1–9, (2008), http://www.scarf360.com/files/SCARF-NeuroleadershipArticle.pdf.

16. HANSON, *supra* note 10, at 34–35.

17. JAAK PANSKEPP & LUCY BIVEN, THE ARCHEOLOGY OF MIND: NEUROREVOLUTIONARY ORIGINS OF HUMAN EMOTIONS (2012).

the three core needs of safety, satisfaction, and connection. When people feel threatened, their bodies go into protective mode in which the amygdala becomes much more active than the prefrontal cortex. Individuals are flooded with adrenaline and have greater access to danger-sensing/harm-avoiding capabilities and a weaker hold on higher-order reasoning and the ability to connect with others not "of their tribe."

We have observed, and research confirms,[18] that in meetings with opponents, peoples' vigilance narrows their perception so that they scan for danger and may miss commonalities, overlapping values, or signs of affiliation. When they're not freezing like a deer in the headlights or running away (in body or mind), they may become more likely to respond to the perceived source of the threat with attack or defense. In most cases, if the issue is a hot one and especially if identities are involved, their opponent will be experiencing the same internal process. In that environment, it only takes a word or phrase to trigger a sequence of vigilance/attack-defend which in turn triggers vigilance/attack-defend. This can quickly become a self-sustaining cycle that ripples out through a group session, public meeting, or a community as people observe and are vicariously affected or infected. Our challenge in creating spaces for public engagement is to reduce the fear of harm, enhance the reward experienced by participating, and enable people to connect with one another in meaningful ways.

David Rock[19] writes of the mistakes that can be made in the first few moments of a meeting. He sums up much of the research in social neuroscience and wraps it into practical ways to understand and address what people scan for when they enter a space with unfamiliar people. He names five "domains of human social experience." We can have an "approach" or an "avoid" response to each of these domains. People rapidly label a situation "good" and draw closer, or "bad" and turn away. "The approach/avoid response is a survival mechanism designed to help people stay alive by quickly and easily remembering what is good and bad in the environment."[20] It's important to do as much as we can as meeting designers to prevent "avoid" responses—limbic

18. DANIEL SIEGEL, THE MINDFUL BRAIN: REFLECTION AND ATTUNEMENT IN THE CULTIVATION OF WELL-BEING (2007).

19. Rock, *supra* note 15.

20. *Id.* at 2.

reactions to perceived threat which develop very quickly and are tenacious once begun ("Velcro for the bad . . . .")—and to enhance "approach" responses which engage more and higher levels of the brain. According to Rock, when entering social situations people scan for cues of danger or safety in five domains:[21]

- Status
- Certainty
- Autonomy
- Relatedness
- Fairness

I think of the questions people ask when they enter a new group situation that grow from these concerns: Will I be treated as an equal or less-than? What's going to happen? Will there be tricks or surprises? Will I have choice, input, and control or will I be controlled? Will I be "in" or "out" in this group? Will I be treated fairly or will there be favorites? Leaders, facilitators, and meeting designers get into trouble by not addressing these domains before and at the beginning of a session. This paper will present a model for engagement that reduces "avoid" responses, invites "approach" responses, and cultivates connection.

B. Dysfunctional Patterns Resistant to Change[22]

Once set in motion and repeated, interactions growing from threat become patterns that are very resistant to change.[23] Our roots in family systems led us to see the similarities in patterns of polarized public discourse with dysfunctional family patterns. According to Richard Chasin and Maggie Herzig, co-founders of Public Conversations:

> The cycles seemed to be composed of family patterns of thought, talk, and action that had become fixed and unvarying. Deviations from these routines were characteristically ignored or punished. It hardly mattered who introduced the deviation, whether it was a spontaneous utterance from a child, a common sense observation from a grown up, or a suggestion made by a

21. *Id.* at 1.

22. STEPHEN W. LITTLEJOHN & KATHY DOMENICI, COMMUNICATION, CONFLICT, AND THE MANAGEMENT OF DIFFERENCE (2007).

23. Richard Chasin et al., *From Diatribe to Dialogue on Divisive Public Issues: Approaches Drawn from Family Therapy*, 13 MEDIATION QUARTERLY 323 (1996).

> therapist. No area of family experience seemed exempt from this phenomenon. The tendency to suppress deviation applied to thoughts and beliefs, to tone and content of statements, and to actions.
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> The suppression of deviation perpetuated the cycles, allowing them to outlast whatever factors may have fostered their creation. These endless loops—even if anachronistic—became, in themselves, a major cause of protractedness. In the grip of these cycles, members of the family took sides and alliances and divisions became rigidified.[24]

We have applied this thinking to conflicts over public issues by working in advance with participants and through careful meeting design to prevent "old," dysfunctional patterns and promoting fresh encounters and new rhythms of engagement.

C. Stories That Shape Attention, Define, and Imprison

We draw from Narrative Therapy[25] and Narrative Mediation,[26] the idea that one way we fashion meaning out of our experiences is to weave them into coherent narratives: stories. Stories help us make sense of our own experience and also that of others. Told in groups, they can help us refine our identities.[27] Unfortunately, stories can also cause us to see each other in distorted ways. Stories about feared others can create a faceless "Them" that makes genuine speaking, listening, and understanding difficult to impossible.[28]

Because we cannot possibly know everything about another person, our stories of others are necessarily partial, colored by: our

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24. Richard Chasin & Maggie Herzig, *Inviting Deviation from Divisive Patterns: Lessons from Work in the United States* (Pub. Conversations Working Paper, 2014). Contact authors for full access: rchasin@publicconversations.org and mherzig@publicconversations.org.

25. MICHAEL WHITE, RE-AUTHORING LIVES: INTERVIEWS AND ESSAYS (1995); Toran Hansen, *The Narrative Approach to Mediation*, 4 PEPP. DISP. RESOL. L.J. 2 (2004).

26. GERALD MONK & JOHN WINSLADE, WHEN STORIES CLASH: ADDRESSING CONFLICT WITH NARRATIVE MEDIATION (2013); Hansen, *supra* note 25, at 2.

27. Laura Black, *Deliberation, Storytelling, and Dialogic Moments*, 18 COMM. THEORY 93 (2008).

28. Dick Simon, The Most Dangerous Four-Letter Word, Address at TEDxBeaconStreet (Dec. 31, 2013), http://tedxtalks.ted.com/video/The-most-dangerous-four-letter-w.

selection and interpretation of experiences and observations, our experience of threat, patterns of communication we may be governed by, and our narrow exposure to others with whom we may differ. The mental process we use to determine the data we include and exclude from our stories of "the other" and the ways we interpret what we attend to is described by Chris Argyris and colleagues at Action Design[29] through their "Ladder of Inference": we pay the keenest attention to the information that best accords with ideas and conclusions that we already have, which have been influenced by our backgrounds, identities, values, and assumptions. We sift what we see into narratives that confirm conclusions we have already drawn. This process becomes especially acute when we are stressed or threatened, flooded with adrenaline, and our thinking processes have become less visible and less accessible to us. Narrow, rigid stories of a "feared other" become the screens through which subsequent encounters are viewed, information interpreted, and explanations for behavior fixed. These stories—which can become self-confirming and self-sustaining and marked by a sense of certainty about who "they" are—do little justice to the lived experiences and gradations of perspective that people bring; the stories can determine how those other people are treated and seen and how they think of themselves.[30] This in turn influences how they choose to show up in the presence of people who hold stories about them in which they may have had no input.

We seek ways of engagement that leave people safe enough to risk seeing beyond the narrow stories they carry about others and to share more of the complexity of their own lives.

IV. AN ALTERNATIVE VISION FOR PUBLIC ENGAGEMENT

Symposium participants expressed desires—some reflected in the session notes and some gathered from my own listening—for a different kind of public engagement. Many of the desires and suggestions for realizing them are outside of the scope of this paper. Many of them, however, can be directly addressed through the practice of dialogue. Participants seek processes that are

29. *The Ladder of Inference,* Action Design, http://www.actiondesign.com/resources/readings/ladder-of-inference (last visited Aug. 11, 2016).

30. Maggie Cary & Shona Russell, *Re-Authoring: Some Answers to Commonly Asked Questions,* INT'L J. NARRATIVE THERAPY AND COMMUNITY WORK, No. 3, 2003, at 1, http://www.interchangecounseling.com/articles/Re-Authoring.pdf.

characterized by greater depth of curiosity, trust, and conversation. They wish for a format that leaves room for introverts while building and enhancing relationships, a format that invites dialogue among people with extreme differences, and a place where people can understand the life experiences of others and how those experiences are connected to their perspectives. They seek to develop a culture of respect and empathy in which success is not necessarily "outcome" but improved relationships. To this end, they recommended processes that would support listening as well as speaking, that make space for the stories that underlie peoples' beliefs, that rest on inquiry as a core component, and that include means to help people prepare themselves for constructive engagement.

David Blankenhorn concludes his article on polarization with a call to action:

> First and foremost we must "think anew." In our public conversation and in our public deeds, we must also "disenthrall" ourselves from the long-developing habits of heart and mind that now threaten our national experiment in ordered liberty. The success of that experiment may depend on it.[31]

A. *Meeting the Challenge Through Dialogue*

> There is in you something that waits and listens for the sound of the genuine in yourself. Nobody like you has ever been born and no one like you will ever be born again—you are the only one. . . .
>
> Now there is something in everybody that waits and listens for the sound of the genuine in other people. And it is so easy to say that anybody who looks like him or her; anybody who acts as this person acts or the other simply there can't be any sound of the genuine there. I must wait and listen for the sound of the genuine in you. I must wait. For if I cannot hear it, then in my scheme of things, you are not even present. And everybody wants to feel that everybody else knows that she is there.[32]

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31. Blankenhorn, *supra* note 8.

32. Howard Thurman, Baccalaureate Address at Spelman College (May 9, 1980), *reprinted in* UNIV. OF INDIANAPOLIS, THE CROSSING PROJECT: CROSSINGS REFLECTION #4 (2004) http://eip.uindy.edu/crossings/publications/reflection4.pdf.

These words of Howard Thurman in his famed baccalaureate address to the 1980 class at Spelman College express the longing that we have to express and encounter "the genuine" in ourselves and others. Yet rarely do our public fora invite or support genuine encounters. So many of our public meetings call out the worst in us: disrespect, accusations, attacks, and listening only to find and exploit weaknesses for the purpose of "winning." From observing this, we learn that we had better arrive at a meeting on a challenging issue rhetorically armed and relationally defended; keep "the genuine" at home. As a consequence, many people choose to stay on the couch.

We propose a different space to engage: a meeting place where we can return to what's best in us and where "the sound of the genuine" is invited and cultivated. What we invite people into, how we invite them, and what we ask them to do in advance all set the stage for fresh possibilities of constructive engagement. The rest of this paper will explore one method of achieving this end: the Reflective Structured Dialogue[33] (RSD) model of the Public Conversations Project. RSD was first created at the Family Institute of Cambridge as an experiment to see if the thinking and techniques for shifting deeply embedded dysfunctional patterns in families might be useful for creating better conversations about divisive public issues. Beginning with abortion in the late 80s, we have since worked on issues as diverse as gun policy, sexual orientation and religious faith, mental health, race, gender, environment, Christian/Muslim conflicts in Nigeria, and returning child soldiers in Liberia, among others, and in contexts where polarization has devastated educational organizations, churches, synagogues, religious denominations, cities, and countries around the world. The approach works for groups as small as six and as large as hundreds, within timeframes of one evening to many years, and it is adaptable to local contexts and customs. It is a useful means for brokering constructive engagement in the civic sphere, whether standing alone or as an adjunct to deliberative processes, making it possible to speak and hear "the sound of the genuine."

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33. *See* MAGGIE HERZIG & LAURA CHASIN, FOSTERING DIALOGUE ACROSS DIVIDES: A NUTS AND BOLTS GUIDE FROM THE PUBLIC CONVERSATIONS PROJECT (2006), http://www.publicconversations.org/sites/default/files/PCP_Fostering%20Dialogue%20Across%20Divides.pdf (providing a very detailed, hands-on field manual complete with meeting designs, formats for participant preparation, and sample questions to stimulate constructive engagement).

To create a "journey into the new"[34] devoid of polarization and dysfunction, we create spaces where the experiences that inform beliefs can be spoken and where people who hold them can be recognized and understood as they wish to be. In order to do that, we must be clear about our purposes, who the people are that should be involved to accomplish those purposes, what we wish to prevent, what we wish to promote instead, and how we will prepare participants to "think anew." We must design meetings that enable people to feel safe enough to be genuine and to move from certainty to curiosity about others, building the mutual regard and care that community rests on.

B. Reflective Structured Dialogue (RSD)

"Dialogue" is a common word that can have many meanings, one of which is germane to our practice in highly conflicted contexts. To begin, let us say what dialogue—as we practice it—is not before we explore what it is. It is not simply discussion of a topic, as in a classroom or an informational forum. Dialogue is not problem-solving. We find, especially in more public meetings, that dialogue is confused with debate. Debate has a valuable place in public discourse but can also serve to deepen, rather than bridge, divisions.

"Dialogue" as we use it is a structured conversation: an encounter where something happens "in the between" that is more than the sum of speech acts. It adds color to people in conflicts who have been rendered black and white, it re-weaves the threads of community, it enables the kinds of respect and relational shifts that other forms of conflict resolution may not afford.[35] Dialogue denotes a conversation to enhance mutual understanding among people who differ deeply about treasured values, identities, and beliefs. It is accomplished in RSD through reflection on one's own and others' experiences, in a context that is guided by shared agreements, bounded by structured exchanges, and that offers opportunities for participants to follow their genuine interest in each other. The results are fresh experiences of being "heard" and understood by an opponent, in many cases for the first time; of coming to more deeply understand the life experiences that inform

34. *Id.*

35. STEPHEN W. LITTLEJOHN & KATHY DOMENICI, ENGAGING COMMUNICATION IN CONFLICT 49 (2001).

others' perspectives; of hearing re-humanized, expanded, and nuanced stories of "the other"; of discovering or re-discovering shared values, enhanced capacity to communicate constructively over a divide, and greater interest in talking with people who differ; and finally, of greater mutual respect.

Dialogue breaks the sharp-edged cycles of dysfunctional communication that shred relationships and perpetuate division. One participant in a dialogue that transformed a multi-year, large-church conflict into renewed connection and shared vision, Lauren Cobb,[36] of Glendale Presbyterian Church, observed:

> One of the outcomes of the dialogue that gives me hope for our church is the effect that it had on my views of others in the group. At the outset, I knew most of them only as acquaintances; a few I knew well. For each person, the view I had developed more fully, in the same way that a picture develops as color and shading are added to an outline. Not one of the participants represents a side, a position or a group to me; each is unique and complex, impossible to reduce to a category, and indisputably someone who offers something I don't already have.

Dialogue stands on its own and can also be used—in whole or in part—as an adjunct to other processes. In the example above, dialogue was used to open communication, restore trust, and re-build connection before the community developed a shared vision for the future of the church and called a new pastor, a process which had been a source of ongoing division in the past. Many years later, the community remains intact.

Others have found a place for dialogue as a prelude to deliberation or other processes. Oliver Escobar,[37] in his "The Dialogic Turn: Dialogue for Deliberation," notes that:

> [D]ialogue before deliberation can help to construct a safe space for relationship building in the group. . . . Such deliberative practices often require high quality of dialogic communication, where the participants feel safe to question their own assumptions and to be open to change.

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36. Lauren Cobb, Conversation-Dialogue Group, 18 Glendale Family News at 2 (2007) (discussing experience at Glendale Presbyterian Church in Glendale, CA).

37. Oliver Escobar, *The Dialogic Turn: Dialogue for Deliberation*, 4 IN-SPIRE J. L. POL. & SOCS., No. 2, December 2009, at 42, 62.

> The early stage of a deliberative process is crucial. It seems appropriate to try to enrich its communication fabric by including alternative ways of producing collective learning and public reason.

Shawn Spano[38] and his colleagues in the Public Dialogue Consortium[39] have demonstrated in their work with the city of Cupertino the possibilities for shifting municipal civic culture by changing the form of public engagement, attending keenly to process and relationships by planning meetings with dialogic purposes in mind. Mediator Susan Podziba[40] integrates dialogue into her larger process of "Civic Fusion": a combination of tools to build broad-based consensus that she used most prominently to help the bankrupt city of Chelsea, Massachusetts, move out of receivership and into effective self-governance. Jaako Siekkula and Tom Arnkil[41] have been doing fascinating work in Finland, using dialogue as a tool to leverage social networks to help people with psychoses and the agencies that serve them. Finally, Rabbi Amy Eilberg[42] is using dialogue in her work on the Israeli-Palestinian conflict. The National Coalition for Dialogue and Deliberation[43] provides many more examples of groups who are doing great things with dialogue and is a treasure-trove of resources for people doing public engagement work.

C. How Reflective Structured Dialogue Works to Meet the Challenge

Once we've worked with a representative planning group to discover/articulate guiding purposes for the session, we begin by asking what kinds of feelings, behaviors, and dynamics to prevent and what to promote in order to realize the purposes. Although each context will yield somewhat different answers to these

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38. *See generally* SHAWN J. SPANO, PUBLIC DIALOGUE AND PARTICIPATORY DEMOCRACY: THE CUPERTINO COMMUNITY PROJECT (2001).

39. PUB. DIALOGUE CONSORTIUM, www.publicdialogue.org (last visited Aug. 11, 2016).

40. SUSAN PODZIBA, CIVIC FUSION: MEDIATING POLARIZED PUBLIC DISPUTES (2012).

41. *See* JAAKO SEIKKULA & TOM ERIK ARNKIL, DIALOGICAL MEETINGS IN SOCIAL NETWORKS xi–xv (2006).

42. RABBI AMY EILBERG, FROM ENEMY TO FRIEND: JEWISH WISDOM AND THE PURSUIT OF PEACE (2014).

43. NAT'L COAL. FOR DIALOGUE AND DELIBERATION, www.ncdd.org (last visited Aug. 11, 2016).

questions, there are characteristics of dysfunctional, polarized conversations—and desires for something else instead—that show up in most contexts.

Generally, we want to prevent:

- High anxiety and "avoid" responses, especially at the beginning of a session (note SCARF).
- Verbal domination by some who may take up a lot of air time.
- Rapid-fire speaking and consequent reactivity.
- Ridicule, attack.
- Reacting against others rather than speaking for oneself.
- Language that could trigger a downward-spiraling exchange (gleaned from pre-session interviews or surveys or in-the-room preparatory work).

Instead, we want to promote:

- Listening to understand.
- Speaking to be understood.
- An experience of welcome and connection.
- People feeling safe enough to be genuine in their speaking and generous in their listening.
- Conversational resilience; people hanging in when it may be tough to listen.
- Democratized speaking.
- Curiosity about others and oneself.
- Responding intentionally.

V. CORE PRACTICES

In order to realize the above, there are several core practices or processes that we employ: (1) collaboration, (2) participant preparation and reflection, (3)creating agreements, (4) slowing the process down, (5) structured exchanges, (6) inquiry for fresh stories, and (7) inviting curiosity.

A. Collaboration

Especially in the midst of a deeply divisive conflict, many people are suspicious of dialogue, wondering if it's a stealth tool to seduce, convince, appease, and silence. Many people also feel pushed around by the dynamics of the conflict that they're in or

are anticipating. Advance collaboration with a representative planning group is crucial to the success of the endeavor. The collaborative process yields vital information about local needs and creates legitimacy and ownership of the process. Tasks of the group include: (1) articulating a shared purpose for the meeting; (2) creating means (e.g., interviews, invitations, reflective tasks) to help participants prepare themselves for a fresh encounter as free as possible from anxiety and previous limiting patterns; (3) designing or approving meeting designs; (4) drafting ground rules/communication agreements for the meeting; (5) identifying likely participants; (6) writing or editing invitations/promotion; and (7) designing and using evaluations.

B. Helping Participants Prepare and Reflect

About 80% of our work is done before a meeting ever takes place. Like cultivating the garden soil, preparation pays big dividends. Reflection and advance preparation change they ways that people participate in a meeting on a difficult issue. When people fear that their core identities or beliefs are threatened, they are often driven internally by their own anxiety and swept along externally into negative patterns of communication that are bigger than any individual. Responses tend to be rapid, defensive, predictable, and automatic. One way that we attempt to break this pattern is by offering dialogue participants opportunities to reflect before, during a single session, and between sessions in a series.[44] We ask people to think about what really matters to them, times when they may have had constructive conversations across divides on the issue, strengths/capacities they recognize in themselves that they want to call on, what they want to understand about their opponents, what they would like to have understood about themselves, hopes and concerns they have about participating, what they will want to restrain and bring out in themselves to realize their intentions, and any advice they have for the planners for addressing their hopes and concerns through ground rules or

44. Robert R. Stains, Jr., *Reflection for Connection: Deepening Dialogue Through Reflective Processes*, 30 CONFLICT RESOL. Q. 41–48 (Fall 2012); Sallyann Roth, *The Uncertain Path to Dialogue: A Meditation*, *in* RELATIONAL RESPONSIBILITY: RESOURCES FOR SUSTAINABLE DIALOGUE 93–97 (Sheila McNamee & Kenneth Gregen eds., 1999).

meeting design. We invite reflection on one or more of these areas through:

- Pre-dialogue interviews[45] (preferred), e-mails or online surveys when necessary.
- Offering questions for participants to reflect on in advance of a meeting.
- Invitation to pause to collect one's thoughts before responding to questions posed to all in a meeting and to pause between speakers.
- Providing pad and pen to participants to encourage them to write down reactions, reflections, and questions as the dialogue progresses, to enable them to be less distracted and to support them in following their curiosity when they can ask one another questions.

C. Creating Agreements

When we can, we prefer to work on agreements/ground rules with participants in advance of a meeting. That way when we convene, people are publicly reaffirming a commitment they've made privately to us in an interview and perhaps doing some tweaking of the agreements. The agreements serve to reduce anxiety, enhance the feeling of safety and respect, and give legitimacy to the interventions of a facilitator. They can insure voluntary participation ("pass" if not ready or unwilling to speak), level the playing field (share airtime), enhance the willingness to tell one's story (no interrupting, no attempts to persuade, no statements of judgment, keep confidentiality if possible given the setting), and discourage sweeping generalizations and globalized accusations (speak for yourself).

D. Slowing Things Down

When the conversation turns to hot-button issues, escalating exchanges often ensue and perpetuate attack or defense patterns of response to threats. People observe or leave these exchanges having learned little about the actual people who hold another opinion, with cardboard caricatures reinforced, and preexisting opinions strengthened. Slowing the process down is a next step

45. *See* HERZIG & CHASIN, GUIDE FROM THE PUBLIC CONVERSATIONS PROJECT, *supra* note 3, at 143 (providing a sample interview protocol).

forward in preventing "the old" destructive pattern of engagement and making space for something new to emerge. Reflective Structured Dialogue slows the process down in several ways:

- Advance planning for an intentional, not an automatic, conversation.
- Spending time at the beginning of a session to set the frame and intentions, review and secure assent to communication agreements, and preview the rest of the session.[46]
- Tightly structured meeting design starting with time-limited responses in go-round fashion to questions posed to all participants, turn-taking, pausing to compose a response, pauses between speakers, and holding questions of others until the end.

E. Inquiry for Fresh Stories: Behind Every Belief Is a Story—Behind Every Story Is a Person

Too often in public discourse, story and person are stripped from conversations about beliefs, values, and perspectives. This makes it easier for people to treat each other—as Martin Buber[47] said—as "It" rather than "Thou." Returning stories, histories, and people to the conversation is a vital pillar of dialogue.

As noted above, we draw from Narrative Therapy and Narrative Mediation the idea that all stories are partial, colored by our selection and interpretation of experiences and observations, our experience of threat, patterns of communication we may be governed by, and our narrow exposure to others with whom we may differ. Stories held of opponents are often thin and certain, reflecting little if any of the complexity and nuance of life. One of our core tasks is to craft questions that invite thicker, more complex, and nuanced stories. It is in responding to these questions that participants have the opportunity to be seen as more fully-dimensional people, to understand their opponents at greater depth and breadth, and to discover areas of common experience, values, and concerns that would otherwise remain invisible. Once

46. In addition to slowing the process down, this has the added benefit of addressing the concerns that participants often bring into a session. David Rock has outlined these in his "SCARF" model. *See generally* Rock, *supra* note 15.

47. MARTIN BUBER, I AND THOU 45 (Walter Kaufman trans., 1970) ("When I confront a human being as my You and speak the word I-You to him, then he is no thing among things nor does he consist of things.").

discovered, they lead to curiosity, a deepened sense of the humanity of the other, enhanced trust, and, in many cases, the desire to collaborate on common concerns.

There are a variety of ways to call stories forth in dialogue. One is to use some variation of Richard Chasin's[48] "Stereotyping Exercise" in which participants are asked to list stereotypes they believe that others may hold of them and speak to the effects these stereotypes may have on communication choices and dynamics. The excerpt below was used with a campus faculty that was deeply divided and suspicious of one another. Through interviews, we knew that most felt "mis-characterized" by others, feeling that stories were being told of them that did not accord with who they construed themselves to be.

> The experience of being characterized by others in ways that differ from our self-understanding is at the root of many communication difficulties. This exercise offers an opportunity to speak about the ways in which you have had assumptions, beliefs, or motivations attributed to you that you deem incorrect, and to note the effects.
>
> How do you imagine that others on campus characterize you?

There is a work-sheet provided with a series of fill-in-the-blanks: "As a _____ I think I'm seen as _____," with invitations to fill in and mark what's most painful, inaccurate, and understandable. The responses will form the basis for conversation and re-authoring stories in the group.

F. Conflict Narrows; Inquiry Expands

Another way to invite story is via questions that are posed to all and responded to in a structured way: questions that open and make visible (1) experience, (2) perspective, and (3) struggle.

In a single or an initial session, a sequence of three kinds of questions is often asked:

- The first with the purpose of bringing in experiences that may have shaped the participants' perspective. In an abortion dialogue: "Can you tell us about a personal experience you have had that has helped shape your

48. Richard Chasin & Maggie Herzig, *Creating Systemic Interventions for the Socio-Political Arena, in* THE GLOBAL FAMILY THERAPIST: INTEGRATING THE PERSONAL, PROFESSIONAL, AND POLITICAL (B. Berger-Gould & D. Demuth eds., 1994).

perspective on abortion, or that would help us understand your perspective?" It is here that people begin to make a deeper connection with others. We all have experiences that inform us, and most of us can find within us resonance with the experiences of others even if they are not the same as our own. It was not uncommon in abortion dialogues, for instance, to hear two women describe unplanned pregnancies as the source of their perspectives, though the perspectives were totally opposite. The connection they made at the level of experience enabled them to be charitable with one another when talking about perspective.

- The second question is to give participants the opportunity to say what's at the core of their perspective, free from fear of interruption, criticism, or attack. From a dialogue on homosexuality and Christian faith: "What's the bedrock of your conviction about the right relationship of human sexuality and holiness?" or, in many other dialogues simply: "What's at the heart of the matter for you with regard to _____?" In our experience, providing an opportunity for people to "plant their flag in the sand" reduces the fear that they will be manipulated in some way or that they are expected to keep their perspective to themselves. Once stated, this frees people up to listen more generously to others and to be open to speaking about places where they may have conflicts or gray areas, if they exist.
- The last question is to open the possibility of expressing the shading within a strong conviction that's usually kept from an opponent—and often from others in one's interest group—for fear of being seen as weak, wishy-washy, less-than-orthodox, or, worse, a traitor. From a dialogue among Jewish and Christian clergy in the wake of a public dispute about Israeli and Palestinian actions: "Are there any places within your overall perspective where there are areas of less certainty, where one value may rub up against another or where you feel pulled in different directions, either in feeling or because of relationships?" When people respond to this, it's much harder for their opponents to see them as cardboard representations of a position, and much easier to see them as fellow humans

balancing their perspective with other values, feelings, and relationships.

G. Inviting Curiosity

The more strongly people feel about their cherished perspectives, the more certainty they may have about the rightness of their views and the wrongness of those opposed. Polarized exchanges characterized by ridicule and attack only lead partisans to deeper degrees of certainty about the motives and the character of those with opposing views ("wrong") and their own ("right"). The typical means of engagement (debate, online comments, public meetings, etc.) perpetuate the process. Reflective Structured Dialogue invites participants to move from certainty to caring through curiosity. Curiosity is fostered in several ways:

- Separating speaking from listening; supporting listening as well as speaking. Posing a question to all participants and asking them to pause and write their response before anyone speaks frees people up to listen to speakers instead of composing responses or worrying about needing to react to what was said.
- Providing pen and paper with encouragement to write down things people say that they want to learn more about supports listening with the intention to deepen understanding of particular people, what they think, and how they got there. It also prepares participants to ask "Questions of Genuine Interest."
- Giving significant time for participants to ask one another questions. As noted above, we frame this as "Questions of Genuine Interest" with guidance about what that means: no rhetorical questions, questions as statements in disguise, questions as weapons, etc.; rather, questions that will invite the respondent to speak more deeply, widely, and with more nuance about their perspectives and experiences. It's not uncommon in a dialogue for people to discover that they've had remarkably similar experiences, but have come to radically different perspectives. This section of a meeting allows them to pursue the curiosity that ensues: "How is it that you experienced the same thing as me but think so differently? What did you make of your experience?" Or, another example of a typical question, "You've said on the one hand, you believe

_____, while on the other, you think _____. How do you wrestle with that difference?"

H. Closure and Ownership

The experience of dialogue can be intense for participants, though it may not be apparent on the outside. It's helpful for the group to have a defined end to that intensity; a transition out of the bounded space of dialogue and back to regular life. It is also common for people in deep conflict to feel "done-to" by an opponent, a process, or a facilitator. In a closing, we offer each participant the chance to claim ownership, reflect on their experience, and say something about what they contributed to the session. A last question often posed to all is often: "Please tell us what have you done—or refrained from doing—that has contributed to this evening going as it has, and anything else that would bring a meaningful close to this experience for you."

I. Basic Format

Though meetings can run from one session of a few hours to a series meetings over a period of a few years, there is a core format that can stand alone or serve as a basis for elaboration:

1) Start with a meal or social time with refreshments, no conversation about the issues at hand.
2) Move to the meeting space, get seated. If possible seat people in groups of 8–10, mixed by perspective.
3) Setting the frame: review purposes and agenda; make sure everyone's on board with both.
4) Agreements: present each with its purpose, secure commitment from all in the group.
5) Three "Opening Questions":
    a) Inquire about life experience that informs perspective. Pause after reading question for people to take notes for themselves, pause for a beat between speakers. No responding to others; no cross-talk. Pause after all have responded for listeners to review their notes and frame questions for later.
    b) Inquire about "what's at the heart of the matter" for them. Process as above.
    c) Inquire about any gray areas, mixed feelings, etc. Process as above.

6) Questions of genuine interest: 30–40 minutes for people to follow their curiosity by asking each other questions that arose from their speaking and listening.
7) Closing. Final question to end the session and have people reflect on their contribution: 1–3 minutes each.

VI. CONCLUSION

It is possible to cultivate a better environment within which our public conversations can grow. With focused intention, participant preparation, and collaborative, responsive design, it is possible to invite the stories that animate perspectives and beliefs and that leave people feeling seen, heard, hopeful, and willing to courageously engage in community life.

Commentary (/commentary/)

Diversity in ADR: Time for Another Uncomfortable Conversation

It's time to put down the press release and get to work to spur transformational change in the industry once and for

By **Marcie Dickson** | August 10, 2020 at 08:14 AM

Marcie Dickson is the Chief Marketing and Business Development Officer for Miles Mediation & Arbitration.

Can I let you in on a little secret? We're not impressed with your corporate statement about diversity and inclusion. Especially if to this point your organization has perpetrated some of the core offenses around retention, lack of opportunities and access for people of color. It's deeply injurious and nothing short of corporate hypocrisy to profit off of exclusionary practices, then scramble to fix the optics and grab the proverbial mic when the cover is blown.

Law Firms Mentioned

Winston & Strawn LLP (/search/?q=Winston+%26+Strawn+LLP&Su

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Now is not the time to issue a mea culpa and highlight your new CSR initiative or inclusion rider. Instead, create a sustainable strategy for your commitment to diversity, equity and inclusion and double down on efforts to align your actions with your rhetoric. And do this without fanfare.

By now we've all heard that diversity is a business imperative. Organizations with equal representation and a range of perspectives are more profitable and better positioned to innovate, attract top talent, increase client satisfaction, take risks, and bounce back from disruptive forces.

Let's take a look at the legal profession, where the lack of diversity is a long-standing issue. According to a study by National Association for Law Placement, at the partnership level, women make up 23.36% of law firm partners; Blacks make up 1.83% of law firm partners; and minorities overall make up 9.13% of partners. In the same study of over 1,000 major law firms, only 2.86% of attorneys were LGBTQ, and 0.52% were attorneys with disabilities. A recent ABA study released last week unveiled a more distressing tale: 70% of women of color have considered leaving the practice of law due to the lack of inclusion and opportunities for advancement.

What's even more distressing are the numbers in the area of alternative dispute resolution. For reference, 17 out of the 412 neutrals at a top ADR provider with a panel of primarily judges are BIPOC (Black, Indigenous and people of color)—in other words 4%. According to a **2015 survey for the National Academy of Arbitrators Research and Education Fund (http://www.lerachapters.org/OJS/ojs-2.4.4-1/index.php/LERAMR/article/download/3101/3076)**, of more than 400 practicing employment arbitrators, 74% were male and 92% were non-Hispanic white. And in 2018, celebrity Jay-Z lambasted a national arbitration provider for its lack of diversity on a roster of arbitrators presented for his arbitration. He contended that only three of the 200+ arbitrators on the panel's New York Large Complex Case Roster were Black arbitrators.

Historically, mediation, arbitration, and ADR services were considered an elite arena for white male retired judges. There is a reason for this. First, there was no incentive for institutional ADR providers to diversify their homogenous panels; second, there was zero accountability for said providers to alter their practices, until now; and third, there was no perceivable talent pool from which to hire diverse mediators and arbitrators.

When questioned why a national ADR provider has experienced issues increasing panel diversity, a senior executive responded that the organization is "looking at people who have reached partner-level status or are retiring from the bench." But according to the executive, the number of women, people of color, and women of color that meet the panel's criteria is "statically small" and the "supply-side starts to become more narrow."

On the contrary, there is a large pool of talented associates and nonjudges who possess the markers of good mediators and arbitrators, but never realize the opportunity because the market has not embraced them and large ADR panels have resisted the exhortation to create pipelines to recruit, train, and invest in talent.

taps-big-law-for-fundraising haul/)

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THE AMERICAN LAWYER (/AMERICANLAWYER/)

To transform diversity, equity, and inclusion in ADR, we need to make appreciable efforts to recruit, train, and retain diverse neutrals on panels. Clients deserve and demand this level of service and selection because what good is an inclusion rider if an ADR panel does not reflect the demographics of the communities it purports to serve?

Supporting Diversity in ADR

- The lack of diversity for most providers may signal the need for a **cultural shift** in the organization. Consider training and intentional programs designed to foster an environment that celebrates and recognizes differences. Building a culture of inclusion will invariably attract talent who seek to join a forward-thinking firm.
- **Recruitment, development, retention, and promotion** are crucial components that require intentional efforts. Diversity-aligned recruiting means looking beyond the rigid checklist of what determines a potential neutral and searching for true talent in unconventional places.
- **Mentorship** programs can help develop promising neutrals into rainmakers. ADR providers can create programs that provide greater access and learning opportunities for law school students and business professionals. The International Institute for Conflict Prevention & Resolution's **Diversity in ADR Task Force (https://www.cpradr.org/programs/committees/diversity-task-force-adr)** offers an excellent example in its mentorship and apprentice program.

There is a business and categorical imperative for diversity in ADR. But there's no imperative for cause marketing when an organization is woefully behind in the practice of diversity, equity, and inclusion. A more genuine approach is to focus on internal strategies for increasing panel diversity and celebrating these achievements —when obtained—through representation in marketing collateral and through creative storytelling that puts diverse candidates front and center.

There are myriad challenges to increasing diversity, equity and inclusion in ADR. Fortunately, the industry is comprised of courageous, creative conflict-resolution specialists who are trained to find solutions in even the most difficult of situations.

It's time to put down the press release and get to work to spur transformational change in the industry once and for all.

Marcie Dickson *is the chief marketing and business development officer for Miles Mediation & Arbitration. She is a guest host of "The Future of Resolution" podcast and co-host of the "Seeking Strategy" podcast. She wrote this commentary after reading the article "**After Arbitrator Ousted Over Racist Email Forward, NRA Wants JAMS and Winston & Strawn to Foot the Bil (https://www.law.com/litigationdaily/2020/08/05/after-arbitrator-ousted-over-racist-email-forward-nra-wants-jams-and-winston-strawn-to-foot-the-bill/)l" in the Litigation Daily.*

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ROSS TODD (/THERECORDER/AUTHOR/PROFILE/ROSS-TODD/) | AUGUST 05, 2020

"Winston & Strawn learned about this email at the same time the NRA did, and we immediately agreed that it rendered the arbitrator unfit and he should be removed from the case," the firm said in an email statement.

Was the World's Biggest Hedge Fund Pursuing a Trade Secrets Case Against Former Employees in Bad Faith? It's a $2 Million Question (https://www.law.com/litigationdaily/2020/07/21/was-the-worlds-biggest-hedge-fund-pursuing-a-trade-secrets-case-against-former-employees-in-bad-faith-its-a-2-million-question/)

ROSS TODD (/THERECORDER/AUTHOR/PROFILE/ROSS-TODD/) | JULY 21, 2020

A series of filings in New York state court are are shedding some light on the often hush-hush world of hedge funds and the lengths that Bridgewater Advocates has gone to in attempts to keep former employees from using allegedly proprietary trading strategies to form competing funds.

California Civil Trial Juries Need to Be Smaller to Get Courts Back on Track (https://www.law.com/litigationdaily/2020/09/03/california-civil-trial-juries-need-to-be-smaller-to-get-our-courts-back-on-track-407-15927/)

ROB SHWARTS | SEPTEMBER 03, 2020

"We need to get over the idea that there must be 12 jurors in the box to conduct a state court civil trial," writes Orrick, Herrington & Sutcliffe's Rob Shwarts.

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Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation

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Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation

*Nancy A. Welsh**

ABSTRACT

Proponents of the "contemporary mediation movement" promised that parties would be able to exercise self-determination as they participated in mediation. When courts began to mandate the use of mediation, commentators raised doubts about the vitality of self-determination. Though these commentators also suggested a wide variety of reforms, few of their proposals have gained widespread adoption in the courts.

Ensuring the procedural justice of mediation represents another means to ensure self-determination. If mediation provides parties with the opportunity to exercise voice, helps them demonstrate that they have considered what each other had to say, and treats them in an even-handed and dignified manner, it is more likely that the parties will share information that will lead to a result that actually represents the exercise of their self-determination.

Recent research, however, counsels that status affects procedural justice perceptions, voice is not always productive, and parties who are marginalized or lower status may neither expect nor desire to exercise voice. Further, research indicates that even those parties in mediation who value voice may not value participating in the back-and-forth or bargaining process that is required to arrive an agreement.

After reviewing this and other research, the Article proposes the following reforms to enhance the likelihood that mediation will provide all parties with voice, trustworthy consideration and real, substantive self-determination: increasing the inclusivity of the pool of mediators; training all mediators to acknowledge and address implicit bias; training mediators to engage in pre-mediation caucusing that focuses on developing trust; institutionalizing systems for feedback and quality assurance; training mediators to model reflective listening; adopting online technology that provides parties with pre-mediation information they need to engage in informed deci-

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sion-making and the opportunity for self-analysis and self-reflection; and perhaps even identifying additional areas of mediation practice in which mediators would be required to take affirmative steps to avoid unconscionable unfairness or coercion.

I. INTRODUCTION

DREAMS and noble intentions, at least in part, inspired the "contemporary mediation movement."[1] Many mediation advocates[2] urged—and continue to urge[3]—that mediation should be embraced and institutionalized because it is an inclusive process and can enable people to find paths that allow them to exercise meaningful self-determination in resolving their disputes. This promise of self-determination has dimmed, however, as courts and agencies have focused on efficiency as a primary reason to institutionalize mediation,[4] as lawyers and repeat players have come to dominate the issue framing and negotiations occurring within mediation,[5] and as research has revealed that a significant percentage of parties do not possess the temperament or desire to fashion their own unique resolutions.[6]

As self-determination has lost luster, some mediation advocates have emphasized mediation's potential to provide an "experience of justice."[7] Drawing on the vast social–psychological literature regarding procedural justice, these mediation advocates have urged that the process offers important opportunities for "voice," "trustworthy consideration," and "even-handed and respectful treatment," in marked contrast to the processes used to resolve the vast majority of litigated civil matters—i.e., default, lawyers' bilateral negotiation, and dispositive motions.[8] This Article, in part, represents a reminder regarding mediation's potential to

1. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 1 (1st ed. 1994).

2. This includes the author of this Article.

3. *See, e.g.*, ADVISORY COMM. ON ALT. DISPUTE RESOLUTION, JOINT STATE GOV'T COMM'N, ALTERNATIVE DISPUTE RESOLUTION IN PENNSYLVANIA: REPORT OF THE ADVISORY COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION 12 (2017) (advocating for institutionalization of mediation in state courts and agencies and in private sector).

4. *See* Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 22 (2001) [hereinafter Welsh, *The Thinning Vision*].

5. *See* Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 865–66 (2008) [hereinafter Riskin & Welsh, *Is that All There Is?*]; Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASH. U. L.Q. 787, 789 (2001) [hereinafter Welsh, *Making Deals*]; Welsh, *The Thinning Vision*, *supra* note 4.

6. *See* Donna Shestowsky, *How Litigants Evaluate the Characteristics of Legal Procedures: A Multi-Court Empirical Study*, 49 U.C. DAVIS L. REV. 793, 828 (2016) (reporting research regarding *ex ante* litigation preferences, specifically that "maintaining veto power over a third-party suggestion was as much decision control that litigants desired and they were indifferent between having this type of power and delegating decision-making authority to a third party or group of third parties.").

7. *See* 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, 671 (2004) [hereinafter Welsh, *Stepping Back Through the Looking Glass*]; Nancy A. Welsh, *The Current Transitional State of Court-Connected ADR*, 95 MARQ. L. REV. 873, 884 (2012) [hereinafter Welsh, *The Transitional State*]; Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 143 (2004) [hereinafter Welsh, *The Place of Mediation*].

8. *See* Welsh, *Making Deals*, *supra* note 5, at 788; Welsh, *The Transitional State*, *supra* note 7.

provide self-determination and procedural justice and then considers the fate of proposals that have arisen to reclaim this potential.

But this Article also examines more recent research raising questions regarding the appropriateness of expecting mediation to deliver self-determination or procedural justice. In particular, the Article examines research indicating that people's societal identity and status can and does affect the likelihood that they will perceive procedural justice in mediation, their ability and willingness to exercise voice in mediation, and even their ability and willingness to demonstrate trustworthy consideration. Members of society who feel marginalized or isolated—or who know that they exercise no power due to their disadvantageous place within an extreme hierarchy—are less likely to be willing or able to embrace opportunities to express themselves in mediation. To do so represents an unacceptable risk. Meanwhile, members of society who are powerful—or who know that they exercise privilege due to their superior place within an extreme hierarchy—are less likely to be willing or able to embrace opportunities to hear and acknowledge what other parties have said in mediation. If mediation lacks participants' voice and trustworthy consideration, it is difficult to understand how the process can provide either procedural justice or a meaningful version of self-determination. In other words, as self-determination and procedural justice meet inequality in mediation, these noble intentions are found wanting.

It is at this point that it becomes tempting to question the value of mediation—to label mediation as an innovation that looked promising but has ended in failure. It is also at this point that the question (and song title) *Do You Believe in Magic?* comes to mind. Of course, the answer to such a question must be "No!" Only a fool believes in magic. But as is so often true, the lyrics of the song are much more nuanced than the title would lead us to believe. The lyrics urge us to "believe in [the] magic in a young girl's heart" and that music can "free your soul." The lyrics also acknowledge that talking about this form of magic is "like trying to tell a stranger 'bout-a rock and roll."[9]

In other words, it is the hope and creativity in music that are "magic," and they must be experienced in order to be felt. There is no doubt that both of these assertions can be true. Music can overcome all sorts of barriers, inhabiting both the space outside and inside us,[10] reaching beyond the rigorously rational and into the hopefully emotional. It can unlock individuals' previously-unacknowledged abilities for expression and freedom,[11] and when we make music together—or dance together—we can feel the power of coming together to create something good. Music defi-

9. THE LOVIN' SPOONFUL, *Do You Believe in Magic?*, *on* DO YOU BELIEVE IN MAGIC (Kama Sutra 1965).

10. *See* KAREN ARMSTRONG, A HISTORY OF GOD (1993).

11. *See* Daoud Tyler-Ameen & Lars Gotrich, *On Film and Stage, Jonathan Demme Looked into the Heart of the Song*, NPR (Apr. 29, 2017, 8:00 AM), http://www.npr.org/sections/therecord/2017/04/29/526017323/on-film-and-stage-jonathan-demme-looked-into-the-heart-of-the-song [perma link unavailable].

nitely has a power, a language, a connecting force—a magic—that can help us overcome barriers and inhibitions that would otherwise divide us. So, the answer to the question "Do you believe in magic?" really has to be *both* "yes" *and* "no."[12] It depends.

And so it is with mediation. "It depends" must be the appropriate response to the question of whether we should continue to believe in the potential power of mediation to foster dialogue, procedural justice, and self-determination. Therefore, this Article will *not* end with the conclusion that mediation represents a failed experiment, unable to overcome the negative effects of inequality, bias, and prejudice. Instead, this Article will call for more realistic expectations of the process, the establishment of conditions that make achievement of its potential more likely, and reforms to increase the inclusivity and safety of the process—thus fostering all people's ability to find and express their own voices, find and exercise their abilities to consider the voice of the other, and arrive at their own voluntary (self-determined) agreements. There is work to be done.

II. MEDIATION AND SELF-DETERMINATION

The field of "alternative" dispute resolution is grounded in the concept of self-determination.[13] Oxford defines this concept as "[t]he process by

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12. I am reminded of Professor Andrea Schneider's recent remarks when accepting the ABA Section of Dispute Resolution's award for scholarship:

> [W]hen I stepped back to think about what negotiation and ADR and international law and ethics all have in common, it is that they look for the best in people. It is the ideal of how people and countries, should behave toward one another with the recognition that ongoing interaction and communication inevitably includes conflict. It's not that we can eliminate conflict–it's that we can handle it better. I also think that these classes are optimistic. Why bother teaching them if you don't believe that you can change the world for the better? And I think that is something that most of us have in common–we are optimists. We do this work because we believe. We believe that behavior can change, we believe that people can learn, we believe that most leaders want what is best for their country and not just themselves. This optimism has, of course, been labeled as naive over the years. It has been particularly tested this year. But, seriously, if we didn't think that we could make a difference, most of us would have found another career a long time ago!
>
> This work also takes patience and persistence since we know people and situations do not change easily. So. . .for better or worse, I tend to view the answer "no" as "not now." And I will come back around to ask again. I also think that when we view learning as an invitation—let's do this together—we are more likely to effectuate the change we want in our students, in our schools, and in our communities. I think that what has worked for me is to own this optimism and invite others along for the ride.

Andrea Kupfer Schneider, Speech for the ABA Section of Dispute Resolution Award for Outstanding Scholarly Work (Apr. 22, 2017) (transcript available at http://www.indisputably.org/?p=10644 [https://perma.cc/E8WE-ZN6A]). *See also* Welsh, *The Transitional State*, *supra* note 7, at 880 (observing that ADR proponents possess "a certain sort of faith, grounded in the principle of self-determination [and] . . . believe in providing people with the opportunity and tools to be their best, enabling them to take responsibility for making serious decisions in a deliberative, thoughtful manner").

13. Although arbitration advocates and mediation advocates sometimes are portrayed as people with very different norms (*see, e.g.*, S.I. Strong, *Clash of Cultures: Epistemic Communities, Negotiation Theory, and International Lawmaking*, 50 AKRON L. REV. 495

which a person controls their own life."[14] Merriam-Webster defines it as "free choice of one's own acts or states without external compulsion."[15] The Free Dictionary defines it as "[d]etermination of one's own fate or course of action without compulsion; free will."[16] All of these definitions evince a faith in people's desire and ability to control their own lives.[17] For those of us who believe in the dignity and capacity of every human being, there is some degree of magic in this concept of self-determination.

Importantly, self-determination is *not* familiar to most lawyers and judges.[18] Instead, it is a concept that finds its home in the worlds of diplomacy and nation building.[19] Nonetheless, mediators in the United States have long embraced self-determination. For example, the *Model Standards of Conduct for Mediators* adopted by the American Bar Association (ABA) Section of Dispute Resolution, the American Arbitration Association, and the Association for Conflict Resolution (formerly the Society of Professionals in Dispute Resolution) in 1994 placed self-determination first among the standards. The 1994 *Model Standards* described self-determination as "the fundamental principle of mediation."[20] Standard I of the 2005 *Model Standards*, meanwhile, provides: "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."[21] The vision of self-determination contained in this standard is not quite as inspirational as those referenced earlier, but the basic message remains the same: resolution of disputes in mediation shall occur only if the people involved in the dispute choose resolution on their own and without anyone forcing their hands.

(2016)), they/we share this commitment to providing people with the real opportunity to resolve disputes in the manner that they choose. *See* Nancy A. Welsh, Introduction, 5 Y.B. On Arb. & Mediation v (2013).

14. *Self-determination*, OXFORD ENGLISH DICTIONARY ONLINE, https://en.oxforddictionaries.com/definition/us/self-determination [https://perma.cc/4F6F-PEK3].

15. *Self-determination*, MERIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/self-determination [https://perma.cc/L6WN-X68P].

16. *Self-determination*, THE FREE DICTIONARY (citing AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2016)), http://www.thefreedictionary.com/self-determination [https://perma.cc/98GR-TFG9].

17. *See* Welsh, *The Transitional State*, *supra* note 7, at 878.

18. *See* Welsh, *The Thinning Vision*, *supra* note 4, at 60.

19. *See* Daniel Thürer & Thomas Burri, *Self-Determination*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873 [https://perma.cc/NX7F-4MZ9] (last updated Dec. 2008) (asserting that the origin of the modern concept of self-determination derives from the U.S. Declaration of Independence, particularly the provision that governments "derive[ ] 'their just powers from the consent of the governed' and that 'whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it'").

20. Am. Arb. Ass'n, *Model Standards of Conduct for Mediators*, 17 J. NAT'L ASS'N OF ADMIN. L. JUDICIARY 323, 324–25 (1997).

21. MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard I (AM. ARB. ASS'N, AM. BAR ASS'N DISPUTE RESOLUTION SECTION & ASS'N FOR CONFLICT RESOLUTION 2005).

Largely due to concerns about declining access to justice—specifically, concerns that litigants were experiencing unacceptable delay and increased costs due to burgeoning civil and criminal court filings and litigation inefficiencies—federal and state courts institutionalized mediation for the resolution of all sorts of civil matters. Respect for parties' self-determination was not a guiding principle. When insufficient numbers of litigants voluntarily elected to try mediation to resolve their cases, courts began making mediation mandatory. As lawyers became more involved in the process, their voices and framing of issues dominated the discussions occurring in mediation, thus marginalizing their clients' participation. The lawyers also chose mediators who were experienced litigators or judges with relevant subject-matter expertise. They sought mediators who would provide reality testing.[22] In some types of cases, lawyers counseled their clients not to attend the mediation.[23] Increasingly today, lawyers urge mediators to avoid joint sessions that would allow the parties to talk directly with each other. Instead, many lawyers prefer private conversations with the mediator (caucuses) and shuttle diplomacy.[24]

All of these adaptations have occurred while many courts continue to describe mediation in a manner that hearkens back to the early days of the contemporary mediation movement and as judges express a preference for mediation because they believe that it involves the parties more

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22. *See* Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399, 400, 420 (2005) [hereinafter McAdoo & Welsh, *Look Before You Leap*]; Riskin & Welsh, *Is That All There Is?*, *supra* note 5, at 420; Welsh, *Making Deals*, *supra* note 5, at 846; Welsh, *The Thinning Vision*, *supra* note 4, at 8–9. I have even raised concerns that lawyers are using mediation—specifically, the mediation privilege—to protect themselves from potential malpractice suits arising out of the settlement of cases. *See* Nancy A. Welsh, *Musings on Mediation, Kleenex, and (Smudged) White Hats*, 33 U. LA VERNE L. REV. 5, 13 (2011) [hereinafter Welsh, *Musings on Mediation*].

23. *See* TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS AND GENDERED PARTIES 86–125 (2009).

24. *See* Lynne S. Bassis, *Face-to-Face Sessions Fade Away: Why is Mediation's Joint Session Disappearing?*, DISP. RESOL. MAG., Fall 2014, at 33; Jay Folberg, *The Shrinking Joint Session: Survey Results*, DISP. RESOL. MAG., Winter 2016, at 19; Eric Galton & Tracy Allen, *Don't Torch the Joint Session*, DISP. RESOL. MAG., Fall 2014, at 25–27; Thomas J. Stipanowich, *Insights on Mediator Practices and Perceptions*, DISP. RESOL. MAG., Winter 2016, at 7. I pointed out the reduced use of joint session nearly twenty years ago. *See* Welsh, *Making Deals*, *supra* note 5, at 789–91; Welsh, *The Thinning Vision*, *supra* note 4, at 20–21. Meanwhile, it is important to note that caucusing has been part of mediation for a very long time. Researchers found that caucus was used in about two-thirds of the community mediations studied; about 35% of disputants' statements occurred in caucus as compared to joint session; and

> [i]n cases that employed a caucus, disputants used more persuasive arguments, made fewer requests for reaction to an alternative, and generated fewer new alternatives. Mediators employed more negative evaluations of the parties' behavior and less positive evaluations of their positions during these cases. These findings suggest that mediators tend to call caucuses when disputants are taking a contentious, as opposed to problem-solving, approach.

Gary L. Welton et al., *The Role of Caucusing in Community Mediation*, 32 J. CONFLICT RESOL. 181, 199 (1988).

directly in the resolution of their disputes.[25] The United States District Court for the Eastern District of New York, for example, defines mediation as

> a process in which parties and counsel agree to meet with a neutral mediator trained to assist them in settling disputes. The mediator *improves communication across party lines, helps parties articulate their interests and understand those of the other party*, probes the strengths and weaknesses of each party's legal positions, and identifies areas of agreement and helps generate options for a mutually agreeable resolution to the dispute. In all cases, mediation provides an *opportunity to explore a wide range of potential solutions and to address interests that may be outside the scope of the stated controversy or which could not be addressed by judicial action. A hallmark of mediation is its capacity to expand traditional settlement discussions and broaden resolution options, often by exploring litigant needs and interests that may be formally independent of the legal issues in controversy*.[26]

When parties seek to set aside agreements they have reached in mediation, however, courts generally do not try to determine whether there was "communication across party lines," articulation and understanding of the parties' interests, "explor[ation of] a wide range of potential solutions," options that "address interests . . . outside the scope of the stated controversy or which could not be addressed by judicial action," and—ultimately—the exercise of self-determination.[27] Rather, courts look for the other extreme, trying to determine whether any participant in the process engaged in behaviors or threats so overwhelming that they could be classified as "coercion."[28] Courts rarely find coercion in mediation.[29]

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25. *See* Bobbi McAdoo, *All Rise, The Court Is in Session: What Judges Say About Court-Connected Mediation*, 22 OHIO ST. J. ON DISP. RESOL. 377, 398–99 (2007) (reporting that one of the top reasons that judges order parties into mediation is because they believe it will get clients more directly involved in discussing their case and its resolution); McAdoo & Welsh, *Look Before You Leap*, *supra* note 22, at 410; *see also* Jennifer W. Reynolds, *Judicial Reviews: What Judges Write When They Write About Mediation*, 5 Y.B. ON ARB. & MEDIATION 111, 142–143 (2013) (observing that when judges write about mediation, their perspective and goals for the process depend upon whether they are focusing on their obligation to process cases or serve as mediators themselves and care about the "fit" between the social role of the courts and mediation).

26. S.D.N.Y. & E.D.N.Y. Local Civ. R. 83.8. (emphasis added). Interestingly, the definition of mediation on the court's website varies slightly from the definition in its local rules. There, mediation is defined as

> a confidential process in which parties and counsel meet with a neutral third party who is trained in settling disputes. The mediator assists in improving communication across party lines, identifies areas of agreement, and helps parties to generate a mutually agreeable resolution to the dispute. Mediation provides an opportunity to explore a wide range of potential solutions and to address interests that may be outside the scope of the stated controversy or which could not be addressed by judicial action.

Mediation, E.D.N.Y., https://www.nyed.uscourts.gov/mediation [https://perma.cc/F4XB-5HUZ].

27. S.D.N.Y. & E.D.N.Y. Local Civ. R. 83.8.

28. *See* Welsh, *The Thinning Vision*, *supra* note 4, at 47.

29. *See* Nancy A. Welsh, *Reconciling Self-Determination, Coercion, and Settlement in Court-Connected Mediation*, *in* DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 420 (Jay Folberg, Ann L. Milne & Peter Salem eds., 2004);

This standard of self-determination as "*not* coercion" represents a very thin vision of self-determination indeed. But it is important to recall that (1) the courts exist in order to produce resolution of disputes; (2) they do not exist to foster citizens' self-determination; (3) they have an interest in the disposition of cases; and (4) they are constantly facing legislative calls for increased efficiency, budget cuts, and competition from administrative courts, private dispute resolution, and even international tribunals.[30] Nonetheless, over the years, there has been no shortage of proposals to reinvigorate self-determination in court-connected mediation.

Working under the assumption that courts will continue to mandate parties' participation in mediation, Leonard Riskin and I have urged that courts should provide for a pre-mediation consultation with the parties to determine the issues that the parties hope to address and their preferred mediation model.[31] Similarly assuming the continuation of mandatory mediation, Jaqueline Nolan-Haley has called long and consistently for parties to have access to information regarding their legal rights and remedies so that their consent to any agreements in mediation is sufficiently informed.[32] Jennifer Reynolds has advocated for law schools to commit themselves to educating members of the public regarding their legal rights and the skills needed to participate in mediation.[33] Stephen Landsman has proposed that state-appointed lawyers should accompany parties

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Welsh, *The Thinning Vision*, *supra* note 4, at 47; *see also* 1 SARAH R. COLE ET AL., *§ 7:9. Contract Defenses—Duress*, *in* MEDIATION: LAW, POLICY AND PRACTICE (Dec. 2016 Update) ("Traditional duress principles would provide a pressured party no relief if the 'threats' come from the party's lawyer and the mediator, and not from the adverse party. Furthermore, if both the mediator and the lawyer believe the settlement is fair, the settlement likely is within the range of settlements the courts would find acceptable." (footnotes omitted)).

30. *See* McAdoo & Welsh, *Look Before You Leap*, *supra* note 22, at 414–15; Nancy A. Welsh, *Mandatory Predispute Consumer Arbitration, Structural Bias, and Incentivizing Procedural Safeguards*, 42 SW. L. REV. 187, 228 (2012) [hereinafter Welsh, *Incentivizing Procedural Safeguards*]; Welsh, *The Place of Mediation*, *supra* note 7, at 140; Welsh, *The Transitional State*, *supra* note 7, at 884–85; *see also* NATIONAL CENTER FOR STATE COURTS, *Call to Action: Achieving Civil Justice for All: Recommendations to the Conference of Chief Justices by the Civil Justice Improvements Committee* (2016); NATIONAL CENTER FOR STATE COURTS, *Civil Justice Initiative: The Landscape of Civil Litigation in State Courts* (2016); Corina D. Gerety & Brittany K.T. Kauffman, *Summary of Empirical Research on the Civil Justice Process: 2008-2013* (2014).

31. *See* Riskin & Welsh, *Is That All There Is?*, *supra* note 5, at 920–21. As noted in the article, staff mediators at the U.S. District Court for the Northern District of California and the Ninth Circuit provide such consultations.

32. *See* Jacqueline Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 799–823 (1998); *see also* McAdoo & Welsh, *Look Before You Leap*, supra note 22, at 413–15 (regarding concerns about ordering self-represented litigants into mediation); Welsh, *The Thinning Vision*, *supra* note 4, at 5 (describing one vision of self-determination that focuses on ensuring parties have relevant information about rights, remedies, and usual settlements).

33. *See* Jennifer W. Reynolds, *Luck v. Justice: Consent Intervenes, but for Whom?*, 14 PEPP. DISP. RESOL. L. J. 245, 306–07 (2014) [hereinafter Reynolds, *Luck*] (examining the meaning of consent and calling for law schools to engage in public education regarding the law relevant to landlord-tenant, income tax, family, immigration, Social Security, and workers compensation and to improve people's skills in negotiation, mediation, and contract-reading; also providing examples of law schools that offer "people's law schools" and clinics that conduct outreach as well provide direct client service).

in mediation,[34] while Kristen Blankley has urged that lawyers should use limited scope agreements to provide legal representation to clients in mediation.[35] Omer Shapira has focused on mediators' ethics, calling for revision of the *Model Standards of Conduct for Mediators* to require mediators to foster parties' real, substantive self-determination rather than permitting formal, illusory self-determination to suffice.[36] Alone and

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34. *See* Stephan Landsman, *Nothing for Something? Denying Legal Assistance to Those Compelled to Participate in ADR Proceedings*, 37 FORDHAM URB. L.J. 273, 277 (2010); *see also* Jean R. Sternlight, *Lawyerless Dispute Resolution: Rethinking a Paradigm*, 37 FORDHAM URB. L.J. 381, 416–17 (2010) (reporting on one legal services office that largely limits its lawyers' time to representation of clients on the day of mediation, with strikingly good results).

35. *See* Kristen M. Blankley, *Adding by Subtracting: How Limited Scope Agreements for Dispute Resolution Representation Can Increase Access to Attorney Services*, 28 OHIO ST. J. ON DISP. RESOL. 659, 661–62 (2013). Interestingly, Dr. Roselle Wissler has observed that people participate less and express less satisfaction with their participation when represented by lawyers in mediation. She also provides several possible reasons for this. Roselle L. Wissler, *Representation in Mediation: What We Know from Empirical Research*, 37 FORDHAM URB. L.J. 419, 446–47 (2010).

36. *See* Omer Shapira, *A Critical Assessment of the Model Standards of Conduct for Mediators (2005): Call for Reform*, 100 MARQ. L. REV. 81, 125–27 (2016). Omer Shapira has recently examined the concept of self-determination in some detail:

> [T]he exercise of self-determination requires the convergence of three accumulative elements: competency to make decisions, voluntariness and lack of coercion at the time of decision-making, and the availability and understanding of the information relevant to the decision-making. It will be helpful in the following discussion to distinguish between the factual observation that an *autonomous* decision has been made, and its *value* or *quality*. An autonomous decision must satisfy the first two conditions of self-determination: it must be made with competence, and be voluntary and uncoerced. An autonomous decision need not satisfy the third condition of self-determination, and could be based on inadequate information. However, such a decision would be of low quality. To put it differently, an uninformed decision is an exercise of *formal* self-determination, while a decision made with awareness of information relevant to the decision is an exercise of *substantive* self-determination.
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> . . . The more the elements of self-determination are present and realized, the more likely it is that the decision is the product of substantive rather than formal self-determination. The exact point that separates substantive self-determination from formal self-determination might sometimes be blurred. However, it seems to me that the legitimate expectation of mediation parties is for "true," i.e., substantive, self-determination, not formal self-determination. This expectation of a real, substantive exercise of rights is sometimes described as an expectation of fairness or justice.
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> . . . .
>
> . . . for a decision to be the product of "real," *substantive* self-determination, as opposed to illusory, formal self-determination, each of the elements of self-determination must be of high quality: a high degree of *competence* in the sense of a high capacity to perceive and process information, as opposed to a low degree of competence following, for example, mental stress, confusion, or exhaustion; a high degree of *voluntariness* in the sense of a decision-making process free of coercive attempts, as opposed to a low degree of voluntariness following coercive acts and pressures that leave the decision-maker with feelings of helplessness and lack of choice; and decisions that are based on information *relevant* to the decision and understood by the decision-maker, as opposed to decisions that are based on inadequate information or on a misunderstanding of the information and its implications. When one or more of the elements of self-determination are of low quality, we will

with others, I have urged courts to establish mechanisms to monitor mediation or provide parties with post-mediation opportunities to submit feedback regarding their experience with the mediation process and the mediators.[37] I have also advocated for a "cooling off" period to be applied to mediated settlement agreements, which would allow parties to rescind their agreements at will as long as such rescission occurred relatively promptly after the agreement was reached.[38] I have urged that courts should be sure that court-connected mediation is supplemented with other alternatives so that parties are ordered to participate in the process that is most appropriate for their dispute—rather than expecting mediation to be all things to all people.[39]

Of course, other means to protect and foster parties' self-determination would be to end courts' mandatory imposition of mediation, make use of mediation only presumptive, or mandate something less than mediation. Jacqueline Nolan-Haley has urged very recently that courts should never

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> consider the decision-making process as reflecting the exercise of *formal* self-determination, and tend to treat it as unfair or unjust.

OMER SHAPIRA, A THEORY OF MEDIATORS' ETHICS: FOUNDATIONS, RATIONALE, AND APPLICATION 137–38, 141–42 (2016).

37. *See* Welsh, *The Place of Mediation*, *supra* note 75, at 139-140; *see also* Bobbi McAdoo & Nancy Welsh, *Court-Connected General Civil ADR Programs: Aiming for Institutionalization, Efficient Resolution, and the Experience of Justice*, *in* ADR HANDBOOK FOR JUDGES (Donna Stienstra & Susan M. Yates eds., 2004) [hereinafter McAdoo & Welsh, *Aiming for Insitutionalization*]; McAdoo & Welsh, *Look Before You Leap*, *supra* note 22, at 427, 430; Nancy A. Welsh, *Magistrate Judges, Settlement, and Procedural Justice*, 16 NEV. L.J. 983, 990 (2016) [hereinafter Welsh, *Magistrate Judges*] (description of survey and attachment); Nancy A. Welsh, Donna Stienstra & Bobbi McAdoo, *The Application of Procedural Justice Research to Judicial Actions and Techniques in Settlement Sessions*, *in* THE MULTI-TASKING JUDGE: COMPARATIVE JUDICIAL DISPUTE RESOLUTION (Tania Sourdin & Archie Zariski eds., 2013); Nancy A. Welsh & Bobbi McAdoo, *Eyes on the Prize: The Struggle for Professionalism*, DISP. RESOL. MAG., Spring 2005, at 15 [hereinafter Welsh & McAdoo, Eyes on the Prize]. The ABA Dispute Resolution Section's Certification Task Force addressed credentialing organizations' responsibility in this area, concluding that they should "[p]rovide an accessible, transparent system to register complaints against credentialed mediators." ALT. DISP. RESOL. SEC. OF THE AM. BAR ASSOC. TASK FORCE ON MEDIATOR CREDENTIALING, FINAL REPORT 4 (2012) [hereineafter Mediation Research Task Force Report]. The Task Force also noted that "[a] majority of the Task Force believes organizations should have a process to monitor the performance of credentialed mediators, such as periodic requests for feedback [while a] minority believes such monitoring is not feasible." *Id.*

38. *See* Welsh, *The Thinning Vision*, *supra* note 4, at 87–89. This approach has been adopted by Minnesota for debtor-creditor matters, Florida in family matters, and California in insurance matters. See Minn. State 572.35(2) (providing for 72 hours to rescind mediated settlement agreement between debtor and creditor); Fla. Family L. R. P. 12.74(f)(1) (providing for ten-day cooling-off period for agreements reached in family mediation, if attorneys do not accompany parties); Cal. Ins. Code 10089.82(c) (providing a three-day cooling-off period for insured to rescind mediated agreement reached regarding earthquake insurance dispute, provided that insured was not accompanied by counsel at the mediation and the settlement agreement is not signed by her counsel). *See also* Reynolds, *Luck*, *supra* note 33, at 309 (expressing great skepticism regarding the likelihood that parties will exercise such opt-out rights).

39. *See* Nancy A. Welsh, *You've Got Your Mother's Laugh: What Bankruptcy Mediation Can Learn from the Her/History of Divorce and Child Custody Mediation*, 17 AM. BANKR. INST. L. REV. 427, 455–56 (2009).

be permitted to make mediation mandatory in the first place.[40] Bobbi McAdoo and I have urged, separately and together, that if courts make mediation mandatory it should be for only a short time—perhaps two years so that lawyers have enough time to experience it—and then its use should be made voluntary.[41] Bobbi McAdoo and I have also advocated for allowing parties to opt out of mandatory mediation at will, without any required showing whatsoever.[42] Some courts specifically provide for such opt-outs.[43] Often, however, such permission is conditioned upon a sufficient showing by at least one of the parties or a screening by the mediator.[44] Andrea Schneider and I have endorsed proposals to mandate only the parties' participation in pre-mediation meetings to educate the parties regarding the mediation process.[45] Jacqueline Nolan-Haley has suggested that courts could create incentives to encourage parties' participation in mediation—i.e., in cases involving fee-shifting provisions, courts could determine whether a party's refusal to voluntarily participate in mediation should be punished by refusing to shift all or a portion of the fees that they would otherwise be entitled to receive.[46]

Most of these proposals have fallen on barren soil in American courts and thus have borne no or little fruit. The only real exception is the option of allowing parties to opt out, usually conditioned upon a sufficient showing. This exception exists primarily in court-connected family media-

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40. *See* Jacqueline M. Nolan-Haley, *Judicial Review of Mediated Settlement Agreements: Improving Mediation with Consent*, 5 Y.B. ON ARB. & MEDIATION 152, 158 (2013).

41. *See* McAdoo & Welsh, *Look Before You Leap*, *supra* note 22, at 413; Welsh, *The Place of Mediation*, *supra* note 7, at 137–39; *see also* Frank E. A. Sander, *Another View of Mandatory Mediation*, DISP. RESOL. MAG., Winter 2007 at 16 (describing mandatory mediation as "a kind of temporary expedient, a la affirmative action").

42. *See* McAdoo & Welsh, *Look Before You Leap*, *supra* note 22, at 427; Welsh, *The Place of Mediation*, *supra* note 7, at 130–32.

43. *See, e.g.*, Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637, 695–96 (2014).

44. *See* McAdoo & Welsh, *Aiming for Institutionalization*, *supra* note 37; McAdoo & Welsh, *Look Before You Leap*, *supra* note 22, at 414; Welsh, *The Place of Mediation*, *supra* note 7, at 131–32; *see also* Robin H. Ballard et al., *Detecting Intimate Partner Violence in Family and Divorce Mediation: A Randomized Trial of Intimate Partner Violence Screening*, 17 PSYCHOL. PUB. POL'Y & L. 241, 242 (2011) [hereinafter Ballard]; Viktoria Pokman et al., *Mediator's Assessment of Safety Issues and Concerns (MASIC): Reliability and Validity of a New Intimate Partner Violence Screen*, 21 ASSESSMENT 529 (2014) [hereinafter Pokman]; Kelly Browe Olson, *Screening for Intimate Partner Violence in Mediation*, DISP. RESOL. MAG., Fall 2013, at 25 [hereinafter Olson].

45. *See* Nancy A. Welsh & Andrea Kupfer Schneider, *The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration*, 18 HARV. NEGOT. L. REV. 71, 134–35 (2013). I (alone, with Andrea Schneider, and with Bobbi McAdoo) have also examined even less intrusive mandatory options—*e.g.*, mandating that lawyers inform their clients about mediation or mandating that lawyers consult with their clients about ADR and then advise the court regarding their parties' preferences). *See* Nancy A. Welsh & Andrea K. Schneider, *Becoming "Investor-State Mediation"*, 1 PENN ST. J.L. & INT'L AFF. 86, 92–93 (2012); Welsh, *The Thinning Vision*, *supra* note 4, at 81–82; McAdoo & Welsh, *Aiming for Institutionalization, supra note 37, at 17;* Nancy A. Welsh & Bobbi McAdoo, *Alternative Dispute Resolution (ADR) in Minnesota—An Update on Rule 114, in* COURT-ANNEXED MEDIATION: CRITICAL PERSPECTIVES ON SELECTED STATE AND FEDERAL PROGRAMS 203, 206–207 (Edward Bergman and John Bickerman, eds., 1998).

46. *See* Jacqueline M. Nolan-Haley, *Is Europe Headed Down the Primrose Path with Mandatory Mediation?*, 37 N.C. J. INT'L L. & COM. REG. 981, 1005–06 (2012).

tion and represents an acknowledgement of the unfortunately widespread reality and likely effects of intimate partner abuse.[47]

At this point, then, it is difficult to muster up faith in the reality of the magic of self-determination as applied to court-connected mediation, especially mandatory court-connected mediation. The courts, certainly, are not going to act as the optimizers or guarantors of self-determination.

As a result, this Article will now turn from the concept of self-determination to the social–psychological concept of procedural justice. This is because assuring procedural justice in mediation may serve as a reasonable link between achieving the courts' mission of case disposition and providing a meaningful measure of self-determination in mediation.

III. MEDIATION AND PROCEDURAL JUSTICE: THE USUAL STORY

Many people use the social–psychological term "procedural justice," but a smaller number actually ground their understanding in the vast social–psychological empirical literature regarding the subject.[48] This literature reveals that people tend to perceive a process as fair or just if it includes the following elements: (1) "voice" or the opportunity for people to express what is important to them;[49] (2) "trustworthy consideration" or a demonstration that encourages people to believe that their voice was heard by the decision-maker or authority figure;[50] (3) a neutral forum

47. *See, e.g.*, Ballard, *supra* note 44, at 241–243, 253; Pokman, *supra* note 44, at 529–31; Olson, *supra* note 44. It is relatively easy to comprehend why an abused intimate partner would not feel the presence of self-determination in a mediation if he or she has been harmed by an abusing partner and fears being harmed again. Others have suggested—legitimately—that an individual who has suffered harassment, discrimination, retaliation, or has been the victim of abuse or a hate crime could feel quite similarly in mediation. However, the courts generally have not established opt outs for these types of cases.

48. Meanwhile, there is also a vast empirical literature regarding related concepts—organizational justice, interactional justice, informational justice, etc. *See* Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL. 1, 26-46 (2008) (cataloguing the many different categories of justice that have been identified); Lisa Blomgren Amsler et al., *Dispute Systems Design: Preventing, Managing and Resolving Conflict* (unpublished manuscript) (on file with author).

49. *See* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 211–12 (1988) [hereinafter LIND & TYLER, SOCIAL PSYCHOLOGY]; E. Allan Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, *in* EVERYDAY PRACTICES AND TROUBLE CASES 177, 187 (Austin Sarat et al. eds., 1998) [hereinafter Lind, *Procedural Justice, Disputing, and Reactions*]; Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOL. 117, 121 (2000) [hereinafter Tyler, *Social Justice*] (describing voice as the opportunity for people to present their "suggestions" or "arguments about what should be done to resolve a problem or conflict" or "sharing the discussion over the issues involved in their problem or conflict" and also noting that voice effects have been found even when people know they will have little or no influence on decision makers); Nourit Zimerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L.J. 473, 488–89 (2010) (reporting that voice "shapes evaluations about neutrality, trust, and respect" and has the "strongest influence, followed respectively by neutrality, trust, and respect").

50. Theories regarding "social exchange," heuristics, and "group value" explain the importance of this perception. In part, at least, people care about voice—and trustworthy consideration—because they wish to know that the decision-maker is fully informed re-

that applies the same objective standards to all and treats the parties in an even-handed manner;[51] and (4) treatment that is dignified.[52] If people believe that they were treated fairly in a decision-making or dispute resolution procedure (i.e., the process was "procedurally just" or "procedurally fair"), they are more likely to (1) perceive that the substantive outcome is fair—even when it is adverse to them;[53] (2) comply with the outcome;[54] and (3) perceive that the sponsoring institution is legitimate.[55]

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garding their perspective, in hopes that this will influence the outcome. *See* Lind, *Procedural Justice, Disputing, and Reactions*, *supra* note 49, at 179. But people care about procedural fairness even when they have been told their voice will not influence the outcome. Procedural justice researchers now theorize that procedural fairness serves as a fairness "heuristic." *See* E. Allan Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224, 225–26 (1993); Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 185–86 (2005); Kees van den Bos et al., *How Do I Judge My Outcome When I Do Not Know the Outcome of Others? The Psychology of the Fair Process Effect*, 72 J. PERSONALITY & SOC. PSYCHOL. 1034, 1034–36 (1997). According to the "group value" or "relational" theory, meanwhile, people also care about the opportunity for voice and sincere consideration because these procedural elements signal the individual's value and social standing within the relevant social group. *See* Donald E. Conlon et al., *Nonlinear and Nonmonotonic Effects of Outcome on Procedural and Distributive Fairness Judgments*, 19 J. APPLIED SOC. PSYCHOL. 1085, 1095 (1989); Tom R. Tyler, *Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justice*, 67 J. PERSONALITY & SOC. PSYCHOL. 850, 858 (1994) [hereinafter Tyler, *Psychological Models*].

51. *See* Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority,* 56 DEPAUL L. REV. 661, 664 (2007) [hereinafter Tyler, *American Public*] ("Transparency and openness foster the belief that decisionmaking procedures are neutral."); *see also* Steven L. Blader & Tom R. Tyler, *A Four-Component Model of Procedural Justice: Defining the Meaning of a "Fair" Process*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 747, 749 (2003) (distinguishing between "formal" or "structural" aspects of groups that influence perceptions of process fairness, such as group rules, and the "informal" influences that result from individual authority's actual implementation of the rules).

52. *See* E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 958 (1990); Tyler, *Social Justice*, *supra* note 49, at 122; Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 J. PERSONALITY & SOC. PSYCHOL. 830, 831 (1989). While dignified or respectful treatment is described here as an essential element of procedural justice, it has also been described as an element of interactional justice, and even of distributive justice. *See* Robert J. Bies, *Are Procedural Justice and Interactional Justice Conceptually Distinct?*, *in* HANDBOOK OF ORGANIZATIONAL JUSTICE 85, 85–86 (Jerald Greenberg & Jason A. Colquitt eds., 2005).

53. *See* Lind & Tyler, SOCIAL PSYCHOLOGY, *supra* note 49, at 66–70; Tyler, *Social Justice*, *supra* note 49, at 119.

54. *See* Lind, *Procedural Justice, Disputing, and Reactions*, *supra* note 49, at 192; Tyler, *American Public*, *supra* note 51, at 673–74 (describing procedural justice findings generally and research that has identified procedural justice and trust as the key antecedents of the willingness to defer to legal authorities); Tyler, *Psychological Models*, *supra* note 50, at 857; Tyler, *Social Justice*, *supra* note 49, at 119.

55. *See* Lind & Tyler, SOCIAL PSYCHOLOGY, *supra* note 49 at 209; Lind, *Procedural Justice, Disputing, and Reactions*, *supra* note 49, at 188. This perception is obviously important to courts. *See* DAVID B. ROTTMAN, ADMIN. OFFICE OF THE COURTS, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF THE PUBLIC AND ATTORNEYS 24 (2005); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 94–108 (1990); Tyler, *American Public*, *supra* note 51, at 665; Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 885–86 (1997) (suggesting that the influence of procedural justice judgments supports the idea "that the

This is the usual story, the generally true story. It is not the whole story, but the Article will return to that a bit later.

For now, it is important to notice the potential relationship between a procedurally just process and one that provides some measure of self-determination. If a person truly has and takes advantage of the opportunity for voice[56]—i.e., if she truly says what she wants and needs to say—she has engaged in an act of procedural self-determination. Her expression of voice also makes it more likely that she will have significant input into the outcome (even though she cannot entirely control that out-

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public has a very moral orientation toward the courts" and "[t]hey expect the courts to conform to their moral values," especially regarding "the fairness of the procedures by which the courts make decisions").

56. I need to distinguish here between voice and participation. They are related but not the same. Dr. Roselle Wissler has conducted research indicating that people's perceptions of procedural justice in mediation are strongly influenced by their perception that they had voice—i.e., the opportunity to tell their views of the dispute. *See* Wissler, *Representation in Mediation*, *supra* note 35, at 448 n.136, 450. Interestingly, the relationship between perceptions of procedural justice and voice is much stronger than the relationship between perceptions of procedural justice and the amount of time people spent talking during (i.e., participating directly in) the mediation. *See id.* at 452 ("Parties' sense that they had a chance to tell their views was more strongly related to favorable assessments of mediation than was how much they participated. Thus, ensuring that parties feel they have a chance to fully express their views appears to be more important to their experience in mediation than how much they participate directly."). Indeed, although there is a relationship between people's perception of voice and the amount of time they talked in the mediation, many people felt they had voice even when they spoke very little or not at all. *See id.* at 448–49, 451 ("Thus, although talking a lot virtually guaranteed that parties felt they had voice, not talking at all, or having a lawyer who talked a great deal, did not prevent a substantial number of parties from feeling they had a chance to tell their views. These findings suggest that parties can feel they have voice through their lawyers. It is not clear, however, why some parties who did not talk in mediation felt they had voice while others did not; perhaps it made a difference whether parties preferred not to talk and wanted their lawyer to speak for them, or whether they were 'shut down' by their lawyers, the mediator, or the other side." Rather, people can feel they had voice even if they spent little time talking in mediation or if their lawyer dominated the conversation.). Consistent with some of the original procedural justice research conducted by Walker, Thibaut, and others, it appears that many people perceived they had voice as a result of their lawyers' participation. *See* Welsh, *Making Deals*, *supra* note 5, at 841–43 (describing early studies by Walker, Thibaut, LaTour, and Lind).

It also appears that those who felt they had voice but did not talk a lot were less likely to feel pressured to settle. In contrast, those who spoke more in both domestic relations and civil mediation sessions were more likely to feel pressured to settle. *See* Wissler, *Representation in Mediation*, *supra* note 35, at 449–50; *see also* Roselle L. Wissler, An Evaluation of the Common Pleas Court Civil Pilot Mediation Project viii (Feb. 2000) (unpublished manuscript) (on file with author). Meanwhile, "parties who said their lawyer talked more felt *less* pressured to settle than did parties who said their lawyer talked less." Wissler, *Representation in Mediation*, *supra* note 35, at 451.

Wissler's research suggests, to me at least, that the opportunity for voice is not the same thing as the opportunity to engage in the give-and-take of negotiation. *See* Welsh, *Stepping Back Through the Looking Glass*, *supra* note 7, at 654–58 (observing that while parents in special education mediation sessions valued the opportunity for voice, they did not particularly value the opportunity to negotiate or problem-solve with school officials). Further, Wissler's findings appear consistent with other research suggesting that people value having their lawyers serve as "buffers" who reduce the need to engage directly in unpleasant interpersonal conflict. *See* Stephen LaTour et al., *Procedure: Transnational Perspectives and Preferences*, 86 YALE L.J. 258, 274 (1976).

come),[57] and the opportunity to share this information may open up a new path toward both relational and instrumental resolution. It is important to notice as well the ways in which trustworthy consideration, a neutral forum, and even-handed and dignified treatment may create a greater likelihood that both parties will be able to *hear* and *share* information that may surprise or enlighten them, that such information may create new opportunities for resolution, that the parties may experience enhanced trust, and that this trust and the expanded exchange of information thus may produce both an integrative solution and a changed relationship.[58]

All of this potential is entirely consistent with the tantalizing promise of substantive self-determination. Long ago, Isabelle Gunning highlighted such potential and its particular promise for otherwise-disadvantaged people who need the opportunity to express "their authentic voices and experiences."[59] Mediation seemed to offer such people a forum in which "ideas about equality are [or at least could be] defined and redefined."[60] Thus, a procedurally just mediation process had the potential to bring different people together in a safe space,[61] break through preexisting stereotypes and behaviors that continue to mar negotiations,[62] and model

57. *See* Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 187 (2002) [hereinafter Welsh, *Hollow Promise*].

58. *See* Nancy A. Welsh, *The Reputational Advantages of Demonstrating Trustworthiness: Using the Reputation Index with Law Students*, 28 NEGOT. J. 117, 133–34, 136 (2012) (observing the correlations that have been found among behaviors associated with procedural justice perceptions, enhanced perceptions of trustworthiness, enhanced information sharing, and enhanced likelihood of capturing available integrative potential) (citing Morton Deutsch, *Conflict Resolution: Theory and Practice*, 4 POL. PSYCHOL. 431, 438 (1983); Rebecca Hollander-Blumoff, *Just Negotiation*, 88 WASH. U. L. REV. 381 (2010)).

59. Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 67 (1995).

60. *Id.* at 67, 86.

61. This is consistent with one of the interventions recommended to combat implicit bias. *See* Andrew J. Wistrich & Jeffrey J. Rachlinski, *Implicit Bias in Judicial Decision Making: How It Affects Judgment and What Judges Can Do About It*, *in* ENHANCING JUSTICE: REDUCING BIAS 87 (Sarah Redfield ed., 2017) (describing exposure to stereotype-incongruent models as one means to combat implicit bias directly).

62. There are many examples of empirical research that demonstrate racial discrimination in the selection of potential negotiation partners and the negotiation process itself. *See, e.g.*, Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 AM. ECON. REV. 304 (1995) (experiment involving more than 400 visits to 200 car dealerships in Chicago); Ian Ayres et al., *Race Effects on eBay*, 46 RAND J. ECON. 891 (2015) (experiment involving sale of baseball cards in eBay auction held by light-skinned versus dark-skinned hand with payment of 20% less if card was held by a dark-skinned hand—even though that card was actually more valuable); Benjamin Edelman, Michael Luca & Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 AM. ECON. J. 1 (2017) (rental of home to "guests"—8% more likely to accept queries from Caucasian-seeming names than African-American-seeming names; the exception was that African-American females did not discriminate against African-American females, but both Caucuasians and African-Americans discriminated against African-Americans generally); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004) (resumes for those with white-sounding names 50% more likely to get callbacks than those with African-American-

the respect, responsibility, and dialogue that "fair and equal" people could and should extend to each other.[63] However, as this Article has already indicated, there is a "rest" of the procedural justice story. The Article turns to this now.

IV. PROCEDURAL JUSTICE MEETS INEQUALITY

A. The Potential for "Sham" Procedural Justice

First, and unfortunately, something called "sham" procedural justice exists. A process may include all of the elements listed above—with the implicit message that people's voice has the potential to affect the outcome. However, the mediator or the parties may have absolutely no intention of allowing themselves to be affected by what they have heard or seen. This situation is most likely to occur when the mediator or the other party has a vested interest in the outcome.[64] Under these circumstances, the mediator or the other party may be using the lessons of procedural justice research simply to seduce compliance.[65] Not surprisingly, people's trust can plummet if they learn that they were misled and unwittingly

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sounding names); Marc-David L. Seidel, Jeffrey T. Polzer & Katherine J. Steward, *Friends in High Places: The Effects of Social Networks on Discrimination in Salary Negotiations*, 45 Admin. Sci. Q. 1 (2000) (members of racial minority groups negotiated significantly lower salary increases from hiring managers' initial offers); *see also* Max H. Bazerman & Ann E. Tenbrunsel, Blind Spots: Why We Fail to Do What's Right and What to Do About It (2011).

63. *See* Jonathan R. Cohen, *Let's Put Ourselves Out of Business: On Respect, Responsibility, and Dialogue in Dispute Resolution*, 108 Penn St. L. Rev. 227, 230 (2003); *see also* Nancy A. Welsh, *I Could Have Been a Contender: Summary Jury Trial as a Means to Overcome Iqbal's Negative Effects upon Pre-Litigation Communication, Negotiation and Early, Consensual Dispute Resolution*, 114 Penn St. L. Rev. 1149, 1153 (2010) [hereinafter Welsh, *I Could Have Been a Contender*] (arguing that people have to be motivated to have this kind of conversation; that fear of litigation, discovery, and trial may provide such motivation to otherwise-dominant players; and that trial procedures aspire to model a fair and equal dialogue that overcomes the preexisting power relations between the litigating parties).

64. *See* Lind & Tyler, Social Psychology, *supra* note 49, at 179–84.

65. *See* Eric Miller, *Thanks for Inviting Me*, Prawfsblawg (Sept. 8, 2017, 3:25 PM), http://prawfsblawg.blogs.com/prawfsblawg/2017/09/thanks-for-inviting-me.html [https://perma.cc/486V-4ZJZ] (describing the "sociological theory [of procedural justice as] . . . not a theory of justice, but of what makes for effective psychological coercion" and observing in the context of police-citizenry interactions that"[i]f we give the police credit for engaging in non-violent psychological coercion of the folks they encounter, are we giv[ing] them—and ourselves—too much credit for promoting 'just' policing[?]"); *see also* Avram Bornstein et al., *Tell It to the Judge: Procedural Justice and a Community Court in Brooklyn*, 39 PoLAR 206 (2016) (citing to MacCoun and describing potential for procedural justice to produce "false consciousness"; also describing behavior of judge and problem-solving court in Red Hook court—demonstrating respect, compassion, interest in person, helpfulness, ability to access resources—and describing such behavior as fairer than what is provided by other courts); Keith G. Allred, *Relationship Dynamics in Disputes: Replacing Contention with Cooperation*, *in* The Handbook of Dispute Resolution 83, 92–93 (Michael L. Moffitt & Robert C. Bordone eds., 2005) (noting the paucity of empirical data but observing that his "experience as a mediator suggests that manipulative uses of procedural justice are on the rise in both the public and private sectors" as well as overly simplistic application of procedural justice principles; specifically citing examples involving a Fortune 500 aerospace company and the Forest Service).

participated in a sham procedure.[66] They may perceive the outcome of this sham procedure to be *less* fair than the identical outcome of an *obviously* unfair process.[67]

Importantly, however, this "frustration effect" has been found to occur quite rarely—e.g., when the apparent procedural justice of a process is relatively weak, the evidence of bias is strong, or a colleague points out the inequity of the outcome. E. Allan Lind and Tom Tyler have concluded that frustration effects "will occur only when there is overwhelming social or factual support for the supposition that the procedure is corrupt."[68] The marginalized and vulnerable are most likely to bear the brunt of a sham procedure—and recent decades have seen worrisome growth in the gap between "haves" and "have-nots" around the world.[69] Unfortunately, the marginalized and vulnerable also may be least likely to detect that they were the victims of a sham procedure.[70]

B. Status and Its Effects on the Perceptions and Influence of Procedural Justice

There is also research indicating that even if a process is authentic and conducted in a procedurally just manner, individuals' roles or social statuses affect the extent to which their judgments regarding procedural justice will influence their perceptions of substantive justice. Some of this research involves mediation directly. *The Metrocourt Project*, for example, reported that Hispanic-American litigants were more likely than Whites to be satisfied with the mediation process and its outcomes, even though Hispanic-Americans' mediation outcomes were neither as favorable as Whites' mediation outcomes nor as favorable as the out-

66. People are aware of their vulnerability to manipulation and if they perceive evidence of unfair treatment or perceive "false representations of fair treatment," they respond with "extremely negative reactions." Lind, *Procedural Justice, Disputing, and Reactions*, *supra* note 49, at 187; *see* Tom R. Tyler et al., *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. Personality & Soc. Psychol. 72, 73–74 (1985) (explaining that, under certain conditions, voice without decision control heightens feelings of procedural injustice and dissatisfaction with leaders, a result described as the "'frustration' effect"). Note that what seems to matter here is the falsity of the explicit or implicit representation that people's voice will have the potential to influence the outcome. In somewhat surprising contrast, there is substantial research demonstrating that if people are told in advance that their voice will not or cannot influence the outcome, they are nonetheless more likely to judge a process as procedurally just if the process includes an opportunity for voice. *See* Welsh, *Making Deals*, *supra* note 5, at 821–22 (describing these studies).

67. *See* Lind & Tyler, Social Psychology, *supra* note 49, at 180.

68. *Id.* at 183–84. Recent research has found an interesting and very strong relationship between people's perceptions of the existence of the rule of law and the absence of corruption. *See* Mila Versteeg & Tom Ginsburg, *Measuring the Rule of Law: A Comparison of Indicators*, 42 Law & Soc. Inquiry 100, 117-118 (2017) (discussing the overwhelming correlation between Transparency International's Corruption Perceptions Index and the Rule of Law indicators of the Heritage Foundation, World Bank, World Justice Project and Freedom House).

69. *See* Ellen Waldman & Lola Akin Ojelabi, *Mediators and Substantive Justice: A View from Rawls' Original Position*, 30 Ohio St. J. on Disp. Resol. 391, 398–400 (2016); Reynolds, *Luck*, *supra* note 33.

70. *See* Reynolds, *Luck*, *supra* note 33.

comes Hispanic-Americans received in adjudication.[71] Interestingly, women of color expressed the highest level of satisfaction with mediation, while white women were the least satisfied and least likely to perceive the mediation process as fair even though they experienced the most favorable outcomes.[72]

Recent research in the Netherlands regarding the mediation of labor disputes similarly indicates that people's place in a hierarchy affects the influence of their procedural justice perceptions upon their perceptions of substantive outcomes. In this study, researchers found that supervisors were more likely than subordinates to judge mediation as effective even when the supervisors perceived low levels of procedural justice. Meanwhile, subordinates' perceptions of mediation's procedural justice determined their perceptions of the process's effectiveness. Especially if subordinates perceived low levels of procedural justice, they perceived mediation to be ineffective.[73] Supervisors also were more likely than subordinates to perceive mediation as procedurally just. Thus, in this research, those with higher status in the hierarchy of the workplace were *more* likely than those lower in the hierarchy to judge mediation as procedurally just and effective and *less* likely to find that low levels of procedural justice undermined the effectiveness of the mediation process.

Other research, not involving mediation, also suggests the relevance of status to procedural justice perceptions and their power.[74] Substantial research has been conducted regarding the effect of procedural justice per-

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71. *See* Michele Hermann, *New Mexico Research Examines Impact of Gender and Ethnicity in Mediation*, *in* THE CONFLICT AND CULTURE READER 91, 91–92 (Pat K. Chew ed., 2001) [hereinafter Hermann, *New Mexico Research*]; MICHELE HERMANN ET AL., THE METROCOURT PROJECT FINAL REPORT: A STUDY OF THE EFFECTS OF ETHNICITY AND GENDER IN MEDIATED AND ADJUDICATED SMALL CLAIM CASES AT THE METROPOLITAN COURT MEDIATION CENTER, BERNALILLO COUNTY, ALBUQUERQUE, NEW MEXICO: CASES MEDIATED OR ADJUDICATED SEPTEMEBER 1990-OCTOBER 1991 viii-xvii (1993) [hereinafter HERMANN, METROCOURT].

72. *See* Hermann, *New Mexico Research*, *supra* note 71, at 92.

73. Katalien Bollen, Heidi Ittner & Martin C. Euwema, *Mediating Hierarchical Labor Conflicts: Procedural Justice Makes a Difference—for Subordinates*, 21 GROUP DECISION & NEGOT. 621, 621–36 (2012). It appears that the researchers defined "effectiveness" largely in terms of settlement. See Roberto Martinez-Pecino, Lourdes Munduate, Francisco J. Medina & Martin C. Euwema, *Effectiveness of Mediation Strategies in Collective Bargaining*, 47 IND. RELATIONS 480, 481 (2008) (pointing to a 30% difference in total settlements achieved as evidence that mediation interventions are more effective in interest conflicts than in rights conflicts).

74. *See* Welsh, *I Could Have Been a Contender*, *supra* note 63, at 1169–70 (citing Jody Clay-Warner, *Perceiving Procedural Injustice: The Effects of Group Membership and Status*, 64 SOC. PSYCHOL. Q. 224, 232–33 (2001); Kristina A. Diekmann et al., *Does Fairness Matter More to Some Than to Others? The Moderating Role of Workplace Status on the Relationship Between Procedural Fairness Perceptions and Job Satisfaction*, 20 SOC. JUST. RES. 161, 163 (2007); Jan-Willem Van Prooijen et al., *Procedural Justice and Intragroup Status: Knowing Where We Stand in a Group Enhances Reactions to Procedures*, 41 J. EXPERIMENTAL SOC. PSCYHOL. 644, 645 (2005); Jan-Willem Van Prooijen et al., *Procedural Justice and Status: Status Salience as Antecedent of Procedural Fairness Effects*, 83 J. PERSONALITY & SOC. PSYCHOL. 1353, 1359 (2002)); *see also* Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, 2016 U. CHI. LEGAL F. 295 (arguing that procedural justice is dangerous, a psychological ploy to get people to comply and cooperate and reveal information that may land them in a criminal proceeding; "voice" should

ceptions on people's perceptions of substantive justice when they interact with police. In general, that research has shown that when police behave in a manner consistent with procedural justice, people are more likely to perceive substantive outcomes as fair even when they are adverse. In other words, the provision of procedural justice can reduce the impact of outcome favorability on perceptions of substantive fairness.[75] Other research has shown, meanwhile, that in making judgments about procedural fairness, people of color "place[d] significantly greater weight on evidence about their social standing than did White group members."[76] The researchers measured social standing by asking respondents "whether the authorities had been polite to them"and "had shown respect for their [respondents'] rights."[77]

More recent research suggests that in interactions between lower status and higher status people in negotiations or the workplace, the lower status persons are more likely to desire future interactions with higher status persons if they perceive that the higher status persons behaved in a procedurally just manner—even when those interactions produced disappointing outcomes for the lower status persons. In contrast, the higher status persons (which would tend to include more powerful parties and dominant repeat players) were less likely to be influenced by procedural fairness. Indeed, when lower status persons treated them in a procedurally just manner, those with higher status were more likely to perceive outcomes as fair only if those outcomes were consistent with what they expected or knew themselves to be entitled to receive.[78]

These findings regarding the interaction between status and the composition and influence of procedural justice perceptions may be explained by the notion that procedural justice is more important and more influential for those who are lower status. Many studies have shown that people's perceptions of outcome fairness are affected primarily by their expectations or comparison to others' outcomes.[79] Lower status persons,

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not just be about compliance with authority but also about challenging the legal or political basis of authority).

75. *See* Ya-Ru Chen et al., *When is It "a Pleasure to Do Business with You?": The Effects of Relative Status, Outcome Favorability, and Procedural Fairness*, 92 ORG. BEHAV. & HUM. DECISION PROCESSES 1, 4 (2003).

76. Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 J. PERSONALITY & SOC. PSYCHOL. 830, 835 n.4 (1989).

77. *Id.* at 833. These two measures were averaged to form a Standing scale. *Id.*

78. *See* Chen et al., *supra* note 75, at 1; JANE W. ADLER ET AL., SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM 76, 83 (1983) ("Unlike the unsophisticated individual litigants, . . . institutional litigants" who made extensive use of the arbitration program "appear[ed] to care little about qualitative aspects of the hearing process" and "judge arbitration primarily on the basis of the outcomes it delivers.").

79. *See* Chen et al., *supra* note 75; Roselle L. Wissler, *Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics*, 29 LAW & SOC'Y REV. 323, 346–47 (1995) (reporting that disputants' satisfaction with outcomes was influenced primarily by outcome measures and, to a lesser but significant degree, by process evaluations; noting that these results are "consistent with theories that maintain that outcome satisfaction is influenced more by one's assessment of the outcome compared with expectations or with others' outcomes than by the absolute outcome received").

however, are less likely to be confident regarding what they are entitled to receive, more concerned about the potential for exploitation, and thus more likely to need to determine how much they can trust a higher status person.[80] For lower status people, attending to procedural cues represents a coping mechanism to help them deal with uncertainty regarding outcome fairness. As a result, for these people, strong procedural justice reduces the influence of outcome favorability upon their perceptions of substantive justice.

There is even biological support for the value of using the assessment of procedural justice as a coping mechanism. Being treated in a manner that is dignified, feels safe, and reduces stress has been shown to have a positive physiological effect that enhances people's cognitive ability and decision-making.[81] Thus, it makes sense that procedural justice will be particularly important for those dealing with vulnerability or uncertainty.[82] It also makes sense that the provision of procedural justice will exercise less influence upon the judgments of those who do not expect to experience vulnerability or uncertainty.[83] In fact, there is research suggesting that when higher status persons perceive that they have received

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80. *See* Joel Brockner, Batia M. Wiesenfeld & Kristina A. Diekmann, *Towards a "Fairer" Conception of Process Fairness: Why, When and How More May Not Always be Better than Less*, 3 ACAD. MGMT. ANNALS 183, 183–216 (2009) (those who are certain of outcomes have less need for procedural fairness and thus do not notice it as much).

81. *See* Jill S. Tanz & Martha K. McClintock, *The Physiologic Stress Response During Mediation*, 32 OHIO ST. J. ON DISP. RESOL. 29, 51–53 (2017) (discussing the "sweet spot" in cortisol production for problem solving and decision-making and how mediators can and should address disparities between mediating parties in the extent to which stressors may affect them); *see also* Keith G. Allred, *Relationship Dynamics in Disputes: Replacing Contention with Cooperation*, *in* THE HANDBOOK OF DISPUTE RESOLUTION 83, 92 (Michael L. Moffitt & Robert C. Bordone eds., 2005) (noting that perceptions of fair process lead to more trust and loyalty).

82. *See* Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473, 477 (2008) (citing E. Allan Lind, *Fairness Judgments as Cognitions, in* THE JUSTICE MOTIVE IN EVERYDAY LIFE 416 (Michael Ross & Dale T. Miller eds., 2002); Kees van den Bos & E. Allan Lind, *Uncertainty Management by Means of Fairness Judgments,* 34 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 1, 26–30 (2002)); *see also* Nancy A. Welsh & Barbara Gray, *Searching for a Sense of Control: The Challenge Presented by Community Conflicts over Concentrated Animal Feeding Operations*, 10 PENN ST. ENVTL. L. REV. 295 (2002).

83. *See* Kees van den Bos et al., *When Do We Need Procedural Fairness? The Role of Trust in Authority*, 75 J. PERSONALITY & SOC. PSYCHOL. 1449, 1452 (1998) (reporting research showing that procedural justice information was not as necessary when the authority had a trustworthy reputation while there was heavy reliance on procedural justice information when no reputational information was provided). Procedurally just treatment has also been found to be more important to, and more influential for, those who define and evaluate themselves based on their relationships with others or believe that social interactions should affirm basic moral values. *See* Joel Brockner et al, *The Influence of Interdependent Self-Construal on Procedural Fairness Effects*, 96 ORG. BEHAV. & HUM. DECISION PROCESSES 155, 155 (2005). There is also research that is beginning to demonstrate that people's roles correlate to the heightened importance of certain elements of procedural justice. For example, one field study (in Germany) has found that observers of court procedures are much more likely to focus on dignified treatment than on voice, consideration, or even-handed treatment. *See* Susanne Beier et al., *Influence of Judges' Behaviors on Perceived Procedural Justice*, 44 J. OF APPLIED SOC. PSYCHOLOGY 46 (2014).

high procedural justice from a lower status person, they are likely to focus even more strongly on outcome favorability in deciding whether to judge the outcome as fair.[84] For them, procedural justice does not soften the blow of an adverse outcome. Rather, procedural justice may *sharpen* the blow because the occurrence of an adverse outcome as a result of a procedurally fair process calls into question the higher status person's self-conception.[85]

Finally, there is somewhat counter-intuitive research suggesting that people with low self-esteem and those who are highly committed to avoiding unfavorable outcomes but are certain they are going to lose actually do not prefer procedurally just processes. Indeed, they prefer procedurally *unjust* processes because they can then blame the processes for adverse outcomes. If the process were procedurally just, these individuals would have to blame themselves for not doing all they could to win—while they were sure they were going to lose.[86]

C. Status and Its Effects on the Desire and Ability to Exercise Voice

There is also an increasing amount of research focusing on the element of voice, and some of this research is particularly problematic in considering how inequality, bias, and prejudice may undermine the potential of mediation to offer procedural justice and a forum in which people's authentic voices and experiences can be expressed.

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84. *See* Chen et al., *supra* note 75, at 1 (finding in experiments—one involving negotiation between higher status and lower status parties and a second involving the allocation of rewards between customer service representatives and supervisors—"high procedural fairness *heightened* the positive relationship between outcome favorability and desire for future interaction"). These researchers explain that higher status people "are more self-focused" than lower status people and use procedural fairness information (in conjunction with outcome favorability) more than lower status people do to determine how much they will be able to maintain existing conceptions of their status. On the one hand, social encounters that combine favorable outcomes and fair procedures on the other's part enable higher status individuals to maintain their existing self-perceptions. Consequently, higher status people will strongly desire future interaction with other parties under such conditions. On the other hand, social encounters that combine unfavorable outcomes and fair procedures on the other's part will be unwelcomed by higher status people insofar as these conditions threaten their existing self-perceptions.
Id. at 6 (citing Dacher Keltner et al., *Power, Approach, and Inhibition*, 110 Psychol. Rev. 265 (2003)).

85. *See id.* at 6. On the other hand, prospect theory indicates that those who believe themselves entitled to a procedurally just process are quite likely to notice if they *fail* to receive such treatment. *See* Heather Pincock & Timothy Hedeen, *Where the Rubber Meets the Clouds: Anticipated Developments in Conflict and Conflict Resolution Theory*, 30 Ohio St. J. on Disp. Resol. 431, 436 (2016) (discussing prospect theory). This research suggests that there is no particular advantage to providing a procedurally just process when dealing with higher status parties, but negative consequences may follow from the failure to provide a procedurally just process.

86. *See* Brockner, Wiesenfeld & Diekmann, *supra* note 80, at 188–90, 194–98 (describing research showing that people with lower self-esteem "felt significantly more self-verified [and their need for consistency was met] when told the event was handled with lower process fairness" while their level of commitment to an institution and its authorities was not affected by low process fairness).

1. Voice That Affects Perceptions of Procedural Justice

As noted earlier, the expression of voice is central to both procedural justice and self-determination.[87] It is important, however, to identify the particular aspects of voice that are valuable in mediation. Roselle Wissler has conducted important research on this topic. First, she has found that people perceive that they have experienced the opportunity for voice and a procedurally just process in mediation if their lawyers speak on their behalf. Second, she has found that people's perceptions of voice are even stronger if they have the opportunity to "tell their stories" themselves. Third, Wissler has found a distinction between voice and "participation." In her research, while people's perceptions of procedural justice are strongly related to their perception that they had a sufficient opportunity for voice, their perceptions of procedural justice are much less strongly related to the extent of their direct participation in the mediation.[88] Indeed, Wissler found that those who spoke more in both domestic relations and civil mediation sessions were more likely to feel pressured to settle.[89] This research suggests a disconnect between the voice that is important to procedural justice and the sort of participation that is often[90] associated with self-determination—i.e., the opportunity to participate directly in the back-and-forth or bargaining of negotiation and mediation. I conducted qualitative research similarly suggesting that, in hierarchical systems, those with less power are quite likely to value the opportunity to express what is important to them while not valuing the opportunity to participate in the bargaining or negotiation process.[91]

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87. Voice also is central to procedural due process and, some would argue, rule of law. *See* Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1, 10 (2011) ("Because the legal system in the United States is adversarial and relies on parties to present their own evidence, this in turn links voice and an opportunity to be heard with principles of rule of law."); Welsh, *Hollow Promise*, *supra* note 57, at 187 (observing that while voice and procedural due process certainly apply to adjudicative procedures, it is much more difficult to apply them to consensual procedures).

88. *See* Wissler, *Representation in Mediation*, *supra* note 35, at 447–52 (distinguishing between clients' direct participation and indirect participation as their lawyers negotiated on their behalf); Roselle L. Wissler, *Party Participation and Voice in Mediation*, DISP. RESOL. MAG., Fall 2011, at 20; *see also* Lind et al., *In the Eye of the Beholder*, *supra* note 52, at 969, 972 (finding that in a variety of dispute resolution processes other than mediation, tort litigants' sense of control over the way their case was handled was strongly related to procedural fairness judgments, while how much they felt they "participated in the process of disposing" of their case was not).

89. *See* Wissler, *Representation in Mediation*, *supra* note 35, at 449–50; *see also* Wissler, *Common Pleas*, *supra*, note 56, at viii.

90. Importantly, the exercise of self-determination does not require participation in the back-and-forth of negotiation. People can also exercise meaningful (although perhaps thinner) self-determination in choosing among predetermined options or in choosing to veto a single proposed solution. *See* Welsh, *The Thinning Vision*, *supra* note 4, at 44–46 (describing this definition of self-determination).

91. Parents participating in special education mediation sessions generally expressed a desire for, and appreciation of, the opportunity to express themselves but were much less likely to anticipate or value the opportunity to listen and try to understand school officials or negotiate with them. *See* Welsh, *Stepping Back Through the Looking Glass*, *supra* note 7, at 581.

Meanwhile, voice is not always pretty or easy to hear. Voice can be angry, aggressive, and cause discomfort, both for the person expressing it and the person listening to such expression.[92] Such voice, with a strong emotional content, is often called "venting" in mediation.[93] Although mediation commentators acknowledge venting as valuable when new information is being shared (including revealing emotional impacts and needs),[94] they increasingly criticize the notion that venting is valuable for its own sake. There is physiological evidence, for example, that allowing a party to vent too much is not effective in helping with the release of difficult feelings and instead has the opposite effect. Continued venting, particularly in the presence of the other party, can result in heightened cortisol levels, which can then lead to greater entrenchment in negative feelings such as anger, as well as distorted perceptions that can inhibit problem-solving and decision-making.[95] Thus, unrestrained venting can

92. Being evaluated negatively and not having a sense of control are reported to be among the most serious psychological stressors that exist, leading to heightened levels of cortisol that then affect perceptions and attributions. *See* Tanz & McClintock, *supra* note 81, at 37 (citing Sally S. Dickerson & Margaret E. Kemeny, *Acute Stressors and Cortisol Responses: A Theoretical Integration and Synthesis of Laboratory Research*, 130 PSYCHOL. BULL. 355 (2004)). This research appears to be consistent with findings from other research regarding the fundamental attribution error. This research has established that situational influences strongly affect our judgments. *See* Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, *in* 10 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 173, 184–87 (Leonard Berkowitz ed., 1977); Michael W. Morris, Richard P. Larrick & Steven K. Su, *Misperceiving Negotiation Counterparts: When Situationally Determined Bargaining Behaviors Are Attributed to Personality Traits*, 77 J. PERSONALITY & SOC. PSYCHOL. 52, 53 (1999); Keith G. Allred, *Anger and Retaliation in Conflict: The Role of Attribution*, *in* THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE 236, 240–41 (Morton Deutsch et al. eds., 2d ed. 2006) (noting that "research indicates that in observing a person at an airport yelling at an airline agent, one tends to over-attribute the behavior to bad temper and underattribute it to circumstances, such as having recently been the victim of recurring unfair treatment by the airline"). We are more likely to take into account situational factors to explain our own behavior. Edward E. Jones & Richard E. Nisbett, *The Actor and the Observer: Divergent Perceptions of the Causes of Behavior*, *in* ATTRIBUTION: PERCEIVING THE CAUSES OF BEHAVIOR 79, 80 (Edward E. Jones et al. eds., 1972). Research further indicates that we are even more likely to attribute negative behaviors to a person's character or disposition if that person is not a member of our own social group. Meanwhile, venting strong emotions in front of an adversary in a mediation session also can represent a stressor that raises cortisol levels. *See* Tanz & McClintock, *supra* note 81, at 37, 45.

93. *See* Tanz & McClintock, *supra* note 81, at 59–60.

94. *Id.* at 59.

95. *Id.* at 60, 66 (citing Brad J. Bushman et al., *Chewing on It Can Chew You Up: Effects of Rumination on Triggered Displaced Aggression*, 88 J. PERSONALITY & SOC. PSYCHOL. 969, 974 (2005); Kenneth F. Dunham, *I Hate You, but We Can Work It Out: Dealing with Anger Issues in Mediation*, 12 APPALACHIAN J.L. 191 (2013); Tammy Lenski, *Venting Anger: A Good Habit to Break,* MEDIATE.COM (May 2011), http://www.mediate.com/articles/LenskiTbl20110516.cfm [https://perma.cc/Y3NT-6AMK]; Dominik Mischkowski et al., *Flies on the Wall Are Less Aggressive: Self-Distancing "in the Heat of the Moment" Reduces Aggressive Thoughts, Angry Feelings and Aggressive Behavior*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1187, 1187–91 (2012)). Tanz and McClintock note that there may be a difference between men and women in their response to negative emotions, with women being more likely than men to inhibit such emotions and begin problem-solving. *Id.* at 49–51. Tanz and McClintock also report that women are more likely to respond to stress with a tend-and-befriend intervention, thus increasing social ties and resources. *Id.* at 68–69 (citing Shelley E. Taylor et al., *Biobehavioral Responses to Stress in Females: Tend-*

chill communications that are likely to be productive in terms of producing settlement in mediation.[96]

At the very least, this research regarding the physiological effects of venting suggests that there can be a "right" and a "wrong" sort of voice in mediation.[97] At this point, it is not clear who is more likely to exercise the wrong sort of voice in mediation, but this research raises legitimate concerns that mediators who seek to place restrictions on venting ultimately could chill the expression of righteous anger and fear by those feeling the effects of inequality, bias, and prejudice.[98]

2. Status and the Willingness to Exercise Voice

Research also reveals that we cannot assume that those who perceive that they have been ignored, excluded, or disrespected will be willing or able to exercise their voice at all. Robert Rubinson has written quite passionately about the difficulties facing low-income participants who are required to participate in court-connected mediation. They may not be able to get child care. Their reliance on public transportation could make it difficult for them to travel to the courthouse. They may have to forego hourly wages and may fear the loss of their jobs if they fail to turn up for work in order to participate in mediation.[99] These difficulties make it unlikely that people will be able to afford the luxury of voice.

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and-Befriend, Not Fight-or-Flight, 107 PSYCHOL. REV. 411 (2000)). Stressed men are likely to become more cognitively rigid and entrenched and engage in tend-and-befriend only with those they already know and trust. *Id.* at 60, 69 (citing Bernadette von Dawans et al., *The Social Dimension of Stress Reactivity: Acute Stress Increases Prosocial Behavior in Humans*, 23 PSYCHOL. SCI. 651, 658 (2012)). *See also* Welton et al., *The Role of Caucusing*, *supra* note 24, at 183–85 (describing in some detail how presenting in front of the other disputant is problematic); Pincock & Hedeen, *supra* note 85, at 436 (asserting the need to revise theory positing that disputants have the emotional and mental capacity to "transition rather abruptly from . . . describing their conflict to solving their problem through generating ideas and forecasting their utility") (citing Richard Birke, *Neuroscience and Settlement: An Examination of Scientific Innovations and Practical Applications*, 25 OHIO ST. J. ON DISP. RESOL. 477, 510–12 (2010)).

96. In the context of online dispute resolution, eBay and Paypal structured their platform to avoid soliciting consumers' open-ended text answers—instead requiring them to choose from a predetermined list—due to the likelihood that the consumers' responses would be negative and thereby chill productive negotiation with merchants. *See* AMY SCHMITZ & COLIN RULE, THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION 36–39 (2017).

97. *See* Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 44–51 (1990) (examining how White's client's voice during their counseling session was quite different from the voice she used when meeting with the caseworker; discussing restrictions on voice, its relationship to participation, power disparity, and safety).

98. In a related vein, Professor Carrie Menkel-Meadow has suggested that in focusing on individual negotiators' behaviors or even the interactions between negotiators, we have perhaps "been naïve about the social structural conditions under which integrative negotiation can most optimally occur" and that we need to identify the "socioeconomic and political conditions [under which we can] actually get to yes by negotiating fairly, equitably, and wisely to achieve joint and mutual gain." Carrie Menkel-Meadow, *Why Hasn't the World Gotten to Yes? An Appreciation and Some Reflections*, 22 NEGOT. J. 485, 499 (2006).

99. *See* Robert Rubinson, *Of Grids and Gatekeepers: The Socioeconomics of Mediation*, 17 CARDOZO J. CONFLICT RESOL., 873, 891–92 (2016).

Recent research also has demonstrated that people's willingness or ability to exercise their voice will depend, in large part, upon their identification with the relevant social group. In this research, the more people felt themselves to be part of a social group, the more they desired and expected voice in matters relevant to group membership. The less they identified with the social group, however, the less they desired and expected voice. Thus, despite the centrality of voice in the procedural justice literature, we cannot assume that everyone will always and uniformly have a high desire for voice.[100] Those who do not feel part of the relevant social group—i.e., those who are marginalized or perceive that others are prejudiced against them—are likely to be less willing to exercise voice. Indeed, they are likely to be aware that their exercise of voice could subject them to heightened attention and negative consequences.[101] People with higher status and greater identification in a social group, meanwhile, are more likely to exercise voice—and more likely to *expect* to exercise more voice.[102] Interestingly, researchers noted that this may mean that people with higher status may actually be willing to trade their voice for something they want even more—i.e., a favorable outcome:

> [L]ower-status individuals or groups might demand voice precisely for its instrumental properties. At the same time, higher-status individuals and groups—particularly *legitimately* higher-status individuals and groups—may feel sufficiently confident in their positions that they would be willing to forgo voice (i.e. express a relatively low desire for voice) in favour of alternative rules such as unbiased decision-making, *precisely because the unbiased decision maker ought to recognize their legitimately higher status and afford them the material benefits normatively associated with it.*[103]

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100. *See* Michael J. Platow et al., *Social Identification Predicts Desires and Expectations for Voice*, 28 SOC. JUST. RES. 526, 527 (2015). These researchers also observed, however, that people's *desire* for voice generally is greater than their *expectations* regarding whether they will have voice. *Id.* at 545.

101. *See, e.g.*, Doron Dorfman, *Re-Claiming Disability: Identity, Procedural Justice, and the Disability Determination Process*, 42 LAW & SOC. INQUIRY 195, 214–15 (2017) (describing how persons with disabilities who identify with the medical-individual model of disability do not necessarily want or need voice while those who identify with the social model of disability appreciate voice but also fear negative consequences of exercising voice in the disability determination process); Welsh, *Stepping Back Through the Looking Glass*, *supra* note 7, at 653–54 n.337 (suggesting this dynamic for parents of children with special needs); James A. Wall, Jr. & Suzanne Chan-Serafin, *Do Mediators Walk Their Talk in Civil Cases?*, 28 CONFLICT RESOL. QUARTERLY 3, 16 (2010) (finding that mediators tended to use evaluative or pressing strategies even when they said they would employ a neutral style, and such strategies were used most often with plaintiffs engaging in behavior the mediators perceived as too demanding or competitive); *see also* Welsh, *I Could Have Been a Contender*, *supra* note 63, at 1168–71 (citing research demonstrating that women who make demands and negotiate assertively are more likely than men to be judged harshly, parties who have suffered discrimination are particularly unlikely to bring claims, employer-respondents tend to refuse the EEOC's invitation to mediate discrimination matters, and status quo bias tends to favor dominant parties and disfavor marginalized parties).

102. *See* Platow et al., *supra* note 100, at 526–49.

103. *Id.* at 545–46.

Related research indicates that people's desire for, and expectation of, voice also is affected by the power distance culture of their national or organizational setting. In those nations with low power distance cultures[104] (i.e., more egalitarian cultures), voice is expected and its legitimacy is high. When people in these nations experience lower levels of voice, they react negatively. In nations with high power distance cultures[105] (i.e., more hierarchical cultures), people's reactions to "low voice" are less negative. The researchers noted that "[a] central premise of the procedural justice literature—based on studies conducted mainly in the United States—is that people react unfavorably when they have little voice in a decision-making process."[106] These studies show that people's desire for voice and their expectation that they will have voice are very likely to vary depending upon their culture, its power distance, and their placement in a relevant hierarchy.

Upon examination, it becomes clear that voice is neither a simple concept nor one that we can take for granted in the context of mediation. It is not magic. Rather, voice may be quite limited. Voice of the wrong sort can produce physiological effects that make it less effective in producing solutions. And people in a hierarchical setting who know they are marginalized may not expect voice or may choose not to exercise voice because they perceive, quite rationally, that it may cause them harm.[107]

D. Status and Its Effects on the Desire and Ability to Provide Trustworthy Consideration

As noted earlier, procedural justice research generally reveals that while people care about the opportunity for voice, they also care about whether their voice has been heard—i.e., whether their views were considered in a trustworthy manner. Most of the research focuses on whether an authority figure or decision-maker—e.g., a judge, police officer, or supervisor—has demonstrated trustworthy consideration. Notice that the people in these roles tend to be third parties, not engaged directly in the dispute. Indeed, researchers have long raised doubts about the ability of

104. The United States and Germany were the low power distance countries examined in this study.

105. China, Mexico, and Hong Kong were the high power distance countries examined in this study.

106. Joel Brockner et al., *Culture and Procedural Justice: The Influence of Power Distance on Reactions to Voice*, 37 J. Experimental Soc. Psychol. 300, 301 (2001). The researchers determined the effect of low or high voice by examining the level of organizational commitment. *Id. But see* Stephen La Tour et al., *Procedure: Transnational Perspectives and Preferences*, 86 Yale L.J. 258, 281 (1976); E. Allan Lind et al., *Reactions to Procedural Models for Adjudicative Conflict Resolution: A Cross-National Study*, 22 J. Conflict Resol. 218, 335 (1978); E Allan Lind et al., *Procedural Context and Culture: Variation in the Antecedents of Procedural Justice Judgments*, 73 J. Personality & Soc. Psychol. 767, 777 (1997).

107. This research is reminiscent of the story told in White, *supra* note 97, in which the client chose to tell one story—the real story—to her lawyer and then told another story—the one that would fit a stereotype and yield the result she needed—when dealing with her welfare officer.

the disputing parties involved in a mediation to truly listen to each other.[108] Relatively recently, however, researchers have discovered that the procedural justice perceptions of parties trying to resolve disputes in mediation depend very much on whether the other party—who *shares* decision-making authority in this consensual process—demonstrated trustworthy consideration.[109]

Trustworthy consideration is a concept that bears similarities to several others: active or reflective listening,[110] "looping,"[111] perspective taking,[112] open-minded listening,[113] testing for understanding,[114] and empathizing.[115] There are three key questions here: "Did the authority (or other) *listen* to what I said?" "Did the authority (or other) *understand* what I said?" "Did the authority (or other) *care* to understand what I said?" Research indicates that people tend to judge accurate procedures—i.e., those in which the decision maker or authority takes all relevant information into account in coming to a decision—as fairer than inaccurate procedures.[116]

As with voice, there is research indicating that inequality, bias, and prejudice can get in the way of listening to someone else's perspective, accurately understanding what she has said, and caring to understand her perspective. Research regarding the fundamental attribution bias, for example, shows that when someone has hurt us and is not in our social

108. *See, e.g.*, Welton et al., *The Role of Caucusing*, *supra* note 24, at 185 ("Joint sessions encourage disputants to simply repeat their official positions over and over rather than to explore these positions or listen to one another.").

109. *See* Tina Nabatchi et al., *Organizational Justice and Workplace Mediation: A Six-Factor Model*, 18 INT'L J. CONFLICT MGMT. 148 (2007) (reporting, in the context of a transformative mediation program, the statistical significance of whether the other party heard and understood).

110. *See* Robert Dinerstein et al., *Connection, Capacity and Morality in Lawyer-Client Relationships: Dialogues and Commentary*, 10 CLINICAL L. REV. 755, 758–62 (2004).

111. *See* ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 64–65 (2000); LEONARD I. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 83–84 (5th ed. 2013).

112. *See* Douglas N. Frenkel & James H. Stark, *Improving Lawyers' Judgment: Is Mediation Training De-Biasing?*, 21 HARV. NEGOT. L. REV. 1, 34–41 (2015).

113. *See* Jonathan R. Cohen, "*Open-Minded Listening*", 5 CHARLOTTE L. REV. 139, 142–43 (2014).

114. *See* NEIL RACKHAM, MODELS FOR EXPLAINING BEHAVIOR: INTERACTIVE SKILLS PROGRAM (1995) (unpublished manuscript) (on file with author).

115. *See* Jennifer Gerarda Brown, *Deeply Contacting the Inner World of Another: Practicing Empathy in Values-Based Negotiation Role Plays*, 39 WASH. U. J.L. & POL'Y 189 (2012); Robert H. Mnookin et al., *The Tension Between Empathy and Assertiveness*, 12 NEGOT. J. 217, 219 (1996); Andrea Kupfer Schneider, *Teaching a New Negotiation Skills Paradigm*, 39 WASH. U. J.L. & POL'Y 13, 29–30 (2012).

116. *See* Jan-Willem Van Prooijen et al., *Procedural Justice and Status: Status Salience as Antecedent of Procedural Fairness Effects*, 83 J. PERSONALITY & SOC. PSYCHOL. 1353, 1357 (2002) (describing manipulation of procedural accuracy in experiment and noting that it represented "an alternative way to study procedural fairness"); *see also* Chen et al., *supra* note 75, at 15 (describing a "high procedural fairness condition" as one in which the decision-maker wrote "I carefully scored the forms, and I saw that you did X percent of the work, so I thought it'd be fair to give you Y of the 10 tickets," while in a "low procedural fairness condition," the decision-maker wrote "I didn't bother to score the forms, but X is my lucky number, so I'm giving you Y percent of the tickets").

group, we are more likely to over-attribute her bad behavior to her essential character and under-attribute it to the situation in which she found herself. We are more forgiving of those in our in-group and even more forgiving of ourselves.[117] This psychological phenomenon is likely to impede our ability or desire to listen and really understand the voice of someone who is not in our social group.

There is also research showing that status can impede trustworthy consideration. Those who have higher status and greater power have been shown to be less likely to be trustworthy[118] and thus less likely to provide consideration that is trustworthy. Worryingly, there is even research suggesting that people naturally associate the failure to provide procedural justice with power and assume that someone who has behaved in a procedurally just manner is less powerful.[119] The failure of those with higher status and greater power to extend trustworthy consideration has been attributed to their reduced need for others' help. This phenomenon also may be self-protective. Bob Mnookin has suggested that one of the great challenges of a similar skill, empathizing, is that it seems to require sympathy, agreement, or even the assumption of responsibility and blame for another's pain—i.e., "the fear that I'm being asked to characterize my own decision as immoral."[120]

This research demonstrates that placing two people in the same room in the presence of a mediator does not guarantee that either will provide the other with trustworthy consideration. Trustworthy consideration, like self-determination and voice, is not magic.

But can something be done to achieve many of the benefits of procedural justice while also recognizing that certain people—e.g., those who are lower status in a hierarchical system, those who have been marginalized within a social group, and ultimately those who are likely to be among the marginalized—may need assistance in exercising their voice, while other people—e.g., those who are higher status—may need assistance with demonstrating trustworthy consideration?

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117. Allred, *supra* note 92; Morris, Larrick & Su, *supra* note 92. *See* Ross, *supra* note 92.

118. *See* DAVID DESTENO, THE TRUTH ABOUT TRUST: HOW IT DETERMINES SUCCESS IN LIFE, LOVE, LEARNING, AND MORE 129–144 (2014) (summarizing research that has shown that trustworthiness is affected by context—*e.g.*, an experience of increased status (even if temporary) leads to a reduced sense of needing others' help and an increased sense of self-reliance that then results in reduced trust, reduced trustworthiness, and increased lying; as social class goes up, trustworthiness also declines).

119. *See* Brockner, Wiesenfeld & Diekmann, *supra* note 80, at 157 n.2.

120. Jean R. Sternlight et al., *Making Peace with Your Enemy: Nelson Mandela and His Contributions to Conflict Resolution*, 16 NEV. L.J. 281, 306 (2016) (transcription of panelists Jean R. Sternlight, Andrea Schneider, Carrie Menkel-Meadow, Robert Mnookin, Richard Goldstone, and Penelope Andrews on Nov. 1, 2014 at the Saltman Center for Conflict Resolution, William S. Boyd School of Law, Thomas and Mack Moot Courtroom).

V. POTENTIAL RESPONSES

The following potential responses represent just a beginning in trying to address the potential for inequality, bias, and prejudice to undermine mediation's potential to deliver procedural justice, substantive justice, and self-determination. The first response focuses on mediators, their commitment to procedural justice and self-determination, and the role that their social identities play in conveying a message of equal treatment, inclusivity, and the safety of a neutral forum. The second response focuses on the use of caucuses, primarily before the formal mediation session begins, in order to foster all parties' voice, their sense of belonging, trustworthy consideration by the mediator, and trust in the mediation forum. The third response examines the potential to enhance the parties' ability to provide each other with trustworthy consideration. The fourth response considers whether online technologies may be used to increase voice, trustworthy consideration, even-handed treatment, and respect—and also increase real, substantive self-determination and access to justice through access to important information. The fifth response asks whether mediators should have some responsibility to avoid patently unconscionable results.

A. Increasing the Inclusivity of the Pool of Mediators and Training All Mediators to Acknowledge and Address Implicit Bias

There is no doubt that courts and public and private dispute resolution providers must increase the inclusivity of their pools of mediators,[121] include underrepresented demographics (e.g., professional women and people of color) in the lists of potential mediators sent to parties,[122] and mentor and promote professional women and people of color as mediators.[123] The presence of such mediators will signal greater inclusiv-

121. *See* Beth Trent, Deborah Masucci & Timothy Lewis, *The Dismal State of Diversity: Mapping a Chart for Change*, Disp. Resol. Mag., Fall 2014, at 21, 21; *see also* Marvin E. Johnson & Maria R. Volpe, *The Color of Money: Compensation Opportunities and Barriers*, Disp. Resol. Mag., Summer 2017, at 14; Susan D. Franck et al., *The Diversity Challenge: Exploring the "Invisible College" of International Arbitration*, 53 Colum. J. Transnat'l L. 429 (2015); Benjamin G. Davis, *Diversity in International Arbitration*, Disp. Resol. Mag., Winter 2014, at 13, 13; Deborah Rothman, *Gender Diversity in Arbitrator Selection*, Disp. Resol. Mag., Spring 2012, at 22; Marvin E. Johnson & Homer C. La Rue, *The Gated Community: Risk Aversion, Race, and the Lack of Diversity in Mediation in the Top Ranks*, Disp. Resol. Mag., Spring 2009, at 17; Maria R. Volpe et al., *Barriers to Participation: Challenges Faced by Members of Underrepresented Racial and Ethnic Groups in Entering, Remaining, and Advancing in the ADR Field*, 35 Fordham Urb. L.J. 119 (2008); F. Peter Phillips, *ADR Continental Drift: It Remains a White, Male Game*, Nat'l L.J. Nov. 27, 2006.

122. *See* Gina Viola Brown & Andrea Kupfer Schneider, *Gender Differences in Dispute Resolution Practice: Report on the ABA Section of Dispute Resolution Practice Snapshot Survey*, 47 Akron L. Rev. 975 (2015); Andrea Kupfer Schneider & Gina Viola Brown, *Gender Differences in Dispute Resolution Practice*, Disp. Resol. Mag., Spring 2014, at 36.

123. See Noah Hanft, *Making Diversity Happen in ADR: No More Lip Service*, 257 N.Y.L.J. (2017) (reporting that "CPR saw an 81 percent increase in the selection of women and diverse neutrals in FY16, with women and minorities accounting for 26 percent of

ity and safety for all.[124] From the perspective of the procedural justice literature, increasing the diversity of the pool of mediators should enhance marginalized parties' willingness to perceive that they will be, and were, heard and understood, therefore increasing marginalized parties' willingness to exercise voice and increasing the likelihood of actual understanding and trustworthy consideration—which may then reduce the likelihood of unjustifiably disparate outcomes.[125] There are hopeful signs that public and private dispute resolution providers[126] and other organizations[127] are moving in this direction.

Carol Izumi has written comprehensively about the presence and influence of implicit bias in mediation[128] and is writing more for this sympo-

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selections"); *We Embrace Diversity*, JAMS, https://www.jamsadr.com/diversity/ [https://perma.cc/Y9J2-YUPL] (last visited Aug. 5, 2017) (reporting "an overall composition of 22% female and 9% persons of color among our distinguished panelists"); *Putting Diversity into Practice*, AM. ARBITRATION ASS'N, https://www.adr.org/sites/default/files/document_repository/AAA_ICDR_Diversity_Initiative.pdf [https://perma.cc/E4JB-WALM] (reporting that the 2015 roster of arbitrators and mediators "[was] composed of 22% women and minorities"; also describing the AAA Higginbotham Fellows Program established "in 2009 to provide training, networking, and mentorship for up-and-coming diverse ADR practitioners"; and offering "to provide arbitrator lists to parties comprising at least 20% diverse panelists where party qualifications are met"); *see also* FINRA DISPUTE RESOLUTION TASK FORCE, *Final Report and Recommendations of the FINRA Dispute Resolution Task Force*, at 8–10 (December 16, 2015) (describing FINRA's efforts to recruit and promote arbitrators who are women and people of color); Comments of ABA Section of Dispute Resolution for FINRA Dispute Resolution Task Force (May 1, 2015) (recommendation to increase and track use of arbitrators and mediators who are women, people of color, and people with disabilities).

124. *See* Lorig Charkoudian & Ellen Kabcenell Wayne, *Fairness, Understanding, and Satisfaction: Impact of Mediator and Participant Race and Gender on Participants' Perception of Mediation*, 28 CONFL. RESOL. Q. 23, 47 (2010) (based on empirical study urging the matching of mediators with disputants by gender (which may require use of co-mediators); regarding race and ethnicity, urging co-mediation or avoiding a mediator-participant match altogether in order to avoid isolating any disputant "who will feel outnumbered and disadvantaged in a process where the opponent and the neutral seem to have so much in common").

125. *See* Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 LAW & SOC'Y REV. 767, 789–90 (1996) (reporting no disparity in outcomes based on gender alone but that "both minority male and female claimants received significantly lower MORs [monetary outcome ratios]—even when we included the nine case-specific and repeat-player variables. Of greatest concern is the fact that this disparity was only present in cases mediated by at least one Anglo mediator. Cases mediated by two minorities [in a co-mediator team] resulted in lower MORs, regardless of claimant ethnicity . . . . Of particular importance is our finding of no significant ethnic disparities in cases mediated by two minority mediators."); *see also* Daniel Klerman & Lisa Klerman, *Inside the Caucus: An Empirical Analysis of Mediation from Within*, 12 J. EMPIRICAL LEGAL STUD. 686, 689, 715 (2015) (reporting that "settlement rates [were] the same for male and female plaintiffs and lawyers" and that "[w]omen and men fared equally well in the mediations studied here, whether as plaintiffs or lawyers").

126. *See supra* note 123.

127. *See* Letter from Nancy A. Welsh, Chair-Elect, ABA Section of Dispute Resolution, to Monica Jackson, Office of the Executive Secretary, Consumer Financial Protection Bureau 4-5 (July 29, 2016) (observing that ICANN's publication of UDRP decisions "has permitted patterns of decision making and institutions' repeat appointments of arbitrators to be highlighted").

128. *See* Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J.L. & POL'Y 71 (2010). Others have written about the influence of implicit bias upon

sium. In this Article, I will suggest only that requiring mediators to practice "considering the opposite" has been shown to be effective in reducing bias.[129]

B. Pre-mediation Caucusing with Parties to Increase the Likelihood and Productivity of Voice

Earlier, this Article expressed concerns regarding lawyers' increasing tendency to avoid joint sessions in mediation and to request mediators whose mediation sessions occur entirely in caucus. Indeed, recent research has indicated that in certain contexts extensive caucusing does not necessarily increase the likelihood of settlement,[130] while it can reduce parties' belief in their ability to work together.[131]

From a procedural justice perspective, however, targeted and careful use of caucus may have the effect of enhancing the voice of those who are hesitant to exercise it (i.e., those who are of lower status or who do not identify with the "social group" being served by the mediation). Targeted and careful use of caucus also may increase the likelihood that people feel and believe that their views received trustworthy consideration and respect. Thus, used appropriately, caucusing has the potential to help parties gain the benefits of procedural justice.

Several years ago, I conducted a small qualitative empirical research project involving special education mediation.[132] To my surprise, caucus emerged as very significant to the parents and school officials who participated in the mediation sessions. It was a potent tool. In some cases, the mediators chose to allow initial presentations in a joint session and then engaged in shuttle diplomacy. One participant expressed appreciation of this approach because he "—like many others—. . . valued the way in which caucus simultaneously permitted bargaining and buffered both the parents and him from the negative emotions often triggered by distribu-

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judges in the facilitation of settlement, motion practice and adjudication. *See, e.g.*, Wistrich & Rachlinski, *supra* note 61; Jeffrey J. Rachlinski, *Processing Pleadings and the Psychology of Prejudgment*, 60 DePaul L. Rev. 413, 428 (2011) (reporting that judges, like most human beings, make egocentric or self-serving judgments about their own abilities; for example, 97.2% of judges surveyed "indicated [that] they were better than the median judge" in avoiding bias in judging and 87% described themselves as "better than the median judge at facilitating settlements" (citing Chris Guthrie, Jefffrey J. Rachlinski & Andrew J. Wistrich, *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 Duke L.J. 1477, 1519 (2009))).

129. *See* Frenkel & Stark, *supra* note 112, at 22–24; *see also* Phyllis E. Bernard, *What Some Theories Say; What Some Mediators Know*, Disp. Resol. Mag., Spring 2009, at 6 (reporting on the effects of requiring mediators to reflect on the role of gender, race, and socioeconomic class and the inclusion of such opportunities for reflection in the Early Settlement Central Mediation Program in Oklahoma City).

130. *See* Mediation Research Task Force Report, *supra* note 37.

131. *See* Admin. Office of the Courts, Court Operations, Md. Judiciary, What Works in Child Access Mediation: Effectiveness of Various Mediation Strategies on Short- and Long-Term Outcomes (2016); Lorig Charkoudian, Deborah Thompson Eisenberg & Jamie L. Walter, *What Difference Does ADR Make? Comparison of ADR and Trial Outcomes in Small Claims Court*, 35 Conflict Resol. Q. 7 (2017).

132. *See* Welsh, *Stepping Back Through the Looking Glass*, *supra* note 7, at 580.

tive negotiation tactics."[133] Other school officials and parents similarly found that the use of caucus kept mediation from "get[ting] out of control," "eliminated the arguments," and allowed the parties to "take a deep breath, step back, take a look, and then come back to the table."[134]

Some participants in this study also described how the use of caucus significantly enhanced their perceptions of procedural justice. For example,

> both parents and school officials reacted positively to caucuses when mediators used the technique to provide disputants with a full opportunity to tell their stories or spent time in caucus ensuring that they understood what disputants were saying. . . . Mediators' use of caucus also garnered positive reviews when the technique assisted the disputants in engaging in a thorough and dignified deliberative process. For example, when the mediator in one case did not challenge the disputants' selection of a normative frame in caucus, but instead assisted the disputants in a more careful examination and application of the legal norms *they* had invoked, both the parent and the school official accepted and valued the mediator's evaluative interventions.[135]

In other instances, however, the mediator's use of caucus significantly harmed the parties' perceptions of procedural justice. "When [the participants] were uncertain that the mediator truly understood what they had said and could not hear the mediator's translation for themselves, they raised concerns about the accuracy of what the mediator communicated on their behalf" and "feared the potential effect of caucus on the quality of the substantive outcomes achieved in mediation."[136] "The privacy of caucus also may have encouraged some mediators to engage quickly in more aggressive evaluative actions and statements, which disputants then described as 'adversarial,' 'impatient,' and 'going over the edge.'"[137] For instance, "when mediators used the privacy of caucus to try to persuade disputants to accept the validity of the other side's normative frame, both parents and school officials questioned the mediators' impartiality."[138] Finally, when mediators did not permit parents to make an initial presentation in joint session, did not disclose prior contact with school officials, or "spen[t] so much time" with school officials, some parents became very suspicious about the relationship between the school officials and

133. *Id.* at 647.
134. *Id.* at 650–51.
135. *Id.* at 650.
136. *Id.* at 647–48.
137. *Id.* at 648 (footnotes omitted); *see also* Welsh, *Magistrate Judges*, *supra* note 37, at 989 (providing examples of aggressive evaluation by judges in ex parte meetings during settlement conferences).
138. Welsh, *Stepping Back Through the Looking Glass*, *supra* note 7, at 648. A Party's reaction is likely to be quite different if the mediator expresses understanding and appreciation of the position being taken by that party. *See, e.g.*, Welton et al., *The Role of Caucusing*, *supra* note 24, at 200 (noting that "[c]aucusing allows mediators to take sides with one party in order to move the process along. Thus it appears that caucusing somewhat relieves the third party of the requirement of being strictly neutral between the two parties.").

mediators.[139] Rather than experiencing a procedurally just mediation process that fostered free, equal, and respectful dialogue, some of these parents felt that they and their children had once again become marginalized "odd men out" with officials talking behind their backs.[140]

Based on these reactions from parents and school officials, I suggested that special education mediation could "borrow a page" from victim-offender mediation, which regularly provides for pre-mediation caucusing—generally conducted before the day of mediation, with the mediator visiting the victim and the offender separately to prepare both of them to participate in the mediation process.[141] The goal is to help both participants identify their goals for the mediation session and prepare to achieve those goals. In a very similar vein, Gary Friedman and Jack Himmelstein recommend meeting with parties individually to help them come to their own decisions about whether, why, and how they might use mediation. Friedman and Himmelstein describe their mediation model as "understanding-based" and also specify that it is a "non-caucus approach"—but their pre-mediation meetings with the parties also represent a sort of caucus, one in which the focus is on welcoming the parties' voice and providing respectful and trustworthy consideration.[142]

In the last few years, other commentators have similarly urged the use of pre-mediation caucuses to enhance the quality of mediation sessions. Jill Tanz and Martha McClintock, who have raised concerns regarding the negative physiological effects of unrestrained venting in mediation, have encouraged the responsive use of early caucuses to build trust in the mediation process and the mediator, learn what each party hopes to achieve, gauge emotional levels, and plan. Such caucusing is designed to reduce stress and anger and instead enhance trust, focus, problem-solving, and decision-making.[143] Other researchers have also recommended the use of pre-mediation caucuses in order to build trust and specifically *not* to develop settlement proposals.[144] Still other commentators have recommended the use of pre-mediation caucuses to assist individuals claiming discrimination to prepare for the mediation process and place their expe-

139. *Id.* at 649.

140. *Id.*

141. *Id.* at 658.

142. *See* GARY FRIEDMAN & JACK HIMMELSTEIN, CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING xxxv-xxxvi (2008).

143. *See* Tanz & McClintock, *supra* note 81, at 55, 60, 62. Tanz and McClintock observe that mediators trying to determine whether parties are experiencing stress may watch for microaggressions (often targeted at women and people of color), which can signal that the aggressor is experiencing stress and then engaging in displaced aggression. *Id.* at 65. Such microaggressions then often cause stress in those who have been targeted. *Id.* Other researchers are focusing on other physiological factors that influence decision-making. *See, e.g.*, Roy F. Baumeister et al., *The Glucose Model of Mediation: Physiological Bases of Willpower as Important Explanations for Common Mediation Behavior*, 15 PEPP. DISP. RESOL. L.J. 377 (2015); JEFFREY Z. RUBIN ET AL., SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT 78–79 (2d ed. 1994) (excitation transfer effect).

144. *See* Roderick Swaab & Jeanne Brett, *Caucus with Care: The Impact of Pre–Mediation Caucuses on Conflict Resolution*, IACM Meetings Paper at 2, 9 (2007).

rience within a larger context.[145] Finally, the researchers who examined the use of labor mediation in the Netherlands, described earlier, also have recommended pre-mediation caucusing, particularly with the subordinates who cared so much about procedural justice and outside the presence of the supervisor, in order to avoid triggering hierarchical relationships and dynamics.[146]

In all of these cases, the commentators and researchers have focused on the use of pre-mediation and early caucusing to enhance parties' trust in the mediator and the process,[147] affirm that each party is a valued member of the group engaged in mediation, and help parties prepare for their participation. It is noteworthy that these efforts also would have the effect of encouraging the productive expression of voice and providing evidence of trustworthy and respectful consideration by the mediator.

Of course, these recommendations also tend to assume that only good things will happen in caucuses. As noted earlier, mediators and parties generally use caucuses to move toward settlement.[148] When mediators focus too heavily or too quickly on settlement, however, they can undermine perceptions of procedural justice and self-determination. Some researchers observing the parties' behavior, meanwhile, have raised other concerns. For example, when the parties are in caucus they are more likely to speak quite strongly about their own cases and more disparagingly about the other party.[149] They also may use caucus to try to manipulate the mediator.[150]

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145. *See* Emily M. Calhoun, *Workplace Mediation: The First-Phase, Private Caucus in Individual Discrimination Disputes*, 9 HARV. NEGOT. L. REV. 187, 189–90 (2004).

146. *See* Bollen, Ittner & Euwema, *supra* note 73, at 632.

147. *See* Welton et al., *The Role of Caucusing in Mediation*, *supra* note 24, at 182 (discussing the importance of caucus for the early development of rapport between mediator and party).

148. *See id.* at 196 (noting the many positive consequences of using caucus: less direct hostility between the parties, increased disclosure of information, more ideas for solutions (perhaps because emotion and defensiveness are reduced and offering an idea is less likely to be seen as a sign of weakness), increased requests from the mediator for information (in contrast to joint session where such requests declined rapidly), more useful challenges by the mediator, providing a route into problem-solving; also noting that caucuses are used for different purposes at different stages of the mediation—e.g., greater likelihood of requests for other disputant's or mediator's reactions to ideas in middle and late stage caucus than in joint sessions; greater likelihood of mediator-generated alternatives in middle stage caucus and then in final stage joint session).

149. *See id.* at 199 (reporting that caucus was used in about two-thirds of the community mediations studied; about 35% of disputants' statements occurred in caucus as compared to joint session; and "[i]n cases that employed a caucus, disputants used more persuasive arguments, made fewer requests for reaction to an alternative, and generated fewer new alternatives. Mediators employed more negative evaluations of the parties' behavior and less positive evaluations of their positions during these cases. These findings suggest that mediators tend to call caucuses when disputants are taking a contentious, as opposed to problem-solving, approach.").

150. *See* DWIGHT GOLANN, SHARING A MEDIATOR'S POWER: EFFECTIVE ADVOCACY IN SETTLEMENT 6–8, 50–52, 68–69, 83–87 (2013) (examples of lawyers' use of mediation and mediators to implement a distributive or competitive negotiation strategy); James R. Coben, *A Candid Look at Advocacy Strategies in Caucused Mediations*, 7 DISP. RESOL. MAG. 27 (Fall 2000); Welton et al., *The Role of Caucusing in Mediation*, *supra* note 24, at 193–94 (reporting research regarding community mediation, finding that in caucus dispu-

The lesson? Pre-mediation caucusing also is not magic. If it is used, its purpose should be clear and constrained. Mediators should be trained in how to use it to develop trust, and courts encouraging or ordering parties' use of mediation should institutionalize sufficient time for pre-mediation caucuses as well as systems that provide for feedback and quality assurance.[151]

C. Reflective Listening in Mediation to Increase the Likelihood and Productivity of Trustworthy Consideration

As noted earlier, participants' inability or unwillingness to extend trustworthy consideration to each other also can hinder mediation's potential to foster procedural justice and self-determination. But people can learn the value of listening as a result of participating in mediation.[152] People also can learn at least the rudimentary components of active or reflective listening—e.g., allowing the other party to speak and then trying to summarize, accurately, what they believe the other party has said.[153] Interest-

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tants were more likely to engage in indirect hostile behavior (e.g., behavioral and character putdowns of the other disputant), self-enhancement, and other persuasive arguments to enhance their own position. "Though we cannot be sure from the data, it seems likely that many of these statements were less than truthful . . . . That such statements could nevertheless have an impact on the mediator is suggested by the finding that mediators tend to recommend solutions that favor the side that has been most vigorous in presenting his or her position"). The use of caucus raises additional procedural justice and due process concerns if it occurs in the context of "judicial mediation" or "med-arb;" if the mediator assumes an adjudicative function, her decision-making may be affected by confidential information she learned while in caucus—and there will not be the opportunity for the veracity of such information to be tested. *See* Welsh, *Magistrate Judges*, *supra* note 37; Tania Sourdin, *Why Judges Should Not Meet Privately with Parties in Mediation but Should Be Involved in Settlement Conference Work*, 4 J. Arb. & Mediation 91 (2013–2014); Ellen E. Deason, *Beyond "Managerial Judges": Appropriate Roles in Settlement*, 78 Ohio St. L.J 73. (2017).

151. See Welsh, *Magistrate Judges*, *supra* note 37, at 1035–1043, 1046–1060 (urging feedback for federal magistrate judges who facilitate settlements, providing examples of different means to provide feedback and opportunities for self-reflection, and providing a sample feedback form); Welsh & Schneider, *Thoughtful Integration of Mediation*, *supra* note 45, at 137–139 (describing courts' systems for assuring the quality of mediation); Welsh, et al., *The Application of Procedural Justice Research to Judicial Actions and Techniques in Settlement Sessions*, *supra* note 37 (presenting and explaining a questionnaire soliciting feedback from lawyers and parties regarding the procedural fairness and helpfulness of judicial facilitation of settlement); McAdoo & Welsh, *Aiming for Institutionalization*, *supra* note 37, at 39–43 (recommendations for assuring effectiveness and quality of court-connected dispute resolution programs and for resolving complaints about dispute resolution processes); McAdoo & Welsh, *Look Before You Leap*, *supra* note 22, at 430; Welsh, *The Place of Mediation supra* note 7, at 139–140 (expressing concerns regarding many courts' failure to monitor the quality of court-connected mediation programs).

152. For example, in the U.S. Postal Service's REDRESS program, supervisors who had participated in mediation reported that they had learned that it was important to listen, rather than immediately propose a solution or other response. See Jonathan F. Anderson & Lisa Bingham, *Upstream Effects from Mediation of Workplace Disputes: Some Preliminary Evidence from the USPS*, 48 Lab. L. J. 601, 607–08 (1997); Lisa B. Bingham, *Employment Dispute Resolution: The Case for Mediation*, 22 Conflict Resol. Q. 145, 158 (2004).

153. It appears that these sorts of behaviors are likely to be perceived as collaborative and procedurally fair, are likely to increase trust, and are likely to result in the provision of

ingly, recent research also indicates that when a mediator models reflective listening (or trustworthy consideration), this can enhance parties' ability to do the same.[154] Other research, in the communications context, has found that when meetings are characterized by a substantial amount of checking for understanding of previous contributions, the incidence of attacking or defensive behaviors is low.[155] Meanwhile, people participating in meetings characterized by substantial testing for understanding tend to judge these meetings as fair.[156]

If the mediator has developed a trusting relationship with the parties and demonstrates that she cares very much about accurately understanding what each of the parties has to say, then it appears to be more likely that the parties will care about ensuring that they understand each other.[157]

D. Online Technology to Increase the Likelihood and Productivity of Voice, Trustworthy Consideration, and Real, Substantive Self-Determination

Some have also suggested that those who are hesitant to exercise voice may be emboldened by the opportunity to participate in asynchronous online mediation.[158] There certainly is plenty of research and personal experience demonstrating that people's online voice can be different from their in-person voice. Research has indicated that lower-status individuals, for example, are more willing to participate in "lean media" like email and that social influence bias is reduced.[159] People can also take their time in composing messages, discerning the meaning of the messages they receive, and making decisions about how to respond. Indeed, a person's written facility with language under these circumstances may be quite different from her verbal facility with language in an in-person meeting.

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more information—thus making it more likely that parties will capture the integrative potential of a situation. *See* Welsh, *The Reputational Advantages*, *supra* note 58, at 119.

154. *See* Administrative Office of the Courts, *supra* note 131, at v–vi.

155. *See* Neil Rackham, Models for Explaining Behavior: Interactive Skills Program 56 (1995) (unpublished manuscript) (on file with author) (defining "testing understanding" as behavior that "explores understanding of previous contribution," "ties down and clarifies points which may be unclear or ambiguous," and "check[s whether] people are seeing things [in] the same way"); Nick Anderson, *Meetings Bloody Meetings*, The Crispian Advantage (Feb. 19, 2010), http://thecrispianadvantage.com/meetings-bloody-meetings/ [https://perma.cc/E5K4-7EHL].

156. *See* Neil Rackham, Models for Explaining Behavior: Interactive Skills Program 56 (1995) (unpublished manuscript) (on file with author); Nick Anderson, *Meetings Bloody Meetings*, The Crispian Advantage (Feb. 19, 2010), http://thecrispianadvantage.com/meetings-bloody-meetings/ [https://perma.cc/E5K4-7EHL].

157. *See* supra note 131. *But see* Wissler, *Representation in Mediation*, *supra* note 35 (reporting that mediation participants were less likely to indicate that they understood each other better when they were represented by lawyers; the reason is unclear).

158. *See* Bollen, Ittner & Euwema, *supra* note 73, at 631.

159. *See* Noam Ebner, Anita D. Bhappu, Jennifer Gerarda Brown, Kimberlee K. Kovach & Andrea Kupfer Schneider, *You've Got Agreement: Negoti@ting via Email*, *in* Rethinking Negotiation Teaching: Innovations for Context and Culture 89, 96 (James R. Coben, Giuseppe DePalo & Christopher Honeyman eds., 2009).

Some dispute resolution organizations actually facilitate an online pre-mediation exchange of information between the parties by requesting that parties respond online to a series of questions and then allowing the parties to see each other's answers. Thus, these online providers facilitate a form of voice and trustworthy consideration.

Less dramatically, asynchronous online communication may play a helpful role as a component part of in-person mediation. For example, researchers have examined the effects of including an online intake procedure before face-to-face mediation (i.e., e-supported mediation) in the context of the workplace, with presumed hierarchical differences between supervisors and subordinates. The particular intake procedure that was examined "encourage[d] both parties to reflect on the issue at hand, the accompanying feelings, the underlying interests as well as potential solutions."[160] According to the researchers, these online tools "provide[d] parties with an opportunity to tell their side of the story via asynchoronous typewritten messages (e-mails); [and] it help[ed] parties to get some insight into the situation at hand, and their needs and interests as well as the needs and interests of the other."[161] The researchers found that in the face-to-face mediations preceded by the online intake procedure, subordinates did not differ from superiors in their satisfaction with the mediation outcome or the mediation process. This was in marked contrast to face-to-face mediation that was not preceded by a preparatory online intake procedure, in which subordinates felt less satisfied with the mediation outcome and the mediation process.[162] This research suggests that an online intake procedure, with carefully-crafted questions, may be used to achieve some of the same goals as pre-mediation caucusing, described earlier.

In addition, online tools may help to ensure real, informed self-determination in mediation. There is research indicating that the widespread use of smartphones (in contrast to computers) is bridging the digital divide that has existed between men and women, between racial groups, and between rich and poor.[163] If this is so, then widespread online access to information—such as that regarding legal rights and defenses, available procedures, available dispute resolution providers, and outcomes in

160. Katalien Bollen & Martin Euwema, *The Role of Hierarchy in Face-to-Face and E-Supported Mediations: The Use of an Online Intake to Balance the Influence of Hierarchy*, 6 NEGOT. & CONFLICT MGMT. RES. 305, 307 (2013).

161. *Id.*

162. *Id.* at 312.

163. *See* SCHMITZ & RULE, THE NEW HANDSHAKE, *supra* note 96, at 19 (citing to data from the Pew Research Center showing "smartphone usage has created new means for accessing the internet, especially for minority groups and those with lower economic means. For example, 10% of Americans do not have home broadband internet access, but they do own a smartphone. Smartphones also virtually eliminate the digital divide among races and ethnicities, with 80% of "White, Non-Hispanic," 79% of "Black, Non-Hispanic," and 75% "Hispanic" having some internet access through home broadband or a smartphone. Still, smartphones widen the digital divide between 18–29 year olds and those who are over age 65 (increasing from a gap of 37 percentage points in home broadband access to 49 percentage points when taking smartphones into account).").

comparable cases—may create the potential for both increased access to justice and more informed self-determination. Legal service providers in the United States already are experimenting with the provision of such information to their clients and self-represented litigants using artificial intelligence, online videos, online legal libraries, and many other tools.[164]

Online tools also may have an important post-mediation application. For example, online publication of information regarding numbers of mediated cases, settlement rates, procedural fairness perceptions and even aggregated substantive outcomes with status-based breakdowns, would provide some degree of transparency and contribute to trust in the procedural and substantive fairness of mediation and the avoidance of systemic but under-the-radar discrimination.[165]

More generally, many are now advocating for online dispute resolution (ODR) in order to increase access to justice by reducing costs and time to disposition.[166] Thus, ODR may be in the process of becoming the "new" mediation,[167] just as mediation has become the new arbitration[168] and arbitration has become the new litigation.[169] Like the processes that came before it, however, ODR is very likely to need to embrace procedural safeguards and transparency in order to assure people of both procedural and substantive justice.[170]

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164. The Legal Service Corporation's annual Technology Initiative Grants Conference provides an opportunity to explore all of these futuristic options. *See also* ETHAN KATSH & ORNA RABINOVICH-EINY, DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES 157–158 (2017).

165. *See* Nancy A. Welsh, *Class Action Barring Mandatory Pre-Dispute Consumer Arbitration Clauses: An Example of (and Opportunity for) Dispute System Design?*, 13 U. ST. THOMAS L.J. 381, 430-431 (2017) (imagining an online dispute resolution process for business-to-consumer disputes that provided consumers with access to information about their rights and defenses, substantive and procedural safeguards, aggregated information regarding consumers' perceptions of fairness and substantive results, and impressive compliance with results).

166. *See* Rebecca Love Kourlis, Natalie Anne Knowlton & Logan Cornett, *A Court Compass for Litigants* (INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, July 2016) (proposing use of technology and ODR for family disputes); ABA COMMISSION ON THE FUTURE OF LEGAL SERVICES, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 6 (2016) (calling for the piloting and expansion of court-annexed online dispute resolution systems); SCHMITZ & RULE, THE NEW HANDSHAKE, *supra* note 96; Katsh & Rabinovich-Einy, Digital Justice, supra note 165, at 158-165; *see also* Zena Zumeta, *Profiles in ADR: Douglas Van Epps*, DISP. RESOL. MAG., Spring 2017, (foreseeing the use of ODR for small monetary disputes, but continued use of in-person procedures like mediation for disputes involving relational or emotional issues).

167. Interestingly, Ethan Katsh and Orna Rabinovitch-Einy are referring to ODR as the "new new courts." *See* Orna Ravbinovich-Einy & Ethan Katsh, *The New New Courts*, 67 AM. U. L. REV. 165 (2017).

168. *See* Jacqueline Nolan-Haley, *Mediation: The "New Arbitration"*, 17 HARV. NEGOT. L. REV. 61 (2012).

169. *See* Tom Stipanowich, *supra* note 23.

170. *See* Nancy A. Welsh, *ODR: A Time for Celebration and the Embrace of Procedural Safeguards*, Conference Presentation at the 2016 International Forum for Online Dispute Resolution, The Hague (May 2016) [hereinafter Welsh, Time for Celebration] (transcript available at www.adrhub.com/profiles/blogs/procedural-justice-in-odr) [https://perma.cc/8NNA-VETM] (calling for algorithmic audits and alternative forums for those who do not have access to, or facility with, online options); *see generally* Noam Ebner & John Zeleznikow, *Fairness, Trust and Security in Online Dispute Resolution*, 36 HAMLINE J. PUB.

E. Empowering Mediators to Avoid Unconscionable Unfairness or Coercion

Ellen Waldman, Lola Akin Ojelabi, Jennifer Reynolds, and other scholars increasingly express concern that even if mediation sessions provide for voice, trustworthy consideration, even-handed treatment, and respect, they also have the potential to produce unconscionable outcomes. Waldman and Ojelabi do not urge that mediators should therefore impose their own solutions and definitions of fairness upon the disputants. However, they do advocate for mediators' ethical responsibility to assist the "have-nots" and at least question outcomes that are so lopsided that they appear unconscionable or patently unfair.[171] This is likely the most controversial suggestion contained in this Article, but there is precedent for imposing some ethical obligation upon mediators to avoid extreme substantive unfairness in specified contexts.[172] It is also relatively easy to

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L. & Pol'y 143 (2015); Noam Ebner & John Zeleznikow, *No Sheriff in Town: Governance for Online Dispute Resolution*, 32 Negot. J. 297 (2016); Carrie Menkel-Meadow & Robert Dingwall, *Negotiating with Scripts and Playbooks: What To Do When Big Bad Companies Won't Negotiate*, *in* The Negotiator's Desk Reference (Christopher Honeyman & Andrea Kupfer Schneider eds., 2d ed. forthcoming); Orna Rabinovich-Einy & Ethan Katsh, *Digital Justice: Reshaping Boundaries in an Online Dispute Resolution Environment*, 1 Int'l J. Online Disp. Resol. 5, 28 (2014); Anjanette H. Raymond & Scott J. Shackelford, *Technology, Ethics, and Access to Justice: Should an Algorithm be Deciding Your Case?*, 35 Mich. J. Int'l L. 485 (2014); Amy J. Schmitz, *Secret Consumer Scores and Segmentations: Separating "Haves" from "Have-Nots*," 2014 Mich. St. L. Rev. 1411(2014); Suzanne Van Arsdale, *User Protections in Online Dispute Resolution*, 21 Harv. Negot. L. Rev. 107, 128–29 (2015); Schmitz & Rule, The New Handshake, *supra* note 96 (noting: "[O]ur enthusiasm for building these new dispute resolution mechanisms should not overshadow our focus on principles of justice and ethical judgment. Those concerns must remain paramount. Indeed, justice and fairness must be at the core of not only the design phase of The New Handshake, but also the ongoing evolution of these systems.").

171. *See* Ellen Waldman & Lola Akin Ojelabi, *Mediators and Substantive Justice: A View from Rawls' Original Position*, 30 Ohio St. J. on Disp. Resol. 391, 420–30 (2016) (using Rawls' "veil of ignorance" as well as ethical codes that permit mediators to withdraw due to concerns regarding unconscionability).

172. In some settings, for example, mediators are obligated to avoid unconscionable settlements. *See* Wissler, *Representation in Mediation*, *supra* note 35, at 435 (citing Model Standards of Conduct for Mediators, §§ I.A, II, VI.A. (Am. Arb. Ass'n et al. 2005); ABA Model Standards of Practice for Family and Divorce Mediation §§ I, IV (2001) [hereinafter ABA Model Divorce Mediation Standards]; Model Rule for the Lawyer as Third-Party Neutral r. 4.5.3, 4.5.6 & cmts. (CPR-Georgetown Comm'n on Ethics and Standards in ADR); Nat'l Standards for Court-Connected Mediation Programs §§ 8.1.f, 11.1 & cmts. (Ctr. for Dispute Settment, Inst. for Judicial Admin); Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 Notre Dame L. Rev. 775, 787 (1999); Leonard Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 Ariz. L. Rev. 329, 349, 354 (1984); Welsh, *The Thinning Vision*, *supra* note 4, at 15, 78–84); *see also* ABA Model Divorce Mediation Standards, §§ XI, 25.4 ("A family mediator shall suspend or terminate the mediation process when . . . the participants are about to enter into an agreement that the mediator reasonably believes to be unconscionable."); Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications* 13–19 (1992); John Lande, *How Will Lawyering and Mediation Transform Each Other?*, 24 Fla. St. U. L. Rev. 839, 878 (1997); Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 Minn. L. Rev. 1317, 1332–33, 1397–98, 1405–06 (1995); Nolan-Haley, *supra*, at 811, 836; Pincock & Hedeen, *supra*, note 85, at 444–47 (discussing

understand how such an obligation would make it more likely that marginalized parties would perceive the mediation process as offering at least minimal assurance that they and their claims will be treated in an even-handed and dignified manner.

VI. CONCLUSION

This Article began by recounting the dreams and noble intentions that inspired many of those who advocated for the institutionalization of mediation. Of course, powerful dissenting voices arose at the time. Richard Delgado was chief among them,[173] and he continues to raise legitimate concerns that must be addressed. Indeed, this Article has examined the ways in which mediation has fallen short of achieving aspirational self-determination and how and why inequality can undermine the ability of mediation to assure a procedurally just process. Much of the research reviewed here is consistent with the social science research that Professor Delgado and his co-authors invoked as the basis for their concerns regarding mediation. Thus, mediation has fallen prey to the same social and economic problems that have afflicted (and continue to afflict) civil and criminal litigation, administrative adjudication, and arbitration.[174]

This Article, though, is for those who have valued and continue to value mediation for its potential to offer self-determination and procedural justice—its potential for a certain sort of magic—even while admitting its shortcomings and acknowledging the need for reform. The research described here, particularly regarding procedural justice, reveals that we can and should take steps to increase the likelihood and productivity of all participants' voice, trustworthy consideration and real, substantive self-determination by: increasing the inclusivity of our pool of mediators; training all mediators to acknowledge and address implicit bias; training mediators to engage in pre-mediation caucusing that focuses on developing trust; institutionalizing systems for feedback and quality assurance; training mediators to model reflective listening; adopting online technology that provides parties with the information they need to engage in informed decision-making and the opportunity for self-analysis and self-reflection; and perhaps even identifying additional areas of mediation practice in which marginalized parties' safety requires mediators to take affirmative steps to avoid unconscionable unfairness or coercion.

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theoretical developments regarding bullying, the related concepts of harassment and discrimination, and the potential responsiveness of restorative justice).

173. See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985).

174. *See* Michael Mofitt, *Three Things To Be Against ("Settlement" Not Included)*, 78 FORDHAM L. REV. 1203, 1245 (2009) ("We should celebrate the beauty in each process's internal narrative of justice, of truth, of efficiency, of predictability, and even of morality. . . . Both settlement and litigation fail on each of these measures with some reliability . . . .").

It turns out that achieving the illusion of magic demands commitment from us, and quite a lot of work. But it is work that can and should be done.

“DOG-WHISTLE” RHETORIC: PEDAGOGY AND THE CODED LANGUAGE OF MODERN AMERICAN POLITICS

A Dissertation

by

STEPHEN WHITLEY

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ABSTRACT

"DOG-WHISTLE" RHETORIC: PEDAGOGY AND THE CODED LANGUAGE OF MODERN AMERICAN POLITICS

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Texas A&M University-Commerce 2014

Advisor: Tabetha Adkins, PhD

"'Dog-Whistle' Rhetoric: Pedagogy and Coded Language in Modern American Politics," is a historical examination of the role of divisive political rhetoric in modern American politics. This dissertation focuses specifically on the speeches of transformative politicians over the past fifty years, including Richard Nixon, Ronald Reagan, Bill Clinton, Hillary Clinton, Sarah Palin and Mitt Romney. This research assigns codes based on four categories, Religion/Values, Race, Class/Economics, and Freedom/Patriotism and examines the coded language used in political rhetoric that seeks to mask a divisive political agenda. This dissertation offers first-year writing teachers a framework through which to teach their students about coded political language through the lens of Critical Pedagogy, in aid of encouraging students to be more actively engaged in the political and economic life around them. This dissertation may be expanded into a book that traces the use of coded political language during the last three presidential elections and how coded political language is used in non-election years to support policy

initiatives, and the varying degrees in which this type of language is successful. I also intend to mine chapters of my dissertation to use as individual journal articles.

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Chapter 1

INTRODUCTION

This dissertation is an examination of the use of coded political rhetoric, also known as "dog-whistle" rhetoric, in American political discourse over the last fifty years. The traditional definition of dog-whistle politics is William Safire's definition in his book *Safire's Political Dictionary* that defines it as "the use of messages embedded in speeches that seem innocent to a general audience but resonate with a specific public attuned to receive them" (190). The political dog whistle is both a vehicle for alienation and affiliation. Politicians use the dog whistle in order to cause voters who hold their questionable beliefs to recognize the politician is "one of them" while not alienating the remainder of the population that might find those views uncomfortable. The political landscape of the post Civil Rights era rendered unacceptable the overtly racist rhetoric that had been tolerated to a certain degree before that time. The changes brought about by Civil Rights movement forced politicians who sought to speak to groups of voters who still held latent racist or sexist views to code their racist or misogynistic language in order not to alienate larger groups of voters who might find these positions detestable. However, I argue that the political dog-whistle has morphed and has been deployed in other situations in addition to race. Whatever reasons a politician uses a dog-whistle, its use complicates the relationship between voter and

politician and prevents the voter from making an informed decision about who they are voting for. The relationship between a voter and a politician is one of trust, and when that trust is broken through the use of misleading rhetoric, voters are harmed and the democratic process is damaged.

In my research, I examine speeches by transformative political figures from the past fifty years, including Richard Nixon, Ronald Reagan, Bill Clinton, Hillary Clinton, Mitt Romney and Sarah Palin. Each of these politicians used coded political rhetoric for different purposes and to varying degrees of effectiveness. I ground this research in discourse analysis and critical pedagogy. I then examine how my own biases inform this research and how I plan to acknowledge those biases. I will then provide a summary of the chapters that follow.

Background

The problem of race and the question of the African-American's role in America has been a subject of political debate since the republic's inception. Thomas Jefferson in his "Notes on Virginia" writes, "I advance it, therefore, as a suspicion only, that the blacks, whether originally a distinct race, or made distinct by time and circumstances, are inferior to the whites in the endowments both of body and mind" (Bizzell 185). Jefferson removed wording from the Declaration of Independence that would have charged King George III with inciting the slaves in the colonies to rise up against their masters even as the king had supported the slave trade (Bizzell 184). The issue of slavery led to the Three-Fifths Compromise, which allowed Southern States to use slaves in their population count, but they

could only count a slave as 3/5ths of a man, and the Missouri Compromise which prohibited slavery in the western territories of the Louisiana Purchase and north of the 36 degree 30' line, and of course, eventually the U.S. Civil War (Finkleman 407). Race, politics, and economy have been intertwined throughout the history of our nation and continue to inform the political rhetoric we engage in today. In his book *Democracy in America*, Alexis de Tocqueville described the American democratic experiment as the "working out of liberal democratic beliefs" in a country founded on egalitarian ideas (Smith 549). Yet, interwoven into this fabric of democracy is the fraught relationship between the black and white races that de Tocqueville observed; a relationship he predicted would define the country for years to come. De Tocqueville writes:

> These two races are fastened to each other without intermingling; and they are alike unable to separate entirely or to combine. The most formidable of all the ills that threaten the future of the Union arises from the presence of a black population upon its territory; and in contemplating the cause of the present embarrassments, or the future dangers of the United States, the observer is invariably led to this as a primary fact. (de Tocqueville, Book 1, Chapter 18)

In the 1960s, one hundred twenty years after de Tocqueville's observations and one hundred years after the Civil War, the question of the African American's place in society was still unsettled. African Americans still did not enjoy all the rights, especially the right to vote, that white Americans did. For the purposes of

this research, I define race as the cultural, ethnic, genetic, and social affiliations a person is born with. I specifically see race in relation to dog-whistle rhetoric as the dominant population employing this strategy against a minority population, either African-Americans, Hispanics, or other racial groups that represent the "other;" something other than white. When a politician is accused of engaging in dog-whistle rhetoric, they often counter with the accusation that the accuser is playing the "race card," or is accusing the speaker of engaging in racist behavior when little or no evidence of racism exists.

One political response to the passage of these Civil Rights laws was the development of the Southern Strategy by 1964 Republican Presidential nominee Barry Goldwater, and 1968 nominee Richard Nixon, which resulted in the Republican political takeover of the South in the 1970s and 1980s. While Goldwater lost in one of the largest landslides in U.S. history, in 1968, Richard Nixon won the presidency by trading on Southern disdain for civil rights legislation. During the 1968 campaign, according to Ian Haney-Lopez in his book *Dog-whistle Politics,* "Late in the campaign, Nixon opted to publicly tack right on race" by making a private deal with South Carolina senator Strom Thurmond, promising to "restrict federal enforcement of school desegregation in the South" (Haney-Lopez 23). Coded political rhetoric was developed to lure Southern Democrats to the Republican Party using words like as "states' rights," but Nixon also spoke to Northern voters using words like "bussing" and "law and order,"

thus proving that the Southern Strategy worked in areas other than the South (Haney-Lopez 24).

Nixon was not the only conservative politician to use coded language. Some scholars and political observers say Ronald Reagan was known for using coded language in order to engage in race baiting. When running for the Republican presidential nomination in 1976, Reagan told a story about a woman who lived on the south side of Chicago, collected welfare using several different names and drove a Cadillac—a story that was later found to be completely false (Krugman). When voicing his opposition to the food stamp program during the same campaign, Reagan would often talk "about how upset workers must be to see an able-bodied man using food stamps at the grocery store. In the South—but not in the North—the food-stamp user became a 'strapping young buck' buying T- 'Republican nomination for president in 1980, went to Philadelphia, Mississippi and delivered a speech where he called for a return to "states' rights" and promised to return power to the states that Congress had taken. Many saw this speech as an extension of the Southern Strategy. Haney-Lopez writes, "Reagan's race-baiting continued when he moved to national politics. Voters heard Reagan's dog-whistle" (58-59).

In 1988, during Vice-President George H.W. Bush's campaign for president, a Republican political action committee aired what became known as the "Willie Horton Ad." The ad, which featured a photo of the African American convicted murderer Willie Horton and blasted Massachusetts Governor Michael

Dukakis for allowing a weekend furlough program during which Horton raped and killed a woman (*Baltimore Sun*). Despite accusations by Dukakis and Vice Presidential candidate Lloyd Bentsen that the ad was racist, it was a narrative of the campaign that the Dukakis campaign was unable to overcome despite airing their own ad that featured "heroin dealer, Angel Medrano, who escaped from a Federal treatment program in Arizona and raped and murdered the mother of two" (Dowd). According to Maureen Dowd's article in the New York Times on the back and forth charges of racism between the two campaigns, Bush asked, "'What about their ad about the halfway house?' Mr. Bush asked. 'Is that racism against Hispanics? That's what I think'" (Dowd). Bush's advertising strategist, Lee Atwater, joked that their only question in bringing up Willie Horton was whether to show him with or without a knife in his hand (Dowd). According to Haney-Lopez, "the young Atwater held Richard Nixon as a personal hero, even describing Nixon's Southern strategy as 'a blue print for everything I've done'" (57). Haney-Lopez writes, "In all (Atwater's) capacities, he drew on the quick sketch of dog-whistle politics he had offered in 1981" (57). Haney-Lopez continues, "No campaign ever turns on one issue, but no one—no one—who followed the 1988 campaign believes George Bush had any more devastating ally than the homicidal black rapist Willie Horton" (106-7). Dog-whistle rhetoric may have existed prior to 1988, but Lee Atwater, who died in 1991, took its use to a whole new level, and in so doing I argue poisoned political discourse to the extent that it has never recovered.

In post-Atwater presidential politics, Bill Clinton and George W. Bush both used coded political rhetoric, but in very different ways from before. Haney-Lopez argues that while "Clinton hoped to refocus the attention of racially resentful whites onto the economy" in 1992, Clinton, too, engaged in racial pandering (108). Bill Clinton attempted to get working class whites, voters also known as Nixon's Silent Majority and Reagan Democrats, to stop voting against their financial and political interests and to join him in becoming "New Democrats" (Haney-Lopez 108). A "New Democrat" was one who was "resistant to black concerns, tough on crime, and hostile to welfare" and was crafted in part to appeal to Southern white voters who had left the Democratic Party (Haney-Lopez 108). Despite the fact that Clinton is often referred to as the first black President, during the 1992 campaign he felt as though he needed to slightly distance himself from African Americans and the traditionally liberal wing of the Democratic Party. To do this, Clinton disassociated himself from the African American politician Republicans most often used to pillory Democratic candidates, Jesse Jackson. During an event hosted by Jackson, "Clinton used the event to upbraid a young rap artist, Sister Souljah, for heated comments about the recent riots in Los Angeles as well as racially offensive lyrics" (Haney-Lopez 109). Clinton's intended audience was not the African Americans in the room, but rather "the white voters whom Clinton hoped would see him "standing up" to blacks by pushing away rather than embracing the Reverend" (Haney-Lopez 109). Kenneth O'Reilly in his book *Nixon's Piano: Presidents and Racial Politics from Washington to Clinton,* writes,

"What Clinton got out of the Sista Souljah [sic] affair were votes, particularly the votes of the so-called Reagan Democrats like the North Philadelphia electrician who said 'the day he told off that fucking Jackson is the day he got my vote'" (410).

Statement of the Problem

In the first part of Chapter 1, I have outlined the history of coded political rhetoric in American politics. From the earliest discussions about how the new nation would be formed, the issue of slavery, the problem of race and the compromises by politicians surrounding those issues created only stop-gap solutions and led to the Civil War. While politicians used coded political language to varying degrees of effectiveness throughout the latter part of the twentieth century, the use of coded language has seemed to explode during the last two presidential elections.

In his book *Safire's Political Dictionary*, William Safire defines dog-whistle politics as "the use of messages embedded in speeches that seem innocent to a general audience but resonate with a specific public attuned to receive them" (190). The term became widely used in Australia in the mid 1990s and was attributed largely to the politics of conservative Prime Minister John Howard, yet the phenomenon has existed for years. In Australia, Howard's campaigns for Prime Minister used phrases like "un-Australian," "mainstream," and "illegal" to describe immigrant populations who were unpopular at the time; yet the Howard administration when elected denied having used racist language to describe

immigrant groups. The Howard administration engaged in the type of plausible deniability that often follows the use of dog-whistle political rhetoric, stating that because there were no overtly racist comments, they could not be accused of racism (Safire 190).

On September 17, 2012, *Mother Jones* and the *Huffington Post* released a video tape of Republican presidential candidate Mitt Romney speaking to a group of wealthy donors at a fund raiser in May. Romney's remarks, that 47% of Americans would vote for President Obama in the general election because they are dependent on government support and are not willing to take personal responsibility for their own lives, while not the only reason Romney lost the general election in November, was seen as a major blunder for the Romney campaign. Because Romney's remarks fit closely with the narrative the Obama campaign had been promoting all summer, that Romney was out of touch with the average working American and would only work to help the wealthy portion of society if he were elected president. Congressman and 2012 Republican vice-presidential candidate Paul Ryan continues to describe America as consisting of "the makers and the takers" with the assumption being that the "makers" are rugged individuals who through sheer determination and hard work have created wealth that the "takers" want "redistributed" to them.

These examples of coded rhetoric with their thinly veiled racial overtones are only part of a larger narrative about society that the nation has engaged in over the past forty or fifty years since Civil Rights and the resultant Southern Strategy.

This type of overly simplistic rhetoric masks deeper divides in the nation and is used by politicians of the two major political parties in the U.S., corporations and news media to encourage economic and racial divisions. The goal of divisive political rhetoric is about more than winning elections. This type of rhetoric is used to alienate those people who do not support a particular cause and to speak to those who do. This type of political rhetoric can also be seen as a form of oppression. The racism that is exemplified by dog-whistle rhetoric is a way for politicians to make sure that they continue to have the ability to exert power. Growth of minority populations and the power that represents, changes in the way economic systems work which call for tax fairness and support a humanitarian safety net and laws that protect the voting rights of minorities, promote racial equality, and end gender discrimination are all threats to the power that is neo-liberalism. Yet this phenomenon is part of a larger narrative about society that the nation has engaged in over the past forty or fifty years.

Republican political strategist Lee Atwater, in an interview in 1981 with Alexander Lamis, described the Southern Strategy and dog-whistle politics this way:

> You start out in 1954 saying "Nigger, nigger, nigger." By 1968, you can't say "nigger"—that hurts you. Backfires. So you say stuff like forced busing, states' rights and all that stuff. You're getting so abstract now (that) you're talking about cutting taxes, and all these things you're talking about are totally economic things and a

> byproduct of them is (that) blacks get hurt worse than whites. And subconsciously maybe that is part of it. I'm not saying that. But I'm saying that if it is getting that abstract, and that coded, that we are doing away with the racial problem one way or the other. You follow me—because obviously sitting around saying, "we want to cut this," is much more abstract than even the busing thing, and a hell of a lot more abstract than "Nigger, nigger." (Lamis)

Lamis printed the quote his book *The Two Party South* without revealing Atwater's name; however, in a later book, Lamis revealed Atwater was the origin of the quote. Racism can come in the form of policy initiatives or laws that disproportionately affect people of color. When attempting to decide if a politician is racist, one must look not only at their rhetoric but also at the policies they support. Sometimes the two dovetail; one example is when Paul Ryan in his poverty tour remarked that "inner city men" did not understand the culture of work, and given the way Ryan has voted in the past, specifically votes not to extend unemployment benefits or to slash food stamp funding. Sometimes policy and rhetoric are more complicated, as in the case of Bill Clinton who had his Sister Souljah moment and voted for welfare reform, but also held widespread political support from African American voters.

According to Safire, "(t)he political dog-whistle may have derived from the term's use by pollsters. Richard Morin, director of polling for *The Washington Post*, observed in a 1988 article that 'subtle changes in question-wording

sometimes produce remarkably different results…'" (190). Pollsters who engage in push polling often utilize this type of rhetoric to elicit the responses they are seeking. While pollsters often serve the needs and the agendas of the politicians they work for, it is the use of dog-whistle political rhetoric that is most destructive. The use of this type of coded rhetoric masks the true agenda of a candidate and does not provide voters with a clear idea of whom they are voting for. When politicians says they support "states' rights," which is often coded language for anti-Affirmative Action policies, they are often engaging in the subtle racism that is exemplified by dog-whistle rhetoric. It is a way for politicians to be re-elected by voters who share their views and to further ensure that they continue to have the ability to exert power without making their true agenda known to those voters who might find it unacceptable.

This type of political rhetoric is often used to describe racial or economic groups in negative ways by politicians who seek to hold office in order to dismantle institutions and policies set up to improve the lives of those marginalized groups. Ian Haney Haney-Lopez argues that the use of dog-whistle politics "succeeded in winning white votes; more direly, it also worked to turn whites against liberal government. New Deal opponents had long repeated a tired mantra: the undeserving poor abuse government help, robbing hardworking taxpayers" (6). By conflating race and class, politicians are able to convince voters that lack of upward mobility or their stagnant incomes are the result of race rather than economics. Freire writes, "Class conflict is another concept which upsets the

oppressors, since they do not wish to consider themselves an oppressive class…""(124). Coded political rhetoric masks the underlying agenda of politicians who wish to divide people into opposing groups who, in actuality, have more in common with each other than they would like to admit. The working-class African-American in Detroit is beleaguered by the same economic pressures as the working class white person in Commerce, Texas. When voters are divided, they are unable to make informed choices about a candidate's true agenda; therefore, the democratic process is sullied.

The very fact that we are able to recognize dog-whistle political rhetoric and comment on it means that it is not entirely hidden. Goodwin and Saward write, "The fact that the practice is noticed, that it is has acquired a name and a bad press, suggests that the message is not literally inaudible to others beyond its intended target" (471). Yet it is still hidden enough that its appeals "remain inaudible to most, instead resonating with their unconscious racial anxieties and eliciting support only so long as they remain hidden" (Haney-Lopez 178). Tali Mendelberg's study of the Willie Horton ad examined the response to the ad in addition to the ad itself. According to Haney-Lopez, "Mendelberg found that support for Bush rose precipitously during the early phase of the Horton campaign, and then plummeted sharply once Jackson shoved race to the surface" (177). Thus, keeping these messages hidden is "important to (its) ability to achieve the intended result of mobilizing whites' racial fears, stereotypes and resentments" (Haney-Lopez 177).

Purpose of Study

One would assume there are two types of political rhetoric, the type that is public that can contain "dog-whistle" rhetoric, and private political rhetoric that politicians use when speaking to private audiences. This dissertation will argue that dog-whistle rhetoric has become so embedded in the collective American psyche that even in small group private political meetings, a politician will speak in coded language. We seldom get to see or hear the private political rhetoric a politician engages in. In an event very similar to Romney's 47% remarks, as a presidential candidate in 2008, President Obama told a private group of wealthy donors in San Francisco that people in Pennsylvania who supported John McCain and the Republican party were doing so because "they get bitter, they cling to guns or religion or antipathy to people who aren't like them or anti-immigrant sentiment or anti-trade sentiment as a way to explain their frustrations." Many saw these remarks as an outright attack on working class and rural values (Smith, Ben). Presidential campaigns produce great political rhetoric to analyze. This dissertation also argues that Democrats and Republicans tend to utilize dog-whistle rhetoric toward different ends. Finally, this dissertation also provides a framework for teaching first-year writing students about dog-whistle rhetoric.

Research Questions

Using examples of speeches by politicians including Mitt Romney, Sarah Palin and Hillary Clinton, and to a lesser extent the presidential campaign

advertisements of Richard Nixon, Jimmy Carter, Ronald Reagan and George H.W. Bush, this dissertation will address the following research questions:

1. How has coded political rhetoric been used since the 1968 U.S. Presidential election through today?
2. How have Richard Nixon, Ronald Reagan, Bill Clinton, Hillary Clinton, Sarah Palin, Mitt Romney used coded language in their speeches?
3. How is coded political rhetoric used differently by Republicans and Democrats?
4. How can first-year writing teachers teach students to recognize and react to coded political rhetoric?

Methodology

In order to answer these research questions, I will focus on the political rhetoric and the context in which this rhetoric was used in the following:

1. Richard Nixon's 1968 Republican Presidential nomination acceptance speech and his call for a return to "law and order"
2. Ronald Reagan's 1980 speech in Philadelphia, Mississippi in which he voiced his support for "states' rights"
3. Bill Clinton's response to rap artist Sister Souljah during a speech at a meeting hosted by Jessie Jackson
4. Hillary Clinton's March 19, 2008 speech in Michigan in which she said no matter what one's color or religion, their vote counts

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Exploring Four Barriers Experienced by African Americans in Healthcare: Perceived Discrimination, Medical Mistrust, Race Discordance, and Poor Communication

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Exploring Four Barriers Experienced by African Americans in Healthcare: Perceived Discrimination, Medical Mistrust, Race Discordance, and Poor Communication

by

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Abstract

For many health conditions, African Americans bear a disproportionate burden of disease, injury, death, and disability compared to European Americans. African Americans also use health services less frequently than do European Americans and this underuse of services contributes to health disparities in the United States. Studies have shown that some disparities are present not as a result of poor access to care, but, to a certain extent, as a result of the experiences patients have at their doctors' offices. It is, therefore, essential to understand African American patients' perspectives and experiences with healthcare providers. Past studies have shown that four barriers affect the quality of patient-provider relationships for African Americans: perceived discrimination, medical mistrust, race discordance, and poor communication. The studies, however, have not looked at how these barriers manifest when African Americans speak about their perspectives and experiences with health care providers. This project was a secondary data analysis of qualitative data provided by adult African American community members from Portland, Oregon with diabetes or hypertension or both, each of whom participated in one of 10 focus groups. The focus groups were conducted as part of a study that applied community based participatory research (CBPR) principles to understand patients' experiences with their doctors. Using a deductive approach, this analysis enhanced the understanding of how the barriers play a role in patient-provider relationships. Further, the analysis showed how the barriers are interrelated. In learning African American patients' experiences and perspectives on these four key barriers, the investigator proposes recommendations for healthcare providers as to how they can best deliver quality care for African Americans.

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Introduction

Racial and ethnic health disparities create persistent problems for African Americans in the United States (CDC, 2011). For example, in 2003, the difference in life expectancy at birth between African Americans and European Americans remained substantial at 6.3 years for men and 4.5 years for women (Harper et al., 2007). African Americans continue to show higher prevalence than the majority population for diabetes, hypertension, and cardiovascular disease (Office of Minority Health, 2009). Although African Americans have higher morbidity and mortality rates, they are less likely to use healthcare. Even when they do use healthcare services, they are less likely to adhere to medication or utilize the same healthcare service again than European Americans (Diala et al., 2000; Traylor et al., 2010).

Underutilization of health services is an important factor that contributes to the existing health disparities (Hass et al., 2004; Weinick & Krauss, 2000). Although service use is affected by many factors such as socioeconomic status, access to care, and health insurance coverage, an important key element to the utilization and continuity of health services is the quality of care itself for ethnic minorities (Zastowny, Roghmann, & Cafferata, 1998). African Americans have been shown to receive lower quality of care than their European American counterparts (Mayr et al., 2010; Bach et al., 2004). For example, obese African American patients are less likely to receive counseling about diet and exercise than their European American counterparts (Bleich, Simon, & Cooper, 2011). Further, African Americans are less likely to receive many types of medical services and procedures (Egede & Bosworth, 2008). For example, African American women are more likely to die from breast cancer than any other ethnic group (American

Cancer Society, 2009). However, African American women are less likely than European American women to have breast cancer diagnosed from a mammogram (18% versus 31%) or clinical breast exam (8% versus 21%; Elmore et al., 2005). Many of these problems with quality of care can be explained by the barriers found in the relationship between the minority patient and his or her physician (Scheppers et al., 2006). As Ashton et al. (2003) suggest some disparities appear after the patient gets to the doctor's office.

The patient-provider relationship is an important factor affecting quality care for patients (Meredith et al., 2001; Saha et al., 2003). There is evidence that African Americans have poor relationships with their healthcare providers. African Americans, for example, report less satisfaction with the quality of care and are more likely to report communication problems with physicians than are European Americans (Collins et al., 2002). African Americans are shown to be less active in patient-physician partnerships (Cooper et al., 2006) and report lower quality interactions with their physicians (Cooper-Patrick et al., 1999).

Why do African Americans report unfavorable views toward health care services? Prior research suggests four reasons: perceived discrimination (Casagrande et al., 2007), medical mistrust (Benkert et al., 2006), race discordance (Saha et al., 1999; LaVeist & Nuru-Jeter, 2002), and poor communication (Rim et al., 2007) between patient and provider. However, no studies have yet examined these four barriers together and how they might be interrelated to one another. Further examination of these four factors can help researchers understand how they affect the patients' healthcare experiences. African American patients' reports of their past experiences with, and perceptions of, healthcare institutions and healthcare providers may yield valuable insight into these four factors.

In this study, I explored whether, and in what ways, these four factors appeared in the focus group discussions of African American men and women. Prior studies have shown that these barriers negatively affect patient-provider relationships, but few have captured how patients actually speak about these barriers. By using a deductive (top-down) approach in this study, moving from *a priori* concepts to exploration of those concepts in the discussion narratives, I have been able to explicate each of these concepts in patients' own words, and to demonstrate the intersectionality that exists among these concepts.

To fully understand the four concepts, it is important to first understand how *African American*, as an ethnicity, is defined in this study. *Ethnicity* is defined in terms of the commonality of culture and tradition that a group of individuals share in a social context. Markus (2008) draws from the literature on social identity to offer a more comprehensive definition:

> Ethnicity is a dynamic set of historically derived and institutionalized ideas and practices that (1) allows people to identify or to be identified with groupings of people on the basis of presumed (and usually claimed) commonalities including language, history, nation or region of origin, customs, ways of being, religion, names, physical appearance, and/or genealogy or ancestry; (2) can be a source of meaning, action, and identity; and (3) confers a sense of belonging, pride, and motivation. (p. 654)

At a conceptual level, the often muddled uses of *race, ethnicity* and *culture* in the social sciences echo the uses of the terms *sex* and *gender*. Although, at first, these may seem to be different matters they bear conceptual parallels. For example, feminist scholarship on sex and gender argues that gender serves as both a *subject variable* – an enduring characteristic of a person or persons – and a *stimulus variable* – a perceived characteristic

which is mainly of interest because of the responses of others who respond to that characteristic (Shields & Dicicco, 2011). The difficulty of the concept *race* is its misuse as a supposed subject variable. The difficulty of the concept *culture* is its nature as a subject variable, when the phenomena of interest require a construct which is in part subject variable and in part stimulus variable. Therefore in this study, have examined the experiences and perspectives of individuals who hold in common a self-identified African American *ethnicity*. I did not explore cultural or other forms of diversity such as socioeconomic status within the African American group. Rather I construed the social category *African Americans* as a group of people with commonalities including language, history, customs, and ancestry. I treated ethnicity as a construct which is simultaneously a subject variable and a stimulus variable.

Studies have shown that race and ethnicity shape psychological experience (Cuddy, Fiske, & Glick, 2007; Plaut & Markus, 2005, Markus, 2008). Further, ethnic and racial identities have been shown to be important predictor of attitudes and behaviors (Ramirez-Valles, Zimmerman & Newcomb, 1998; Kaplan et al., 2004). Many of these behaviors and attitudes are shaped by how the "other" sees the members of a given group -- their status, in other words, as stimuli or attitudinal targets. Simplified conceptions of a particular social group, held by others who are not in that group, can have negative effects on target group members (Steele & Aronson, 1995). Stereotypes are beliefs, and prejudice is an attitude; however, stereotyping can provide cognitive content which facilitates or perpetrates prejudice and discrimination (Link & Phelan, 2001; Sekaquaptewa & Thompson, 2003). Such prejudice and discrimination do not always have to be overt to affect the attitudes and behaviors of target group members. As Steele

and Aronson (1995) have compellingly demonstrated, the experience of anxiety or concern in a situation wherein individuals have the potential to confirm a negative stereotype about their social group can affect individuals' performance. This is particularly pertinent when the target individual believes he or she is being mistreated based on the negative stereotype.

Such beliefs, particularly in the healthcare system, are likely to have multiple causes, including experiences of discrimination and disrespectful treatment, and including more subtle perceptions of being perceived stereotypically by healthcare professionals (Blanchard & Lurie, 2004; Van Houtven et al., 2005). Studies have shown that healthcare providers hold conscious and unconscious negative stereotypes of minority patients, tending to view them as less educated and less likely to be adherent than their European American counterparts (van Ryn & Burke, 2000).

How does the subjective experience of discrimination affect the health of target persons? The model by Pascoe and Richman (2009), shown in Figure 1, is based on their meta-analysis of research on discrimination and health. This model illustrates three pathways through which perceived discriminatory experiences may affect mental and physical health. First, perceptions of discrimination could have a direct effect on health (path a); for example, perceived discrimination has been shown to be associated with psychological distress (Williams et al., 2008), depression symptoms (Bogart et al., 2011), and overall poor mental and physical health (Penner et al., 2009). As a second possibility, the relationship can be partially *mediated* through stress responses to a discriminatory event (paths b and c). For example, routine discrimination can become a chronic stressor that may erode an individual's protective resources and thereby increase vulnerability to

physical illness (Gee, Spencer, Chen, & Takeuchi, 2007). Pascoe and Richman (2009) argued that if an individual perceives discrimination on a regular basis, stress responses are activated more often, potentially leading to a frequently negative emotional state. Third, a mediating mechanism, tested by Pascoe and Richman in their meta-analysis, the role of health risk behaviors (path d) emerge as possible coping mechanisms when discrimination is experienced. For example, an African American who believes she has received unfair treatment by a physician may be less likely to adhere to the physician's recommended treatment plan or to return for follow-up visits. As represented by path e, these consequences can in turn have detrimental effects on psychological and physical health.

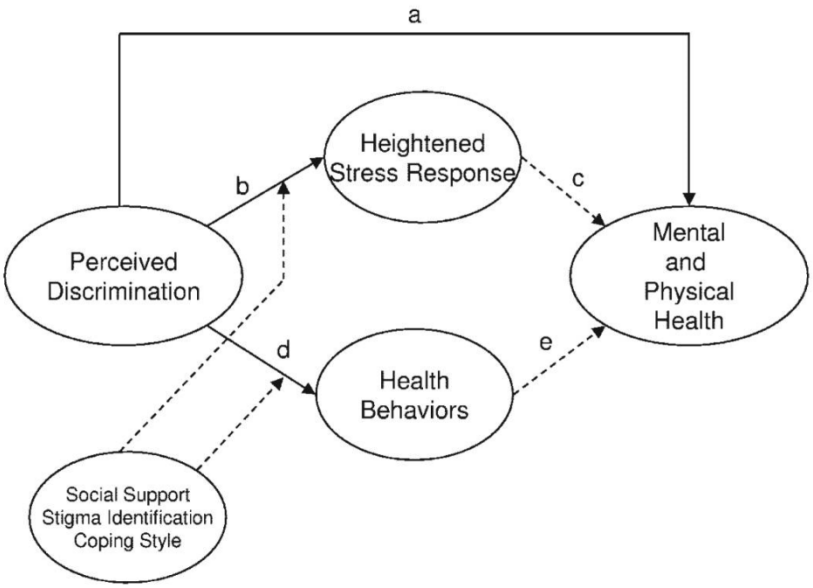

Figure 1. Pathways by which perceived discrimination influences health outcomes (Pascoe & Richman, 2009). Solid lines indicate analyzed pathways; dashed lines represent pathways hypothesized by past research.

Historically, African Americans have experienced discrimination in the United States. African Americans are more likely to perceive racism and discrimination than are

European Americans (Robert Wood Johnson Foundation, 2005). For example, a study of 4,157 randomly selected U.S. adults comparing perceptions of health care among a variety of different racial and ethnic groups found that member of many ethnic minority groups view their health care situations differently and, often, more negatively than European Americans. Particularly, African Americans perceived discrimination in receiving health care, and many felt that they would not receive the best care if they were sick (Blendon et al., 2007). Most differences remained when socioeconomic characteristics were controlled for analytically. Adegbembo (2006) similarly found that African Americans perceived more racism in the healthcare system than do European Americans. Studies have further demonstrated that perceived discrimination contributes to differences in patient behavior. For example, in a study of randomly selected community members, Van Houtven et al. (2005) found that perceived discrimination was associated with the person delaying medical tests and treatment. Reports of perceived discrimination were also linked to lower rates of participation in preventive health services (Blanchard & Lurie, 2004).

Perceived discrimination has been shown to be negatively associated with physical and psychological health as well (Williams & Mohammed, 2009; Burgess et al., 2008; Brondolo et al., 2009a, Brondolo et al., 2009b). Reports of perceived discrimination from African American patients are associated with lower likelihoods of quality treatment (Napoles-Springer et al., 2005; Hoyo et al., 2005; Casagrande et al., 2007; Fowler-Brown et al., 2006; Facione and Facione, 2007). For example, African Americans who perceive discrimination report lower medication adherence, provide lower patient ratings of visit informativeness, and underuse healthcare services compared

to European Americans (Casagrande et al., 2007; Hausmann et al., 2011; Burgess et al., 2008). Before these negative perceptions can be addressed, research must uncover some of the factors that influence them. One factor that has been shown to be a major influence in African American's perception and experience is medical mistrust.

Medical mistrust

Although other researchers (Thompson et al., 2003; Hammond et al., 2010) have not used the term *mistrust* as a cultural phenomenon, they indicate their awareness of the prevalence of mistrust toward healthcare found among African Americans. Therefore, I use *medical mistrust* as a main term encompassing a range of terms (e.g., cultural mistrust and medical distrust) that are found in studies pertaining to African Americans in the healthcare system. Terrell and Terrell (1981) defined *cultural mistrust* as an inclination among Blacks to mistrust Whites, with mistrust being most evident in interpersonal and social relations. Terrell and Terrell describe this as a cultural phenomenon that exists for African Americans, having developed a reluctance to trust majority ethnic group members due to historical and contemporary experiences with racism and oppression. As Whaley (2001) mentions, this is not to be misconstrued as clinical paranoia, in which the distrusting persons see themselves as uniquely targeted, and thus may be seen as psychopathological; rather, cultural mistrust is a response style from African Americans based on historical and contemporary experiences with racism and oppression.

Scholars such as Whaley (2001) and Townes (2009) have linked long time oppression, social disadvantage, and historical events that involved African Americans receiving unfair treatment to the present mistrust that many African Americans hold

towards the healthcare system. African American men have been shown to choose not go to the doctor because of their distrust (Hammond et al., 2010). This deep mistrust towards healthcare organizations and health professionals has been linked to dissatisfaction, noncompliance, and underuse of healthcare services (Hammond, 2010; Hall et al., 2001; LaVeist et al., 2000; LaVeist et al., 2009). African Americans who hold mistrust tend to have more negative views and expectations of their health providers than do other African Americans who do not hold mistrust (Thompson, Bazile, & Akbar, 2004). For example, a study of 214 African American men diagnosed with HIV examined whether a specific form of medical mistrust – HIV conspiracy beliefs (e.g., "HIV is genocide against African Americans") – was associated with antiretroviral treatment nonadherence among African American men with HIV (Bogart et al., 2010). Confirmatory factor analysis revealed two distinct conspiracy belief subscales: genocidal beliefs (e.g., "HIV is human-made") and treatment-related beliefs (e.g., "People who take antiretroviral treatments are human guinea pigs for the government"). Both subscales were related to antiretroviral treatment nonadherence, thus showing that medical mistrust may contribute to health disparities by discouraging appropriate treatment behavior. Nicolaidis et al. (2010) similarly reported that African American women with histories of depression and/or partner violence viewed the healthcare system as racially biased and untrustworthy as well. In that report, an African American woman illustrated the lack of trust toward European Americans, "You know, it's in our culture; you don't go tell White people nothing." This lack of trust towards the dominant culture reflects that mistrust need not be based on personal past experience (e.g., participation in the Tuskegee study), but can be learned through members of one's ingroup (e.g., ingroup knowledge of the Tuskegee

study). Consequently, learned distrust may become part of the schematic framework with which one sees, and responds to, the social world.

Race discordance

LaVeist and Nuru-Jeter (2002) argue that racial and ethnic disparities in the use of health services, quality of care, and health status would be reduced by increasing the number of minority health care providers in the U.S. This is based on the notion that race discordance between provider and patient contributes to disparities in health. In light of the earlier discussion on the concepts of race, culture, and ethnicity, it is important to mention that in the existing literature, race concordance is defined as patients having the same racial and ethnic background as their healthcare provider; therefore I have used the term *race* while considering it, like ethnicity, both a stimulus variable and a subject variable.

According to Malat et al. (2009), African American patients are less likely than European American patients to see a race concordant doctor. It is then assumed that if an African American patient has a race concordant doctor, he or she will most likely use health services more often and rate those services favorably. Saha et al. (1999) found that African Americans patients were more likely to rate a race concordant physician more favorably and were more likely to report receiving preventive care and medical care than patients with race discordant doctors. Similarly, Cooper-Patrick et al. (1999) found that African Americans patients who had race concordant physicians rated their visits as significantly more participatory than patients who had race discordant physicians. These findings suggest that the patient's perception of the physician's ethnic background may affect the quality of care; the same may be said of the physician's perception of the

patient's ethnic background, as well. van Ryn and Burke (2000) found that European American physicians rated African American patients as less intelligent, less compliant, and more likely to engage in risky health behaviors than other patients. van Ryn and Burke suggested that such attitudes may be perceived by patients via nonverbal cues or verbal tone or inflections, consequently influencing the patient to negatively respond to the physician's behavior. In other words, in the case of a European American physician, the European American physician's behavior can lead to a poor interaction with the African American patient. This is turn leads the African American to prefer a race concordant doctor (Chen et al., 2005).

Studies have shown that African Americans who had the ability to choose their own doctor were significantly more likely to be race concordant with their physician compared with respondents that lacked choice in their physician (LaVeist & Nuru-Jeter, 2002; Saha et al., 2000). Patients are more likely to trust and feel more comfort with physicians of the same ethnic background (Street et al., 2008). LaVeist and Nuru-Jeter (2002) suggest that the source of such trust among patients may be an intrinsic sense of connection to members of their own racial/ethnic group, with the expectation that a physician of their same racial or ethnic group will exercise a greater sense of agency with regard to patient care. This may explain why African Americans report a more positive attitude toward race concordant doctors than race discordant doctors and believe race concordant doctors understand their health problems (Malat et al., 2009; Saha et al., 1999).

Race is not the only variable on which physicians and patients may be similar or different. Gender, age, and language or dialect are further variables which merit study.

Even so, the mentioned studies have shown that race concordance plays an important role in African Americans' use of services and communication with their physicians. Qualitative investigations may help to uncover why race concordance is valued by African American patients, while also exploring the complexities of this phenomenon. Such an understanding may help agents within the healthcare system to determine where greater efforts should be placed, for example, increasing the number of African American physicians and/or improving the ability of how physicians interact with patients who are not of their own ethnic background.

Poor communication

Effective communication between patients and providers is essential to achieving positive health outcomes. It is also essential in the maintenance of positive patient relationships among patients in general (Piette et al., 2003; Travaline, Ruchinskas & D'Alonzo; 2005). A successful relationship contributes to the patient's continuance of care and adherence to prescriptions. Poor communication, conversely, can become a cause for the low use of services for ethnic minorities, particularly African Americans. Patient ethnic background is an often overlooked but important variable within doctor-patient communication studies (Schouten & Meeuwesen., 2006). It is important to examine how a patient's ethnic or cultural background affects communication with healthcare providers (Schouten et al., 2007). In turn, a doctor's understanding of the patient's ethnic background can in some cases benefit the communication (Schouten et al., 2007).

Studies have shown, however, that this level of understanding is largely missing. For example, Gordon et al. (2006) found that African American patients who were

diagnosed with pulmonary nodules or lung cancer received less information from their doctors and were less active participants than European American patients. They also found that African American patients engaged in fewer communication behaviors (i.e. asking questions, expressing concerns, assertions) that usually bring forth more information from doctors. These findings imply that African American patients are less active in the exchange of information and involvement in decision making, thus decreasing the chance of obtaining a positive health outcome (Stewart, 1995). This lack of involvement needs further understanding; if it is, in part, a response to the physician's communicative behavior this would have implications for the training of physicians.

Studies have shown that African American patients report that doctors do not spend enough time with them, do not respect their intelligence, and do not provide sufficient explanations (Gordon et al., 2006; van Ryn and Burke, 2000). Furthermore, studies have found that the doctor–patient interaction in interethnic consultations is rated by third-party observers as less friendly and warm than the doctor–patient interaction in consultations between persons of the same ethnic background (Schouten et al., 2006). As a consequence, patient non-adherence and dissatisfaction become more likely to occur.

Thus, the relationship between patient and provider is a key place to look to improve our understanding of patients' experiences of disparities in care and to identify possible steps for intervention. This study asked:

Research Question 1: To what extent do the four concepts of perceived discrimination, poor communication, medical mistrust, and race discordance manifest when patients speak about their experiences with, and their perspectives on, healthcare providers?

Research Question 2: To what extent do patient narratives about their experiences with, and their perspectives on, healthcare providers help us to understand the four concepts of perceived discrimination, poor communication, medical mistrust, and race discordance? A deeper understanding of these four concepts may contribute to a fuller picture of African Americans' experiences with the healthcare system.

Method

This secondary data analysis is based on an original study which aimed to determine what constitutes a good or bad relationship from the perspective of patients, across three broad ethnic groups (African American, Latino/Latina, European American). The study, known as Project EQUALED (Exploring the Quality of African American and Latino/Latina Experiences with Doctors), was supported by the Robert Wood Johnson Foundation with Somnath Saha as Principal Investigator and with Kerth O'Brien and Teresa Gipson as Co-Principal Investigators.

Community-Based Participatory Research

In its work with members of the African American community, Project EQUALED employed several principles of community-based participatory research (CBPR). Israel et al. (1998) give an in-depth and widely recognized explanation of CBPR, describing it as a collaborative and equal partnership approach to research that involves community members, community organization representatives, and researchers in all aspects of the research process. Israel and colleagues further state that the partners contribute their expertise and share responsibilities to increase understanding of a certain phenomenon, with the goal of integrating the gained knowledge with action to enhance

the health and well-being of community members (Israel et al., 1998). Although Israel et al. (1998) provided additional principles, the principles which were particularly relevant for this particular study included that CBPR recognizes community as a unit of identity; CBPR promotes a co-learning and empowering process that attends to social inequalities; CBPR addresses health from both positive and ecological perspectives; and CBPR involves a long-term commitment by all partners.

A CBPR approach may be particularly appropriate when the community partners and participants of interest are African Americans. Because, as mentioned earlier, many members of the African American community lack trust towards people of government institutions, this approach enhances trust among potential and actual participants, empowers and provides resources to the participating African American community, and creates a genuine relationship between researcher and community members. To operationalize these CBPR principles, Project EQUALED included a community liaison on the research team and enlisted the guidance of a Community Advisory Board. In recruiting participants the project used community-based recruitment strategies, including attending community events, advertising in community venues, and relying on word-of-mouth dissemination by participants and advisory board members.

Focus group facilitators and training. Potential African American focus group facilitators were identified by community advisory board members and other community members. Focus group facilitators attended a one-day, 8-hour training session; the academic members envisioned a pool of potential facilitators from which to draw from, based on availability. The first half of the session was largely didactic and included content on the purpose of focus groups, their advantages and disadvantages as a data

collection method, and guidelines for appropriate focus group facilitation. In the second half of the training session, the academic members held mock focus group sessions, where trainees practiced asking questions and facilitating discussion. Trainees were given incentives for their time and participation. The academic members chose four African American trainees (two men, two women) to lead the focus groups. All, but one, focus groups were led by the four African American trainees. One focus group was co-moderated by the (European American) project manager and an African American community member.

Participant recruitment. The research team posted study flyers in a variety of venues (restaurants, stores, barber and beauty shops, etc.). The research team avoided clinics and hospitals as recruitment sites, because the researchers wanted the sample to be truly community-based, not clinic-based, and because the researchers did not want to oversample from any particular health care facility. Because the enrollment method could have potentially led to few enrollments, a member of the research team went to specific sites and events (e.g., a community walk) and enrolled participants onsite. The researchers asked potential participants to spread the word in their community about this study.

Focus groups. The research team conducted focus groups to identify the perspectives of participants, as well as to understand their shared experiences, while accessing the language participants used to think and talk about the study topics. These purposes are consistent with social scientific uses of focus groups (Morgan, 1996; Hughes & DuMont, 1993). The focus groups were held at a community coffee house in inner NE Portland. The researchers formed a total of ten African American focus groups,

five groups of females and five groups of males. The focus groups had between 6 to 10 people in each. During the focus group sessions, one moderator asked the questions and led the discussion, while the other moderator took notes and monitored the discussion to ensure balanced participation. Often moderators traded these roles within a given discussion. With help from the Community Advisory Board, research team members created the focus group guide to learn about people's actual experiences in the healthcare system, particularly their interactions with physicians, as well as their values and preferences regarding doctor-patient interactions. The interviews were semi-structured, allowing the moderators the freedom to probe interesting areas that occurred during the sessions (Smith, 1995). The focus group guide included questions about experiences with most recent visits to the doctor; questions about good experiences with doctors (i.e., actual experiences and what makes a good experience); questions about bad experiences with doctors (actual experiences and what would have made for a better experience); questions of experiences and preferences regarding physician's race/ethnicity and advice to doctors. After each focus group session, the investigators distributed a brief questionnaire asking participants to provide demographic information.

Transcription. A freelance transcriptionist transcribed all of the African American focus group dialogue and placed the transcriptions into Microsoft Word documents. Each focus group was given its own file.

Data Analysis

In the original study analyses we used grounded theory to create theme-driven understandings of patient experiences and perspectives for each of the three respective ethnic groups. Although I was not involved in the original data collection I was involved

in the analysis of study data (Cuevas et al., 2011). In this secondary analysis instead of using this same approach to the data I used a deductive approach; that is, I began with the framework of the four concepts to see how the existing codes, based on participants' discussion narratives, conform to the already-developed framework.

I used *NVivo 9 Student*, a qualitative software, to assist me in my analysis of data. I began my analytic process by looking at the existing codes from the original study to look for codes pertaining to the four barriers. I then created a new NVivo file and began to code the text using the four frameworks (i.e., perceived discrimination, medical mistrust, poor communication, race discordance). I organized labels and categories under which the raw data seem to fit. That is, I devised a common system of four main categories (i.e., perceived discrimination, medical mistrust, race discordance, poor communication) and sub-categories across the whole set of 10 focus groups, and used that as a means of searching for and retrieving large segments of labeled data. I decided this approach offered a systematic overview of the scope of the data, to aid finding examples which do not appear in an orderly way in the data, to aid locating conceptual, analytical categories in the data, and to help getting a handle on the data for making comparisons or connections (Ritchie & Lewis, 2003). This method also allows others to replicate the analytic process or review the analytic building blocks to better understand the final results. I also wrote memos -- essentially, these are margin notes -- of the way I interrogated the data, developed categories, and how relationships between categories manifest. I also wrote memos of my own thoughts about the data and future research directions. These memos were formally logged and viewed as part of the interpretative process. Lastly, using *NVivo 9 Student*, I built a hierarchy of categories (tree nodes) to

examine how well the four frameworks fit in the data and generate explanations. As has been stated elsewhere, "The ability to explain, or build explanations, lies at the heart of qualitative research" (Ritchie & Lewis, 2003, p. 215). This final phase allowed me to explain why the data took the forms that I had identified, and to address recurrent linkages or contradictions I found in the data.

Results

A total of 60 African Americans participated in the focus groups. Thirty-five African American men participated in the study with ages ranging from 27 to 81 and the mean age being 56. Twenty-five African American women participated in the study with ages ranging from 24 to 89 and the mean age being 58. About three quarters of the participants had high blood pressure, about one-half had diabetes, and about one-third had both conditions (Saha, 2007).

The data provided insight into the four concepts which I had identified from prior literature. I found the four concepts in both men's and women's focus groups, at times manifesting differently. For instance, the theme of medical mistrust was much strongly evident in the women's focus groups. In the men's focus groups, however, when participants spoke about mistrust, they also spoke about poor communication and discrimination. I also found relationships among concepts in the participants' reports. For example, when the person spoke about poor communication, perceived discrimination was embedded in that experience. There is, however, no clear sequence in how these barriers manifest. Therefore, I name the connection among the barriers "intersectionalities" in this section; this term represents the multiple forms in which these

barriers manifest within one another. This section is structured with examples of each respective theme and then followed by examples of intersectionalities.

Perceived discrimination

African Americans in this study reported experiences of discrimination which took place at their doctors' offices but before they entered the doctors' examining rooms. The ambiguous situation of not knowing whether their treatment in the waiting room was in response to their racial/ethnic background caused concern and distress. One participant discussed his experience in a waiting room.

> Actually, I've had good experiences with all my doctors. I just recently got a new doctor in the past month, and they saw me for the first time about a month ago. I always feel like I'm getting skipped over. I don't know if it's a Black thing or not, but I always feel like, I was here before somebody else, and they went in before I did, but I sort of try to keep that to myself. But outside of that, people I talk to and the receptionist, or whatever, they're always pretty nice to me. I haven't had any problems outside of feeling like, I don't know, like I said, if it's a Black thing. I'm just being skipped over.

Another man makes it clear that for him such incidents were not isolated from one another. The experience of discrimination happened often when he went to the doctor's office. He underwent a similar process of questioning whether the treatment was discriminatory or not.

> That's all the time. That's all the time. Every time I go to a doctor, it seems like I'm always there on time, um, and, you know, here are other people, say, at certain different appointments I go to for different reasons, I'll hear people say, "my appointment's at 4:15," and, you know, my appointment's at 4:00, but somehow, they got in before I did and, I'm thinking, "Are they more injured than I am? Are they sicker than I am? What's going on?" The first thought that comes into my mind is, "Is it because I'm Black?"

As opposed to keeping the tension to himself, he tried to make sense of his experience by asking other people whether the experience was discriminatory or not. He did not want to wrongly interpret his experience, but he wanted to resolve the ambiguity he felt:

> I've still been confused. I've still been confused and wondering if it's just me, you know, once again. Like I said, a Black man gets paranoid sometimes for no reason. Well, was I just getting… was I overreacting? Am I over... Am I seeing this completely wrong? That's why I ask people all the time, "What do you think about that statement? How does that make you feel, if you were to hear, 'you know you almost passed.'" You know, it just didn't sound professional to me. It threw me off.

This experience was not exclusive to African American men. When speaking about experiences of discrimination, the men brought up the experience of long waits in the waiting room. The women, however, spoke about experiences interacting with medical staff. They noticed a difference in how the medical staff interacted with European American patients and African American patients.

> Well, my primary care doctor, doctor of internal medicine, is very helpful towards me, and she goes out of her way to help me, but I notice when I'm in the receptionists' area, that the receptionists seem more willing to chit-chat with the White clients that come through than they are with me. They'll have them standing there talking to them and laughing and joking, and when I step up and make a comment, you know, it's all business. I feel (laughs), I feel like they're prejudiced...

Unlike the men, African American women also brought up experience of discrimination in the doctor's exam room. The women believed they had to constantly fight to receive fair treatment from the medical staff and doctor. This was a common experience many women reported. An African American woman described her experience receiving care from her doctor.

> When I flare all up, I like to have something just because my pain go from my toes all the way up to my neck and shoulders sometime, and I can't hardly function. I need something, and that's why I be saying, give me something, or tell me something I can do. I need help and that's my biggest gripe. I think it's because I'm a Black woman I don't get no medication or no kind of other kind of treatment. So, I'm saying, I think it's that kind of an issue, because you got White druggies, they are all kinds of people are druggies, but they suspect the African American.

Another African American woman agreed with her, as she felt that African American women's pain and symptoms were ignored because they were viewed as drug addicts. She believed women had to overcome many barriers to receive quality care.

> When you got us Black sisters that's really sick or really need some help, we always got to go through a whole bunch to get something and I just don't think that's fair. I ain't crying about it, that's life, but, like she said, it seem like to me they got the attitude that you just going there for pills. So, it just seems like to me sometimes that's the attitude that they have.

Race discordance

Focus group participants varied in their preference or lack of preference for race concordant doctors. Many African Americans said they did not care whether they had a race concordant doctor as long as the doctor was competent. One participant described what she wanted from a doctor, which went beyond race, ethnicity, and culture. She said, "I see a Black doctor now, but I don't think either way that it would make any difference the culture or the race of the doctor. I just want to have a doctor that's a good doctor, that's willing to listen, and has a good understanding." The men's groups echoed this preference as one man said, "If it happened to be a Black doctor, I wouldn't have any problem with it, but I just want to have a good doctor." Those who did prefer race concordant doctors believed that African American doctors are much better communicators and much more caring. Experiences of poor communication and

discrimination seemed to influence their preference (I discuss this intersectionality in more detail below). As one woman expressed, "They are more compassionate. They always want to give you as much information and they seem to have empathy with you and everything." One African American man, in particular, spoke of benefits beyond communication. He believed it was important for African Americans, especially children, to see a race concordant doctor because they can have positive role models in their lives.

> Yeah, I went to one when I was a kid. That was the only time, but, he did take care of my grandmother and he had to come to the house to take care of her. He was there any time she needed him. I wouldn't hesitate to go to one. They just don't have that many in this part of the country. So, okay, wait a minute, let's go beyond that. If there isn't that many Black doctors here, then the kids who's growing up, they're not really going to think about being a doctor because there's no role model.

Medical mistrust

Lack of trust seemed to pervade reports from the African American women's group discussions. African American men also provided accounts of medical mistrust, but in those accounts, mistrust was closely linked to other barriers (I shall discuss these intersectionalities in detail below). One African American woman described why she withholds information from doctors; her account shows evidence that mistrust was learned from members of her family. She said, "Well, I had doctor that I didn't… I saw her for many, many years, but it made me realize that that's one thing, you don't tell everything. I should have known that because my father taught me 'Don't let your right hand know what your left hand is doing when you go to the doctor.'" Another woman agreed saying, "Well, I didn't trust him no further than I could see him because, especially when he started, uh, telling me, telling me some medication, you know, where I can go get some cheap medication." Another woman recommended bringing someone

else along to the doctor visit to advocate for the patient and bring some form of support because she does not trust doctors in treating patients with quality care. She said, "I want to add that many people go to the doctor and, if at all possible, they should never go to the doctor alone."

Poor Communication

Poor communication is a crucial barrier that affects patients' relationships with doctors. Often when focus group members spoke about their account of poor communication, they spoke about instances where the doctors did not provide the time to allow the patient to speak. An African American man described an instance where he had to prepare himself to interrupt the doctor so he can have a moment to talk.

> Well, it really kind of pisses you off, because a lot of times I've gone to the doctor with something specifically that I had to say to them, and hell, when I go in there to say, well, they get off on something else and I didn't even get to ask what I really went in there for. So it kind of pisses me off. And so, I go back for the same thing the next time. One time, I just wrote it down, I said, "Wait a minute, hold it! Let me tell you for a minute!" Because otherwise, they just take over and tell you what it is.

Another African American man spoke about how his symptoms were ignored during a routine appointment. Although the doctors focused on his diabetes, they completely ignored his other complaints.

> Okay, I got a situation real quick that I'm dealing with right now. I've had a torn rotator cuff in my shoulder for three years. I know exactly when I tore it, and I been telling doctors, three different doctors in the past three years. Like I said, I got this new one, and I have to start all over with this new doctor and explain, after we figure out my whole diabetic and my other problem that I'm having with. Now, I have to start all over and say, "Now, I have this torn rotator cuff. Can you help me?" I've been telling three different doctors for the past, three years that I've this problem, and all they talk about is diabetes. And I'm not there to talk about my diabetes, I might be there to add that in somewhere, but that's not the reason why I'm there. They seem to stick on the whole subject because "You're a

> diabetic. How is your blood sugar? Let's go do the blood tests. Let's have your blood drawn. Are you doing this good?" Yes! That's all fine, okay, and if it's not fine, tell me how to fix that later, but I'm here today because my rotator cuff. My cuff is torn, and it hurts real bad. Now, it's affecting my life a whole lot more. I can't sleep as well as I would like to, and I can't get comfortable like I like to, but I'm being completely ignored, and it's not just one doctor, and it's not a man or a female, it's just, they only see your diabetes, and that's a problem to me. I mean, if they're my primary, I have other problems that I want to get taken care of, and this is one of them.

An African American man described how a doctor's use of jargon constrained the communication. He, like some of the other focus group members, felt uncomfortable when the doctor spoke in formal terms.

> Well, I don't know, sometimes a doctor can make you feel comfortable, and sometimes they make you feel uncomfortable, and it's all in the way they talk to you. I don't have a lot of education, and when he [doctor] gets to using them big words, that's a bring-down. If I understand you, then I can cope with you, but if I don't understand you, I can't.

An African American woman described an incident in which the doctor did not listen to her, which resulted in an altercation that required her to eventually seek another medical provider.

> And it was a male doctor at the time, and I didn't feel that he was really listening to me trying to help me solve my blood pressure problems. It seemed that I remember that my blood pressure was really high at the time, and it seemed that he just started accusing me of, "Well your blood pressure shouldn't be this high. You must be on drugs. Your pressure shouldn't be this high. You're so young and everything." So we end up having an argument, because I wasn't on drugs. I was there to try to find out why my blood pressure was so high and bothering me. And so he just started making accusations and I feel like he got me more upset. That's when I switched over to a different hospital and insurance at that time.

Intersectionalities

Poor communication and perceived discrimination

Poor communication and perceived discrimination seemed to overlap with one another. Often the focus group members seemed to attribute the poor communication to how the doctors respond to their racial/ethnic background. They believed that doctors (often race discordant doctors) seemed to devalue their symptoms or ignore their comments because they were African Americans. This man describes a negative experience when interacting with the doctor.

> I don't know, I guess I was a little upset because I go in, I went in with a problem, and it seems like my problem was downplayed and I was told something else was wrong, when I knew better. It was more or less just being ushered out as quick as possible. It's as though when they see an African American come in there, it's like we're trying to get over and that's the impression I get every time I go. It's a little upsetting.

An African woman described a situation in which her symptoms were devalued. She believed that as an African American she was not treated with quality care. Her experience showed the lack of competency from the medical provider in treating African American patients, an incompetency which seemed to be compounded by poor communication. The medical provider failed to recognize the woman's symptoms and did not provide her with any more information.

> They act like they're afraid to touch you or they can't tell you. You say, "I got a bump right here where I can't see." They can't see anything on you and I have heard a lot of Black people have issues about that, where they act like they can't see anything on you. You just kind of a nobody. You don't have nothing on you. "What's that?" You tell them, "I've got a bump right here." They say, "Hmm… bump? I can't see nothing," And a lot of time, they go in, they won't touch you.

Medical mistrust and poor communication

The lack of an explanation for procedures and recommendations can reinforce the level of mistrust that a patient may have brought with himself or herself into the patient-

provider relationship. One woman said that even with good doctors, she was reluctant to trust their recommendations. She provides evidence that the history of discrimination played a role in her mistrust:

> I have a problem with that. That doctor might have been a really good doctor, but when somebody come and talk about "More Blacks have this," I got a problem with that. I don't believe everything they say because it ain't always true. I know this is not the question that you just asked (laughter), but I got to tell you. I went to the doctor and this person I guess she didn't have nothing to do. And she asked me, "Did I want to take an AIDS test?" And I said, "Why should I take an AIDS test?" She said, "Because she didn't have nothing to do." I said, "Well you ain't giving me no AIDS test!" I said, "Why do they tell me they paying for it? I don't have no reason to take no AIDS test. I mean, just out of the blue. She didn't have nothing to do! (laughter) While I'm on that subject, I have this experience that Gloria had. When I get ready to have the shots I tell them you got one chance. Do not miss that vein! And if you can't get it the first time you going to get somebody else… one chance. You ain't sticking me six times.

Poor communication and race discordance

Those who preferred a race concordant doctor spoke about the ease in communicating with a doctor of the same racial/ethnic background. Patients were able to be a part of the decision-making process. The ease in communicating with a race concordant doctor came from the comfort in knowing that the doctor knew the patient's culture and spoke in a way that was understandable. An African American man described how race concordant doctors interacted in a way that was preferable for African American patients. He explained how European American doctors might misinterpret his words as opposed to African American doctors who are able to understand his words and respond clearly.

> Like he can be in my format. He can talk to me like I talk to him, everything is cool. Because, even though I might, say the same words, they may not come out the same way, okay? And if I talk to a White

> doctor, he going to look at me and he is going to say, "Well, Okay. Well, hmm… yeah right, this and that." But if I talk in a certain kind of way to a Black doctor, he's going to come to you because he knows this is where he's from. He knows what it takes to get there, okay?

Another man explained why race concordant doctors were preferred when it came to communication. He believed that a race concordant doctor would have the same cultural prism that the patient has, enabling him to have a better communication with the patient. The man saw the relationship going beyond just a patient-provider relationship. He saw it more as a friendship, in which he was comfortable to ask for clarification.

> I think one of the benefits of having a doctor of your own ethnicity is just a level of communication because some doctors may not understand what's going on from a cultural perspective. They just don't know. I mean, it's just like, if you had an Asian doctor, sometimes there's a language barrier. I've had seen Asian doctors before and it was hard to understand what people were saying. Sometimes they understand, like I had a doctor that was real short with me in terms of his patience because he just couldn't understand why I was in the situation I was in. But see, if he had understood our culture, then he would have been a lot more understanding and a lot more patient in terms of dealing with my situation. So I think culture it has a lot to do with understanding. I'm not saying it's the biggest thing, but if you can get a doctor of color… I had a real good doctor of color. In fact, his son was on my basketball team, Dr. Johnson. He retired several years ago, but it was just good to be able to go in there and see somebody that looked like you, you know. That they care about you, and then to be able to have a conversation about what's going on, and they can break it down sometimes.

An African American woman described her experience with an African American doctor. The doctor was able to make her feel comfortable. The feeling of comfort made her feel as though the doctor cared about her health. The feeling of comfort allowed her to be open to doctor and receive the care that she needed.

> She made me feel more comfortable. I felt like I could talk more freely to her without being judged. I'm a recovering addict, so I was able to tell her that and get the help that I needed. Even when I was in treatment, she

> would make sure that she didn't prescribe me anything that was narcotics. I felt she cared, really cared.

Race discordance, perceived discrimination, and medical mistrust

While some African Americans preferred to see an African American doctor, others preferred a European American doctor. This African American man explained how his expectations for an African American doctor were too high and would be disappointed if the doctor did not meet his expectations. He had lower expectations for European American doctors, expecting them to treat him poorly. This anecdote shows the complexity that exist and how discrimination is embedded in the discussion of race discordance.

> I think my expectations would be too high if I saw a Black doctor. But then, I'd expect him to understand everything I'm saying and to understand how I feel. And if he doesn't for one second, it's just going to piss me off. And then I'm going to think, "He's got a serious problem." So, me, personally, I just want to go to the best doctor, but, no, I'd rather not see a Black doctor because if he does one single thing that I don't appreciate, I'm going to have a fit, you know. I'm going to be real angry about this Black doctor, and I'm going to go tell everybody, "I saw this Black doctor and I can't believe this man did this, and I can't believe this man didn't listen to me, and all he did was piss me off, and I'm done with him." I'll be done with the doctor. I'd be more angry if he hurt my feelings than if somebody I'm already used to hurt my feelings. I could deal with that better because I'm used to being offended by White doctors. It's nothing new to me. I've been offended by White people all my life. I don't appreciate being offended by somebody of my own race.

Another man agreed with this statement. He described just how he also accepted the treatment he received from European Americans, but his expectations were too high for an African American doctor. For him, it went beyond the doctor's competence; he held important how an African American doctor would communicate with him. If an African

American doctor communicated in a way that was not in accordance with how African Americans should communicate with one another, he would be disappointed. In other to avoid such situation, he would rather see a race discordant doctor.

> I've been offended by White people all my life. I don't appreciate being offended by somebody of my own race. I want to be able to talk to them, and I want to be able to say things that I probably wouldn't say to a White man, you know. And if he comes off wrong or treats me like, "How're you doing there, Mr. Smith?" (use an affected voice), or something like that, that's going to throw me off, and I'm going to go, "What the heck is wrong with this man? Did he lose his way at some point?" or "What happened to him?" So, I'd just feel safer going to what I'm used to going to, because I don't want to get my feelings hurt by a brother or a sister. I don't want to get my feelings hurt.

Another African American man had negative experiences with race concordant doctors. Although he did not describe actual experiences with the doctors, he saw them as pretentious. His statement gives insight as to why the patient would view a race concordant doctor in that manner.

> Okay, something else that gets me. It would be nice to have more Black doctors, but the ones that I've had that I've visited, they have this mentality, you know, they looking down their noses at you. It's like, "I'm a doctor, and you are a piece of." I mean, this dude, he's a closet bigot against his own people, as far as I'm concerned. I think it's part of the program. I don't look for them to be better than anyone. Just do your job like you're supposed to do, that's all I ask. I think you expect a Black doctor to make you more comfortable because he's Black. Period!

Discussion

What do these findings tell us about patient-provider relationships for African Americans? By using the four concepts of perceived discrimination, race discordance, medical mistrust, and poor communication, we are able to understand how African American patients experience these barriers in primary care. This study allowed me to

gain valuable insight into the four concepts; particularly in understanding exactly what African American patients consider discriminatory, why they prefer race concordant physicians, what influences their lack of trust towards doctors, and what factors negatively affect communication with doctors. Further, this study was able to show the complexities that exist within each concept. Each concept overlapped the next in participants' commentary. This intersectionality suggests that future studies would do well to study these concepts together, in order to develop a fuller understanding on African Americans' experiences in primary care. Before I discuss their intersectionality further, it is important to reflect on each of the four concepts, respectively.

In regards to the concept of *perceived discrimination*, what exactly do African American patients consider discriminatory? African Americans in this study did perceive discrimination when receiving health care, and many African Americans felt they would not receive the best care if they were sick (cf. Blendon et al., 2007). This study also showed that the experience of discrimination actually begins before the patient enters the examining room. For many African Americans, having to wait a long time in the waiting room made them question whether they were being discriminated against or not. African American women, in particular, noticed how the medical staff interacted with European American patients. They found the interaction to be friendly and warm, as opposed to their own interaction of being cold and business-like. Some would even ask members of their own ethnic group for help in validating their experience. Although the experience may or may not have been discriminatory, by having a person validate their experience helped them resolve the internal tension they felt.

Study participants reported that they experience discrimination in the examining room as well. There were instances, particularly for African American women, in which participants felt they were treated like drug addicts. They believe they are less likely to receive medication or treatment because of how doctors and medical staff responded to their racial/ethnic background. These experiences caused distress and concern. Dion (2002) would suggest that these stressful situations would affect the person's behavior. These experiences can in turn lead to a lack of trust towards the doctor and perhaps reduce the chances of adhering to the doctor's recommendations. These findings provide insight as to why perceived discrimination contributes to differences in patient behavior. These findings, for example, corroborates studies that find perceived discrimination being associated with lower medication adherence, provide lower patient ratings of visit informativeness, and underuse healthcare services for African Americans (Casagrande et al., 2007; Burgess et al., 2008). Insofar as discrimination itself is the result not of who one is (subject variables) but how powerful others respond to who one is (stimulus variables), discrimination removes control from the patient and reduces patient autonomy. This too is consistent with findings from past studies (Penner et al., 2009; Hausmann et al., 2011).

Race discordance was not a problem for some focus group members. As long as the doctor was competent, it did not matter what ethnic group the doctor belonged to. Those participants who did prefer a race concordant doctor provided insight as to why African Americans patients with race concordant doctors have higher levels of trust, satisfaction, and intent to adhere than those with race discordant doctors (Street et al., 2008). For those who did prefer race concordant doctors, they felt that race concordant

doctors were able to communicate better and understand the patients' experience much better, which enables the doctor to be empathic and compassionate. These patients would view African American doctors as being more concerned about their well-being. Similar to perceived discrimination, poor outcomes of race discordant relationships may be a result of how doctors respond to who the patient is (stimulus variables) or vice versa, reducing the opportunity for openness, trust and good communication that enable doctor-patient partnership. Social Identity Theory would suggest a person would display favoritism toward members of their in-group (Tajfel, 1982). How would Social Identity Theory explain why other focus group members did not prefer a race concordant doctor? Perhaps, those who have a stronger attachment to their in-group would favor other members of their in-group, while those who do not identify with a certain group may display little to no favoritism toward members of that group. Future studies might explore whether African Americans with high levels of racial identity would prefer a race concordant doctor more so than those with lower levels of racial identity. Alternately, it may be that some participants viewed African American doctors as problematically distant from themselves in level of education, and thus, too difficult with whom to establish rapport. In either case, reports from participants who did favor race concordant doctors provide us a better understanding as to why (Saha et al., 1999; Cooper-Patrick et al., 1999).

Pertaining to the concept of *poor communication*, prior studies have shown that African American patients report unfavorable interactions with their doctors (Gordon et al., 2006; van Ryn and Burke, 2000). What are some of the factors that may negatively affect communication between patient and doctor? When focus group members spoke

about negative experiences about communicating with doctors, they often spoke about how doctors did not listen to them. The focus group members mentioned how the doctors seemed to be pressed for time and often did not let them speak. The experience of not being heard decreases person's willingness to participate in his or her own treatment. Similarly, a doctor's use of jargon can prevent the patient from understanding and engaging in the conversation of his or her own health (Travaline, Ruchinskas & D'Alonzo; 2005). This provides better understanding as to why African American patients report that doctors do not spend enough time with them, do not respect their intelligence, and do not provide sufficient explanations (Gordon et al., 2006; van Ryn and Burke, 2000). Because they do not have a chance to be heard or the opportunity to ask for clarification, they are less likely to be engaged in the treatment. This in turn may lead them to receive less information from their doctors and be less active participants (Gordon et al., 2009). As patients decrease their communication behaviors (i.e. asking questions, expressing concerns, assertions), this may affect future doctor-patient interactions.

What factors influence a person to *mistrust* medical providers? African Americans who are high in medical mistrust tend to have more negative views and expectations of their health providers (Thompson, Bazile, & Akbar, 2004). However, studies have yet to identify the discursive practices that occur in the healthcare system that influence this mistrust. In this study, medical mistrust seemed to be connected with the other concepts. However, there were some isolated examples of medical mistrust, primarily in the women's focus groups. Mistrust seemed to not be based on personal past experience towards medical providers, but learned from family and friends. For instance, an African

American woman was reluctant to provide the doctor with complete information about her health because she learned from her father to never be completely open with doctors. Although she did not elaborate on this statement, it is clear she withheld information it may have benefited her to disclose. Another woman was reluctant to accept a doctor's recommendation. She felt as though doctors are always trying to push pills toward African Americans and not trying alternative methods to improving their health. The doctor's lack of explaining the regimen or the lack of considering alternative methods in treatment can lead to the patient mistrusting doctors. Mistrust can in turn lead to dissatisfaction with doctor's care and noncompliance (Hall et al., 2001; Hammond, 2010).

It is difficult to talk about these concepts individually because they were embedded within one another in participants' reports. Many participants who talked about medical mistrust also talked about discrimination; many who talked about their experiences with race discordant doctors also talked about poor communication. Prior literature has shown how each barrier negatively affects patient-provider relationship, but until now, no studies have looked at these four concepts together.

The interrelated nature of these ideas evokes the social psychological concept of self-fulfilling prophecy (Merton, 1968; Rosenthal, 1974). Possibly, because doctors do not explain or clarify their recommendations, communication suffers and patients are less adherent or satisfied. The unfavorable experience reifies a sense of medical mistrust that patients may have initially brought to the interaction. In turn, patients are less likely to be engaged participants in the next interaction. This would contribute again to a lower adherence of medication, lower satisfaction with quality of care satisfaction, and lower

use of healthcare services (Whetten et al., 2008; LaVeist, Nickerson, & Bowie, 2000; Yang, Matthews, & Hillemeier, 2011). Future studies might explore the self-fulfilling dynamic, and identify junctures amenable to intervention.

Race discordance and poor communication were frequently mentioned together in the focus group discussions. This finding supports LaVeist and Nuru-Jeter's (2002) theory that the source of trust among patients may be an intrinsic sense of connection to members of their own racial/ethnic group, with the expectation that a race concordant doctor will exercise a greater sense of agency with regard to patient care. Patients who prefer race concordant doctors may feel they are able to be a part of the decision-making process. They believe that communicating is comfortable and easier because they believe the race concordant doctor knows their culture.

Future studies could look at how both poor communication and medical mistrust play a role toward patients' health and health behavior. For example, studies could use mistrust as a moderator to determine whether the relationship between poor communication and negative health behaviors depend on the person's level of mistrust. Interventions that are designed for African Americans to address patient provider communication may help to overcome medical mistrust. The intervention can be developed with strong community input that includes ways in which patient and doctor can build a partnership and promote informed decision-making and adherence. Input from the community can also help modify medical training for future doctors and medical staff to help with their interaction with African American patients, which in turn can also help build trust.

The last intersectionality is race discordance, medical mistrust, and perceived discrimination. Their overlap clearly depicts the necessary complexity in discussion of these barriers. While some African Americans preferred to see African American doctors, others preferred European American doctors. They preferred European American doctors not because they provide better quality of care, but because their lowered expectations of European Americans meant less risk of disappointment. One study participant explained he was used to being treated poorly by European American doctors (discrimination), but he could not accept the possibility of being treated poorly by a member of his own racial/ethnic group. Social Identity Theory would suggest that he is trying to maintain a positive image of his in-group by avoiding any situation that would violate this image. Social Identity Theory also rings true in another example. Another focus group member said he would not like it if an African American doctor used medical jargon in the exam room. The use of jargon would create social distance between doctor and patient, meaning the doctor would be a kind of traitor to his own ethnic group. It seems as though medical jargon is associated with the out-group and by using jargon the African American doctor would remove himself from in-group membership. This complexity might provide insight into prior research that finds little evidence to support differences in health outcomes between race concordant and race discordant patient-provider relationships (Meghani et al., 2009).

Further understanding of the intersectionality of these barriers can help us identify ways in which they influence patient-provider relationships. Future studies could explore ways to design interventions to help improve discordant patient-provider relationships. For example, interventions can modify a doctor's approach to interacting with a patient

(e.g., less use of jargon, explaining all treatment regimens, and giving the patient time to offer their own perspective on their own health and treatment), which in turn can improve patient trust. Because race discordance and medical mistrust, as shown, are linked to perceived discrimination, it is also important to develop interventions to help African American patients cope with daily stressors like discrimination (Mays, 1995). Although the coping of discrimination may not improve discordant patient-provider relationships or reduce mistrust, it can at least improve adherence to medication or the continuation of the use of healthcare. Ideally of course the problem of discrimination would be prevented rather than addressed after the fact.

Limitations

Important limitations need to be taken into consideration when talking about this study. Most of the participants lived in Portland, Oregon, a city with relatively low racial diversity (American FactFinder, 2008). Because of the low racial diversity (i.e., small African American population), African Americans' experience may differ from African Americans of other geographical regions. This means the focus group participants were far more likely to have received service from European American healthcare providers than from African American healthcare providers. This in turn lowered the chance of reading discussion narratives about past experience with race concordant doctors. This lack of information has prevented us from fully understanding African American patients' experiences with race concordant doctors.

Because this study relied on word of mouth recruitment, this reduced the chances of diversity of age, socioeconomic status, or other relevant variables (Sadler et al., 2010) within any given focus group or across groups. While this is a study limitation it is also a

study strength. Focus group discussions are often enhanced by the participation of "homogenous strangers" (Morgan, 1997) who are similar enough to be at ease disclosing their views and experiences to one another.

As a method of collecting data, focus groups depend upon group interaction. Depending upon the population, the topic, and potentially also upon situational factors, normative influences on participants' commentary can be high in focus groups. Real or imagined social pressures can influence individuals' decisions to report perspectives discrepant from a perceived norm or indeed, discrepant from what participants believe researchers wish to hear. This is a common criticism of focus groups (Ritchie & Lewis, 2003). In part to minimize this problem, the research team trained the focus group moderators to welcome all points of view on topics of discussion and to solicit a wide range of experiences from study participants. Even so, we did have the problem that moderators were relatively inexperienced at soliciting dissenting viewpoints. In addition, because moderators were new, the earliest focus groups were held in a setting with the study's Principal Investigator close by; the Principal Investigator is not an African American. His presence is likely to have affected some of the group discussions, although it is impossible to know to what extent this was the case.

There is also the concern to know how far the findings from a study can be generalized to the specific population from which the study sample was drawn. Richie and Lewis (2003) state that generalization in qualitative research involves three key issues: whether what is found in a research sample can be generalized to, or held to be equally true of, the parent population from which the sample is drawn; whether the findings from a particular study can be generalized, or inferred, to other settings or

contexts beyond the sampled one; and whether theoretical generalization (i.e., theoretical propositions, principles or statements from the findings of a study) can be used to develop further theory. The basis for generalization in qualitative research is very different, however, from that in quantitative research (Lincoln & Guba, 1985). Ritchie and Lewis (2003) would add:

> Qualitative research cannot be generalized on a statistical basis - it is not the prevalence of particular views or experiences, nor the extent of their location within particular parts of the sample, about which wider inference can be drawn. Rather, it is the content or 'map' of the range of views, experiences, outcomes or other phenomena under study and the factors and circumstances that shape and influence them, that can be inferred to the researched population (p. 269).

To reach a level of generalizability (known as "transferability" in qualitative research), accuracy is needed (Winter, 2000). Accuracy depends on the quality of fieldwork, analysis and interpretation. To increase validity, researchers can use triangulation through multiple analysis, which is using different observers, interviewers, analysts to compare and check data collection and interpretation (Golafshani, 2003) or respondent validation, which involves taking research evidence back to the research participants to see if the interpretation assigned is confirmed by those who contributed to it in the first place (Ritchie & Lewis, 2003). This process increases credibility and validity, thus, increasing the trustworthiness of the entire study (Lincoln & Guba, 1985). In this secondary analysis I was unable to check the accuracy of transcripts or to hear the participants' own voices due to the unavailability of group discussion audiotapes. However, another member of the research team has confirmed my interpretation of study findings, and I have requested the Principal Investigator of the original project, who knows the data very well, to review my findings also.

A related issue is the degree to which the focus group sample is representative of the parent population. The representation should not be based on statistical significance level but on inclusivity, namely, whether the sample provides "symbolic representation" by containing the diversity of perspectives that are central to explanation (Ritchie & Lewis, 2003). Inclusivity is practiced by reporting and explaining the atypical as much as it does reporting the more recurrent themes. In this study, we approximated inclusivity through reporting both areas of agreement and areas of disagreement. All things considered, qualitative research is able to capture the perspective of participants themselves in their own words, something that quantitative research cannot offer.

Despite the limitations, the study has important implications for healthcare practice. Healthcare providers and healthcare staff must understand and acknowledge the past experience and perspective of African American patients. This understanding can help increase the chances of African American patients using healthcare service again. One step towards getting a fuller understanding is further examining the four barriers that is prevalent in the African American population. For now, these barriers have been shown to affect the use of services, which may play a role in the healthcare disparity that exists in the United States for African Americans. A better understanding of the four barriers from African American patient perspectives may help ameliorate the problem by suggesting ways in which quality of care may be improved.

Secondary data analysis

This study was a secondary data analysis stemming from an original study that asked adult community members of three ethnic groups (African American, Latino/Latina, and European American), each of whom had diabetes or hypertension or

both, about their experiences with and perspectives on healthcare providers, specifically doctors. Focus group questions ranged from topics regarding race concordance to trust and respect and were structured to allow moderators the freedom to probe interesting areas. As a relatively recent arrival on the research team, I coded and analyzed the original data from all three ethnic groups. Because my study has involved secondary analysis it is important to mention some of the limitations in using secondary data analysis in psychological research.

One major limitation is that the researchers designed the interview guide and collected data prior to my own arrival on the research team. Particular information that I might have liked to have had was not collected; for example, in some instances the moderator could have probed the respondents for more information about trust and other aspects that negatively affects patient-provider communication. A second limitation in using secondary data is that because I did not participate in the planning and execution of the data collection process, I did not know exactly how it was done. This required me to find the information through other means, such as attending research meetings, asking team members, and reading meeting notes or meeting minutes. All things considered, disadvantages to using secondary data include the inability to select specific questions and lacking control over the precise timing or design of the data collection (Boslaugh, 2007; Tomlinson-Keasey, 1996).

There were also several benefits to working with secondary data. One was economy: with data already available I did not need to devote resources to the data collection phase of research. The time it has taken to learn about the community of interest and analyze the data is minimal compared with the time it would have taken to

gain initial access to an "elusive population" (Fielding, 2004), recruit participants, conduct the group discussions and transcribe them. For this specific study, working with secondary data facilitated my training by allowing me to focus more time on data analysis and indirectly learn the proper way of conducting a study. Furthermore, as Wortman and Bryant (1978) state, a system of quality control can be established when conducting secondary data analysis, allowing the secondary researcher to inspect the work of the primary researcher and verify the validity of his or her own procedures as well. Because I was not one of the primary researchers in the original data collection, I was able to inspect the original work in this manner. Lastly, this secondary analysis also adds to existing knowledge by examining issues that were not addressed by the original researchers (Cook, 1976; Johnson, 1964). It is profitable to conduct a reassessment of old data in the light of new findings and conceptual extensions of prior literature.

It is important to mention that although I did not have to invest time creating a research instrument or collecting the data, I did invest significant effort in coding the primary data. This allowed me to acquaint myself with the questions that were asked to participants and the responses given by them. Furthermore, this allowed me to feel confident that the research question for the secondary data analysis fits well with the existing data. I learned about the planning and execution of the data collection during regular EQUALED meetings and reading through archival documents pertaining to the original study's research method and procedure. Having a strong literature base in the area of African American health issues also enabled me to ground my qualitative analytic decisions in conceptual understanding, thus strengthening my capabilities in analyzing these data.

Implications

Despite its limitations, this study provides important implications for African American-specific interventions and future studies. Participants provided insight into how the four barriers manifest. Health service providers must understand and acknowledge the experience of minority patients who underuse their service. They should use these insights to implement change in the healthcare system. As shown, the change does not only apply to doctors, but to medical staff as well. This understanding can help create culturally appropriate medical training for current and future medical staff, as well as with current and future doctors, to help with their interaction with African American patients. Such training might focus on ways to enhance effective communication and strengthen patient opportunities for patient-provider concordance, while also building medical trust and reducing real and perceived discrimination. Future studies might also quantitatively examine these barriers together to see how they relate to the underuse of health care services. Further, future studies might identify staff and/or providers who are considered by African American patients to do an exceptional job in the areas of building trust and communication; these staff and/or providers might then be observed or interviewed so that their best practices can be identified. These best practices, in turn, might be offered in future trainings of doctors and their clinic staff.

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Appendix

The focus group guide is used with permission by Somnath Saha.

The focus group guide was intended to probe people's actual experiences with health care, particularly interacting with physicians, as well as their values and preferences regarding doctor-patient interactions. The focus group guide included the following:

- Introduction
- Experience with most recent visit to the doctor
- Good experiences with doctors
    - Actual experiences
    - What makes a good experience
- Bad experiences with doctors
    - Actual experiences
    - What would have made for a better experience
- Physician race/ethnicity
    - Experiences
    - Preferences
- Personal/sensitive topics discussed with doctors
    - Drug and alcohol use
    - Sexual history, activity, and function
    - Delivering bad news
    - Complementary and alternative therapies
    - End-of-life preferences and living wills
- Trust

    - Experiences of distrust
    - What engenders trust
- Respect
    - Experiences of disrespect
    - How is respect demonstrated
- Following doctors' recommendations – medications and procedures, lifestyle changes
    - Experience not following doctors' recommendations
    - What prompted non-adherence to recommendations
- One piece of advice you'd like to give your doctor

FROM CULTURALLY COMPETENT TO ANTI-RACIST: TYPES AND IMPACTS OF RACE-RELATED TRAININGS

July 2020

HANOVER RESEARCH

TABLE OF CONTENTS

INTRODUCTION

Racial inequity in education outcomes is well-established. Differences in white and minority student test scores, discipline outcomes, advanced course enrollment, graduation rates, and college enrollment rates, among other indicators, reveal continued bias and systemic racism in U.S. education opportunities and practices. Teachers' own biases are a contributing factor to persistent inequity and have been shown to impact teachers' expectations, management, and instructional quality for students of color. [1]

Accordingly, school districts may attempt to address racial bias and resulting student outcome inequity through teacher professional development and training opportunities, but there is great variation in district training frameworks and approach. Districts may engage their staff in diversity awareness training, cultural competency workshops, social justice professional development, and/or anti-racism programming. A critique of cultural competency training notes that cultural awareness has many "overlapping derivatives," such as anti-racism, diversity, and micro-aggression training.[2] Race-related trainings may therefore include similar and overlapping topics and conversations; however, each topic has its own nuanced definition (Figure ES 1).

Figure ES 1: Definitions of Diversity-Related Topics

TOPIC	DEFINITION
Anti-Racism	An active and consistent process of change to eliminate individual, institutional and systemic racism.
Anti-Oppression	Strategies, theories, and actions that challenge social and historical inequalities/injustices that have become part of our systems and institutions and allow certain groups to dominate over others.
Equity	A condition or state of fair, inclusive, and respectful treatment of all people. Equity does not mean treating people the same without regard for individual differences. Racial equity is the condition that would be achieved if one's racial identity no longer predicted, in a statistical sense, an individual's outcomes. The term racial equity if often used interchangeable with racial justice and thus also implies work to address root causes of inequities, not just their manifestation. This includes elimination of policies, practices, attitudes and cultural messages that reinforce differential outcomes by race or fail to eliminate them.
Social Justice	Social justice includes a vision of society in which the distribution of resources is equitable, and all members are physically and psychologically safe and secure. Social justice involves social actors who have a sense of their own agency as well as a sense of social responsibility toward and with others and the society as a whole.
Diversity	A term used to encompass the acceptance and respect of various dimensions including race, gender, sexual orientation, ethnicity, socio-economic status, religious beliefs, age, physical abilities, political beliefs, or other ideologies.
Inclusion	Authentically bringing traditionally excluded individuals and/or groups into processes, activities and decision/policy making.

[1] [1] Starck, J.G. et al. "Teachers Are People Too: Examining the Racial Bias of Teachers Compared to Other American Adults." *Educational Researcher*, 49:4, May 1, 2020. p. 279. https://doi.org/10.3102/0013189X20912758 [2] Will, M. "Teachers Are as Racially Biased as Everybody Else, Study Shows." *Education Week*, June 9, 2020. https://www.edweek.org/ew/articles/2020/06/09/teachers-have-racial-biases-too-study-shows.html [3] Schwartz, S. "Next Step in Diversity Training: Teachers Learn to Face Their Unconscious Biases." *Education Week*, May 14, 2019. https://www.edweek.org/ew/articles/2019/05/15/next-step-in-diversity-training-teachers-learn.html

[2] Shepherd, S.M. "Cultural Awareness Workshops: Limitations and Practical Consequences." *BMC Medical Education*, 19:14, 2019. p. 1. https://bmcmededuc.biomedcentral.com/articles/10.1186/s12909-018-1450-5

TOPIC	DEFINITION
Implicit Bias	Also known as unconscious or hidden bias, implicit biases are negative associations that people unknowingly hold. They are expressed automatically, without conscious awareness. Many studies indicate that implicit biases affect individuals' attitudes and actions, thus creating real-world implications, even though individuals may not even be aware that those biases exist within themselves. Notably, implicit biases have been shown to overcome individuals' stated commitments to equality and fairness, thereby producing behavior that diverges from the explicit attitudes that many people profess. The Implicit Association Test (IAT) is often used to measure implicit biases with regard to race, gender, sexual orientation, age, religion, and other topics.
Multicultural Competency	A process of learning about and becoming allies with people from other cultures, thereby broadening understanding and ability to participate in a multicultural process. Cultural competence requires respect for the ways that others live in and organize the world as well as an openness to learn from them.

Source: Canadian Race Relations Foundation, Racial Equity Tools, W.K. Kellogg Foundation[3]

To determine the most relevant and effective race-related training for their staff, districts seek to understand the differences between these trainings and the evidence, if any, of their efficacy in reducing racial inequity in education and education outcomes.

In this report, Hanover Research examines the overlap and/or distinctions between race-related trainings and then explores five training types in greater detail.

- **Section I: Overlap and Distinctions Between Race-Related Trainings** explores the nuances of race-related training types and how they intersect. This section contextualizes training types before presenting further details and impacts in the subsequent sections;
- **Section II**: **Anti-Racism and Anti-Oppression** describes four anti-racism training types and their effectiveness as well as examples of districts implementing anti-racist training. This section also provides anti-racism and anti-oppression guides that may support districts in developing anti-racism initiatives;
- **Section III**: **Equity and Social Justice** provides evidence of efficacy of justice-oriented training for teachers and a tool for assessing equity when hiring staff. This section also highlights districts with equity training and guides that may support districts in developing their own related initiatives;
- **Section IV**: **Diversity and Inclusion** summarizes recent research about the effectiveness of diversity training. This section also highlights districts with diversity training and programs and includes a sample guide that may support districts in developing diversity and inclusion initiatives;
- **Section V**: **Implicit Bias** highlights studies about the effectiveness of implicit bias training as well as districts using implicit bias training. This section also includes guides that may support districts in developing implicit bias initiatives; and
- **Section VI: Cultural Competency** provides recent literature regarding cultural competency training. This section also references districts that use cultural competency training as well as guides that may support districts in developing cultural competency initiatives.

[3] Figure text reproduced almost verbatim from: [1] "CRRF Glossary of Terms." Canadian Race Relations Foundation. https://www.crrf-fcrr.ca/en/resources/glossary-a-terms-en-gb-1 [2] "Racial Equity Resource Guide: Glossary." W.K. Kellogg Foundation. http://www.racialequityresourceguide.org/about/glossary [3] "Glossary." Racial Equity Tools. https://www.racialequitytools.org/glossary#multicultural-competency

RECOMMENDATIONS

- **Determine the goals of race-related training within the district.** Collect quantitative and qualitative data to understand the district's current areas of strength and current areas of need as related to race. Use the data to inform the type of training that would most benefit the community.
- **Develop a comprehensive plan for addressing inequity and bias within the district, with race-related training as one part of a multi-faceted approach.** Work with stakeholders to develop programming and strategic plans to addressing issues of race within the district as it relates to all areas of district operation.
- **Monitor progress toward the district's vision of equity and inclusion on campus by developing a framework for evaluation alongside the development of programming and strategic plans.** Regularly communicate progress to the community and involve stakeholders in the process by which improvements are made.

KEY FINDINGS

- **The overlapping yet nuanced nature of race-related training reveals how training types exist on a spectrum from informational and individualistic to practical and systemic.** For example, the National Court Appointed Special Advocate Association considers diversity training the first step to build awareness, followed by anti-racism training, then coalition building. This last step involves individuals working together to create change and requires participants to understand how systemic racism negatively impacts society and their role in addressing issues.
- **While research does identify positive outcomes for various race-related trainings, critical perspectives suggest that certain types of trainings are insufficient or even detrimental to certain goals**. For example, there is some concern that cultural competency trainings reinforce the establishment of "otherness" and do not engage participants in the conversations and activities necessary to enact systemic change.
- **Anti-racism training includes four common training methods: intergroup contact, training and education, communication and media campaigns, and organizational development.** To ensure anti-racism training demonstrates effectiveness, sessions should prioritize balanced proportions of backgrounds, support from leaders, safe environments, common goals among participants, encouraging trainers, and other elements. Additionally, communication should target specific issues and challenges rather than sending general positive messages that may cultivate prejudices.
- **Diversity and implicit bias trainings appear to be more effective when participants have more autonomy over engagement and see connections to their work**. When individuals in the education and non-education industries feel forced to participate in training sessions or fulfill requirements, these employees may become less open to learning about diversity or participating in discussions. However, when given more autonomy in training opportunities, such as through voluntary training, employees may become more empowered to get involved. Additionally, providing skills and actionable tools during training may lead to positive outcomes.
- **Evidence regarding the effectiveness of cultural competency training is less prevalent in the current education literature, although available information suggests its importance in increasingly diverse classrooms**. The recent empirical literature on cultural competency often focuses on non-education areas and outcomes, such as the health industry and medical institutions. However, school leader interviews and observations demonstrate that teachers feel unprepared for supporting students of other cultures and cultural identities.

SECTION I: OVERLAP AND DISTINCTIONS

In this section, Hanover explores the similarities and differences of race-related training types and contextualizes training types before presenting further details and impacts in the subsequent sections. This section also explores possible limitations of certain training types.

COMPARING TYPES OF RACE-RELATED TRAININGS

Although race-related trainings often include similar themes, their respective goals are often nuanced, and well-intentioned content may sometimes fail to fully address race-related concepts.[4] The following subsections provide descriptions of what makes each training unique as well as available critiques.

ANTI-RACISM TRAINING

During anti-racism training, facilitators support participants in increasing anti-racist attitudes and actions as well as acknowledging problematic distribution of power and social dynamics.[5] A key part of anti-racism training includes knowing the different types of racism and the different types of racists. These categories, shown in Figure 1.1, show how anti-racism involves individuals and their involvement in a systemic issue.

Figure 1.1: Types of Racism and Racists

TYPES OF RACISM	TYPES OF RACISTS
▪ **Individual racism** refers to the beliefs, attitudes, and actions of individuals that support or perpetuate racism in conscious and unconscious ways. The U.S. cultural narrative about racism typically focuses on individual racism and fails to recognize systemic racism. ▪ **Interpersonal racism** occurs between individuals. These are public expressions of racism, often involving slurs, biases, or hateful words or actions. ▪ **Institutional racism** occurs in an organization. These are discriminatory treatments, unfair policies, or biased practices based on race that result in inequitable outcomes for whites over people of color and extend considerably beyond prejudice. These institutional policies often never mention any racial group, but the intent is to create advantages. ▪ **Structural racism** is the overarching system of racial bias across institutions and society. These systems give privileges to white people resulting in disadvantages to people of color.	▪ **Actively Racist** individuals consciously desire [racial inequity and injustice] and expend energy moving in the same direction as the walkway: they are actively racist. ▪ **Non-Racist** individuals do not consciously desire racial injustice and do not seek to rush toward it. However, because our systems operate in ways that maintain racial inequality, non-racist people are still being carried along the same path as actively racist people, which will continue to lead to inequity and injustice. ▪ **Anti-Racist** individuals see where the walkway is headed and actively work against the systems that lead to injustice. Being anti-racist is not passive, but instead requires constant effort. Because anti-racism works against the prevailing "current," progress can seem slow or even nonexistent at times.

Source: National Museum of African American History and Culture, Project READY: Reimagining Equity & Access for Diverse Youth[6]

[4] [1] Shepherd, Op. cit., pp. 1–2. [2] "What Do We Mean by Diversity Training." The National Court Appointed Special Advocate Association. p. 1. http://nc.casaforchildren.org/files/public/community/programs/training/What_is_Diversity_Training.pdf [3] Osta, K. and H. Vasquez. "Implicit Bias and Structural Inequity." National Equity Project. p. 1. https://nationalequityproject.org/wp-content/uploads/National-Equity-Project-Implicit-Bias.pdf [4] Allen, J. "Improving Cross-Cultural Care and Antiracism in Nursing Education: A Literature Review." *Nurse Education Today*, 30:4, May 1, 2010. sec. Abstract. http://www.sciencedirect.com/science/article/pii/S0260691709001634

[5] Pedersen, A. et al. "Anti-Racism – What Works? An Evaluation of the Effectiveness of Anti-Racism Strategies." Centre for Social Change & Social Equity Murdoch University, March 2003. p. 6. https://www.racialequitytools.org/resourcefiles/antiracism_what_works.pdf

[6] Figure text reproduced verbatim from: [1] "Being Antiracist." National Museum of African American History and Culture. https://nmaahc.si.edu/learn/talking-about-race/topics/being-antiracist [2] "Module 13: Allies & Antiracism." Project READY:

As shown in Figure 1.1, anti-racism training includes information on "working against systems that lead to injustice."[7] Therefore, training also includes information on being an **ally**—a person who understands the disadvantages of people who identify as being in a different group, works towards supporting that group, and continues to reduce their biases and increase their understanding.[8] For example, this matrix presents ally behaviors and actions for individuals and groups, as well as actions and behaviors for passive non-racists, active non-racists, and anti-racism advocates.[9]

Additionally, for anti-racism training in schools, this training explores institutional racism and its impact on relationships and oppressed groups' advantages and disadvantages.[10] Notably, this training includes the impact of institutional leaders and their impact on institutional policies, procedures, and anti-racist initiatives.[11] Anti-racism training in schools also includes anti-racism resources, teaching strategies, and other components identified in anti-racist education literature and summarized by the National Museum of African American History and Culture.[12] These components appear in Figure 1.2.

Figure 1.2: Components of Anti-Racism Education

Examining the historical roots and contemporary manifestations of racial prejudice and discrimination	Exploring the influence of race and culture on one's own personal and professional attitudes and behavior	Identifying appropriate anti-racist resources to incorporate into the curriculum in different subject areas
Developing new approaches to teaching children using varying cognitive approaches to diverse learning styles	Identifying and counteracting bias and stereotyping in learning material	Dealing with racial tensions and conflicts
Identifying appropriate assessments and placement procedures and practices	Assessing the hidden curriculum and making it more inclusive and reflective of all students' experiences	Ensuring that personnel policies and practices are consistent with equity goals and that they provide managers with the knowledge and skills to implement equity programs

Source: National Museum of African American History and Culture[13]

EQUITY TRAINING

Equity training aims to bring awareness to the issues within organizations (e.g., schools) and society that prevent certain groups from accessing resources and opportunities. These training sessions build leadership skills and confront opportunity gaps, which impact students' access to resources, academic performance, and disciplinary referrals.[14] A 2016 article published in *Multicultural Perspectives* refers to equity training as "equity literacy," which author Paul Gorski defines as "cultivating in teachers the knowledge and skills necessary to become a threat to the existence of inequity in their spheres of influence."[15] This training focuses on building teachers' skillsets in four ways, as shown in Figure 1.3.

Reimagining Equity & Access for Diverse Youth. p. 13. https://ready.web.unc.edu/section-1-foundations/module-13-allies-antiracism/

[7] "Module 13: Allies & Antiracism," Op. cit.
[8] "Racial Equity Resource Guide: Glossary," Op. cit.
[9] "Spectrum: From Non-Racist to Anti-Racist Advocate." Campbell Consulting. http://ready.web.unc.edu/files/2018/07/antiracist.jpg
[10] "Being Antiracist," Op. cit.
[11] Greene, M.P. "Beyond Diversity and Multiculturalism: Towards the Development of Anti-Racist Institutions and Leaders." *Journal for Nonprofit Management*, 2007. p. 11. https://www.racialequitytools.org/resourcefiles/greene.pdf
[12] "Being Antiracist," Op. cit.
[13] Figure text reproduced verbatim from: Ibid.
[14] [1] "Equity Training and Education." Office of Equity and Human Rights, The City of Portland Oregon. https://www.portlandoregon.gov/oehr/article/450420 [2] "Module 14: (In)Equity in the Educational System." Project READY: Reimagining Equity & Access for Diverse Youth. p. 14. https://ready.web.unc.edu/section-2-transforming-practice/module-14-inequity-in-the-educational-system/
[15] Gorski, P. "Rethinking the Role of 'Culture' in Educational Equity: From Cultural Competence to Equity Literacy." *Multicultural Perspectives*, 18:4, October 2016. p. 225. https://www.tandfonline.com/doi/full/10.1080/15210960.2016.1228344

Figure 1.3: Equity Literacy Skills

The ability to *recognize* even the subtlest forms of inequity, such as subtle ways in which students' home languages might be denigrated in a school environment	The ability to *respond* in the immediate term to inequity, such as by skillfully challenging colleagues or students who denigrate students' home languages	The ability to *redress* inequity in the long term, such as by effectively and equitably attending to the deeper cultural dynamics of the institution that make people believe it is acceptable to denigrate students' home languages	The ability to *sustain* equity efforts—even in the face of resistance

Source: *Multicultural Perspectives*[16]

DIVERSITY TRAINING

Diversity training presents an important and potentially influential initiative, as demonstrated in the section on diversity and inclusion later in this report.[17] However, **diversity training often demonstrates an incomplete approach to race-related training, as it emphasizes raising awareness and often omits discussions around systemic racism and social dynamics**.[18] Diversity training sessions and their role in building awareness and understanding provide a stepping stone to deeper, more critical training sessions on anti-racism and long-term development. Best practices literature for corporate diversity training notes that "the primary goal [of diversity training] is to create ongoing awareness and understanding of human diversity as a corporate asset."[19] In the health industry, too, professionals note diversity training's emphasis on awareness of differences and ensuring that institutions value all people.[20]

The conversations that occur during diversity training explore the people included and excluded in an organization or opportunities, why an organization should be inclusive, and whether the organization commits to evolving its practices. When implemented as the first step in a larger race training process, diversity training offers a space for reflection on participants' beliefs and an organization's opportunities.[21]

IMPLICIT BIAS

During implicit bias training, participants learn about what implicit biases are, how everyone has implicit biases, implicit bias' impact on students and society, and strategies to counteract implicit biases and implement more equitable practices.[22] This type of training explains how people do not inherently have biases but develop them consciously and unconsciously in everyday life. Training also reviews current policies and procedures that support biases and considerations for how an organization or society can adapt to the changes that come with reducing bias and changing biased operations.[23] Figure 1.4 presents key considerations for when organizations and individuals address implicit bias, which training may include and explore further.

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[16] Figure text reproduced verbatim from: Ibid.
[17] Bezrukova, K. et al. "A Meta-Analytical Integration of Over 40 Years of Research on Diversity Training Evaluation." *Psychological Bulletin*, 11, 2016. pp. 39–41. https://scholarship.sha.cornell.edu/cgi/viewcontent.cgi?article=1973&context=articles
[18] [1] "What Do We Mean by Diversity Training," Op. cit., p. 1. [2] Greene, Op. cit., p. 12. [3] Hudson, D.J. "On 'Diversity' as Anti-Racism in Library and Information Studies: A Critique." *Journal of Critical Library and Information Studies*, 1:1. pp. 10–11. https://journals.litwinbooks.com/index.php/jclis/article/view/6
[19] Manson, E. "Chapter 9: Training and Education." In *Diversity Primer*, Diversity Best Practices. p. 137. https://www.diversitybestpractices.com/sites/diversitybestpractices.com/files/import/embedded/anchors/files/diversity_primer_chapter_09.pdf
[20] "Diversity Training v. Cultural Competency Training." DiversityRx, January 18, 2011. http://www.diversityrx.org/blog/qa/diversity-training-v-cultural-competency-training
[21] "What Do We Mean by Diversity Training," Op. cit., p. 1.
[22] [1] "Module 4: Implicit Bias & Microaggressions." Project READY: Reimagining Equity & Access for Diverse Youth. p. 4. https://ready.web.unc.edu/section-1-foundations/module-4-implicit-bias-microaggressions/ [2] "Limiting Implicit Bias Training." Ohio Academy of Family Physicians. https://www.ohioafp.org/education/limiting-implicit-bias-training/
[23] Osta and Vasquez, Op. cit., pp. 2–8.

Figure 1.4: Implicit Bias Training Considerations

Situate learning about implicit bias in a historical and socioeconomic political context	Don't confuse the fact that "we all have implicit biases" with immunity from responsibility as the benefactors of the current inequitable structural arrangements
Highlight and interrogate the ways that current policies and practices create and reproduce inequitable outcomes that serve to reinforce our implicit biases and the ways in which our implicit biases lead us to reify (and justify) existing inequities	We are all connected – our fates our linked. Working for social justice is not about "helping those kids" or "those communities", but about dismantling structures that exclude, increasing access to opportunity and building healthy, inclusive communities in which we all belong and can thrive
Understand that structural racism, othering, and exclusion have become normalized and result in policies and practices that ensure access to opportunity for some and exclude others	Any effort to interrupt implicit bias and its impacts must be accompanied by efforts to dismantle structures that exclude and build structures that provide access to opportunity or create new opportunities

Source: National Equity Project[24]

CULTURAL COMPETENCY

Cultural competency training informs participants about different cultures' values and distinctions to facilitate interactions with individuals that identify with another culture. Proponents of cultural competency note that this type of training goes beyond awareness and presents an ongoing practice that requires people to learn cultural developments and gain skills for various interactions.[25] Additionally, the concept of cultural competency stems from cultural diversity (i.e., "the differences between people based on a shared ideology and valued set of beliefs, norms, customs, and meanings evidenced in a way of life"), and reflects the act of understanding cultural differences and using them to better engage with others.[26]

Critics find that cultural competency training lacks a critical lens, maintains a set understanding of a culture's beliefs and characteristics, and often creates a sense of "otherness" among non-white groups.[27] Although the training aims to support participants in interacting with a variety of people and reducing inequities, the approach may be too general and potentially harmful through its ability to create outgroups.[28] A critique of cultural competency finds that this training does not confront power dynamics and considers the topic a new form of racism that sustains oppression and "involves a shift away from racial exclusionary practices based on biology to practices based on culture."[29]

[24] Figure text reproduce verbatim from: Ibid.
[25] "Diversity Training v. Cultural Competency Training," Op. cit.
[26] Campbell, E.L. "Transitioning from a Model of Cultural Competency toward an Inclusive Pedagogy of 'Racial Competency' Using Critical Race Theory." *Journal of Social Welfare and Human Rights*, 3:1, June 2015. p. 10. http://jswhr.com/journals/jswhr/Vol_3_No_1_June_2015/2.pdf
[27] Pon, G. "Cultural Competency as New Racism: An Ontology of Forgetting." *Journal of Progressive Human Services*, 20:1, May 13, 2009. pp. 59–60, 63. http://www.tandfonline.com/doi/abs/10.1080/10428230902871173
[28] Shepherd, Op. cit., pp. 1, 4.
[29] Pon, Op. cit., pp. 61–62.

TRAINING COMPARISONS

The overlapping yet nuanced nature of race-related training reveals how training types exist on a spectrum from informational and individualistic to practical and systemic.[30] Figure 1.5 presents how one county in Minnesota differentiates training types into three levels.

Figure 1.5: Levels of Race-Related Training

1. DIVERSITY = AWARENESS	2. CULTURAL COMPETENCY	3. ANTI-RACISM = SOCIAL JUSTICE/RACIAL JUSTICE
▪ Develop a sensitivity and understanding of another ethnic group ▪ Celebrates variety of cultures and gain knowledge of that culture ▪ Acknowledges and respect each other's differences ▪ Positive response – however it will never effectively address racism	▪ Celebrates Diversity ▪ Depth tends to be historical perspective to so we can all just get along today ▪ Emphasis is on effectively operating in different cultural contexts ▪ Relate and communicate across cultural lines ▪ Managing diversity for overall productivity and often using the dominant bias to do so ▪ Doesn't look at power, privilege or access	▪ Looks at the large, societal perspective regarding issues of oppression and social change ▪ Sights are set on changing the systems and structures that perpetuate inequality and inequity in our society ▪ Addresses issues of power and privilege along the lines of social identities ▪ People at this level realize that racism is a problem and are committed to working towards it end ▪ Need to address both how racism effects People of Color as well as how racial injustice benefits White People ▪ How practices, policies and procedures do not serve People of Color and over- serve White People

Source: Ramsey County[31]

Other organizations, such as the National Court Appointed Special Advocate Association, see race-related training as operating on a similar spectrum. For this organization, diversity training again represents a first step to build awareness, followed by anti-racism training, then coalition building. This last step involves individuals working together to create change and requires participants to understand how systemic racism negatively impacts society and their role in addressing issues.[32]

Furthermore, certain training types can exist individually but become more relevant, realistic, effective, and equitable when implemented within other training types (e.g., discussing diversity within an anti-racism training).[33] Critics of diversity and cultural competency training take issue with the stagnant and simplistic nature of these initiatives—how they often build awareness and highlight differences between people that inform interactions but do not address root problems (e.g., power); they may also create a sense of "otherness," and insufficiently supply practical teaching strategies.[34]

Cultural competency and equity, on the other hand, present an example of overlap, with organizations presenting cultural competency training through an equity lens. However, many of these training opportunities in education spaces are criticized in that they "are implemented in ways that essentialize marginalized students and mask the forms of structural injustice that feed educational outcome disparities."[35]

[30] [1] "What Do We Mean by Diversity Training," Op. cit., p. 1. [2] Osta and Vasquez, Op. cit., pp. 1–2.
[31] Figure text reproduced verbatim from: "Three Levels for Anti Racism Training Diversity = Awareness, Cultural Competence, Antiracism = Justice." Ramsey County.
[32] "What Do We Mean by Diversity Training," Op. cit., p. 1.
[33] [1] Ibid. [2] Shepherd, Op. cit., p. 1. [3] "How A Large Urban District Focused on Literacy Instruction and Improved Student Learning." Reading Apprenticeship at WestEd. sec. Abstract. https://readingapprenticeship.org/successstories/large-urban-district-improved-student-learning/
[34] [1] "What Do We Mean by Diversity Training," Op. cit., p. 1. [2] Bezrukova et al., Op. cit. [3] Allen, Op. cit. [4] Shepherd, Op. cit., p. 1. [5] Pon, Op. cit., p. 60.
[35] Gorski, Op. cit., p. 221.

SECTION II: ANTI-RACISM AND ANTI-OPPRESSION

In this section, Hanover presents examples and evidence of efficacy of four anti-racism training types: intergroup contact, training and education, communication and media campaigns, and organizational development. This section also provides anti-racism and anti-oppression resources that may support districts in developing anti-racism initiatives.

To contextualize this section and reiterate the definitions from the introduction, **anti-racism** is "an active and consistent process of change to eliminate individual, institutional and systemic racism," and **anti-oppression** represents "strategies, theories, and actions that challenge social and historical inequalities/injustices that have become part of our systems and institutions and allow certain groups to dominate over others."[36]

TYPES OF ANTI-RACISM TRAINING

The first type of anti-racist training, according to the *Routledge International Handbook of Contemporary Racisms*, is intergroup contact, through which contact between people decreases prejudice. In a 2018 article published in *Behavioral Public Policy*, authors use a meta-analytic approach to review 27 intergroup contact studies. Twenty-four of these studies show that intergroup contact leads to more positive beliefs and less prejudice. Although this meta-analysis lacks evidence that supports intergroup contact reducing *racial* prejudice, analyzed studies find intergroup contact effective in a variety of settings.[37]

During intergroup contact, **contact quality appears to have a stronger impact on positive outcomes than contact quantity**, and bringing together a balanced group (i.e., a balanced proportion of majority to minority group members) also supports anti-racism attitudes and reduces prejudice.[38] When using intergroup contact for anti-racism training, intergroup contact theory highlights five essential conditions that may occur in-person or indirectly (e.g., virtually). These conditions include:[39]

- Equal status between interacting groups;
- Common goals between groups;
- Intergroup cooperation;
- Support from authorities, law, or custom; and
- Situations that allow for developing personal acquaintance and friendships through meaningful, repeated contact.

Another form of anti-racism development is training and education, in which programs "increase positive intergroup behaviours [sic] and decrease prejudice or discrimination towards (perceived) out-group members."[40] Such training typically occurs at schools and job sites, often focus on diversity, and may lead to negative outcomes (e.g., increased discriminatory attitudes) for a small subset of participants.[41] However, the elements shown in Figure 2.1 may promote successful anti-racism education outcomes.

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[36] "CRRF Glossary of Terms," Op. cit.

[37] [1] Paluck, E., S. Green, and D. Green. "The Contact Hypothesis Re-Evaluated." *Behavioural Public Policy*, July 10, 2018. pp. 1, 22. https://www.researchgate.net/publication/326298328_The_contact_hypothesis_re-evaluated [2] Ben, J., D. Kelly, and Y. Paradies. "Contemporary Anti-Racism." In *Routledge International Handbook of Contemporary Racisms*, Routledge, 2020. p. Page numbers not included. https://books.google.com/books?hl=en&lr=&id=s6PSDwAAQBAJ&oi=fnd&pg=PT9&dq=%22%22Routledge+International+Handbook+of+Contemporary+Racisms%22+AND+%22Contemporary+anti-racism%22&ots=twkxAs1EjS&sig=WeF21wIgcpCC6u2e9sUJfY7A_0I#v=onepage&q=%22%22Routledge%20International%20Handbook%20of%20Contemporary%20Racisms%22%20AND%20%22Contemporary%20anti-racism%22&f=false

[38] Ben, Kelly, and Paradies, Op. cit., p. Page numbers not included.

[39] Bulleted text reproduced verbatim from: Ibid.

[40] Ibid.

[41] Ibid.

Figure 2.1: Elements of Anti-Racism Education and Training

Discuss racism explicitly	Hold conversations within a safe space	Use multiple instructional methods (e.g., readings, group discussions, role play)	Integrate components of the training
Focus on a range of backgrounds (i.e., racial, ethnic, cultural, religious) rather than one group	Adjust training to meet organization goals	Ensure trainers conduct themselves respectfully, build social norms, enhance awareness, and encourage contact	Include participants from different positions within the organization and with varied backgrounds

Source: *Routledge International Handbook of Contemporary Racisms*[42]

The third type of anti-racism training is communication and media campaigns. This training type may improve or worsen racist beliefs, and studies generally find mixed impacts of media campaigns on beliefs and attitudes. Evidence of impacts becomes clearer among studies with targeted anti-racism messages rather than general positivity and diversity messages.[43] For example, an Australian health-focused report from 2006 highlights that when communications emphasize specific problems and negative feelings, then change becomes more productive. Notably:[44]

> Anti-racism campaigns need to deal with specific negative beliefs used by the in-group when they rationalize their negative feelings for the other group or when they simply describe members of the out-group. Simply attempting to generate positive feelings to other groups will be far less effective and perhaps be counterproductive as the target audience's system stimulates negative feelings to counteract these attempts – thus strengthening the original negative attitudes (a harmful 'key').

Lastly, anti-racism training may occur through organizational development, which supports anti-racism progress through assessments or auditing. For example, organizations may include the following methods:[45]

- Implement new organizational policies, plans, or operational processes;
- Model and enforce non-discriminatory standards;
- Work to impact social norms and wider societal change;
- Develop resources (e.g., teacher professional development);
- Draw on organizational leadership; and
- Deploy conflict resolution approaches.

According to research published in 2012 and 2009, **methods demonstrate effectiveness when following specific goals and visions, tailoring development to an organization's characteristics, ensuring accountability, and measuring outcomes.**[46] However, tools to assess the effectiveness of such methods on racism require greater focus and specificity on systemic racism.[47] One organizational development evaluation tool, here, provides an example of a potential assessment resource to reflect on anti-racism

[42] Figure adapted, with text reproduced verbatim with modifications, from: Ibid.
[43] Ibid.
[44] Block quote reproduced verbatim from: Donovan, R.J. and R. Vlais. "A Review of Communication Components of Anti-Racism/Anti-Discrimination and Pro- Diversity Social Marketing/Public Education Campaigns." Vic Health, June 2006. pp. 115–116. https://www.vichealth.vic.gov.au/-/media/ResourceCentre/PublicationsandResources/Discrimination/MoreThanTolerance/Paper_1-Donovan_Communications_Marketing.pdf?la=en&hash=1BBDAB70D4D30E93076BA1F32723FDF5F1FB482C
[45] Bulleted text reproduced nearly verbatim from: Ben, Kelly, and Paradies, Op. cit., p. Page numbers not included.
[46] Ibid.
[47] Trenerry, B. and Y. Paradies. "Organizational Assessment: An Overlooked Approach To Managing Diversity And Addressing Racism In The Workplace." *Journal of Diversity Management*, 7:1, Spring 2012. p. 21. https://www.researchgate.net/publication/267826856_Organizational_Assessment_An_Overlooked_Approach_To_Managing_Diversity_And_Addressing_Racism_In_The_Workplace

training and development. Although the Western States Center created this tool for non-profits, it shows how organizations may exist on a racism spectrum from an "All White Club" to an "Anti-Racist Organization," and the tool provides a rubric to help organizations identify their position.[48] The tool also includes guiding questions for discussing anti-racism development and suggestions for further improvement.[49]

SPOTLIGHTS AND SAMPLES

The preceding subsection presents information and evidence from predominantly non-education organizations, institutions, and sectors, though school districts also demonstrate anti-racism training initiatives. However, these training sessions and initiatives appear to be evolving, and districts have or present little evidence of outcomes. For example, Hartford School District, located in White River Junction, Vermont, recently created a new anti-racism school policy. The policy, which awaits final approval, includes a statement on the district's anti-racist beliefs and the following changes to operations:[50]

- Assess and monitor the "institutional climate" to understand implicit bias and its consequences;
- "Oppose teachings that perpetuate white supremacy and/or superiority by acknowledging the violence, disenfranchisement, and bigotry these topics depict before a lesson begins;"
- Train teachers and staff about racism and its inequitable outcomes, as well as training in "cultural awareness and/or culturally responsive teaching practices;" and
- Respond to racist acts by students by teaching them about the impact of their actions on others through restorative justice, mediation or role playing, among other responses.

Additionally, Hartford School District board members continue to discuss potentially hiring anti-racism experts, who would ensure that teachers receive accurate training from professionals in the field. The position would "be appointed to positions akin to math coordinators in the school."[51]

In Cambridge, Massachusetts, Cambridge Public Schools (CPS) plans to offer two training initiatives shown in Figure 2.2. CPS advances towards full implementation by following action plans and benchmarking dates.[52]

Figure 2.2: Cambridge Public Schools Anti-Racism Trainings

FOUNDATIONAL ANTI-BIAS TRAINING	COMPREHENSIVE ANTI-RACISM AND RACIAL EQUITY PROFESSIONAL LEARNING
▪ As part of the ongoing Dynamic Diversity Development initiative, the 2019-20 budget included funding to support the implementation of EverFi, a digital platform containing professional learning modules focused on preventing harassment, discrimination, and bias. This program intends to clearly communicate organizational norms and expectations relative to race and gender-based interactions while establishing a common base of knowledge for combating bias.	▪ Building on the foundation established by EverFi, CPS is working to develop comprehensive anti-racism and equity professional learning for all educators and staff. This professional learning includes differentiated learning opportunities based on staff members' previous experiences, role in CPS, and racial and ethnic identities. Informally, this idea has been referred to as a "core curriculum" for CPS educators, which might include multiple modules of content that CPS staff engage with over time.

[48] "Anti-Racist Organizational Development." Western States Center. pp. 60–63. https://catholicvolunteernetwork.org/wp-content/uploads/2019/02/Anti-Racist-Organizational-Development-and-Assesment-Tool-Western-States-Center.pdf
[49] Ibid., pp. 65–75.
[50] Bulleted text reproduced verbatim from: Gregg, J.P. "Hartford School District Develops Wide-Reaching Policy on Racism." Valley News, June 26, 2020. https://www.vnews.com/Hartford-School-Board-enacting-anti-racism-policy-34961312
[51] Ibid.
[52] "Staff Training & Professional Learning." Cambridge Public Schools. https://www.cpsd.us/equity/staff_training

FOUNDATIONAL ANTI-BIAS TRAINING	COMPREHENSIVE ANTI-RACISM AND RACIAL EQUITY PROFESSIONAL LEARNING
▪ The Office of Human Resources is continuing to work on the rollout of EverFi, a new digital platform containing training tools and video modules focused on harassment and discrimination prevention and managing bias. Planning for a multi-phase, district-wide rollout is underway, with the goal of 100% of CPS staff members engaging in and completing this training by June 2021.	▪ The initial working group, comprised of staff from human resources, professional learning, curriculum and instruction, and school leaders, has begun to define a set of equity competencies that will serve as the foundation for the course. A plan for engaging multiple educator stakeholders and community members in the development of this course is underway. Opportunities for feedback and involvement will be available in the upcoming months.

Source: Cambridge Public Schools[53]

Furthermore, Principal Joe Truss from Visitacion Valley Middle School, located in San Francisco, California, gathered staff members together to discuss White Supremacy Culture in 2019. Truss discusses what White Supremacy Culture is, why it needs to change, and how school staff members engaged in conversations and reflection regarding White Supremacy Culture. Truss' article is available through Next Generation Learning Challenges here.[54]

Guilford County Schools (GCS) in Guilford, North Carolina established its Office of Diversity, Equity, and Inclusion in 2006, and the office continues to develop and offer diversity training and resources.[55] GCS finds that teachers often enter the school system with little understanding of race, racial identity, and associated economic challenges. To support these teachers, who work in a district where most students identify with minority groups, the Office of Diversity, Equity, and Inclusion focuses on training for all staff levels.[56] In 2018-2019, GCS offered monthly anti-racism training opportunities to certificated and classified staff members. During these sessions, participants engaged in a two-day program from 9 am to 5 pm and worked towards the following objectives:[57]

- Develop a common definition of racism and an understanding of its different form: individual, institutional, linguistic, and cultural;
- Develop a common language and analysis for examining racism in educational settings;
- Understand one's own connection to institutional racism and its impact on one's work and personal life;
- Understand how poverty and racism are inextricably linked;
- Understand the historical context for how racial classifications in the United States come to be and how and why they are maintained;
- Address surface assumptions about how our work and personal lives are affected by racism;
- Develop awareness and understanding of ways to begin "eliminating racism" in our schools, our lives, and in institutional structures; and

[53] Figure text reproduced nearly verbatim from: Ibid.
[54] Truss, J. "When My School Started to Dismantle White Supremacy Culture." Next Generation Learning Challenges, August 20, 2019. https://www.nextgenlearning.org/articles/what-happened-when-my-school-started-to-dismantle-white-supremacy-culture
[55] Healey, L. "K-12 School Districts Work to Improve Inclusion Through Teacher Training." INSIGHT Into Diversity, November 21, 2016. https://www.insightintodiversity.com/k-12-school-districts-work-to-improve-inclusion-through-teacher-training/
[56] [1] Ibid., p. 12. [2] "By the Numbers." Guilford County Schools. https://www.gcsnc.com/page/4313
[57] Bulleted text reproduced verbatim from: "2018-2019 Anti-Racism Training for GCS Employees." Guilford County Schools. p. 1. https://www.gcsnc.com/cms/lib/NC01910393/Centricity/Domain/2412/2018-19%20Anti-Racism%20Training%20Information%20and%20Schedule.pdf

- Develop an understanding of the intersectionality of racism and all the other "isms" that plague our society.

GCS's Professional Learning and Leadership department supports diversity-related training in addition to managing teachers' other professional development opportunities. The department notes the following upcoming training programs on their website:[58]

- Culturally Responsive Teaching; and
- MOOCs for Educators.

Education and other industry organizations provide sample frameworks and guides to support institutions with anti-racism and anti-oppression training. Figure 2.3 contains examples of these guides, which districts may consider when creating training opportunities that best fit their needs and goals.

Figure 2.3: Anti-Racism Training Frameworks and Guides

Becoming an Anti-Racism Educator Wheaton College	Anti-Oppression Training Resource Toronto Youth Cabinet	Anti-Oppression Toolkit National Campus and Community Radio Association	How to Be an Antiracist Educator ASCD

Source: Multiple sources detailed below.[59]

[58] Preceding information and bulleted links obtained from: [1] "Professional Learning Overview." Guilford County Schools. https://www.gcsnc.com/Domain/5037 [2] "Culturally Responsive Teaching." Guilford County Schools. https://www.gcsnc.com/site/default.aspx?PageType=3&DomainID=5037&ModuleInstanceID=3050&ViewID=6446EE88-D30C-497E-9316-3F8874B3E108&RenderLoc=0&FlexDataID=47446&PageID=2141 [3] "MOOCs for Educators (The Friday Institute)." Guilford County Schools. https://www.gcsnc.com/site/default.aspx?PageType=3&DomainID=5037&ModuleInstanceID=3050&ViewID=6446EE88-D30C-497E-9316-3F8874B3E108&RenderLoc=0&FlexDataID=18402&PageID=2141

[59] Figure adapted and links obtained from: [1] "Becoming an Anti-Racist Educator." Wheaton College. https://wheatoncollege.edu/academics/special-projects-initiatives/center-for-collaborative-teaching-and-learning/anti-racist-educator/ [2] Virelli, C. and A. Fernandez. "Anti-Oppression Training Resource." Toronto Youth Cabinet, March 2019. https://static1.squarespace.com/static/564be1d3e4b08e5f0e45876f/t/5c898d6c15fcc074e571f7f7/1552518509610/TYC+-+Anti-oppression+resource+2019+-+March+11+Export.pdf [3] "Anti-Oppression Toolkit." National Campus and Connumity Radio Association, May 2013. http://imaa.ca/source/wp-content/uploads/2017/06/ncra-anti-oppression-toolkit.pdf [4] "How to Be an Antiracist Educator." ASCD, October 2019. http://www.ascd.org/publications/newsletters/education-update/oct19/vol61/num10/How-to-Be-an-Antiracist-Educator.aspx

SECTION III: EQUITY AND SOCIAL JUSTICE

In this section, Hanover presents evidence of justice-oriented training for teachers and a tool for assessing equity. This section also highlights districts with equity training and guides to support districts in developing equity and justice initiatives. Notably, research on equity training and its impact on students and schools is limited and lacks clear evidence and causal effects.

As noted in the introduction, **equity** is "a condition or state of fair, inclusive, and respectful treatment of all people. Equity does not mean treating people the same without regard for individual differences."[60] More specifically, "**racial equity** is the condition that would be achieved if one's racial identity no longer predicted, in a statistical sense, an individual's outcomes. The term racial equity if often used interchangeable with racial justice and thus also implies work to address root causes of inequities, not just their manifestation. This includes elimination of policies, practices, attitudes and cultural messages that reinforce differential outcomes by race or fail to eliminate them."[61] Furthermore, "**social justice** includes a vision of society in which the distribution of resources is equitable, and all members are physically and psychologically safe and secure. Social justice involves social actors who have a sense of their own agency as well as a sense of social responsibility toward and with others and the society as a whole."[62]

RESEARCH AND IMPACT

School districts may support diversity and inclusion through social justice and equity means, which demonstrate effectiveness as presented in a relatively recent national teacher conference. In 2015, the Progressive Education Network (PEN) held the conference "Teaching the Possible: Access, Equity, and Activism!"[63] The conference combined social justice training with professional development components to "provide attendees with opportunities to investigate their own roles in producing, changing, and interpreting socially-just learning and teaching in their own school contexts."[64] A 2017 study on the conference's framework finds that the workshops on social justice incorporated effective training elements, including:[65]

- Content focus;
- Active learning;
- Coherence;
- Duration; and
- Collective participation.

Although the study does not specify how well the teachers retained and implemented the knowledge and skills gained at the conference, the author highlights how the theme of justice combined with workshops allowed for deep reflection and connections. These workshops, therefore, provided professional development-oriented training with justice content to present accessible and topical teaching strategies.[66]

To assess the impact of equity and justice training, organizations may use rubrics and assessment guides to reflect on their progress and status. For example, the Checklist for Racial Equity presents part of an equity evaluation tool, which allows for a clear analysis of equity in staffing and may support districts with hiring.[67]

[60] "CRRF Glossary of Terms," Op. cit.
[61] "Racial Equity Resource Guide: Glossary," Op. cit.
[62] Ibid.
[63] Gambone, M. "Teaching the Possible: Justice-Oriented Professional Development for Progressive Educators." *Brock Education Journal*, 27:1, 2017. https://www.researchgate.net/publication/322240464_Teaching_the_Possible_Justice-Oriented_Professional_Development_for_Progressive_Educators
[64] Ibid., p. 53.
[65] Bulleted text reproduced verbatim from: Ibid., p. 64.
[66] Ibid., pp. 53, 64.
[67] Lettner, T. and S. Louis. "Anti-Racist Organizational Change: Resources & Tools for Nonprofits." CommunityWise Resource Centre, 2017. pp. 36–37. http://communitywise.net/wp-content/uploads/2017/10/AROC-Resources-and-Tools_web.pdf

SPOTLIGHTS AND SAMPLES

Teachers in Montgomery County Public Schools (MCPS) have the opportunity to participate in the Equity and Excellence in Education (EEE) program through a partnership with McDaniel College. This certificate program includes five courses, a total of 15 credits, and engages teachers in "the theory, research, and practice of teaching and leading for equity in the classroom, school and beyond."[68] Program course work includes those in Figure 3.1.

Figure 3.1: Courses Required for the Equity and Excellence in Education Certificate

Foundations of Social Justice Teaching	Race and Ethnicity in American Education	Culturally Reflective Instruction	Leadership for Equity and Excellence	Research and Planning for Equity and Excellence

Source: McDaniel College[69]

Furthermore, the program supports teacher and district development through the following objectives:[70]

- Reach every student by building a culture of equity in our schools and classrooms;
- Conduct action research related to cultural proficiency and educational equity;
- Delve into critical race theory to examine the impact of race and ethnicity on public school curriculum and pedagogy;
- Examine ways dominant cultures serve groups to varying degrees;
- Understand how curricular and pedagogical choices can reproduce inequities or promote success for all students; and
- Grow as an educational leader able to transform environments for equity and excellence.

Education organizations provide sample frameworks and guides to support equity and social justice training, as linked in Figure 3.2.

Figure 3.2: Equity and Social Justice Training Frameworks and Guides

Professional Learning Sequences Designed for Equity Next Generation Learning Challenges	Social Justice Standards: The Teaching Tolerance Anti-Bias Framework ▪ Facilitator Guide Teaching Tolerance	Northshore School District Equity Framework Northshore School District	Racial Justice in Education: Resource Guide National Education Association

Source: Multiple sources detailed below.[71]

[68] [1] "Equity & Excellence Certification." Montgomery County Public Schools. https://www.montgomeryschoolsmd.org/departments/clusteradmin/equity/certification.aspx [2] "Can Equity Be Taught?" Edutopia, May 19, 2017. https://www.edutopia.org/article/can-equity-be-taught-carly-berwick

[69] Figure adapted from: "Equity and Excellence in Education." McDaniel College. p. 2. https://news.montgomeryschoolsmd.org/wp-content/uploads/2018/01/McDaniel-College-Equity-and-Excellence-in-Education-flyer.pdf

[70] Bulleted text reproduced verbatim from: Ibid., p. 1.

[71] Figure adapted with links obtained from: [1] "Professional Learning Sequences Designed for Equity." text/html. Next Generation Learning Challenges. https://www.nextgenlearning.org/equity-toolkit/professional-learning [2] "Social Justice Standards | The Teaching Tolerance Anti-Bias Framework." Teaching Tolerance. https://www.tolerance.org/professional-development/social-justice-standards-the-teaching-tolerance-antibias-framework [3] "The Teaching Tolerance Social Justice Standards: A Professional Development Facilitator Guide." Teaching Tolerance, 2018. https://www.tolerance.org/sites/default/files/2018-11/TT-Social-Justice-Standards-Facilitator-Guide-WEB_0.pdf [4] "The Teaching Tolerance Social Justice Standards: A Professional Development Facilitator Guide." Teaching Tolerance. https://www.tolerance.org/sites/default/files/2018-11/TT-Social-Justice-Standards-Slide-Deck.pdf [5] "Northshore School District Equity Framework." Northshore School District, 2019. https://www.boarddocs.com/wa/nsd/Board.nsf/files/BALKRF531B8E/$file/NSD%20Equity%20Framework_Updated.pdf [6] "Racial Justice in Education: Resource Guide." National Education Association. https://neaedjustice.org/wp-content/uploads/2018/11/Racial-Justice-in-Education.pdf

SECTION IV: DIVERSITY AND INCLUSION

In this section, Hanover presents recent literature regarding the effectiveness of diversity training and highlights districts with diversity programs.

As defined in the introduction, diversity is "a term used to encompass the acceptance and respect of various dimensions including race, gender, sexual orientation, ethnicity, socio-economic status, religious beliefs, age, physical abilities, political beliefs, or other ideologies."[72] Inclusion means "authentically bringing traditionally excluded individuals and/or groups into processes, activities and decision/policy making."[73]

RESEARCH AND IMPACT

Diversity training demonstrates effectiveness according to research studies in education and non-education sectors. For example, a 2016 meta-analysis published in *Psychological Bulletin* references 260 workplace- and school-based studies. Researchers analyze the studies for the impact of diversity training on participants' cognitive learning (i.e., awareness), behavioral learning (i.e., skill-building and implementation), attitudinal learning (i.e., attitude towards diversity and self-efficacy), and reactions (i.e., feelings towards the training and the trainer).[74] Researchers present the following outcomes:[75]

- Reactions to the training itself feature the strongest overall positive effects;
- Diversity training programs seem less effective in changing attitudes;
- Diversity training effects on reactions and attitudinal/affective learning decayed over time;
- Training effects on cognitive learning remained stable or in some cases even increased in the long-term; and
- The effectiveness of diversity training varied as a function of diversity training context, design, and to a lesser degree the characteristics of trainees.

Additionally, when studying the education sector specifically, diversity training for higher education faculty members demonstrates certain positive impacts of training on student and faculty outcomes. A 2016 study published in the *International Journal for the Scholarship of Teaching and Learning* uses focus group interviews with 16 faculty members and 37 students across seven colleges to determine the effects.[76] Figure 4.1 shows how faculty diversity training impacts faculty members and students.

Figure 4.1: Impacts of Diversity Training on Faculty and Students

FACULTY MEMBERS	STUDENTS
▪ Ideologically ▪ Individually through knowledge and skill development ▪ In terms of classroom practice	▪ Professional development ▪ Classroom environment ▪ Personal growth

Source: *International Journal for the Scholarship of Teaching and Learning*[77]

[72] "CRRF Glossary of Terms," Op. cit.
[73] "Racial Equity Resource Guide: Glossary," Op. cit.
[74] Bezrukova et al., Op. cit., pp. 10–11, 30.
[75] Bulleted text compiled and reproduced verbatim from: Ibid., pp. 39–41.
[76] Booker, K.C., L. Merriweather, and G. Campbell-Whatley. "The Effects of Diversity Training on Faculty and Students' Classroom Experiences." *International Journal for the Scholarship of Teaching and Learning*, 10:1, 2016. pp. 1–2. http://digitalcommons.georgiasouthern.edu/ij-sotl/vol10/iss1/3
[77] Figure text reproduced verbatim from: Ibid., p. 3.

However, this study notes limitations of diversity training, including a lack of time to put knowledge from the training into course schedules, which indicates that training may not convey the importance of integrating diversity into curricula. Additional training limitations include not addressing potential student and faculty resistance as well as perceived incompatibility between diversity education and course content.[78]

Additionally, the Harvard Business Review's (HBR's) article, "Why Diversity Programs Fail," notes similar challenges when implementing diversity training programs.[79] For instance, **required training may *trigger* bias and negativity rather than *reduce* it. Therefore, effective training allows for autonomy**. Such approaches "engage managers in solving the problem, increase their on-the-job contact with female and minority workers, and promote social accountability—the desire to look fair-minded."[80] Opting for less forceful diversity training methods demonstrates effectiveness in HBR authors Dobbins and Kalev's 2016 review of diversity program outcomes. Figure 4.2 presents eight initiatives that result in greater diversity among employees in 829 large and midsize U.S. companies.[81]

Figure 4.2: Effective Diversity Training Initiatives

	Voluntary training		Self-managed teams
	Cross-training		College recruiting: women
	College recruiting: minorities		Mentoring
	Diversity task forces		Diversity managers

Source: Harvard Business Review[82]

SPOTLIGHTS AND SAMPLES

Twinsburg City School District, located in Twinsburg, Ohio, expanded its diversity training in 2017. The changes, approved unanimously by the local school board, initiated a partnership with The Diversity Center of Northeast Ohio through which Twinsburg teachers receive training on diversity and other social topics, including:[83]

- Body image and stigma;
- LGBTQ inclusion;
- Bullying prevention;
- Gender;
- Problem-solving;
- Immigration;
- Ethnicity;
- Leadership; and
- Special needs.

[78] Ibid., p. 6.
[79] Dobbin, F. and A. Kalev. "Why Diversity Programs Fail." *Harvard Business Review*, July 1, 2016. https://hbr.org/2016/07/why-diversity-programs-fail
[80] Ibid.
[81] Ibid.
[82] Figure adapted from: Ibid.
[83] Preceding information obtained and bulleted text reproduced nearly verbatim from: Helms, A. "Twinsburg District Expands Its Diversity Training." MyTownNEO, August 25, 2017. https://www.mytownneo.com/news/20170825/twinsburg-district-expands-its-diversity-training

Although the district does not appear to publish outcomes from the training, Twinsburg City School District continued its partnership with The Diversity Center of Northeast Ohio after the first year, which may suggest a positive impact of the program on students and teachers.[84]

Additionally, **Spring Grove Area School District, located in Spring Grove, Pennsylvania, supports multiple diversity training opportunities and initiatives as part of annual events, sustained programs, and collaborative efforts.** These initiatives appear in Figure 4.3 and vary regarding the individuals involved and the subjects discussed (e.g., race, mental health, gender identity).[85]

Figure 4.3: Spring Grove Area School District Diversity Initiatives

INITIATIVE	DESCRIPTION
Diversity Festival	Spring Grove Area School District hosts an annual Diversity Festival to showcase and celebrate the diversity represented in the community. The district invites the entire community to attend the festival to learn from each other and their differences, to experience an inclusive and welcoming environment, and to help break down barriers in their society. Each year, a keynote speaker addresses the attendees to share personal experiences, challenges, and successes. The district has been honored to host several notable keynote speakers: Dr. Pamela Gunter-Smith, President of York College; Mr. Adnan Pasic, VP & Sr. Commercial Loan Officer/Lancaster Market Executive with ACNB Bank; U.S. Navy Rear Admiral Jonathan A. Yuen; Mr. Darrien Davenport, Executive Director of Multicultural Engagement at Gettysburg College.
Spring Grove Area Intermediate School Cultural Day	Grade 6 students at Spring Grove Area Intermediate School immerse in presentations where they learn about the traditions, foods, holidays, etc. of different cultures. After the presentations, students may try new foods from various cultures represented in the program.
Artist in Residency	Mr. Jason Reed, founder of REACH!, has been an Artist in Residency at Spring Grove Area High School over the last two years. The purpose of the program is to promote self-discipline, respect for others, and respect for yourself. Mr. Reed recently received the YMCA Racial Justice Award.
Character Education Classes	Spring Grove Area High School counselors, in conjunction with other staff members, develop and teach Character Education classes approximately twice a month to all high school students. The various topics include, but are not limited to, diversity acceptance, mental wellness, connecting with others, drug prevention, safe driving, after high school planning, etc.
Leadership Diversity Training from Dr. Monea Abdul-Majeed, Racial Justice Coordinator	The District Leadership Team and various staff members have had multiple opportunities to meet with, and learn from, Dr. Monea Abdul-Majeed, the Racial Justice Coordinator for YWCA York. Dr. Abdul-Majeed presented on topics such as implicit bias and inclusion. She has also helped the district continue its diversity planning.
Professional Development by Stock and Leader	District leadership and staff members have participated in several diversity seminars and training offered by Stock and Leader.
Leadership for Diverse Schools	Spring Grove Area School District has participated in the Leadership York: Leadership for Diverse Schools program. Educators learn to interact more effectively with diverse populations of students, parents, and colleagues. The program fosters understanding, acceptance, and tolerance so the participants can be leaders in helping to build culturally proficient communities within their districts.
York County Diversity Advisory Council	Spring Grove Area School District participates and is represented on the York County Diversity Advisory Council to facilitate communication between community members and diverse populations and addresses matters related to diversity that are important to everyone.

[84] "Minutes of REGULAR Meeting, March 20, 2019." Twinsburg City School District, March 20, 2019. http://www.twinsburg.k12.oh.us/Downloads/P_Mins_19_03_20.pdf
[85] "Diversity In Our Schools." Spring Grove Area School District. https://www.sgasd.org/domain/927

INITIATIVE	DESCRIPTION
Spring Grove Area High School S.P.I.R.I.T. (Student Problem Identification and Resolution of Issues Together) Council	School officials and student leaders work together in an inclusive environment to delve into various student issues affecting the student population. Through cooperative and open discussions, they discuss ways to resolve important and sensitive matters to help keep the school environment a positive and safe learning space.
Aevidum	The word Aevidum means "I've got your back." The Aevidum club at Spring Grove Area High School works to create a school climate where students feel accepted, appreciated, acknowledged, and cared for. The club works to create a place where teachers, students, and staff embrace these values and support each other every day. Aevidum sees the importance of starting and continuing conversations about mental health and suicide prevention.
Friends and Fun Day	The Friends and Fun Festival club is for students interested in working with special needs students from Spring Grove High School as well as neighboring schools. The FFF is a field day type event that provides a fun and social experience for diverse students in the Autistic Support and Multiple Disabilities classrooms in Spring Grove Area School District.
GSA Club	The goal of the Gay-Straight Alliance (GSA) at Spring Grove High School is to promote a safe community for every person regardless of his/her sexual preference or gender identity. Members of the GSA will work to increase awareness while educating the social community in a frank but respectful manner. The GSA is a creative and respectful outlet in which to understand all viewpoints. Most importantly, the GSA is a fun and exciting group in which to reduce social stigmas and lead by example.
Diversity Committee	Staff members from across the district participate in professional development activities and training regarding diversity and inclusion. The committee discusses areas of concern and how the district can continue to embrace and improve upon building understanding and acceptance among staff and students. Members of the committee write and revise the Building Level Diversity Action Plans each year.
WEB (Where Everyone Belongs)	WEB is a middle school orientation and transition program that welcomes Grade 7 students and makes them feel comfortable throughout the first year of their middle school experience. WEB also acts as an anti-bullying program for the middle school by providing it with a cadre of student leaders who look for bullying behavior and help stop it. WEB gives older students permission to be aware of and report any negative behavior they see, creating a safer school for everybody.
LINK Crew	LINK Crew is a transition program that provides social and academic support throughout the year for Grade 9 students. This program utilizes upper-classmen as leaders, motivators, role models, and teachers. Selected leaders commit to attend and actively participate in multiple training sessions as well as social events. They will also commit to working with and building relationships with a selected group of freshmen throughout the year.
Project TEAM	Project TEAM for Grade K-6 students is a comprehensive bullying prevention/social and emotional school-wide program. Project TEAM aims to improve schools' climate and culture, making sure all students feel connected and part of the team. Students learn the six foundations of Project TEAM: Helping Others, Positive Change, Anti-Bullying, Problem Solving, Resiliency, and Leadership. Students will gain an understanding of the foundations, why they are important, and how to implement them in their lives in and out of school.
YWCA Leadership Summit: Dialogues in Race	Five Spring Grove Area High School students had the opportunity to attend the YWCA York Leadership Summit in the fall of 2019, where students gathered in a supportive and structured environment to have dialogues about race. The students spoke freely about their experiences dealing with race while encouraging cultural competency, acceptance, and inclusivity within schools.

Source: Spring Grove Area School District[86]

[86] Figure text reproduced nearly verbatim from: Ibid.

As shown in Figure 4.3, diversity training opportunities and initiatives take many forms, and districts may use various programs to fit their needs. Alternatively, districts may turn to fewer but still comprehensive training opportunities. For example, the National Education Association (NEA) offers the Diversity Training Program, which requires at least 11 hours of participation in a stand-alone program or in conjunction with the NEA's Social Justice Training Program and Cultural Competence Training Program. These programs, their sessions, and their objectives appear on the program brochure here.[87] Districts may consider aligning training opportunities with NEA's or engaging in these programs directly.

[87] "Diversity Training Program." National Education Association. https://www.nea.org/assets/docs/Diversity%20Training.pdf

SECTION V: IMPLICIT BIAS

In this section, Hanover presents recent literature regarding the effectiveness of implicit bias training. This section also highlights districts with implicit bias training and guides that may support districts in developing implicit bias initiatives.

To contextualize this section, the following definition presents an abbreviated version of the one detailed in the introduction: "**implicit biases** are negative associations that people unknowingly hold. They are expressed automatically, without conscious awareness."[88]

RESEARCH AND IMPACT

Implicit—or unconscious—bias may lead to adverse outcomes (e.g., suspensions) among minority students.[89] **However, implicit bias training demonstrates potential and measurable effectiveness in changing teachers' biased beliefs and student interactions.**[90] Regarding implicit bias's impact on students, a 2017 paper from the University Council for Educational Administration conference analyzes discipline and student race from the 2015-2016 academic year. The analysis includes 41 school administrators and 2,468 discipline-causing incidents. Results show that "in overall and subjective (but not objective) incidents, implicit bias accounted for differences in the relationship between race and discipline severity at similar levels."[91] These results highlight how certain students receive more severe punishments regardless of their actions, which occurs frequently and may affect students beginning in early education.[92]

In the few available studies that review the impact of implicit bias training on teachers and students, training supports positive teacher attitudes and interactions. For example, a 2014 study analyzes the impact of implicit bias training on male and female university faculty members' attitudes towards women in science, technology, engineering, and mathematics (STEM). The study uses a pre- and post-test method to compare 234 faculty members' attitudes before and after implicit bias training and bases the study on awareness training being effective in improving views on race and gender.[93] Researchers find that male faculty members are more likely than female faculty members to support stereotypes about women in STEM. Additionally, implicit bias training leads to an improvement in male, but not female, faculty members' attitudes towards women in STEM.[94]

According to the report, "Unconscious Bias in the Classroom," engaging teachers in implicit bias programs supports bias reduction efforts for the following three reasons:[95]

- Engagement at the teacher level reaches into classroom practice in a way that higher-level policies do not;

[88] "Glossary," Op. cit.
[89] Gullo, G.L. "Principal Implicit Bias in School Disciplinary Decisions." University Council for Educational Administration, November 17, 2017. Retrieved from Google Scholar: https://scholar.google.com/citations?user=Tc-JxugAAAAJ&hl=en
[90] [1] Ibid., p. 3. [2] Gilliam, W.S. et al. "Do Early Educators' Implicit Biases Regarding Sex and Race Relate to Behavior Expectations and Recommendations of Preschool Expulsions and Suspensions?" *Yale University Child Study Center*, September 28, 2016. p. 15. https://medicine.yale.edu/childstudy/zigler/publications/Preschool%20Implicit%20Bias%20Policy%20Brief_final_9_26_276766_5379_v1.pdf [3] Jackson, S., A. Hillard, and T. Schneider. "Using Implicit Bias Training to Improve Attitudes toward Women in STEM." *Social Psychology of Education*, 17:3, September 1, 2014. p. 4. https://www.researchgate.net/publication/269354231_Using_implicit_bias_training_to_improve_attitudes_toward_women_in_STEM
[91] Gullo, Op. cit., p. 2.
[92] Gilliam et al., Op. cit.
[93] Jackson, Hillard, and Schneider, Op. cit., pp. 4, 6, 7.
[94] Ibid., p. 4.
[95] Linked obtained and bulleted text reproduced verbatim from Gershenson, S. and T. Dee. "Unconscious Bias in the Classroom: Evidence and Opportunities." Google, Inc., 2017. pp. 14–15. https://services.google.com/fh/files/misc/unconscious-bias-in-the-classroom-report.pdf

- Teacher-facing programs engage the entire classroom context, creating the possibility of supportive "recursive" processes (e.g., by improving classroom climate or creating positive peer interactions) and, by implication, more promising scalability; and
- The established infrastructure associated with teacher training and professional development provides opportunities to situate such interventions for both pre-service and in-service teachers.

SPOTLIGHTS AND SAMPLES

Long Beach Unified School District (LBUSD), located in Long Beach, California, acknowledges and works towards reducing implicit bias among teachers through student-led training. LBUSD partnered with Californians for Justice (CFJ) to train students as leaders and workshop facilitators. CFJ also supports staff members with professional development.[96] CFJ highlights key positive outcomes from working with the LBUSD community on its website. These outcomes also appear in Figure 5.1.[97]

Figure 5.1: Californians for Justice and Long Beach Unified School District Successes

CFJ has trained hundreds of youth of color in Long Beach to be community leaders and organizers. CFJ youth have gone on to attend universities and to work in their communities as change makers and leaders.	In 2008, CFJ pushed for the successful adoption and implementation of the Academic and Career Success Initiative at LBUSD. The CFJ-led initiative increased college-going rates for the district and doubled the rate of students graduating with A-G college requirements.	In 2013, CFJ Long Beach successfully moved LBUSD to pass a resolution committing to implement restorative justice practices district-wide as an alternative to punitive discipline practices that disproportionately target students of color.

Source: Californians for Justice[98]

During the spring of 2019, students trained by CFJ led an implicit bias training for LBUSD teachers, which provided a space for teachers to reflect on their teaching and learn unbiased practices. An outcome of this two-day training included learning that student silence may reflect discomfort rather than disinterest or defiance. Additionally, teachers learned about student perspectives and how teachers must be mindful of their comments and interactions with students since "teachers may not realize when they make hurtful remarks."[99] The training also provided time and space to have deep conversations, open communication, active engagement, and attention focused on reducing implicit bias.[100]

Cleveland Heights-University Heights City School District (CH-UH School District), located in University Heights, Ohio, implemented implicit bias training to address opportunity gaps. District data showed that a disproportionate number of minority students received referrals, suspensions, and expulsions and were not enrolled in Advanced Placement classes. To better support minority students—who comprised most of the student population—district leaders now mandate three diversity training sessions, including:[101]

- A course on self-identity;
- A course that explores stereotypes and microaggressions; and
- A course that addresses the historical marginalization of students of color in the United States.

[96] "CFJ Youth Leading Together with LBUSD to Interrupt Bias in the Classroom." Californians for Justice, April 17, 2019. https://caljustice.org/2019/04/17/cfj-youth-leading-together-with-lbusd-to-interrupt-bias-in-the-classroom/
[97] "Long Beach." Californians for Justice. https://caljustice.org/our-work/long-beach/
[98] Figure text reproduced nearly verbatim from: Ibid.
[99] Schwartz, Op. cit.
[100] "CFJ Youth Leading Together with LBUSD to Interrupt Bias in the Classroom," Op. cit.
[101] Bulleted text reproduced nearly verbatim from: Schwartz, Op. cit.

Although large discussion groups in recent sessions appeared less comfortable than small-group discussions, according to a CH-UH School District teacher, participants gained awareness and skills. Another teacher noted that he came away with questions to ask himself before writing a referral, such as those in Figure 5.2.[102]

Figure 5.2: Reflection Questions for Teachers to Prevent Biased Referrals

What is going on?	What is happening in that student's life?	How could I address it in a different way than a referral?

Source: Education Week[103]

Education and research organizations provide sample frameworks and guides to support institutions with implicit bias training. Figure 5.3 contains examples of these guides, which districts may consider when creating training opportunities that best fit their needs and goals.

Figure 5.3: Implicit Bias Training Frameworks and Guides

Implicit Bias and Cultural Sensitivity Training Future Ready Schools	Implicit Bias Module Series The Kirwan Institute for the Study of Race and Ethnicity	Implicit Bias in K-12 Education Case Study and Scenario Workbook The Kirwan Institute for the Study of Race and Ethnicity	Unconscious Bias in Teaching* MIT Teaching Systems Lab

Source: Multiple sources detailed below.[104]

[102] Ibid.
[103] Figure text reproduced nearly verbatim from: Ibid.
[104] Figure adapted with links obtained from: [1] "Implicit Bias and Cultural Sensitivity Training." Future Ready Schools. https://futureready.org/implementation-guide/implicit-bias-and-cultural-sensitivity-training/ [2] "Implicit Bias Training Modules." The Kirwan Institute for the Study of Race and Ethnicity. http://kirwaninstitute.osu.edu/implicit-bias-training/ [3] "Implicit Bias in K-12 Education Case Study and Scenario Workbook: Putting Theory into Practice." The Kirwan Institute for the Study of Race and Ethnicity. http://kirwaninstitute.osu.edu/implicit-bias-training/resources/K12-scenario-workbook.pdf [4] "Unconscious Bias in Teaching." MIT Teaching Systems Lab. https://mit-teaching-systems-lab.github.io/unconscious-bias/

SECTION VI: CULTURAL COMPETENCY

In this section, Hanover presents recent literature regarding cultural competency training, although publicly available literature does not appear to include studies on the impact of cultural competency training on teacher or student outcomes. Therefore, this section draws mostly on a Canadian study and anecdotal evidence to provide insights. This section also references teachers who received cultural competency training and guides that may support districts in developing cultural competency initiatives.

According to Racial Equity Tools, and as stated in the introduction of this report, **multicultural competency** is "a process of learning about and becoming allies with people from other cultures, thereby broadening understanding and ability to participate in a multicultural process. Cultural competence requires respect for the ways that others live in and organize the world as well as an openness to learn from them."[105]

RESEARCH AND IMPACT

Although limited, research on multicultural and cultural competency among teachers demonstrates a gap in teacher knowledge and effective training. For example, in a 2019 Canadian case study of a large, diverse Canadian school district analyzes district leaders' views towards, knowledge of, and implementation of multicultural competency training and in-service education.[106] The study relies on observations, documents, and interviews with five district leaders. Results show how cultural competency training sessions "remain disconnected from the reality that teachers have been dealing with and there is still a huge gap between what has been done and what is needed to be done to support teachers [teaching] from a multicultural perspective that engages with critical and transformative frameworks."[107] Teachers in this district demonstrate dissatisfaction with how pre-service and professional development training presents multiculturalism, particularly as student demographics become increasingly diverse. Furthermore, the comprehensive cultural education that teaching a diverse classroom requires cannot occur without leaders committed to implementing comprehensive training. To ensure effective training, the district may consider collaborating with institutions of higher education and engaging district leaders in reflections on their role in social justice.[108]

Anecdotally, teachers of all backgrounds may benefit from cultural competency training, as indicated in an NEA article on cultural sensitivity. Author Tim Walker highlights the "culture gap" problem between students and teachers, which results from the inability to connect and educate due to differences in background and identity. According to Devon Alexander, a Black English teacher in a Chicago suburb, "'given the diversity of today's public school classroom, most new teachers lack that serious professional background or training to deal with racial and cultural issues.'"[109] Although new teachers may have a basic understanding of cultural competency, this does not reach the depth of knowledge needed to support students in increasingly diverse classrooms. Therefore, teachers note the importance of finding ways—such as in-service training opportunities and communication with families—to build their confidence in connecting with students of all backgrounds. Alexander notes that "'everything is changing […] Teachers bear the burden and we have to take the lead on [cultural competency].'"[110]

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[105] "Glossary," Op. cit.
[106] Miled, N. "Educational Leaders' Perceptions of Multicultural Education in Teachers' Professional Development: A Case Study from a Canadian School District." *Multicultural Education Review*, 11:2, 2019. p. 79. https://www.researchgate.net/publication/333003555_Educational_leaders%27_perceptions_of_multicultural_education_in_teachers%27_professional_development_a_case_study_from_a_Canadian_school_district
[107] Ibid., p. 92.
[108] Ibid.
[109] Walker, T. "Closing the Culture Gap." National Education Association. http://www.nea.org//home/43098.htm
[110] Ibid.

SPOTLIGHTS AND SAMPLES

Wichita Public Schools, located in Wichita, Kansas, supports cultural competency in its district by approving and adhering to a cultural proficiency education policy. This policy defines cultural proficiency and lists the district's efforts to ensure that staff members act appropriately and treat all members of the school community equitably.[111] Wichita Public Schools' policy presents the actionable items in Figure 6.1.

Figure 6.1: Wichita Public Schools Cultural Proficiency Policy Items

	The Board of Education and district leaders have the prime responsibility for ensuring there is a culturally proficient environment within Wichita Public Schools, including within each school and classroom. In carrying out this responsibility, the Board of Education adopted in 2007-08 a five-year plan for cultural proficiency and a work statement that includes a commitment to "provide a coherent, rigorous, safe and nurturing, culturally responsive and inclusive learning community" for all of its students.
	The Office of Learning Services is responsible for implementing the five-year plan for cultural proficiency and providing quarterly professional development training. This includes the cultural proficiency curriculum development, implementation and coordination of programs and district and school level professional development that promote and foster culturally proficient practices.
	All new staff will participate in cultural proficiency professional development through New Staff Orientation and first year teachers will receive ongoing development through New Teacher Induction.
	Building principals (at attendance and non-attendance center) and leadership team are vital in leading and facilitating cultural proficiency work in the buildings. As a result, the Office of Learning Services shall provide building principals and building leadership teams with ongoing professional development regarding cultural proficiency. The principals and building leadership teams shall be responsible for providing cultural proficiency professional development to their respective staffs.
	All district staff is required to participate in ongoing professional development for cultural proficiency and for supporting and monitoring the implementation of programs and professional development at the school level and district wide.
	An annual report will be made to the Board of Education.

Source: Wichita Public Schools[112]

Figure 6.2 contains examples of guides districts may consider when creating cultural awareness or competency training opportunities that best fit their needs and goals.

Figure 6.2: Cultural Competency Training Frameworks and Guides

Cultural Competency Resources Teacher Incentive Fund	Cultural Competency Framework Year Up	A Quick and Easy School Visit Observation Guide Culturally Responsive Teaching and the Brain	Training Module: Developing Cultural Competency Among School Staff Teacher Action Group Philadelphia

Source: Multiple sources detailed below.[113]

[111] "P6812 Cultural Proficiency Education." Wichita Public Schools. https://www.usd259.org/cms/lib/KS01906405/Centricity/domain/622/boe%20policies/6812%20Cultural%20Proficiency%20Education.pdf

[112] Figure text reproduced verbatim from: Ibid., p. 1.

[113] Figure adapted with links obtained from: [1] Scott, J. "Cultural Competency Resources." Teacher Incentive Fund, December 2016. https://www.tifcommunity.org/sites/default/files/resources/cultural_competency_resources.pdf [2] "Cultural Competency Framework." Year Up. http://culturallyresponsiveteaching.weebly.com/uploads/1/8/1/5/18153535/cultural_competency_framework.pdf [3] Hammond, Z. "A Quick and Easy School Visit Observation Guide." Culturally Responsive Teaching and the Brain. https://crtandthebrain.com/wp-content/uploads/CRT-Walk-Through-Observation-Guide.pdf [4] "Training Module: Developing Cultural Competency Among School Staff." Teacher Action Group Philadelphia, April 2014. http://tagphilly.org/wp-content/uploads/2015/04/Developing-Cultural-Competency-Among-School-Staff.pdf

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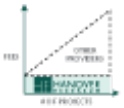

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DIVERSITY

How to Promote Racial Equity in the Workplace

by Robert Livingston

From the September–October 2020 Issue

Intractable as it seems, the problem of racism in the workplace can be effectively addressed with the right information, incentives, and investment. Corporate leaders may not be able to change the world, but they can certainly change *their* world.

Organizations are relatively small, autonomous entities that afford leaders a high level of control over cultural norms and procedural rules, making them ideal places to develop policies and practices that promote racial equity. In this article, I'll offer a practical road map for making profound and sustainable progress toward that goal.

I've devoted much of my academic career to the study of diversity, leadership, and social justice, and over the years I've consulted on these topics with scores of *Fortune* 500 companies, federal agencies, nonprofits, and municipalities. Often, these organizations have called me in because they are in crisis and suffering—they just want a quick fix to stop the pain. But that's akin to asking a physician to write a prescription without first understanding the patient's underlying health condition. Enduring, long-term solutions usually require more than just a pill. Organizations and societies alike must resist the impulse to seek immediate relief for the symptoms, and instead focus on the disease. Otherwise they run the risk of a recurring ailment.

To effectively address racism in your organization, it's important to first build consensus around whether there is a problem (most likely, there is) and, if so, what it is and where it comes from. If many of your employees do not believe that racism against people of color exists in the organization, or if feedback is rising through various communication channels showing that Whites feel that they are the real victims of discrimination, then diversity initiatives will be perceived as the problem, not the solution. This is one of the reasons such initiatives are frequently met with resentment and resistance, often by mid-level managers. Beliefs, not reality, are what determine how employees respond to efforts taken to increase equity. So, the first step is getting everyone on the same page as to what the reality is and why it is a problem for the organization.

But there's much more to the job than just raising awareness. Effective interventions involve many stages, which I've incorporated into a model I call PRESS. The stages, which organizations must move through sequentially, are: (1) Problem awareness, (2) Root-cause analysis, (3) Empathy, or level of concern about the problem and the people it afflicts, (4) Strategies for addressing the problem, and (5) Sacrifice, or willingness to invest the time,

energy, and resources necessary for strategy implementation. Organizations going through these stages move from understanding the underlying condition, to developing genuine concern, to focusing on correction.

Let's now have a closer look at these stages and examine how each informs, at a practical level, the process of working toward racial equity.

Problem Awareness

To a lot of people, it may seem obvious that racism continues to oppress people of color. Yet research consistently reveals that many Whites don't see it that way. For example, a 2011 study by Michael Norton and Sam Sommers found that on the whole, Whites in the United States believe that systemic anti-Black racism has steadily decreased over the past 50 years—and that systemic anti-White racism (an implausibility in the United States) has steadily increased over the same time frame. The result: As a group, Whites believe that there is more racism against them than against Blacks. Other recent surveys echo Sommers and Norton's findings, one revealing, for example, that 57% of all Whites and 66% of working-class Whites consider discrimination against Whites to be as big a problem as discrimination against Blacks and other people of color. These beliefs are important, because they can undermine an organization's efforts to address racism by weakening support for diversity policies. (Interestingly, surveys taken since the George Floyd murder indicate an increase in perceptions of systemic racism among Whites. But it's too soon to tell whether those surveys reflect a permanent shift or a temporary uptick in awareness.)

Even managers who recognize racism in society often fail to see it in their own organizations. For example, one senior executive told me, "We don't have any discriminatory policies in our company." However, it is important to recognize that even seemingly "race neutral" policies can enable discrimination. Other executives point to their organizations' commitment to diversity as evidence for the absence of racial discrimination. "Our firm really values diversity and making this a welcoming and inclusive place for everybody to work," another leader remarked.

The real challenge for organizations is not figuring out "What can we do?" but rather "Are we willing to do it?"

Despite these beliefs, many studies in the 21st century have documented that racial discrimination is prevalent in the workplace, and that organizations with strong commitments to diversity are no less likely to discriminate. In fact, research by Cheryl Kaiser and colleagues has demonstrated that the presence of diversity values and structures can actually make matters worse, by lulling an organization into complacency and making Blacks and ethnic minorities more likely to be ignored or harshly treated when they raise valid concerns about racism.

Many White people deny the existence of racism against people of color because they assume that racism is defined by deliberate actions motivated by malice and hatred. However, racism can occur without conscious awareness or intent. When defined simply as differential evaluation or treatment based solely on race, regardless of intent, racism occurs far more frequently than most White people suspect. Let's look at a few examples.

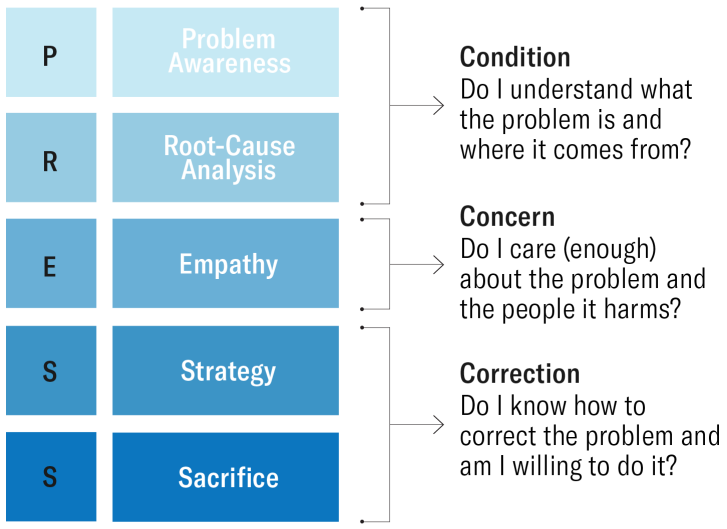
In a well-publicized résumé study by the economists Marianne Bertrand and Sendhil Mullainathan, applicants with White-sounding names (such as Emily Walsh) received, on average, 50% more callbacks for interviews than equally qualified applicants with Black-sounding names (such as Lakisha Washington). The researchers estimated that just being White conferred the same benefit as an additional eight years of work experience—a dramatic head start over equally qualified Black candidates.

Research shows that people of color are well-aware of these discriminatory tendencies and sometimes try to counteract them by masking their race. A 2016 study by Sonia Kang and colleagues found that 31% of the Black professionals and 40% of the Asian professionals they interviewed admitted to "Whitening" their résumés, either by adopting a less "ethnic" name or omitting extracurricular experiences (a college club membership, for instance) that might reveal their racial identities.

These findings raise another question: Does Whitening a résumé actually benefit Black and Asian applicants, or does it disadvantage them when applying to organizations seeking to increase diversity? In a follow-up experiment, Kang and her colleagues sent Whitened and non-Whitened résumés of Black or Asian applicants to 1,600 real-world job postings across various industries and geographical areas in the United States. Half of these job postings were from companies that expressed a strong desire to seek diverse candidates. They found that Whitening résumés by altering names and extracurricular experiences increased the callback rate from 10% to nearly 26% for Blacks, and from about 12% to 21% for Asians. What's particularly unsettling is that a company's stated commitment to diversity failed to diminish this preference for Whitened résumés.

A Road Map for Racial Equity

Organizations move through these stages sequentially, first establishing an understanding of the underlying condition, then developing genuine concern, and finally focusing on correcting the problem.



This is a very small sample of the many studies that have confirmed the prevalence of racism in the workplace, all of which underscore the fact that people's beliefs and biases must be recognized and addressed as the first step toward progress. Although some leaders acknowledge systemic racism in their organizations and can skip step one, many may need to be convinced that racism persists, despite their "race neutral" policies or pro-diversity statements.

Root-Cause Analysis

Understanding an ailment's roots is critical to choosing the best remedy. Racism can have many psychological sources—cognitive biases, personality characteristics, ideological worldviews, psychological insecurity, perceived threat, or a need for power and ego enhancement. But most racism is the result of structural factors—established laws, institutional practices, and cultural norms. Many of these causes do not involve malicious intent. Nonetheless, managers often misattribute workplace discrimination to the character of individual actors—the so-called bad apples—rather than to broader structural factors. As a result, they roll out trainings to "fix" employees while dedicating relatively little attention to what may be a toxic organizational culture, for example. It is much easier to pinpoint and blame individuals when problems arise. When police departments face crises related to racism, the knee-jerk response is to fire the officers involved or replace the police chief, rather than examining how the culture licenses, or even encourages, discriminatory behavior.

Appealing to circumstances beyond one's control is another way to exonerate deeply embedded cultural or institutional practices that are responsible for racial disparities. For example, an oceanographic organization I worked with attributed its lack of racial diversity to an insurmountable pipeline problem. "There just aren't any Black people out there studying the migration patterns of the humpback whale," one leader commented. Most leaders were unaware of the National Association of Black Scuba Divers, an organization boasting thousands of members, or of Hampton University, a historically Black college on the Chesapeake Bay, which awards bachelor's degrees in marine and

environmental science. Both were entities that could source Black candidates for the job, especially given that the organization only needed to fill dozens, not thousands, of openings.

Diana Ejaita

A *Fortune* 500 company I worked with cited similar pipeline problems. Closer examination revealed, however, that the real culprit was the culture-based practice of promoting leaders from within the organization—which already had low diversity—rather than conducting a broader industry-wide search when leadership positions became available. The larger lesson here is that an organization's lack of diversity is often tied to inadequate recruitment efforts rather than an empty pipeline. Progress requires a deeper diagnosis of the routine practices that drive the outcomes leaders wish to change.

To help managers and employees understand how being embedded within a biased system can unwittingly influence outcomes and behaviors, I like to ask them to imagine being fish in a stream. In that stream, a current exerts force on everything in the water, moving it downstream. That current is analogous to systemic racism. If you do nothing—just float—the current will carry you along with it, whether you're aware of it or not. If you actively discriminate by swimming with the current, you will be propelled faster. In both cases, the current takes you in the same direction. From this perspective, racism has less to do with what's in your heart or mind and more to do with how your actions or inactions amplify or enable the systemic dynamics already in place.

Workplace discrimination often comes from well-educated, well-intentioned, open-minded, kindhearted people who are just floating along, severely underestimating the tug of the prevailing current on their actions, positions, and outcomes. Anti-racism requires swimming against that current, like a salmon making its way upstream. It demands much more effort, courage, and determination than simply going with the flow.

In short, organizations must be mindful of the "current," or the structural dynamics that permeate the system, not just the "fish," or individual actors that operate within it.

Empathy

Once people are aware of the problem and its underlying causes, the next question is whether they care enough to do something about it. There is a difference between sympathy and empathy. Many White people experience sympathy, or pity, when they witness racism. But what's more likely to lead to action in confronting the problem is

empathy—experiencing the same hurt and anger that people of color are feeling. People of color want solidarity—and social justice—not sympathy, which simply quiets the symptoms while perpetuating the disease.

> **If your employees don't believe that racism exists in the company, then diversity initiatives will be perceived as the problem, not the solution.**

One way to increase empathy is through exposure and education. The video of George Floyd's murder exposed people to the ugly reality of racism in a visceral, protracted, and undeniable way. Similarly, in the 1960s, northern Whites witnessed innocent Black protesters being beaten with batons and blasted with fire hoses on television. What best prompts people in an organization to register concern about racism in their midst, I've found, are the moments when their non-White coworkers share vivid, detailed accounts of the negative impact that racism has on their lives. Managers can raise awareness and empathy through psychologically safe listening sessions—for employees who want to share their experiences, without feeling obligated to do so—supplemented by education and experiences that provide historical and scientific evidence of the persistence of racism.

For example, I spoke with Mike Kaufmann, CEO of Cardinal Health—the 16th largest corporation in America—who credited a visit to the Equal Justice Initiative's National Memorial for Peace and Justice, in Montgomery, Alabama as a pivotal moment for the company. While diversity and inclusion initiatives have been a priority for Mike and his leadership team for well over a decade, their focus and conversations related to racial inclusion increased significantly during 2019. As he expressed to me, "Some Americans think when slavery ended in the 1860s that African Americans have had an equal opportunity ever since. That's just not true. Institutional systemic racism is still very much alive today; it's never gone away." Kaufmann is planning a comprehensive education program, which will include a trip for executives and other employees to visit the museum, because he is convinced that the experience will change hearts, open eyes, and drive action and behavioral change.

Empathy is critical for making progress toward racial equity because it affects whether individuals or organizations take any action and if so, what kind of action they take. There are at least four ways to respond to racism: join in and add to the injury, ignore it and mind your own business, experience sympathy and bake cookies for the victim, or experience empathic outrage and take measures to promote equal justice. The personal values of individual employees and the core values of the organization are two factors that affect which actions are undertaken.

Strategy

After the foundation has been laid, it's finally time for the "what do we do about it" stage. Most actionable strategies for change address three distinct but interconnected categories: personal attitudes, informal cultural norms, and formal institutional policies.

To most effectively combat discrimination in the workplace, leaders should consider how they can run interventions on all three of these fronts simultaneously. Focusing only on one is likely to be ineffective and could even backfire. For example, implementing institutional diversity policies without any attempt to create buy-in from employees is likely to produce a backlash. Likewise, focusing just on changing attitudes without also establishing institutional policies that hold people accountable for their decisions and actions may generate little behavioral change among those who don't agree with the policies. Establishing an anti-racist organizational culture, tied to core values and modeled by behavior from the CEO and other top leaders at the company, can influence both individual attitudes and institutional policies.

Just as there is no shortage of effective strategies for losing weight or promoting environmental sustainability, there are ample strategies for reducing racial bias at the individual, cultural, and institutional levels. The hard part is getting people to actually adopt them. Even the best strategies are worthless without implementation.

> **Fairness requires treating people equitably—which may entail treating people differently, but in a way that makes sense.**

I'll discuss how to increase commitment to execution in the final section. But before I do, I want to give a specific example of an institutional strategy that works. It comes from Massport, a public organization that owns Boston Logan International Airport and commercial lots worth billions of dollars. When its leaders decided they wanted to increase diversity and inclusion in real estate development in Boston's booming Seaport District, they decided to leverage their land to do it. Massport's leaders made formal changes to the selection criteria determining who is awarded lucrative contracts to build and operate hotels and other large commercial buildings on their parcels. In addition to evaluating three traditional criteria—the developer's experience and financial capital, Massport's revenue potential, and the project's architectural design—they added a fourth criterion called "comprehensive diversity and inclusion," which accounted for 25% of the proposal's overall score, the same as the other three. This forced developers not only to think more deeply about how to create diversity but also to go out and do it. Similarly, organizations can integrate diversity and inclusion into managers' scorecards for raises and promotions—if they think it's important enough. I've found that the real barrier to diversity is not figuring out "What can we do?" but rather "Are we willing to do it?"

Sacrifice

Many organizations that desire greater diversity, equity, and inclusion may not be willing to invest the time, energy, resources, and commitment necessary to make it happen. Actions are often inhibited by the assumption that achieving one desired goal requires sacrificing another desired goal. But that's not always the case. Although nothing worth having is completely free, racial equity often costs less than people may assume. Seemingly conflicting goals or competing commitments are often relatively easy to reconcile—once the underlying assumptions have been identified.

As a society, are we sacrificing public safety and social order when police routinely treat people of color with compassion and respect? No. In fact, it's possible that kinder policing will actually increase public safety. Famously, the city of Camden, New Jersey, witnessed a 40% drop in violent crime after it reformed its police department, in 2012, and put a much greater emphasis on community policing.

The assumptions of sacrifice have enormous implications for the hiring and promotion of diverse talent, for at least two reasons. First, people often assume that increasing diversity means sacrificing principles of fairness and merit, because it requires giving "special" favors to people of color rather than treating everyone the same. But take a look at the scene below. Which of the two scenarios appears more "fair," the one on the left or the one on the right?

People often assume that fairness means treating everyone *equally*, or exactly the same—in this case, giving each person one crate of the same size. In reality, fairness requires treating people *equitably*—which may entail treating people differently, but in a way that makes sense. If you chose the scenario on the right, then you subscribe to the notion that fairness can require treating people differently in a sensible way.

Of course, what is "sensible" depends on the context and the perceiver. Does it make sense for someone with a physical disability to have a parking space closer to a building? Is it fair for new parents to have six weeks of paid leave to be able to care for their baby? Is it right to allow active-duty military personnel to board an airplane early to express gratitude for their service? My answer is yes to all three questions, but not everyone will agree. For this reason, equity presents a greater challenge to gaining consensus than equality. In the first panel of the fence scenario, everybody gets the same number of crates. That's a simple solution. But is it fair?

In thinking about fairness in the context of American society, leaders must consider the unlevel playing fields and other barriers that exist—provided they are aware of systemic racism. They must also have the courage to make difficult or controversial calls. For

example, it might make sense to have an employee resource group for Black employees but not White employees. Fair outcomes may require a process of treating people differently. To be clear, different treatment is not the same as "special" treatment—the latter is tied to favoritism, not equity.

> **There is no test or interview that can invariably identify the "best candidate." Instead, hire good people and invest in their potential.**

One leader who understands the difference is Maria Klawe, the president of Harvey Mudd College. She concluded that the only way to increase the representation of women in computer science was to treat men and women differently. Men and women tended to have different levels of computing experience prior to entering college—different levels of *experience*, not intelligence or potential. Society treats boys and girls differently throughout secondary school—encouraging STEM subjects for boys but liberal arts subjects for girls, creating gaps in experience. To compensate for this gap created by bias in society, the college designed two introductory computer-science tracks—one for students with no computing experience and one for students with some computing experience in high school. The no-experience course tended to be 50% women whereas the some-experience course was predominantly men. By the end of the semester, the students in both courses were on par with one another. Through this and other equity-based interventions, Klawe and her team were able to dramatically increase the representation of women and minority computer-science majors and graduates.

The second assumption many people have is that increasing diversity requires sacrificing high quality and standards. Consider again the fence scenario. All three people have the same height or "potential." What varies is the level of the field and the fence—apt metaphors for privilege and discrimination, respectively. Because the person on the far left has lower barriers to access, does it make sense to treat the other two people differently to compensate? Do we have an obligation to do so when differences in outcomes are caused

by the field and the fence, not someone's height? Maria Klawe sure thought so. How much human potential is left unrealized within organizations because we do not recognize the barriers that exist?

Further Reading

"U.S. Businesses Must Take Meaningful Action Against Racism"
Laura Morgan Roberts and Ella F. Washington
HBR.org, June 1, 2020

"How the Best Bosses Interrupt Bias on Their Teams"
Joan C. Williams and Sky Mihaylo
HBR, November–December 2019

"Toward a Racially Just Workplace"
Laura Morgan Roberts and Anthony J. Mayo
HBR.org, November 2019

"Numbers Take Us Only So Far"
Maxine Williams
HBR, November–December 2017

"Why Diversity Programs Fail"
Frank Dobbin and Alexandra Kalev
HBR, July–August 2016

Finally, it's important to understand that quality is difficult to measure with precision. There is no test, instrument, survey, or interviewing technique that will enable you to invariably predict who the "best candidate" will be. The NFL draft illustrates the difficulty in predicting future job performance: Despite large scouting departments, plentiful video of prior performance, and extensive tryouts, almost half of first round picks turn out to be busts. This may be true for organizations as well. Research by Sheldon Zedeck and colleagues on corporate hiring processes has found that even the best screening or aptitude tests predict only 25% of intended outcomes, and that candidate quality is better reflected by "statistical bands" rather than a strict rank ordering. This means that there may be absolutely no difference in quality between the candidate who scored first out of 50 people and the candidate who scored eighth.

The big takeaway here is that "sacrifice" may actually involve giving up very little. If we look at people within a band of potential and

choose the diverse candidate (for example, number eight) over the top scorer, we haven't sacrificed quality at all—statistically speaking—even if people's intuitions lead them to conclude otherwise.

Managers should abandon the notion that a "best candidate" must be found. That kind of search amounts to chasing unicorns. Instead, they should focus on hiring well-qualified people who show good promise, and then should invest time, effort, and resources into helping them reach their potential.

CONCLUSION

The tragedies and protests we have witnessed this year across the United States have increased public awareness and concern about racism as a persistent problem in our society. The question we now must confront is whether, as a nation, we are willing to do the hard work necessary to change widespread attitudes, assumptions, policies, and practices. Unlike society at large, the workplace very often requires contact and cooperation among people from different racial, ethnic, and cultural backgrounds. Therefore, leaders should host open and candid conversations about how their organizations are doing at each of the five stages of the model—and use their power to *press* for profound and perennial progress.

A version of this article appeared in the September–October 2020 issue of *Harvard Business Review*.

Robert Livingston is the author of *The Conversation: How Seeking and Speaking the Truth About Racism Can Radically Transform Individuals and Organizations* (soon to be released by Penguin Random House/Currency). He also serves on the faculty of the Harvard Kennedy School.

The New York Times | https://nyti.ms/2wsh0bY

How to Respond to Microaggressions

Should you let that comment slide, or address it head on? Is it more harm than it's worth? W

By Hahna Yoon

March 3, 2020

For many of us, microaggressions are so commonplace that it seems impossible to tackle them one at a time. Psychologists often compare them to death by a thousand cuts.

The metaphor is both the subtitle to a paper that Kevin Nadal, professor of psychology at John Jay College, wrote about the impact of microaggressions on L.G.B.T.Q. youth, and the title of another paper on the health implications of black respectability politics by Hedwig Lee, professor of sociology at Washington University in St. Louis, and Margaret Takako Hicken, research assistant professor at the University of Michigan. The phrase is commonly found in additional studies on the topic.

I felt my thousandth cut a few Novembers ago standing outside a bar as my friend's boyfriend explained to me the concept of American Thanksgiving. From the time in fourth grade when my teacher made me read the part of "slanted-eyed child" in a play to every time a stranger in the online dating world told me he "loves Asian women," I have been pressed with the dilemma of how I should react to these seemingly small lacerations. Should I respond? Is it worth it?

When I tell people that I am writing about microaggressions, most — even some of my closest friends who are women of color — ask me why. It's tempting to ignore microaggressions, considering blatant, obvious discrimination is still a real problem, but the buildup of these "everyday slights" has consequences on a victim's mental and physical health that cannot be overlooked. The normalization of microaggressions is antithetical to a well-rounded society with equal opportunities for marginalized individuals.

So many of us ask the same questions: Was that really a microaggression? Is this worth tackling? What should I say and how should I cope? Or worse, we've convinced ourselves that the questions are not even worth asking. Dancing in circles myself, I weigh in with experts who have witnessed microaggressive acts and had them share their insights based on years of research and data.

What is a microaggression?

Originally coined in the 1970s by Chester M. Pierce, a Harvard psychiatrist, today's definition of a microaggression can be credited to Derald Wing Sue, a professor of counseling psychology at Columbia University. Since 2007, he has written several books on microaggressions, including "Microaggressions in Everyday Life: Race, Gender, and Sexual Orientation." In it, Dr. Sue writes that microaggressions are the everyday slights, indignities, put-downs and insults that members of marginalized groups experience in their day-to-day interactions with individuals who are often unaware that they have engaged in an offensive or demeaning way.

Microaggressions are often discussed in a racial context, but anyone in a marginalized group — be it as a result of their gender, sexual orientation, disability or religion — can experience one.

Microaggressions can be as overt as watching a person of color in a store for possible theft and as subtle as discriminatory comments disguised as compliments.

The first step to addressing a microaggression is to recognize that one has occurred and dissect what message it may be sending, Dr. Sue said. To question where someone is from, for instance, may seem fairly innocuous but implicitly delivers the message that you are an outsider in your own land: "You are not a true American." Subtle actions, like a white person's clutching a purse closer as a darker-skinned person approaches, are nonverbal assumptions of criminality and examples of microaggressions.

While there has been debate about the definition of microaggressions and how they should be addressed, Dr. Sue says their existence is impossible to dispute. "When I talk about the concept of microaggressions to a large audience of people of color and women, I'm not telling them anything new, but it provides them with a language to describe the experiences and the realization that they're not crazy," he said.

Recognize the real consequences of microaggressions

Discrimination — no matter how subtle — has consequences. In 2017, the Center for Health Journalism explained that racism and microaggressions lead to worse health, and pointed out that discrimination can negatively influence everything from a target person's eating habits to his or her trust in their physician, and trigger symptoms of trauma. A 2014 study of 405 young adults of color even found that experiencing microaggressions can lead to suicidal thoughts.

For many members of marginalized groups, it is easy to believe that simply growing a thick
experiences. However, Dr. Nadal argues that the consequences of microaggressions are rea
numb to them.

"Experiencing the spectrum of racism — from microaggressions to systemic oppression to
whether someone is aware of it at all," Dr. Nadal said. "If the person who committed the mic
worth bringing up. In the same way that a family member or friend may hurt you and it tak
microaggression can be long-lasting too."

Pick your battles

When discussing microaggressions, people from privileged backgrounds often say marginalized individuals are simply overreacting. Dr. Alisia G.T.T. Tran, an associate professor of counseling and counseling psychology at Arizona State University, disagrees. She says that most people actually ignore and shake off a lot of microaggressions. "They have no choice, they're so common, and you can't fight every battle — but these things can stay with you or build up," she said. She and many other psychologists say that responding to a microaggression can be empowering, but with so many battles, how do you decide which to fight?

To help, Dr. Nadal developed a tool kit called the Guide to Responding to Microaggressions. It lists five questions to ask yourself when weighing the consequences of responding to a microaggression.

- *If I respond, could my physical safety be in danger?*
- *If I respond, will the person become defensive and will this lead to an argument?*
- *If I respond, how will this affect my relationship with this person (e.g., co-worker, family member, etc.)*
- *If I don't respond, will I regret not saying something?*
- *If I don't respond, does that convey that I accept the behavior or statement?*

Diane Goodman, a social justice and diversity consultant, says the process is unfair, but having to decide whether or not to take action is inevitable in today's society. "The emotional labor should not have to fall on people from marginalized groups. In the real world, people are confronted with microaggressions and people need to decide what they want to do."

Before moving forward with confronting the microaggression, she recommends you assess the goals of your response: Do you simply want to be heard? Or are you more interested in educating the other person and letting them know they did something wrong?

Microinterventions: Disarm a microaggression

Even once you have decided that you can respond to a microaggression, knowing what to say or how to behave can be nerve-racking. In his research on disarming microaggressions, Dr. Sue uses the term "microintervention" to describe the process of confronting a microaggression. "Unless adequately armed with strategies, microaggressions may occur so quickly they are oftentimes over before a counteracting response can be made," he said.

While your response will vary by situation, context and relationship, Dr. Goodman recommends memorizing these three tactics from her list of prepared statements.

Ask for more clarification: "Could you say more about what you mean by that?" "How have you come to think that?"

Separate intent from impact: "I know you didn't realize this, but when you _____ (comment/behavior), it was hurtful/offensive because_____. Instead you could_____ (different language or behavior.)"

Share your own process: "I noticed that you _____ (comment/behavior). I used to do/say that too, but then I learned_____."

One principle underlying these statements is helping the aggressor understand she or he is not under attack for their comment. "If we want people to hear what we're saying and potentially change their behavior, we have to think about things that will not immediately make them defensive," Dr. Goodman said.

How to respond to microaggressions in the digital space

It happens all the time — a friend of yours likes a racist comment on Facebook or a co-worker shares a meme with misogynist undertones. How can you respond when communicating online seems so visible and permanent?

According to research by Robert Eschmann, an assistant professor at Boston University's School of Social Work, the visibility of microaggressions also means you can have like-minded allies step in to respond with you. "When you experience a microaggression when you're by yourself," Dr. Eschmann said, "there is no one else that can validate that experience for you. When you're online, you can have

lots of eyes on it and more people that can call it out and say that's wrong."

Another tactic Dr. Nadal suggests is to send links to articles that identify the microaggressi microaggressions each time you encounter them; however, copying and pasting a link may link and call out the microaggression, it is also important to identify when the person you ar conversation.

Dr. Sue reminds us that so much of what happens online are monologues and not dialogues. are a waste of time, because I don't think — unless I have time to interact with the person o change," he said. Knowing when to step away and shut off the screen, especially when you sense a dead end, is crucial to self-care, he adds.

Choose self-care

Learning to draw boundaries and find support among allies is one of the most important steps in dealing with microaggressions.

For those looking for an immersive experience, one Psychology Today article suggests a process of radical healing — developing pride in your community, sharing stories with people from it and taking action to make changes on a local and political level, reflecting on the challenges of your ancestors and practicing self-care by staying healthy — physically and spiritually.

Self-care, however, can be as simple as having a few friends to discuss common experiences with. Shardé M. Davis, a professor of communication at the University of Connecticut, has studied supportive communication about microaggressions among groups of black women and finds that talking can facilitate the coping process. Although Dr. Davis's study was limited to black women, she believes the spirit of what that represents could easily translate to other groups of people.

Impartiality v. Substantive Neutrality:

Is the Mediator Authorized to Provide Legal Advice?

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Current views of mediation, the mission of the mediator and the debate over mediators providing legal advice.

A *sine qua non* of alternative dispute resolution (ADR) is the parties' right to self-determination, which in mediation involves the ability to select the mediator and decide whether to agree to a settlement of all or some of the disputed issues. Mediators, lawyers and scholars agree that compliance with the mediator's duty to remain impartial during and after mediation is crucial both for the process to succeed and the parties' rights to be protected. By complying with the duty to remain impartial, the mediator contributes to the betterment of the practice of mediation. As one commentator noted, "mediator impartiality instills trust, enables the parties to collaborate and share information with the mediator and other parties, protects mediation agreements from subsequent challenges, and helps prevent abuses of the process. In addition, an appearance of impartiality promotes public confidence in the fairness of the process."[1]

The mediator's duty to remain impartial is one facet of the more general duty to conduct the mediation fairly. Mediators have a continuing obligation, both before and during the mediation, to disclose actual and potential conflicts of interest as they arise.[2] A great deal of work has been done by the International Bar Association (IBA) on the types of conflicts of interest that must be disclosed. However, there is less agreement about what impartiality means in general and how the obligation to remain impartial restricts the behavior of mediators. Clearly, at a minimum, mediators must appear to be, and actually be free from bias against or toward any party. In other words, a mediator is not allowed to support one party against the other.[3] But does the impartiality requirement also restrain the mediator from offering potential solutions to settle the dispute because any solution would likely be somewhat more favorable to one side than the other? Does it also restrain the mediator from informing the parties about their rights and obligations because doing so could somewhat benefit one party and disadvantage the other?

A mediator is not allowed to support one party against the other. But does the impartiality requirement also restrain the mediator from offering potential solutions to settle the dispute because any solution would be likely to be somewhat more favorable to one side than the other?

This article examines current views of mediation and the mission of the mediator. It also looks into the hotly debated issue of whether providing legal advice is compatible with the mediator's duty to remain impartial.

Definitions of Mediation and Impartiality

Some define mediation as "a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making."[4] Professor Carrie Menkel-Meadow and her co-authors define mediation as "a process in which an impartial third party acts as a catalyst to help others constructively address and perhaps resolve a dispute, plan a transaction, or define the contours of a relationship."[5]

An effective mediator helps the parties move toward the contemplation of possible solutions and an eventual settlement.[6]

Impartiality means "freedom from favoritism or bias in word, action or appearance, and includes a commitment to assist all participants as opposed to any one individual."[7] The American Arbitration Association (AAA)/American Bar Association (ABA) Model Standards of Conduct for Mediators further specify that "a mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason."[8] The practical implications of the mediator's duty to be free from favoritism or bias and to assist all participants to the mediation have been the subject of debate.

The above-stated definition of impartiality undoubtedly prohibits a mediator from imposing a particular settlement agreement on the parties, or compelling them to reach an agreement of their own. But some believe that it does not preclude a mediator from informing the parties of their respective rights and obligations. Others disagree, arguing that "a mediator must not assume the role of legal counsel to either party or both of them jointly [and] must not give advice as to what the law is."[9]

It is important to recognize that, regardless of whether mediators are permitted to provide legal advice, even the most neutral mediator—that is, a mediator who strictly complies with the duty to refrain from supporting one party against another and imposing an opinion on the parties—inevitably influences the process while trying to move the parties towards a settlement.[10] This influence occurs as a result of the mediator's role in:

- establishing the agenda of the mediation;
- managing the communications between the parties during private caucuses;
- managing information exchanges;
- reframing and restating the parties' claims, needs and interests in order to ensure that the mediator understands them;
- determining the seating arrangements at the mediation table;
- setting time frames for various stages of the mediation or for "homework" assignments;
- managing doubt (encouraging doubt as a way to moderate a party's position); and
- deciding when to convey offers and counteroffers,[11] among other activities.

Even if no agreement is reached at the end of the mediation, the mediator is not freed from the duty to remain impartial and must keep confidential whatever was learned during the proceedings. If that were not the case, the parties would be unlikely to negotiate freely and openly during mediation proceedings. They would be concerned about protecting their legal positions in future court or administrative proceedings.

In order to ensure the integrity of the mediation process, the AAA/ABA Model Standards of Conduct for Mediators provide that "a mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law."[12] One commentator has also pointed out that "the mediator must not be involved in any process after the mediation [has] ended which would require the mediator to evaluate the parties or to reveal information obtained during mediation."[13]

Does Impartiality Mean Substantive Neutrality?

Some scholars and mediators infer from the term "party self-determination" that the parties are free to reach the agreement into which they desire to enter, whether "fair or not, in accord with the applicable law or not, [and] in accord with true facts or not."[14] These commentators conclude that mediators bear no responsibility for the fairness of a mediation settlement. They maintain that a mediator merely acts as "a host and chair," and as a "master of communication and translator."[15]

But others see more than party self-determination as the goal of mediation. They identify other important goals, including fairness of the outcome.[16] This is especially so in the family mediation context where there is often greater economic power on one side. One commentator has pointed out that "lawyer-mediators may be more likely to experience greater tension between the need to preserve self-determination of the parties and the desire to intervene more directively to achieve a legally fair and equitable result."[17]

What should a mediator do when an unrepresented party heads down a path toward an unfeasible, unfair, or inequitable resolution of a disputed matter, toward an agreement that could adversely affect that party's legal rights and obligations? In such circumstances, practitioners and scholars agree that in order for the parties to make an informed decision, the mediator may recommend that unrepresented parties seek independent legal counsel and advice from "other professionals on technical aspects of the dispute."[18] What would the solution be if all parties were represented by counsel? Should the mediator's views on the parties' positions or the proposed settlement or both be shared with the parties, whether they have legal representation or not?[19]

State rules on this issue vary. Some states allow the mediator to give legal advice, but only in the presence of a lawyer.[20] Other states prohibit mediators from giving legal advice altogether but allow them to define legal issues in the presence of all parties.[21]

Facilitative v. Evaluative Mediation

Globally, there are two models of mediation dividing the legal community: for some, mediation is a facilitative process; for others, it is an evaluative process.

Based on the understanding that the parties to mediation have the fundamental right to self-determination, adherents of facilitative mediation maintain that the mediator's primary mission is to enhance communications and assist the parties to reach a settlement. This mission does not include giving opinions or personal views on the merits of the case or offering legal advice where there is a power differential between the parties.[22] Some adherents of facilitative mediation believe that "lawyer-mediators should be prohibited from offering legal advice or evaluations."[23] They argue that mediation should be "pure" and "limited to helping the parties communicate, identify and address all the negotiated issues, and develop proposals acceptable to all parties."[24] In other words, mediators should lead the process by drawing the parties' attention to the objective of reaching a mutually beneficial solution.[25]

Adherents of evaluative mediation see things differently. They defend the view that the mediator is entitled to "provide some direction as to the appropriate grounds for settlement-based on law, industry practice or technology."[26] They also believe that a mediator who has substantive knowledge and training in the relevant field of the dispute[27] can opine on the relative merits of the case[28] at any time during the mediation, "whether subtly or overtly,"[29] and help the parties assess their risks.[30] Finally, according to one commentator, "an evaluative mediator who believes that injustice is being done may intervene to direct the settlement in a fashion consistent with the mediator's notion of justice."[31] This is a critical element distinguishing evaluative mediation from facilitative mediation.

Mediators and scholars who vigorously support evaluative mediation argue that to be effective, mediation requires the mediator to assess the strengths and weaknesses of the parties' positions in private caucuses so that the parties can predict

the outcome were the case to be tried in court. Evaluative mediators nevertheless agree with adherents of facilitative mediation that the parties should never feel coerced into a settlement and when they do agree to settle, they should all be convinced that the agreement reached is beneficial to all,[32] even though it represents a compromise.

Some adherents of facilitative mediation concede that the mediator may, at most, offer an opinion on how the case should settle if, near the close of the final session, no resolution of the dispute has been achieved.[33] However, even they are opposed to mediators providing legal advice or expressing an opinion about the merits of the dispute, since that could be or appear to be a departure from the duty to remain impartial.[34] For example, Professor Marjorie Aaron argues that even if an evaluation were even-handed, there is always the risk that it could be perceived as partial by a party.[35] Maureen Laflin has pointed out that "should such an appearance take hold, the reality of the mediator's impartiality becomes irrelevant for the perceived loss of neutrality undercuts the integrity of the process as the party disgruntled by the evaluation comes to view the mediator as an adversary."[36]

Evaluative mediators agree with adherents of facilitative mediation that the parties should never feel coerced into a settlement and when they do agree to settle, they should all be convinced that the agreement reached is beneficial to all, even though it represents a compromise.

I believe there are circumstances in which providing an evaluation does not violate the principle of self-determination. Accordingly, in those circumstances, providing legal advice is not in conflict with the mediator's neutrality. While it is undisputed that "impartiality implies that the mediator is committed to a process which aids all parties," according to Loretta Moore, "this does not mean ... that the mediator should not raise questions for the parties to consider in reaching a realistic, fair, equitable, and feasible resolution of their disputed matter."[37] Furthermore, whether providing legal advice (for instance, by offering an assessment of the parties' positions and/or suggesting settlement options) is compatible with the mediator's duty to remain impartial depends on the circumstances of each case and the parties' expectations of the mediation.

Regarding the latter point (i.e., whether the mediator should be entitled to provide legal advice), this article will look at four situations.

- First, the parties are moving toward a solution that optimizes benefits for all but is not strictly in compliance with the law.
- Second, the parties are moving toward a solution that does not optimize benefits for all (whether or not that solution would be fair in regard to the law).
- Third, the parties have reached an impasse.
- Fourth, the parties ask the mediator to evaluate their positions.

As to the situation in which the parties are moving toward a solution that optimizes benefits for all, but is not strictly in compliance with the law, the mediator clearly must refrain from opining on the terms of the contemplated solution. Otherwise, the mediator would be undertaking the role of a referee, judge, or arbitrator, rather than that of a facilitator of the parties' communication. That action would violate the principle of self-determination of the parties. More specifically, by opining on the terms of the contemplated solution, the mediator would be dictating to the parties what he or she believes is a proper interpretation of the law. Doing so would compromise the integrity of the mediation process.

Regarding the situation in which the parties are contemplating a solution that does not optimize benefits for all—whether or not that solution would be fair under the applicable law—I believe that a mediator who would provide advice regarding the parties' rights and obligations would be trying to redirect the parties' negotiation in support of the party who would have been prejudiced by the envisaged solution. Again, this would compromise the integrity of the mediation process.

I believe that the mediator might, at most, encourage the parties to imagine a solution that would maximize benefits for all, and provide legal advice only as to how such a solution could be implemented. However, even in this case, the mediator may not opine on the parties' respective rights and obligations.

The merit of mediation resides in providing the parties with opportunities to come up with solutions that are agreeable to all sides—solutions that are often not available in court or arbitral proceed-

ings. According to Menkel-Meadow and her co-authors, "[c]ustom-tailored outcomes ... can create more value for parties than the standardized remedies provided in adjudicative forums."[38] Without supporting either party's claims or assessing either party's rights, the mediator may encourage the parties to find a solution maximizing benefits for all and help them shape their agreement.

I agree with Lawrence Susskind's "activist evaluative approach," according to which the "activist mediator" is not neutral but rather nonpartisan with regard to the outcome. This is to say, the activist mediator is "an 'advocate' of the 'best possible outcome,' though he or she maintains a posture of disinterest toward the parties individually."[39]

Let us now consider the third and fourth situations, the former involving the parties having reached an impasse and the latter involving the parties requesting guidance from the mediator. These are exceptional situations that I believe warrant the mediator conveying to the parties, without supporting or defending one party against the other and without imposing any single point of view, an assessment of the risks that they would incur in a litigation or arbitral procedure in order to help them communicate and reach an agreement.

In impasse situations, helping the parties explore options provides them with a last chance (before moving on to litigation) to settle the dispute in a fashion satisfactory to them all. In cases involving an impasse, I agree with proponents of evaluative mediation that "disputants need help in understanding the law and how their case is affected by the law, and that lawyers want mediators to provide direction regarding appropriate settlement figures."[40]

Finally, in cases in which the parties ask the mediator to provide evaluative assistance, I believe that such activity should be authorized. The foundation of the mediator's duty to remain impartial is the right of the parties to self-determination. Consequently, if the parties seek an evaluation by the mediator because they believe that this support would help them reach an agreement, "the principle of self-determination calls for allowing evaluation, not prohibiting it."[41] Furthermore, as Robert Moberly has said, "without sacrificing neutrality, a mediator's neutral assessment can provide participants with a much-needed reality check." He states, and I agree, that "sophisticated parties ought to have the freedom to choose the mediation style that best suits their needs.... Free choice—and not regulation—is the best course."[42]

Conclusion

One may draw two conclusions from the above understanding of the role and mission of the mediator, and in particular from the fact that there are only a limited number of precisely defined circumstances in which a mediator may provide legal advice without being held in breach of the duty to remain impartial.

The first conclusion pertains to the issue of whether a mediator should be a layperson as opposed to an expert in the legal or technical fields in which the dispute has arisen. At first glance, one might believe that in order to preserve mediator neutrality, a mediator should be a layperson. One might indeed argue that the analysis of an expert is more likely to lead the latter to take positions. Nevertheless, close examination leads to the conclusion that in order to bring mediation to a successful outcome, the mediator ought to have sufficient legal and technical knowledge in the area of the disputed issues.[43] The reason is that a mediator who has this kind of expertise is more likely to be able to help parties who are at an impasse or have asked the mediator for evaluative assistance to intelligently analyze the unresolved issues and devise potential solutions. Clearly, the mediator must at all events be well trained in how to maintain an attitude of impartiality.

The second conclusion is that so long as the parties agree on the terms of settlement, the mediator should be prohibited from opining on the merits of those terms and from attempting to influence the parties by maintaining that the solution envisaged is not the best or the fairest under the applicable law. The primary goal of mediation is not to achieve fairness in a legal sense. The merit of mediation resides in the fact that the parties may devise a solution with which they are all satisfied, even if it is not strictly in keeping with each party's rights and obligations or would not be available in court or arbitration. Fairness in mediation means satisfying the parties rather than strictly complying with the law.

A mediator may try to reconcile "legal" fairness—that is, compliance with the law—and a settlement acceptable to all only by raising questions for the parties to consider and by encouraging them to explore options that would maximize benefits for all. Only when a mediation might fail may a mediator become more than a facilitator and provide the parties with an assessment of how their legal positions might fare in litigation or arbitration. This should only be allowed as a last resort in order to help the parties reach an agreement satisfying them all and to which they all will freely adhere. Even in this case, however, it is important to stress that the parties are not compelled to subscribe to any proposals set forth by the mediator. ■

(Endnotes are on the next page)

ENDNOTES

[1] Michelle D. Gaines, "A Proposed Conflict of Interest Rule for Attorney-Mediators," 73 *Wash. L. Rev.* 699, 702. See also Leda M. Cooks & Claudia L. Hale, "The Construction of Ethics in Mediation," 12 *Mediation Q.* 55, 62-63 (1994); Christopher W. Moore, *The Mediation Process: Practical Strategies For Resolving Conflicts* 15 (1st ed. 1986); John D. Feerick, "The Lawyer's Duties and Responsibilities in Dispute Resolution: Toward Uniform Standards of Conduct for Mediators," 38 *S. Tex. L. Rev.* 455, 462-463, 466 (1997); Jacqueline M. Nolan-Haley, "Court Mediation and the Search for Justice Through Law," 74 *Wash. U. L.Q.* 47, 66-71 (1996); Leonard L. Riskin, "Toward New Standards for the Neutral Lawyer in Mediation," 26 *Ariz. L. Rev.* 329, 354-359 (1984). See also *Poly Software Int'l v. Su*, 880 F. Supp. 1487, 1494 (D. Utah 1995) (explaining that the success of mediation depends greatly upon the ability of the mediator to maintain neutral stance while preserving confidences); *McEnany v. West Del. County Community Sch. Dist.*, 844 F. Supp. 523, 532 (N.D. Iowa 1994) (involving a challenge to the validity of a mediation settlement on the ground that the mediator was biased through past representation of party by his law firm).

[2] See Model Standards of Conduct for Mediators (Model Standards), originally developed in 1994 and revised in 2005. The Model Standards were adopted by the participating organizations—the American Arbitration Association (AAA), the American Bar Association (ABA), and the Association for Conflict Resolution.

The Model Standards were developed to serve as a general framework for the practice of all types of mediation. Accordingly, they serve as a guide for the conduct of mediators and as a source of information for the mediating parties. They also promote public confidence in mediation.

[3] See Jamie Henikoff & Michael Moffitt, "Remodeling the Model Standards of Conduct for Mediators," 2 *Harv. Negotiation L. Rev.* 87, 102-103, according to whom, for the sake of the integrity of the mediation process, the mediator must at all times be free from bias toward the parties and their interests, as well as the outcome of the mediation.

[4] See the Preamble to the Model Standards, *supra* n. 2. See also John D. Feerick, "Standards of Conduct for Mediators," 79 *Judicature* 314 (1996).

[5] Carrie J. Menkel-Meadow *et al.*, *Dispute Resolution—Beyond the Adversarial Model* 266 (Aspen 2005).

[6] Moore, *supra* n. 1, at 327.

[7] Model Standards of Practice for Family and Divorce Mediation (2001), Standard IV.A.; Society of Professionals In Dispute Resolution, (SPIDR, now called the Association for Conflict Resolution), *Making the Tough Calls: Ethical Exercises for Neutral Dispute Resolvers* 9 (Anne B. Thomas ed., 1991). See also Henikoff & Moffitt, *supra* n. 3.

[8] Model Standards (2005), Standard II.B.1, *supra* n. 2.

[9] Tom Arnold, "Mediator Ethics Issues in Mediation," C976 *ALI-ABA* 701, 706, about the codes or "standards" of ethics for mediators.

[10] Moore, *supra* n. 1, at 327.

[11] *Id.* at 327-333.

[12] Model Standards (2005), Standard V.A., *supra* n. 2.

[13] Karen A. Zerhusen, "Reflections on the Role of the Neutral Lawyer: The Lawyer as Mediator," 81 *KY. L. J.* 1165, 1171 (1993). Zerhusen has "instituted a practice of working with a professional who will be able to provide the court with the information desired, after an independent investigation, without compromising the mediation process." Nevertheless, I believe that even such cooperation with a professional, allowing the latter access to information disclosed during the mediation process, might influence the parties' attitude during the negotiations and thus compromise, to a certain extent, the mediation process.

[14] Arnold, *supra* n. 9, at 710.

[15] Menkel-Meadow *et al.*, *supra* n. 5, at 266-67.

[16] See, for example, ABA Family Law Section, "Standards of Practice for Lawyer Mediators in Family Disputes," 18 *Fam. L.Q.* 363, Standard 4.c (1984); Thomas Bishop, "The Standards of Practice for Family Mediators: An Individual Interpretation and Comments," 17 *Fam. L. Q.* 461, 467 (1984); Ill. 17th Cir. Ct. R. 4(C) (imposing on the mediator the duty to achieve a fair agreement).

[17] Loretta W. Moore, "Lawyer Mediators: Meeting the Ethical Challenges," 30 *Fam. L. Q.* 679, 687 (1996).

[18] *Id.* at 688. This could include suggesting that the unrepresented party also consult with an accountant or real estate appraiser.

[19] This raises the issue of whether a lawyer/mediator who gives opinions would be considered to be giving legal advice and therefore engaged in the practice of law in the jurisdiction where the mediation is being held, even though the mediator does not represent either party. If giving advice does constitute the practice of law, the next issue is whether the mediator is authorized to give advice in the jurisdiction where the mediation is being held. This is an important issue in the United States.

[20] E.g., Ala. Code of Ethics for Mediators (adopted by Order of the Supreme Court of Alabama, Dec. 14, 1995, and effective on March 1, 1996). See Standard 7(d) ("A mediator may discuss possible outcomes of a case, but a mediator may not offer a personal or professional opinion regarding the likelihood or any specific outcome except in the presence of the attorney for the party to whom the opinion is given."). Available online at http://alabamaadr.org/flashSite/Standards/standards.cfm.

[21] Ala. Code of Ethics for Mediators, Standard 7(d); Kan. Sup. Ct. R. Relating to Mediation, Rule 901 ("The attorney-mediator defines the legal issues to the parties only in the presence of all parties in the matter"). Available online at www.kscourts.org/ctruls/adrruls.htm.

[22] As one commentator said, a facilitative mediator is not apt to remedy a substantive power imbalance between the parties by giving the weaker party helpful factual or legal information. Samuel J. Imperati, "Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation," 33 *Willamette L. Rev.* 703, 710.

[23] Standards of Professional Conduct in Alternative Dispute Resolution (Symposium), 1995 *J. Disp. Resol.* 95, 100 (1995) (comments of Professor Leonard Riskin).

[24] Robert B. Moberly, "Mediator Gag Rules: Is it Ethical for Mediators to Evaluate or Advise?," 38 *S. Tex. L. Rev.* 669, 670 (1997).

[25] Imperati, *supra* n. 22, at 710.

[26] Leonard L. Riskin, "Mediator Orientations, Strategies and Techniques," 12 *Alternatives to the High Cost of Litigation* 111 (Sept. 1994).

[27] *Id.*

[28] Imperati, *supra* n. 22, at 711; see also John W. Cooley, *Mediation Advocacy* 18 & 21 (2nd ed. 2002).

[29] Rick Russel, Conflict Analysis in Relation to Mediator Strategy and Type, *Consensus* (January 1998), available online at /www.mediate.com/articles/russelR.cfm?nl=9; John G. Bickerman, "Evaluative Mediator Responds," 14 *Alternatives to the High Cost of Litig.* 70 (June 1996) (stating that the mediator ought to "reduce a client's expectations by providing frank assessments of the risks").

[30] Imperati, *supra* n. 22, at 711; see also Cooley, *supra* n. 28, at 18 & 21.

[31] Imperati, *supra* n. 22, at 711.

[32] See however Riskin, *supra* n. 26; Leonard R. Riskin, "Understanding Mediators' Orientations, Strategies, and

Techniques: A Grid for the Perplexed," 1 *Harv. Negot. L. Rev.* 7, 27-28 (1996). Riskin maintains that the techniques associated with evaluative mediation include proposing position-based compromise agreements, urging or pushing the parties to settle or to accept a particular settlement proposal or range.

[33] Cooley, *supra* n. 28, at 18; this is a "combined facilitative-evaluative mediation."

[34] Kimberlee K. Kovach & Lela P. Love, "Evaluative Mediation Is an Oxymoron," 14 *Alternatives to the High Cost of Litig.* 31 (March 1996). Professors Kovach and Love consider evaluative mediation to be an oxymoron. Kovach asserts that evaluation "invariably favors one side over the other" and necessarily compromises impartiality. Kovach and Love nevertheless concede that so long as the mediator does not take an actual position, as would a judge, arbitrator, or neutral expert, the mediator's conduct may be considered to be in compliance with the facilitative mediation model. Lela P. Love, "The Top Ten Reasons Why Mediators Should Not Evaluate," 24 *Fla. State U. L. Rev.* 937, 979-980 (1997). For example, they claim that "activities such as reframing, structuring of the bargaining agenda, probing of assessments and positions, challenging proposals, urging parties to obtain additional resources or information, suggesting possible resolutions (for the purpose of stimulating parties to generate options), and reality testing or checking, while admittedly evaluative, are appropriate as "essential parts of a mediator's facilitative role…." More generally, they believe that as long as the mediator does not disclose an opinion on the merits of the dispute, and thus does not "'answer' the question posed by the dispute," all other mediator opinions, assertions, challenges, and actions are acceptable in a facilitative mediation. Kimberlee K. Kovach & Lela P. Love, "Mapping Mediation: The Risks of Riskin's Grid," 3 *Harv. Negot. L. Rev.* 71, 75 (1998).

[35] Marjorie Corman Aaron, "ADR Toolbox: The Highwire Act of Evaluation," 14 *Alternatives to the High Cost of Litig.* 62 (May 1996). It is interesting to note that a quantitative analysis, conducted in 2004, using a database of 645 cases mediated at the Equal Employment Opportunity Commission, indicated that where facilitative techniques were used, the parties were more likely to perceive the mediator as being neutral or fair. 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, 98.

[36] Maureen L. Laflin, "Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators," 14 *Notre Dame J.L. Ethics & Pub. Pol'y* 479, 498; see also Aaron, *supra* n. 35, at 62.

[37] Moore, *supra* n. 17, at 689.

[38] Menkel-Meadow *et al.*, *supra* n. 5, at 270.

[39] Laflin, *supra* n. 36, at 499; John Forester & Lawrence Susskind, "Activist Mediation and Public Disputes," in *When Talk Works: Profiles of Mediators* 328, 329, 331, 332 (Deborah M. Kolb *et al.* eds., 1994).

[40] Murray S. Levin, "The Propriety of Evaluative Mediation: Concerns about the Nature and Quality of an Evaluative Opinion," 16 *Ohio St. J. On Disp. Resol.* 267 (2001).

[41] Moberly, *supra* n. 24, at 672.

[42] Bickerman, *supra* n. 29, at 70. See also Larry Watson, A Time and Place for Evaluative Mediation, paper delivered to the American College of Civil Trial Mediators in Orlando, Florida (March 1, 1997).

[43] Lawrence Susskind, "Environmental Mediation and the Accountability Problem," 6 *Vt. L. Rev.* 1 (stating that "to be effective, [a] … mediator will need to be knowledgeable about the substance of the disputes and intricacies of the regulatory context within which decisions are embedded"). This article deals specifically with environmental mediation. However, I believe that the principles cited ought to be extended to other types of mediation.

Implicit Bias and Structural Inequity

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"Implicit biases come from culture. I think of them as the thumbprint of the culture on our minds. Human beings have the ability to learn to associate two things together very quickly—that is innate. What we teach ourselves, what we choose to associate is up to us."

Dr. Mahzarin R. Banaji

Increased interest in the topic of implicit bias provides an opportunity to open and deepen important conversations in our organizations and communities about equity, belonging, and ultimately justice. Most work on implicit bias focuses on increasing awareness of individuals in service of changing how they view and treat others. However, in order to lead to meaningful change, an exploration of implicit bias must be situated as part of a much larger conversation about how current inequities in our institutions came to be, how they are held in place, and what our role as leaders is in perpetuating inequities despite our good intentions. Our success in creating organizations and communities in which everyone has access to the opportunities they need to thrive depends on our ability to confront the history and impacts of structural racism, learn how implicit bias operates, and take action to interrupt inequities at the interpersonal, institutional and structural level.

Implicit bias (also referred to as unconscious bias) is the process of associating stereotypes or attitudes towards categories of people without conscious awareness - which can result in actions and decisions that are at odds with one's intentions or explicit values. This can lead us to make biased and unfair decisions regarding who we hire for a job or select for a promotion, which classes we place students into and who we send out of the classroom for behavior infractions, and which treatment options we make available to patients.

Some have argued that the surge in popularity of the implicit bias field is because it keeps white people safe and does not require them to be accountable for creating and perpetuating systemic oppression and structural inequalities. We understand this caution. Yet, we believe that recent research findings in the field of neuroscience are ultimately cause for optimism and that the uptick in interest in implicit bias "training" in the fields of education, public health,

social services, law enforcement, government and private sector companies is a hopeful sign. The field of neuroscience has shown us that our brains continue to develop and grow well into adulthood. This means that while we cannot avoid mentally absorbing some of the negative stereotypes about groups of people that permeate our culture, the associations and implicit biases that we internalize are malleable. We can, quite literally, change the physiology of our brain, like adding wiring to a house or building a new road in a city. We have the ability to produce new associations which in turn can produce new, more inclusive and equitable, ways of behaving and reacting.

In order to ensure that learning about implicit bias leads to significant and meaningful change toward creating more equitable and inclusive communities and organizations, we offer these important cautions and considerations.

Consideration #1: Situate learning about implicit bias in a historical and socioeconomic political context.

We are not born with negative biases toward any particular group of people. The biases we have internalized, both consciously and unconsciously, have been "primed" through our experiences – images and messages we receive every day about who is "normal" or "desirable" and "belongs" and who is "different" or "undesirable" and "not one of us." These messages are neither neutral nor random. In the United States, "whiteness" is the dominant and privileged identity; socially constructed to justify conquest and slavery and reified in laws and policies, both historic and current, that ensure that white people benefit disproportionately from the benefits of society and are protected from more of its harms. White supremacy is baked into our country's DNA. As such, what is deemed good and acceptable is normed to white people and we have all, white people and people of color, internalized an "anti-black and brown" bias. The effects of these biases results in both individual and institutional acts and are pervasive across sectors including education, health, employment, and housing. The negative associations and assumptions we make about people of color have been wired into our unconscious mind over hundreds of years and show up in all of our institutions today.

Consideration #2: Highlight and interrogate the ways that current policies and practices create and reproduce inequitable outcomes that serve to reinforce our implicit biases and the ways in which our implicit biases lead us to reify (and justify) existing inequities.

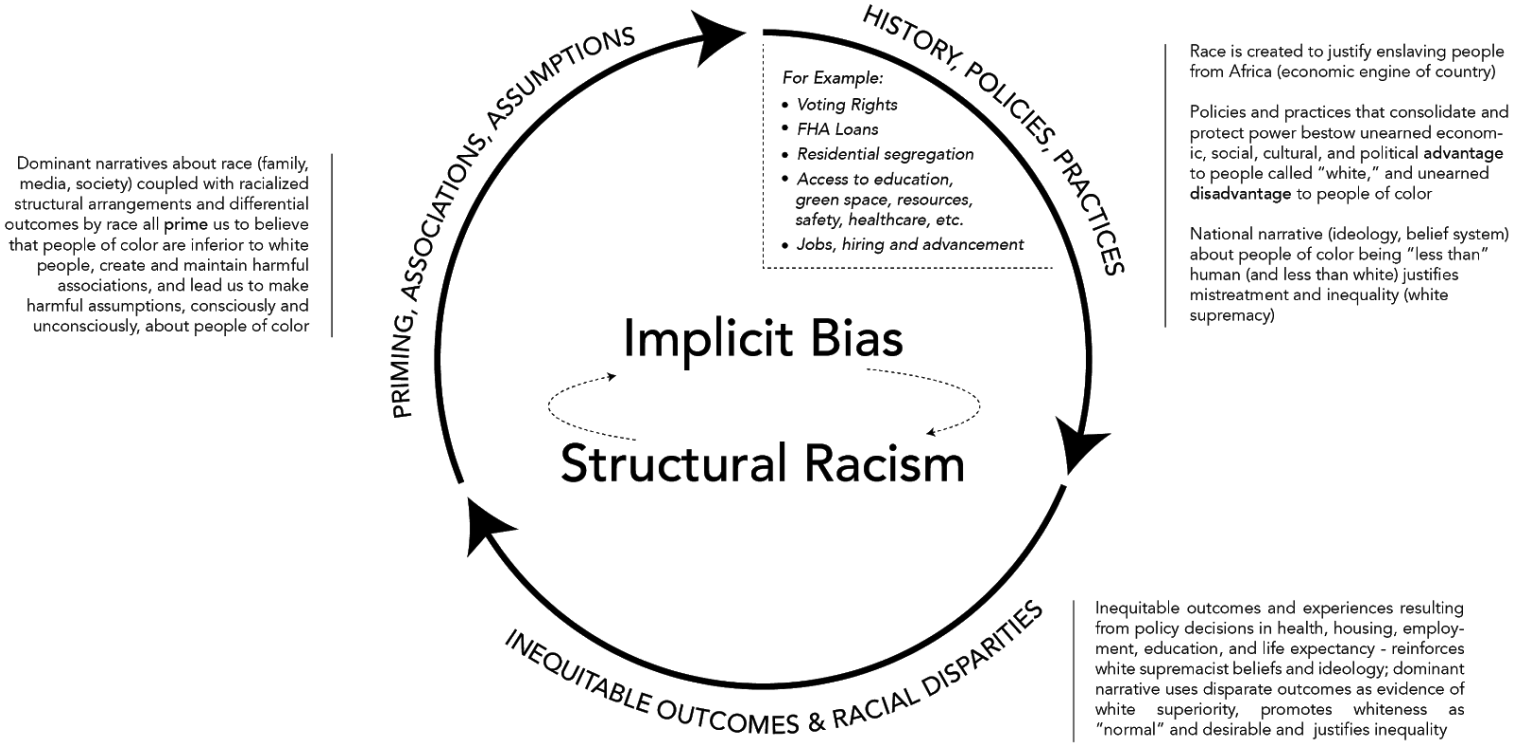
Access to opportunity has never been equitable or fair in the United States. As john powell points out, since our inception as a nation "We the People" only included some people. Housing discrimination, racial segregation, voter suppression, and disinvestment in neighborhoods where people of color live, are a result of explicit policies which produce outcomes that reinforce our biases – whether we are conscious of it or not. It isn't just the media that reinforces our negative racial biases (which it does), it is also the way we have historically and currently denied people of color access to opportunities in and across our communities that reinforces negative associations (crime, unemployment, crumbling infrastructure). In other words, we design policies and practices that disproportionately benefit white people and exclude and harm people of color and then use the negative outcomes the policies produce as evidence of racial superiority and inferiority.

For example, our inequitable structural arrangements mean that children of color are much more likely to grow up in poverty and attend underfunded, under-resourced schools with other students of color living in poverty. When these students, who have very likely had less experienced teachers, larger class sizes, and fewer extracurricular and enrichment activities score below state standards, the discourse that accompanies this fact most often focuses on what "extra" supports are needed for these students as if the problem is somehow located in *the student* and not in the material conditions of their educational experiences. The structural arrangement produces the outcomes (low achievement for student of color), but the outcomes produce and reinforce associations in our minds between students of color and lower academic performance.

Similarly, we now live in neighborhoods that are more racially segregated than they were in the 1960s. This means that many white children grow up with very little interaction with people of color. It may also mean that the primary way white people learn about people of color are through media depictions which often serve to perpetuate harmful negative stereotypes. To complicate things further, in their own segregated communities, they may only see people of color working in lower paying service positions such as gardeners, house cleaners, dishwashers in restaurants, security guards in their schools, lunchroom supervisors, or bus drivers. What are they learning? What messages are being reinforced unconsciously every day by simply walking around in their communities? What children see and experience every day attaches to messages about "those people" that are fed to their brains without their conscious awareness. In this way, white children (and people) living in racially segregated neighborhoods are primed to make associations between people of color and violence, crime and lower status positions.

This plays out within racially diverse schools as well. For example, in schools we often see the majority of African American and Latino kids placed in the lower track classes while "honors" and "gifted" classes are most often filled with white students. As a result, our mind consciously and unconsciously starts to associate African American and Latino kids with being less intelligent, less capable. (Note again that student placement patterns are the result of both the structural arrangements and policies governing schooling and the discretion of individual teachers and counselors.) Now picture a new student of color walking into the school. Whether we are conscious of it or not, we may assume that student should not be placed in the honors track. Even if we consciously and intellectually understand that intelligence is malleable and evenly distributed across the human race, what our mind sees day-to-day in our communities and schools are conditions that create associations that reinforce negative assumptions about the academic ability of students of color. When, based on this implicit assumption, we place the new student of color into a lower and less rigorous track, we reproduce the inequity and the vicious cycle of structural racism and implicit bias continues.

Another example relevant for educators is the issue of student discipline. We are barraged with images of African American and Latino men and boys' mug shots in the media. There have been numerous studies (IAT and others) that show that we associate black and brown boys with aggression and violence; we have been primed to do so since before the United States was a country. As early as preschool, we are viewing the same behaviors very differently for different groups of children, attributing aggression to boys of color. One preschool study showed that when teachers were told there may be challenging behavior in their preschool classroom, they watched black boys significantly more than other children even though all the children were behaving well. Black preschoolers are more likely to receive suspensions than white preschoolers. Throughout their educational experience, African American and Latino students are more likely to be disciplined harshly and sent out of class. We walk by the school office and we see African American students sitting there - in trouble. Consciously or not, our mind begins to make associations between African American and Latino students and misbehavior in school. When we interact with these students, we carry those associations and assumptions with us. We don't consciously THINK we are doing this, but we are. We perceive the same behavior from a student of color in the classroom as threatening and disruptive and are more likely to send that student out to a system of harsher punishment.



Consideration #3: Understand that structural racism, othering, and exclusion have become normalized and result in policies and practices that ensure access to opportunity for some and exclude others.

Part of what allows these harmful associations and assumptions about people of color to endure is the fact that we have come to accept the structural and institutional inequities we have created as normal. We see neighborhoods with vastly different resources and most days we carry on with our lives accepting that this is just "how it is." We have come to accept the current inequitable conditions – it's the water we swim in. But the current conditions are NOT NATURAL and are not normal. We created them through laws and policies that have created advantage for some particularly white people and disadvantage for others particularly people of color. By default, we accept these structural inequities as normal and we mostly try to help kids and families of color survive, and maybe do a little bit better, while living under inequitable conditions in a system that was not designed for their success. As educators, social

workers, nurses, doctors, we are doing our best to meet the needs of the populations we serve. This is our job and the work that we do matters. However, it is critical to periodically step back and problematize the current structural conditions that have produced the inequitable outcomes and therefore the harmful associations and biases. Our work as advocates and providers is to make these inequitable conditions visible and consider the ways in which our programs and services may be designed without sufficient consideration of how different populations are "situated" to opportunity in our communities and how implicit bias may be playing out in our own policies and practices.

Consideration #4: Don't confuse the fact that "we all have implicit biases" with immunity from responsibility as the benefactors of the current inequitable structural arrangements.

It can come as a relief to white people to find out that people of color have also internalized negative racial biases. It shouldn't. While it is true that none of us are immune to the negative narratives and images we receive via the media, our families, in our communities, in literature, etc., the fact that we have all internalized these biases makes us no less responsible for their negative effects. Awareness of how implicit bias operates requires us to become even more vigilant and comes with an even greater level of responsibility to interrupt biases when we see them, in ourselves and others, and to dismantle the structures that created and perpetuate systems of othering. Understanding how implicit bias operates within each of us does not let us off the hook, rather it illuminates the ways that we may be unknowingly contributing to inequities at the interpersonal, institutional, or structural level and pushes us to think critically and creatively about how to create inclusive communities in which everyone belongs and has what they need to thrive.

Consideration #5: We are all connected – our fates our linked. Working for social justice is not about "helping those kids" or "those communities", but

about dismantling structures that exclude, increasing access to opportunity and building healthy, inclusive communities in which we all belong and can thrive.

Now let's connect all of this to the concepts of "belonging" and "othering." Belonging is more than just "feeling included." john powell makes the case that "in a legitimate democracy, belonging means that your well-being is considered and your ability to design and give meaning to its structures and institutions is realized." Our need to connect is as fundamental as our need for food and water. Across many studies of mammals, from the smallest rodents all the way to us humans, the data suggests that we are profoundly shaped by our social environment and that we suffer greatly when our social bonds are threatened or severed. This is why our brains evolved to experience threats to our social connections in much the same way they experience physical pain. By activating the same neural circuitry that causes us to feel physical pain, our experience of social pain helps ensure the survival of our children and ensures that staying socially connected will be a lifelong need, like food and warmth. Deep down we know that belonging is essential to survival and we resist any attempts to be divided from each other. However, although we are hard wired for belonging, we have become soft wired for othering.

Othering is defined as "a set of dynamics, processes, and structures that engender marginality and persistent inequality across any of the full range of human differences based on group identities." Othering is artificial; we have created it. For example, racial discrimination in our laws, real estate practices, and banking industry meant that people of color have not had access to home ownership, the primary driver of wealth accumulation in the United States. This form of othering has become institutionalized and its harmful effects can be seen in every major city today.

Yet, it is NOT in our nature to "other." One can see evidence of this during natural disasters. When a devastating earthquake hit the San Francisco area in 1989, the impulse to help other human beings superseded any biases about one another's differences as people helped each other out of the rubble. When the World Trade Center towers fell, people helped each other without regard to race as they ran from the ashes. These are the times when we truly experience our linked fates and our hard wiring kicks into action, human being to human being.

With this in mind, the health and well-being of our communities can be measured by the extent to which all of its members experience a sense of belonging and have access to and benefit from the opportunities available. Numerous studies from across the globe have shown that when we have inequality, it is not just the marginalized who suffer, but rather exclusion hurts us

all. Extreme inequality reduces quality of life, life expectancy, and social cohesion which in turn lead to greater isolation and increased rates of poverty and racial tension. As we delve into an exploration of implicit bias, we are called to look at the extent to which our policies, practices, and ways of communicating create a sense of belonging for every member of our communities and to identify those policies, practices, and narratives that create or perpetuate othering in any form.

Consideration #6: Any effort to interrupt implicit bias and its impacts must be accompanied by efforts to dismantle structures that exclude and build structures that provide access to opportunity or create new opportunities.

As we have seen, inequitable structural arrangements produce and reinforce implicit biases. Therefore, any effort to mitigate implicit biases and interrupt their harmful effects must include strategies focused on changing *structures*. Yes, we need to increase our self-awareness and interrogate how biases may be playing out and shaping our interactions and decision making. We need to actively work to change the narrative about people and communities, to actively do stereotype replacement, and intentionally build more relationships and connections across differences to build new neural pathways. However, in order for any of this to lead to meaningful change toward equity and justice, we must also dismantle the policies and practices in our organizations and communities that create and perpetuate inequities in the first place.

About the National Equity Project

The National Equity Project (www.nationalequityproject.org) is a U.S. based leadership and organizational development non-profit committed to increasing the capacity of people to achieve thriving, self-determining, educated, and just communities. Our mission is to transform the experiences, outcomes, and life options for children and families who have been historically underserved by our institutions and systems.

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As Regional Director, Kathleen supports a team of staff to provide coaching and strategic advising to leaders in school districts, non-profits, foundations, and national networks who are committed to designing equitable policies and practices and leading equity-focused system change efforts. Kathleen has provided executive leadership coaching and organizational development consultation to non-profit leaders in the fields of education, youth development, social and health services, philanthropy, and cross-sector initiatives aimed at improving the experiences and outcomes for youth and families who have been marginalized by historic and current policies and practices. Her work has focused on the intersection of racial and social justice and the development and implementation of policies and programs that facilitate belonging, whole child wellness, adolescent identity development and learning. Prior to joining the National Equity Project in 1997, Kathleen worked as a School Social Worker and Project Facilitator for the Comer School Development Program in the Chicago Public Schools where she led the development of school-community partnerships and facilitated multi-disciplinary teams responsible for meeting the academic and social emotional needs of children and families. Kathleen has also served as a bilingual kindergarten teacher and has done extensive research on educational approaches aimed at meeting the needs of racially and culturally diverse learners. Kathleen earned her undergraduate degree from the College of Wooster in Wooster, Ohio and a Masters in Social Work from the School of Social Service Administration at the University of Chicago.

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Implicit Bias and the Illusion of Mediator Neutrality

Carol Izumi*

INTRODUCTION

Plaintiff (P), the owner/operator of a carpet cleaning business, sued the defendant-homeowners for $500 in a breach of contract action for the unpaid balance of a $1,000 carpet cleaning agreement. Defendants (Ds or Mr. and Mrs. D) counterclaimed for the return of the $500 deposit they paid before work began. Ds hired P to dry out and clean the soaked carpet in their basement, which had flooded during a storm. Ds refused to pay the balance because the carpet had not dried out as P promised. Under the small claims court mediation program, the parties were required to attempt mediation before a trial date was set.

P was a middle-aged white male who attended the mediation in work clothes. Ds were an equally mature married couple of Asian descent who spoke with noticeable accents. They were dressed in what might be called "business casual" attire. The mediation was conducted around a large conference table by two white co-mediators: a male who looked to be in his forties and a younger female. The mediators conducted a "caucus model" facilitative-style mediation. P presented the case as a simple breach of contract: the agreement between the parties required the homeowners to make two

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$500 payments and the second payment had not been made. Mr. D complained that the business owner was trying to cheat him by charging him for work that was unsatisfactory. During the mediation, P and Mr. D had markedly different demeanors. P was matter-of-fact and even-tempered. Mr. D was angry and agitated. Mrs. D sat quietly behind and to the right of her husband during the mediation. She spoke once and was quickly shushed by her husband.

In the joint session, P described the business transaction and his actions placing large fans in the basement to dry out the carpet. He stated that he had stressed to the homeowners the importance of keeping the upstairs door to the basement open for air to circulate. However, when he went to the house the following day, he found the door shut. P argued that the carpet did not dry as he expected because Ds did not keep the door open as instructed. The mediators asked P a number of questions about the contract, his interaction with Ds, and his professional cleaning techniques. When it was his turn to speak, Mr. D argued that P failed to complete the work as promised and that P's work was unsatisfactory. He asserted that the door was kept open as instructed; P saw it closed because Ds were preparing food and had temporarily shut the basement door in the kitchen because of the musty odor downstairs. During their co-mediator caucus after the joint session, the mediators commented that Ds failed to keep the door open.

In the individual sessions with the disputants, the mediators gathered and clarified information and explored options. P reiterated his position that he was entitled to the contract price since Ds' failure to keep the door open protracted the carpet drying process. In their individual session, Ds pressed that they were not satisfied with P's work because the carpet did not dry out in the promised time frame. Mr. D said he entered into the transaction cautiously because he was aware that American businesses sometimes take advantage of customers. After these two individual sessions, the mediators caucused and decided that the parties had reached an impasse. They brought the parties back together, conducted a bit more discussion, and concluded the session. The mediation was terminated in less than an hour without an agreement, and the matter was scheduled for trial. With more cases awaiting mediation, the mediators were quickly assigned another small claims case.

The preceding description is based on a small claims case mediation that I witnessed as a requirement for civil mediator certification in Michigan.[1] As an observer, I wondered why the mediator team decided that Ds failed to keep the door open despite their consistent assertions to the contrary. What judgments did the mediators make to reach such a determination? I was curious as to why the mediators failed to explore the door open/door closed issue in the individual sessions with the parties since it seemed significant. What factors and phenomena might have influenced the mediators' thought processes, judgment, and decision-making? I immediately thought about the possibility that racial dynamics played a role. None of the other observers I asked imagined that racial issues were at play. Being the sole non-white observer, perhaps I was more sensitive to potential racial aspects in the mediation.

One could view this mediation in a number of ways. When I presented this scenario to a group of mediation academics, one colleague opined that it was simply an example of bad mediation. In his view, the mediators seemed poorly skilled and their process lacked a systematic exploration of party interests, goals, priorities, and options. To him, the mediators were guilty of incompetence, nothing more. Another colleague supposed that the mediators were pressured by time limits and a waiting room full of parties in other cases. To this colleague, it was merely an example of "speed mediation." A third professor reasoned that the mediators made a credibility determination and decided that P was more believable. She allowed that mediators make credibility calls all the time and acknowledged that race could play a role in determining credibility. For all three mediation experts, nothing in the scenario raised concerns about mediator neutrality. I offer this mediation scenario as an opportunity to explore the nuances of mediator neutrality, consider the pervasiveness of unconscious bias, and provoke new dialogue.

This Article probes the complex challenges of a mediator's ethical duty to mediate disputes in a neutral manner against the behavioral

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1. Observation of two mediations was required as part of the Michigan civil mediator certification process. MEDIATOR TRAINING STANDARDS AND PROCEDURES § 5.2.3 (Office of Dispute Resolution, Mich. Supreme Court 2005), *available at* http://courts.michigan.gov/scao/resources/standards/odr/TrainingStandards2005.pdf.

realities of mediator thought processes, actions, motivations, and decisions. Part I begins with a dissection of the elements of mediator neutrality. Part II introduces the science of implicit social cognition and its application to various legal contexts, turning to the mediation process as a focal point. In Part III, using one particular racial category (Asian Americans), I tease out ways in which implicit bias might affect the mediators' conclusions and actions in a particular situation.[2] Ending with Part IV, I present ideas that may help us get closer to the ideal of attaining "freedom from bias and prejudice" in mediation. I conclude that the reduction of bias and prejudice demands more attention and effort than mediators currently devote to it. We must have the intention and motivation to undertake deliberate actions to reduce unconscious bias. Bias mitigation also requires proactive steps and a more robust curriculum than what is offered in many mediation trainings, programs, and classrooms.

I. THE ESSENTIALITIES OF NEUTRALITY

Mediator neutrality is universally understood to be a vital attribute of the mediation process. The traditional definition of mediation from the 2005 revised Model Standards of Conduct for Mediations ("Model Standards"), originally approved in 1994 by the American Arbitration Association, the American Bar Association Section of Dispute Resolution, and the Association for Conflict Resolution, states, "Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute."[3] Textbook definitions of the mediation process invariably use language about the involvement of a "neutral" or "impartial" third party. A sample of dispute resolution casebooks reveals similar descriptions of mediation as:

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2. I chose Asian Americans as the focal group because of the Ds' ethnicity. Although I frame the discussion around this discrete group, I would suggest that many issues and ideas presented could be extrapolated to apply to other groups as well.

3. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Preamble (2005), *available at* http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf.

- "[A]n informal process in which an *impartial* third party helps others resolve a dispute or plan a transaction but does not impose a solution."[4]
- "[A] process of assisted negotiation in which a *neutral* person helps people reach agreement."[5]
- "[A] process in which a *disinterested* third party (or *'neutral'*) assists the disputants in reaching a voluntary settlement of their differences through an agreement that defines their future behavior."[6]
- "[A] process in which an *impartial* third party acts as a catalyst to help others constructively address and perhaps resolve a dispute, plan a transaction, or define the contours of a relationship."[7]
- "[A] process in which a *neutral* intervener assists two or more negotiating parties to identify matters of concern, develop a better understanding of their situation, and, based upon that improved understanding, develop mutually acceptable proposals to resolve those concerns."[8]

Neutrality is a core concept of mediation.[9] Within the profession, there is widespread consensus about the vital importance of neutrality.[10] Neutrality, along with consensuality, gives the mediation process legitimacy.[11] "The essential ingredients of classical mediation

4. LEONARD L. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 16 (4th ed. 2009) (emphasis added).

5. DWIGHT GOLANN & JAY FOLBERG, MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL 95 (2006) (emphasis added).

6. JOHN W. COOLEY, THE MEDIATOR'S HANDBOOK: ADVANCED PRACTICE GUIDE FOR CIVIL LITIGATION 2 (2000) (emphasis added).

7. CARRIE MENKEL-MEADOW ET AL., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 266 (2005).

8. JAMES J. ALFINI ET AL., MEDIATION THEORY AND PRACTICE 1 (2d ed. 2006) (emphasis added).

9. KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 211 (3d ed. 2004).

10. KATHERINE V.W. STONE, PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION 33, 41 (2000).

11. Hilary Astor, *Rethinking Neutrality: A Theory to Inform Practice—Part I*, 11

are: (1) its voluntariness—a party can reject the process or its outcomes without repercussions; and (2) the mediator's neutrality, or total lack of interest in the outcome."[12] As a principle "central to the theory and practice of mediation," neutrality serves "as the antidote against bias, . . . [which] functions to preserve a communication context in which grievances can be voiced, claims to justice made, and agreements mutually constructed."[13]

Mediator neutrality is foundational to the mediation process. Other essential values, such as confidentiality and party self-determination, rest upon the parties' perception of the mediator as an unaligned participant. Mediator neutrality legitimizes the mediation process because the parties, rather than the mediator, are in control of decision-making.[14] To encourage the parties to share information freely and candidly with the mediator, the mediator promises not to take sides with the other party or use the information to advance the opponent's interests. Mediator neutrality makes it possible for parties to discuss issues of their choosing, negotiate with opponents, and design their own agreements.[15] Moreover, the parties' expectation of mediator neutrality is the basis upon which a relationship of trust is built.

> Trust is attained and maintained when the mediator is perceived by the disputants as an individual who understands and cares about the parties and their disputes, has the skills to guide them to a negotiated settlement, treats them impartially, is honest, will protect each party from being hurt during mediation by the other's aggressiveness or their own perceived

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AUSTRALASIAN DISP. RESOL. J. 73, 73 (2000).

12. COOLEY, *supra* note 6, at 2.

13. Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 LAW & SOC. INQUIRY 35, 35 (1991).

14. Hilary Astor, *Rethinking Neutrality: A Theory to Inform Practice—Part II*, 11 AUSTRALASIAN DISP. RESOL. J. 145, 146 (2000).

15. *See* Leah Wing, *Whither Neutrality?: Mediation in the Twenty-First Century*, *in* RE-CENTERING: CULTURE AND KNOWLEDGE IN CONFLICT RESOLUTION PRACTICE 93, 94 (Mary Adams Trujillo et al. eds., 2008); *see also* Scott R. Peppet, *Contractarian Economics and Mediation Ethics: The Case for Customizing Neutrality Through Contingent Fee Mediation*, 82 TEX. L. REV. 227, 256 (2003) ("[N]eutrality is considered fundamental to the self-determination for which mediation strives. To the extent that a mediator is biased towards one party, the mediator may undermine the parties' ability to craft their own solution to their problem.").

> inadequacies, and has no interests that conflict with helping to bring about a resolution which is in the parties' best interest. Only when trust has been established can the parties be expected to be candid with the mediator, disclose their real interests and value the mediator's reactions . . . .[16]

Neutrality is critical to the role of the mediator.[17] Mediators must meticulously avoid even the appearance of partiality or prejudice throughout the mediation process.[18] One mediation scholar has cautioned:

> Whether there is such a thing as pure neutrality or not, we know, and our clients know, that when we commit to being neutral, we are committing to not intentionally promoting one party's interests at the expense of another. When we choose to play that role, we must truly honor it, and the fact that we have a choice and decision to make about whether to put ourselves forward as a third-party neutral should only emphasize how important that commitment is.[19]

While the importance of mediator neutrality is undisputed, what actually constitutes neutrality is less clear. Neutrality is discussed, practiced, and researched rhetorically, but there are no empirical studies demonstrating exactly what neutrality means.[20] The mediator's function is nebulous due to the difficulty in defining neutrality.[21] Despite its importance, mediation literature offers slim guidance on how to achieve neutrality.[22] "Neutrality is a hard concept to nail down. It has different meanings in different cultural contexts. In some contexts, the term *neutral* is associated with being inactive,

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16. NANCY ROGERS & RICHARD SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW 7–39 (1987), *as reprinted in* STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 113 (4th ed. 2003).

17. KOVACH, *supra* note 9, at 211.

18. COOLEY, *supra* note 6, at 28.

19. BERNARD S. MAYER, BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION 242 (2004).

20. Cobb & Rifkin, *supra* note 13, at 36–37.

21. MAYER, *supra* note 19, at 83.

22. Peppet, *supra* note 15, at 253–54.

ineffective, or even cowardly. In others, it is viewed as a sine qua non for third parties to establish respect."[23]

Comprehension of mediator neutrality is complicated by the lack of consistency in definitions. The dispute resolution lexicon is imprecise. "One reason that the theoretical concepts seem divorced from practice is that we do not yet have a shared vocabulary in our field. Although neutrality has aspects similar to fairness, justice, and appropriateness, as well as impartiality and lack of bias, it is not the same as those concepts."[24]

There is no consensus within the dispute resolution community that neutrality and impartiality are terms of art or synonyms in the vernacular.[25] Commentators and guidelines employ neutrality and impartiality circularly, asserting, for example, that "mediators shall at all times remain impartial,"[26] or "a mediator needs to remain impartial to be able to fulfill her role."[27] Neutrality and impartiality are often used synonymously when discussing a mediator's ethical duty. One reason for this is because distinctions between the terms may appear synthetic or arbitrary.[28] In their studies, Sara Cobb and Janet Rifkin found that fourteen out of fifteen mediators defined neutrality by using the word "impartiality."[29]

Other commentators and guidelines apply "neutrality" to the outcome or the elements of any resolution and "impartiality" to engagement with the parties.[30] Douglas Frenkel and James Stark propose:

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23. MAYER, *supra* note 19, at 83.

24. Alison Taylor, *Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence, and Transformative Process*, 14 MEDIATION Q. 215, 217 (1997).

25. KOVACH, *supra* note 9, at 212 ("Neutrality is often used interchangeably with a variety of other words and phrases: *impartiality*; *free from prejudice or bias*; *not having a stake in the outcome*; and *free from conflict of interest*. Other synonyms include *unbiased*, *indifferent* and *independent*. There is dissention within the mediation community about whether all of these terms define neutrality, and somewhat surprisingly, whether all, or any, are appropriate characteristics for mediators.").

26. *Id.*

27. Peppet, *supra* note 15, at 264 ("I agree with the classical conception of neutrality to the extent that it recognizes the importance of impartiality.").

28. William Lucy, *The Possibility of Impartiality*, 25 OXFORD J. LEGAL STUD. 3, 13 (2005).

29. Cobb & Rifkin, *supra* note 13, at 42.

30. KOVACH, *supra* note 9, at 212–14.

> "Impartiality," as we define the term, means that the mediator does not favor any one party in a mediation over any other party. Favoritism might be caused by a prior relationship or alliance with a mediation participant or by a personal bias for or against a participant based on that person's background, position, personality or bargaining style. Impartiality thus means a freedom from bias regarding the mediation *participants*.[31]

They define neutrality as meaning "that the mediator has no personal preference that the dispute be resolved in one way rather than another. The mediator is there to help the parties identify solutions that *they* find acceptable, not to direct or steer the parties toward results he favors."[32] Stated another way, neutrality is "a mediator's ability to be objective while facilitating communication among negotiating parties,"[33] and impartiality is "freedom from favoritism and bias in word, action and appearance."[34]

Despite this lack of clarity in the field, four key elements of neutrality are discernable: no conflict of interest; process equality; outcome-neutrality; and lack of bias, prejudice, or favoritism toward any party.[35] At a minimum, mediator neutrality is understood to mean

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31. DOUGLAS N. FRENKEL & JAMES H. STARK, THE PRACTICE OF MEDIATION: A VIDEO-INTEGRATED TEXT 83–84 (2008).

32. *Id.* at 84; *see also* Susan Oberman, *Mediation Theory vs. Practice: What Are We Really Doing? Re-Solving a Professional Conundrum*, 20 OHIO ST. J. ON DISP. RESOL. 775, 802 (2000). Oberman defines impartiality as "the ability of the mediator to maintain non-preferential attitudes and behaviors towards all parties in dispute; it is the ethical responsibility of the mediator to withdraw if she or he has lost the ability to remain impartial." *Id.* She defines neutrality as the "alleged ability of the mediator to remain uninvested in the outcome of a dispute, to be aware of any contamination of neutrality, and to withdraw if he or she has lost it." *Id.*

33. Susan Nauss Exon, *The Effects that Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation*, 42 U.S.F. L. REV. 577, 580 (2008) (citing JAMES J. ALFINI ET AL., MEDIATION THEORY AND PRACTICE 12 (2001)).

34. *Id.* at 581 (quoting DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 68 (Phyllis Bernard & Bryant Garth eds., 2002)).

35. *See* Susan Douglas, *Questions of Mediator Neutrality and Researcher Objectivity: Examining Reflexivity as a Response*, 20 AUSTRALASIAN DISP. RESOL. J. 56, 57 (2009). This study found that mediators are aware of three themes regarding neutrality and per these themes, neutrality "is understood as impartiality, even-handedness and as central to the distinction between the process and content or outcome of a dispute." *Id.* A fourth theme is also important to understanding neutrality: "'value neutrality' or the absence of a situated perspective on experience." *Id.*

that the mediator has no pecuniary interest in the subject matter, no undisclosed relationship to the parties, and no possibility of personal gain.[36] Avoiding any actual or apparent conflict of interest is subsumed in the concept of neutrality. The Uniform Mediation Act states that:

> [B]efore accepting a mediation, an individual who is requested to serve as a mediator shall: (1) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation; and (2) disclose any such known fact to the mediation parties as soon as is practical before accepting a mediation.[37]

The Model Standards contain a similar prescription on conflicts:

> [A] mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.[38]

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36. *See, e.g.*, ETHICAL GUIDELINES FOR THE PRACTICE OF MEDIATION § 4.2 (Wis. Ass'n of Mediators 1997), *available at* http://wamediators.org/pubs/ethicalquidelines.html ("As WAM members, we disclose to the parties any dealing or relationship that might reasonably raise a question about our impartiality. If the parties agree to participate in the mediation process after being informed of the circumstances, we proceed unless the conflict of interest casts serious doubt on the integrity of the process, in which case we withdraw."); *see also* COLORADO MODEL STANDARDS OF CONDUCT FOR MEDIATORS § II.A (2000), *available at* http://dola.colorado.gov/dlg/osg/docs/adrmodelstandards.pdf ("The mediator shall advise all parties of any prior or existing relationships or other circumstances giving the appearance of or creating a possible bias, prejudice, or partiality.").

37. UNIF. MEDIATION ACT §§ 9(a)(1)-(2) (2003), *available at* http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf.

38. MODEL STANDARDS OF CONDUCT FOR MEDIATORS III(A) (2005), *available at* http://www.abanet.org/dispute/documents/model_standards_conduct_apn12007.

The source of the mediator's fees may compromise neutrality. A mediator must disclose any "monetary, psychological, emotional, associational, or authoritative affiliations" with any of the parties that might arguably cause a conflict of interest.[39] This aspect of neutrality has special consequences for attorney-mediators:

> One major issue for lawyers who alternate between the roles of advocate and neutral is the potential for conflicts of interest—the possibility that a party in a mediated case will be a past or future legal client of the mediator-lawyer. This is a particular concern in large law firms, where a lawyer-neutral's partners may be concerned that a single modestly compensated mediation will disqualify the entire firm from representing the party in a much more lucrative matter. Standards for neutrals call for disclosure in such situations.[40]

A second facet of neutrality is process-based or procedural, requiring that the mediator conduct the mediation process in a manner that is even-handed.[41] The Model Standards require a mediator to conduct a mediation in a manner that promotes party participation and procedural fairness.[42] "The mediator's task is to control the process of the mediation, providing a procedural framework within which the parties can decide what their dispute is about and how they wish to resolve it."[43] Process symmetry may be manifested by maneuvers such as ensuring an equal number of caucuses with the disputants or spending roughly the same amount of time with each party. It also means enforcing stated guidelines in a

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39. KOVACH, *supra* note 9, at 213.

40. JAY FOLBERG ET AL., RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW 447 (2005).

41. MODEL STANDARDS OF CONDUCT FOR MEDIATORS VI.A (2005), *available at* http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf ("Quality of the Process: A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.").

42. *Id.*

43. Hilary Astor, *Mediator Neutrality: Making Sense of Theory and Practice*, 16 SOC. & LEGAL STUD. 221, 223 (2007); *see also* Wing, *supra* note 15, at 94 ("[M]ediators are seen as only interested in the *process*, in ensuring that it is fair and that parties to the dispute are the decision-masters on any mutually acceptable agreement formulated.").

fair manner. For example, if the mediator sets a deadline for the submission of written statements or enforces behavioral guidelines, the parties expect enforcement to be equal. "One feature of procedural impartiality is that the rules constitutive of some decision-making process must, at a minimum, favour neither party to the dispute-cum-competition or favour or inhibit both equally."[44]

Expectations of mediator neutrality encompass both procedural and outcome impartiality.[45] Neutrality in mediation is widely understood to mean that the mediator does not influence the content or outcome of the mediation. The mediator's ethical duty to be impartial throughout the process applies to her interaction with the parties and to the substance of the dispute.[46] Content-neutrality is closely linked to consensual decision-making by the disputants; it constrains mediators from usurping party control over choices and judgments.[47] Outcome neutrality requires the mediator to refrain from promoting either party's interests.[48] This component of neutrality also means the mediator should not press the parties to reach a resolution at all. "Some would draw a line at content-neutrality, however, when the result would be unfair to one of the parties or have detrimental effects on individuals with interests that are not represented at the table."[49]

A mediator's ethical duty and ability to be outcome-neutral have inspired significant debate within the profession.[50] For years, scholars

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44. Lucy, *supra* note 28, at 11.

45. *Id.* at 8.

46. COOLEY, *supra* note 6, at 23.

47. Taylor, *supra* note 24, at 218 ("[T]he mediator is not to determine the outcome, but allow a process where decisions are made by the participants.").

48. CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 52 (2d ed. 1996) ("What impartiality and neutrality do signify is that mediators can separate their personal opinions about the outcome of the dispute from the performance of their duties and focus on ways to help the parties make their own decisions without unduly favoring one of them.").

49. EDWARD BRUNET ET AL., ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE 200 (3d ed. 2006). In certain contexts, mediators have duties that extend beyond the immediate parties. In environmental disputes, international conflicts, and family law matters, for example, strict neutrality yields to normative consensus and standards to protect outside interests.

50. *See, e.g.*, Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 46–47 (1981) (asserting that environmental mediators ought to accept responsibility for ensuring that agreements are as fair and stable as possible, even though

and practitioners have questioned whether a mediator should be a mere facilitator of party-initiated outcomes or should assertively prevent agreements that are unfair or favor more powerful parties.[51] From one perspective, neutral mediators are viewed as being interested solely in ensuring a fair process, leaving the disputants to determine any mutually agreeable resolution.[52] An alternative philosophy is that mediators may or must interact with the parties unequally to account for differences such as resources, power, educational level, and financial sophistication.[53] This debate is less about how we define neutrality and more about how neutrality meshes with equally valued norms of fairness and justice, process legitimacy and quality, and party self-determination.[54] While it is important for mediators to engage in that colloquy, it is not the focus of this Article.

The final element of neutrality, and the one I want to emphasize, is the mediator's duty to "avoid bias or the appearance of bias."[55] "Impartiality between the parties and neutrality regarding the outcome are only two forms of bias. The sum total of the life experience of the mediator, the subjective self, enters into each mediation and impacts the process and outcome."[56] The Model Standards capture this in Standard II, which states in pertinent part:

"such intervention may make it difficult to retain the appearance of neutrality and the trust of the active parties"); Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 86 (1981) ("It is precisely a mediator's commitment to neutrality which ensures responsible actions on the part of the mediator and permits mediation to be an effective, principled dispute settlement procedure."); *see also* Evan M. Rock, *Mindfulness Meditation, the Cultivation of Awareness, Mediator Neutrality and the Possibility of Justice*, 6 CARDOZO J. CONFLICT RESOL. 347, 355 (2005) (citing Peppett, *supra* note 15, at 255); Sydney E. Bernard et al., *The Neutral Mediator: Value Dilemmas in Divorce Mediation*, 4 MEDIATION Q. 61, 66 (1984).

51. *See* Carrie Menkel-Meadow, *Professional Responsibility for Third-Party Neutrals*, 11 ALTERNATIVES TO HIGH COST LITIG. 129 (1993).

52. Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARVARD NEGOT. L. REV. 71 (1998); Wing, *supra* note 15, at 94.

53. Bernard et al., *supra* note 50, at 66–67.

54. For example, family mediators must remain neutral as to outcome and impartial toward the parties but protect the best interest of children. *See* Kimberly A. Smoron, *Conflicting Roles in Child Custody Mediation: Impartiality/Neutrality and the Best Interests of the Child*, 36 FAM. & CONCILIATION CTS. REV. 258, 261 (1998).

55. Astor, *supra* note 11, at 77.

56. Oberman, *supra* note 32, at 819–20 (citing Deborah M. Kolb & Jeffrey Z. Rubin, *Mediation Through a Disciplinary Prism*, *in* RESEARCH ON NEGOTIATION IN ORGANIZATIONS

> A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.
>
> B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.
>
> 1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.[57]

As of 2007, over a dozen states have implemented standards in which neutrality is defined as "freedom from favoritism or bias either by word or action, and a commitment to serve all parties as opposed to a single party."[58] Favoritism might be caused by a personal bias for or against a participant based on that person's background, position, personality or bargaining style; as such, impartiality means a freedom from bias towards the mediation participants.[59] For the disputants in mediation, a paramount concern is that the mediator has no prejudice against them on any level.[60]

To maintain neutrality, mediators must be aware of their assumptions, biases, and judgments about the participants in the process, particularly in cases where they have strong reactions to one of the parties.[61] Achieving impartiality requires mediators to have "insight into their own perspectives and experiences and [to understand] the impact that these have on their relationship with the parties in mediation."[62] "There remains the concern that the mediator's ideas and approaches to a problem will intrude and affect

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231, 240 (Max H. Bazerman et al. eds., 3d ed. 1991)).

57. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard II (2005), *available at* http://abanet.org/dispute/documents/model_standards_conduct_april2007.pdf.

58. Exon, *supra* note 33, at 585 (quoting MINN. R. GEN. PRAC. 114 app. I cmt. 1, *available at* http://www.mncourts.gov/rules/general/GRtitleII.htm; STANDARDS OF PRACTICE: ETHICAL GUIDELINES FOR FULL MEMBERS 4 (Mont. Mediation Ass'n 1998), *available at* http://mtmediation.org/doc/Full%Ethics%20and%20Quals.pdf).

59. FRENKEL & STARK, *supra* note 31, at 83–84.

60. COOLEY, *supra* note 6, at 28.

61. Taylor, *supra* note 24, at 226.

62. Astor, *supra* note 11, at 77.

the direction of the process of mediation and its outcomes, as well as the difficulty of monitoring unconscious bias."[63]

This Article highlights the impartiality dimension of mediator neutrality in order to examine the imposing challenge presented by one form of bias,[64] i.e., implicit or unconscious bias. The next Part begins with a condensed review of the science of implicit social cognition and the phenomenon of implicit bias. It introduces the work of "behavioral realists" who import scientific research into legal analysis, and concludes with the application of these concepts to the mediation process.

II. IMPLICIT BIAS, BEHAVIORAL REALISM, AND APPLICATION TO MEDIATION

An impressive body of social science research produced over the past decades illuminates in new ways how our minds work. Advances in experimental psychology provide a deeper understanding of human perception, attention, memory, judgment, and decision-making. Cognitive social psychology studies persuasively show[65] that

63. *Id.*

64. There are many ways that "bias" operates in dispute resolution. *See, e.g.*, Robert S. Adler, *Flawed Thinking: Addressing Decision Biases in Negotiation*, 20 OHIO ST. J. ON DISP. RESOL. 683 (2005) (arguing that cognitive biases often associated with availability and representative and anchoring heuristics can be helpful, but can lead to stereotyping of large numbers of people based on limited past experiences; also argues that egocentric bias can affect one's perception of fairness); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974) (contending that by understanding the positive and negative aspects of heuristics and biases, one can improve one's judgments and decisions when faced with uncertainty); John Livingood, *Addressing Bias in Conflict and Dispute Resolution Settings*, DISP. RESOL. J., Nov. 2007–Jan. 2008, at 53, 54–59 (asserting that judgment in conflict situations can be affected by four core biases: learned, incident-driven, process-driven and attributional); Joel Lee, *Overcoming Attribution Bias in Mediation: An NLP Perspective*, 15 AUSTRALASIAN DISP. RESOL. J. 48 (2004) (arguing that neuro-linguistic programming (NLP) can be useful to a mediator in helping parties understand and deal with attribution biases). A discussion of these forms of bias in mediation and negotiation is beyond the scope of this Article.

65. This research has critics and defenders. Some argue that implicit association test data do not support the conclusion that implicit bias leads to discriminatory behavior. *See* Amy L. Wax, *The Discriminating Mind: Define It, Prove It*, 40 CONN. L. REV. 979, 985 (2008) (contending that it is not "proper to equate unconsciously biased mental associations with the tendency to engage in unlawful discrimination"); R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169, 1187–88 (2006) (asserting that the Implicit Association Test (IAT) is not significantly

unconsciously held attitudes and stereotypes can affect our interaction with others and may predict behavior.[66] This rich reservoir of scientific material deserves a more expansive presentation than I am able to offer here. What follows is a selective summary of some of the fascinating, and often startling, experimental discoveries about the insidious operation of unconscious bias. In the interest of space, I omit detailed descriptions of experimental design and administration and refer readers to the sources for explanations of methodologies and statistical analyses.

Following this summary of implicit bias research, I present the work of "behavioral realists." These legal academics and social scientists use social cognition research to measure how legal doctrines and institutional processes address discriminatory behavior. In contexts such as peremptory challenges, judicial decision-making, employment, and jury selection, scholars argue that current procedural and substantive legal protections fail to account for the

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correlated to discriminatory behavior because subtle behaviors such as eye contact, speech errors, and body language do not constitute discriminatory action); Philip E. Tetlock, *Cognitive Biases and Organizational Correctives: Do Both Disease and Cure Depend on the Politics of the Beholder?*, 45 ADMIN. SCI. Q. 293 (2000) (arguing that studies should not focus on judgmental shortcomings but on the fact that everyone cannot fit in a particular category, and that an ideological bias on the part of researchers does not always translate to a "real-world" setting); Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006) (claiming that implicit bias research is invalid and should not be used in developing antidiscrimination law). There are rebuttals to this criticism. *See* Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477 (2007) (discrediting critics such as Mitchell and Tetlock for dismissing research unscientifically and subjectively, and further arguing that sufficient evidence exists to show that implicit biases lead to discrimination, and that antidiscrimination laws should be used to counter implicit bias effects); David L. Faigman et al., *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389, 1389–99, 1426–29 (2007) (arguing that expert testimony regarding research on implicit bias should be admissible in Title VII discrimination cases as a general background of implicit bias to give triers of fact understanding and context because "studies using a variety of measures and techniques have demonstrated the effects of implicit bias on judgments and behavior, creating a broad research base that spans several social scientific disciplines including psychology, sociology, and organizational behavior"; therefore "it is a mistake to conflate the existence of implicit bias with any one measure such as the IAT," or Implicit Association Test, and "it is a mistake to assume that critiques of one particular measure such as the IAT undermine the entire body of evidence showing the existence of implicit stereotypes and bias and their impact on judgments and behavior in the workplace").

66. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 954–55 (2006).

operation of unconscious biases. With evidence that implicit attitude measures reveal much more bias favoring advantaged groups than do explicit measures, adherents of behavioral realism advocate legal reform to adequately address prejudiced behavior. I examine the mediation process through a behavioral realism lens and suggest that mediators regularly fail to act in unbiased ways.

A. Implicit Bias Research

Implicit social cognition is "a broad theoretical category that integrates and reinterprets established research findings, guides searches for new empirical phenomena, prompts attention to presently undeveloped research methods, and suggests applications in various practical settings."[67] Implicit social cognitionists posit that we can learn more about stereotypes and prejudice when we examine their unconscious operations. For example, experiments examining the causal relationship between unconscious stereotypes and biases in perception and memory have shined new light on social interactions and led theorists to recommend corrective actions to counteract the pervasiveness of unconscious biases.[68] Mental processes such as implicit memory, implicit attitudes, implicit self-esteem, implicit perception, and implicit stereotypes operate outside conscious attention and thereby unconsciously influence judgment.[69] "The term *implicit*, contrasted with *explicit*, is used to capture a distinction variously labeled as unconscious versus conscious, unaware versus aware, and indirect versus direct."[70] The most commonly used techniques for studying implicit social cognition are priming tasks with rapid response time measures and the Implicit Association Test (IAT), which is described below.[71]

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67. Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 4 (1995).

68. Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Stereotyping and Prejudice, in* 7 THE PSYCHOLOGY OF PREJUDICE: THE ONTARIO SYMPOSIUM 55, 56 (Mark P. Zanna & James M. Olson eds., 1994).

69. Greenwald & Krieger, *supra* note 66, at 947.

70. Mahzarin R. Banaji, Curtis Hardin & Alexander J. Rothman, *Implicit Stereotyping in Person Judgment,* 65 J. PERSONALITY & SOC. PSYCHOL. 272 n.1 (1993).

71. Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 428, 431 (2007).

Implicit bias refers to:

> [A]n aspect of the new science of unconscious mental processes that has substantial bearing on discrimination law. Theories of implicit bias contrast with the "naïve" psychological conception of social behavior, which views human actors as being guided solely by explicit beliefs and their conscious intentions to act. A belief is *explicit* if it is consciously endorsed. An intention to act is *conscious* if the actor is aware of taking an action for a particular reason. . . . In contrast, the science of implicit cognition suggests that actors do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions.[72]

An overview of implicit social cognition research draws four main conclusions about the collective findings: (1) there is a variance, sometimes wide, between implicit and explicit cognition; (2) there is a discernable, pervasive and strong favoritism for one's own group, as well as for socially valued groups; (3) implicit cognitions, often more accurately than explicit, predict behavior; (4) implicit social cognitions are not impervious to change.[73]

Two concepts are key to the study of implicit social cognition: attitude (or preference) and stereotype (or belief).[74] Attitudes can be defined as dispositions toward things, such as people, places, and policies.[75] Stated another way, "an *attitude* [is] an evaluative disposition—that is, the tendency to like or dislike, or to act favorably or unfavorably toward, someone or something."[76] Explicit attitude expression can come in the form of action, such as selecting something we like or rejecting something we dislike.[77] Implicit attitudes are "introspectively unidentified (or inaccurately identified) traces of past experience that mediate favorable or unfavorable

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72. Greenwald & Krieger, *supra* note 66, at 946.
73. Lane, Kang & Banaji, *supra* note 71, at 431–38.
74. *Id.* at 429.
75. Greenwald & Banaji, *supra* note 67, at 7.
76. Greenwald & Krieger, *supra* note 66, at 948.
77. *Id.*

feeling, thought, or action toward social objects."[78] For example, "[a]n implicit attitude toward B may be indirectly indicated by a (direct) measure of evaluation of A, when A and B have some relation that predisposes the implicit influence."[79] "Halo effect" research provides another example: physically attractive men and women "are judged to be kinder, more interesting, more sociable, happier, stronger, of better character, and more likely to hold prestigious jobs" by operation of an "objectively irrelevant attribute [physical attractiveness] that influences evaluative judgment on various other dimensions."[80]

A stereotype "is a mental association between a social group or category and a trait."[81] Stereotyping is "the application of beliefs about the attributes of a group to judge an individual member of that group."[82] A person's attitude toward someone or something is a consistent positive or negative response to an object.[83] On the other hand,

> a stereotype may encompass beliefs with widely diverging evaluative implications. For example, the stereotype of members of a certain group (e.g., cheerleaders) may

78. Greenwald & Banaji, *supra* note 67, at 8.

79. *Id.*

80. *Id.* at 9 (citing Karen Dion, Ellen Berscheid & Elaine Walster, *What is Beautiful is Good*, 24 J. PERSONALITY & SOC. PSYCHOL. 207 (1972)). The act of voting presents another example of implicit attitude. Voting for Obama because you know you like his beliefs and policies would be an explicit attitude expression. However, "a vote might function as an *implicit attitude indicator*—that is, an action that indicates favor or disfavor toward some object but is not understood by the actor as expressing that attitude. For example, a voter may vote for a particular candidate even though the voter knows nothing other than the candidate's name shares initial letters with the voter's name. In such a case, the vote can be understood, at least in part, as an implicit expression of the voter's self-favorable attitude." Greenwald & Krieger, *supra* note 66, at 948. Reliable research finds that most people have a positive attitude about themselves. Thus, "an expectable form of implicit attitude effect is that novel objects that are invested with an association to self should be positively evaluated." Greenwald & Banaji, *supra* note 67, at 10. Continuing with the voting example, even if you know nothing about Obama's sister, you might like his sibling. "This favorable attitude is an *implicit indicator* of attitude toward the candidate. Here, the 'implicit' designation indicates that the attitude expressed toward the candidate determined the attitude toward the relative, even though the liking or disliking for the relative may be experienced as an independent attitude." Greenwald & Krieger, *supra* note 66, at 948–49.

81. Greenwald & Krieger, *supra* note 66, at 949.

82. Banaji & Greenwald, *supra* note 68, at 58.

83. Greenwald & Banaji, *supra* note 67, at 7.

> simultaneously include the traits of being physically attractive (positive) and unintelligent (negative). Stereotypes guide judgment and action to the extent that a person acts toward another as if the other possesses traits included in the stereotype.[84]

Stereotypes are activated automatically, generally leading to the presumption that "the operation of the stereotype or prejudice [is] unintended by the research participants (i.e., not deliberate), either because they are unaware of certain critical aspects of the procedure or because they are operating under conditions that make it difficult to deliberately base responses on specific beliefs or evaluations."[85] For example, a 1983 experiment conducted by Samuel Gaertner and John McLaughlin provided one illustration of stereotype activation, demonstrating that subjects more quickly identified word pairs if they were consistent rather than inconsistent with African American stereotypes (e.g., Blacks-lazy vs. Blacks-ambitious).[86]

More recently, Mahzarin Banaji and Curtis Hardin conducted two priming task experiments on gender stereotyping.[87] Subjects saw gender-related primes (e.g., mother, father) or neutral primes (e.g., parent, student) followed by target words. Subjects in the first experiment were asked to respond as to whether the following target pronoun, either gender-related (e.g., he, she) or neutral (e.g., it, me), was male or female. Participants were able to respond faster to pronouns that were consistent with the gender stereotype of the prime; this result occurred independently of explicit beliefs about gender stereotypes.[88] The second experiment asked participants only to identify whether the target word was a pronoun or not a pronoun, but still resulted in similar effects of gender stereotyping.[89] These

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84. *Id.* at 14.

85. Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 243 (2002).

86. *Id.* at 242 (citing Samuel L. Gaertner & John P. McLaughlin, *Racial Stereotypes: Associations and Ascriptions of Positive and Negative Characteristics*, 46 SOC. PSYCHOL. Q. 23 (1983)).

87. *See* Mahzarin R. Banaji & Curtis D. Hardin, *Automatic Stereotyping*, 7 PSYCHOL. SCI. 136 (1996).

88. *Id.* at 136–39.

89. *Id.* at 139–40.

experiments "demonstrated that judgments of targets that follow[ed] gender-congruent primes are made faster than judgments of targets that follow[ed] gender-incongruent primes," showing that gender information imparted by words can automatically influence judgment, even in unrelated tasks.[90] Other studies bolster the finding that "[p]eople may often not be aware of what they are doing, they might even intend to be doing something else; perhaps worst of all, the operation of stereotypes and prejudice may be outside of their control."[91]

Automatic activation of stereotypes "provides the basis for implicit stereotyping."[92] "*Implicit stereotypes* are the introspectively unidentified (or inaccurately identified) traces of past experience that mediate attributions of qualities to members of a social category."[93] In one study, Mahzarin Banaji and Anthony Greenwald examined the relationship between implicit stereotypes and gender.[94] When testing participants' recognition of famous names, participants were more likely to falsely identify a male name as famous than they were to falsely identify a female name as famous. The false-fame effect was substantial when the names were male but weaker when the names were female, demonstrating an implicit indicator of the stereotype that associates maleness with fame (and achievement).[95] Researchers observe that stereotypes are often expressed implicitly in the behavior of people who expressly disavow the stereotype. Because race and gender stereotypes have been studied more often, they provide the "most persuasive evidence for implicit stereotyping."[96]

"*Implicit biases* are discriminatory biases based on implicit attitudes or implicit stereotypes. Implicit biases are especially

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90. *Id.* at 140. In another experiment, researchers discovered that by activating abstract knowledge about beliefs associated with men and women, such as dependence and aggressiveness, subjects judged male and female targets more harshly when the targets' group membership stereotypically matched (e.g., after the subject's exposure to dependence primes, the subject will judge the female target to be more dependent). Banaji, Hardin & Rothman, *supra* note 70, at 272.

91. Blair, *supra* note 85, at 242.

92. Greenwald & Banaji, *supra* note 67, at 15.

93. *Id.*

94. Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Gender Stereotyping in Judgments of Fame*, 68 J. PERSONALITY & SOC. PSYCHOL. 181 (1995).

95. *Id.*

96. Greenwald & Banaji, *supra* note 67, at 15.

intriguing, and also especially problematic, because they can produce behavior that diverges from a person's avowed or endorsed beliefs or principles."[97] The existence of stereotypes and biases does not mean that a person necessarily holds consciously prejudicial beliefs. Stereotypes and prejudices unconsciously and naturally form "through ordinary biases rooted in memory" to simplify cognitive processes.[98] To a varying degree, all of us are subject to the operation of implicit stereotyping and prejudice.[99] "The best of intentions do not and cannot override the unfolding of unconscious processes, for the triggers of automatic thought, feeling, and behavior live and breathe outside conscious awareness and control."[100]

In large part, implicit social cognition research has advanced because of the development and accessibility of the Implicit Association Test (IAT), an instrument that produces an implicit-attitude measure based on response speeds in two four-category tasks.[101] Since 1998, self-administered IAT demonstrations have been available online.[102] The most widely used version is the "Race IAT" which measures implicit attitudes toward African Americans (AA) relative to European Americans (EA).[103]

Using the IAT, social scientists have found that most Americans exhibit a "strong and automatic positive evaluation of White

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97. Greenwald & Krieger, *supra* note 66, at 951.

98. Mahzarin R. Banaji & R. Bhaskar, *Implicit Stereotypes and Memory: The Bounded Rationality of Social Beliefs, in* MEMORY, BRAIN, AND BELIEF 139, 167 (Daniel L. Schacter & Elaine Scarry eds., 2000).

99. *Id.* at 143.

100. *Id.* at 142–43.

101. *See* Anthony G. Greenwald, Mahzarin R. Banaji & Brian A. Nosek, *Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm*, 85 J. PERSONALITY & SOC. PSYCHOL. 197 (2003).

102. PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/ (last visited Nov. 6, 2010).

103. The IAT works as follows: "[R]espondents first practice distinguishing AA from EA faces by responding to faces from one of these two categories with the press of a computer key on the left side of the keyboard and to those of the other category on the right side of the keyboard. Respondents next practice distinguishing pleasant-meaning from unpleasant-meaning words in a similar manner. The next two tasks, given in a randomly determined order, use all four categories (AA faces, EF faces, pleasant-meaning words, and unpleasant-meaning words). In one of these two tasks, the IAT calls for one response (say, pressing a left-side key) when the respondent sees AA faces or pleasant words, whereas EA faces and unpleasant words call for the other response (right-side key). In the remaining task, EA faces share a response with pleasant words and AA faces with unpleasant words." Greenwald & Krieger, *supra* note 66, at 952–53.

Americans and a relatively negative evaluation of African Americans."[104]

An analysis of data archived from many years of web-accessed IAT interactive demonstrations compared the level of favoritism toward advantaged versus disadvantaged groups revealed by implicit and explicit measures. Over two million people have taken the IAT; 90 percent have been American.[105] Eighty-eight percent of white test takers have manifested implicit bias in favor of Whites and against Blacks.[106] Over 80 percent of heterosexuals manifested implicit bias in favor of straights over gays and lesbians.[107] Non-Arab and non-Muslim test takers manifested strong implicit bias against Muslims.[108] These results are in sharp contrast to self-reported attitudes.[109] The following generalizations are apparent as to these self-selected users: explicit measures show much greater evidence for attitudinal impartiality or neutrality, and the IAT measures revealed greater bias in favor of the advantaged group. Implicit attitude measures reveal far more bias favoring advantaged groups than do explicit measures.[110] Interestingly, only African Americans failed to show substantial pro-EA race bias on the Race IAT.[111] From this, one can draw the conclusion that "*any* non-African American subgroup of the United States population will reveal high proportions of persons showing statistically noticeable implicit race bias in favor of EA relative to AA."[112]

Becca Levy and Mahzarin Banaji surveyed research that utilized the IAT and implicit priming to measure automatic attitudes and stereotypes related to age.[113] Based on 68,144 tests that included people along a wide spectrum of ages, Levy and Banaji offered three

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104. Nilanjana Dasgupta et al., *Automatic Preference for White Americans: Eliminating the Familiarity Explanation*, 36 J. EXPERIMENTAL SOC. PSYCHOL. 316, 316 (2000).

105. Shankar Vedantam, *See No Bias*, WASH. POST MAG., Jan. 23, 2005, at 12, 15.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. Greenwald & Krieger, *supra* note 66, at 955.

111. *Id.* at 956.

112. *Id.*

113. Becca R. Levy & Mahzarin R. Banaji, *Implicit Ageism*, *in* AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS 49, 51–52 (Todd D. Nelson ed., 2002).

key findings.[114] First, ageism, defined as "an alteration in feeling, belief, or behavior in response to an individual's or group's perceived chronological age[,] . . . can operate without conscious awareness, control, or intention to harm."[115] Levy and Banaji found implicit ageism to be among the largest negative implicit attitudes observed, even larger than the anti-black attitude among white Americans.[116] Second, explicit age attitudes toward the elderly are negative, but implicit age attitudes are far more negative overall.[117] Third, a peculiar feature of implicit ageism is that it does not appear to vary as a function of age, since both older and younger subjects tend to have negative implicit attitudes toward the old and positive implicit attitudes toward the young.[118] The authors argue that ageism occurs implicitly and that all people are implicated in it. "Once age stereotypes have been acquired, they are likely to be automatically triggered by the presence of an elderly person."[119]

When implicit and explicit attitudes toward the same object vary, the discrepancy between the two is referred to as dissociation. This is often seen in attitudes toward stigmatized groups defined by age, race, sexual orientation, and disability.[120] Experiments show that implicit expressions of beliefs and attitudes are unrelated to explicit versions of the same. Two studies explored the use of the IAT "to chart the emergence of implicit attitudes in early and middle childhood."[121] The first study examined white American children's attitudes of blacks and Japanese.[122] The second also tested for explicit and implicit race biases but used a sample from a rural Japanese town where participants had little exposure to out-groups.[123] Generally, implicit and explicit biases existed at the earliest ages tested, but dissociation began around age ten or middle childhood as

114. *Id.* at 54.
115. *Id.* at 50.
116. *Id.* at 54–55.
117. *Id.* at 55.
118. *Id.*
119. *Id.* at 64.
120. Greenwald & Krieger, *supra* note 66, at 949.
121. Yarrow Dunham et al., *From American City to Japanese Village: A Cross-Cultural Investigation of Implicit Race Attitudes*, 77 CHILD DEV. 1268, 1270 (2006).
122. *Id.* at 1270–71.
123. *Id.* at 1274.

participants' explicit bias began to dissipate.[124] Researchers consistently observed dissociation between conscious and unconscious social judgment.[125]

Significantly, implicit bias predicts individually discriminatory behaviors.[126] Studies substantiate that "implicit measures of bias have relatively greater predictive validity than explicit measures in situations that are socially sensitive, like racial interactions, where impression-management processes might inhibit people from expressing negative attitudes or unattractive stereotypes."[127] An experiment featuring doctors making patient assessments provides an example of discriminatory behavior predicted by implicit bias measures.[128] Physicians with stronger implicit anti-black attitudes and stereotypes were not as likely to prescribe a medical procedure for African Americans compared to white Americans with the same medical profiles.[129] In addition, implicit measures are relatively better predictors of "spontaneous behaviors such as eye contact, seating distance, and other such actions that communicate social warmth or discomfort."[130] "Those who possess stronger negative attitudes toward a stigmatized group tend to exhibit more negative behaviors (e.g., blinking) and less positive behaviors (e.g., smiling) when interacting with a member of that group."[131]

Researchers conclude:

> The exposure of stereotyped knowledge in these studies represents an experimental analog of the countless ways in everyday life by which stereotyped information is continuously made available. . . . [I]mplicit stereotyping effects undermine the current belief about the role of consciousness in guaranteeing equality in the treatment of individuals irrespective of sex, class, color, and national origin. . . . Implicit stereotyping critically compromises the efficacy of

124. *Id.* at 1270, 1274–76.
125. Banaji & Bhaskar, *supra* note 98, at 146.
126. Lane, Kang & Banaji, *supra* note 71, at 436.
127. Greenwald & Krieger, *supra* note 66, at 954–55.
128. Lane, Kang & Banaji, *supra* note 71, at 430.
129. *Id.*
130. Greenwald & Krieger, *supra* note 66, at 955.
131. Lane, Kang & Banaji, *supra* note 71, at 436.

"good intention" in avoiding stereotyping and points to the importance of efforts to change the material conditions within which (psychological) stereotyping processes emerge and thrive.[132]

B. Behavioral Realism

With so much laboratory evidence to support findings in implicit social cognition, many commentators have argued that we should consider the legal implications of this new science.[133] Over twenty years ago legal scholar Charles Lawrence called attention to the effects of unconscious racism in an oft-cited law review article, noting that "a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation."[134] Social science research has spawned a new generation of academics who question whether existing legal doctrines realistically account for the operation of implicit social cognition on human actors.[135]

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132. Banaji, Hardin & Rothman, *supra* note 70, at 280.

133. Several authors have surveyed research and experiments on metacognitive processes to show how awareness, control, and intentionality (features of consciousness) relate to the formation of beliefs, attitudes, and behaviors. They argue that research on implicit social processes, particularly data on influences outside conscious awareness, control, and intention, may drive re-conceptualization of the legal notion of intention as it relates to discrimination. *See, e.g.*, Lane, Kang & Banaji, *supra* note 71; Banaji & Bhaskar, *supra* note 98; Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006); Mahzarin R. Banaji & Nilanjana Dasgupta, *The Consciousness of Social Beliefs: A Program of Research on Stereotyping and Prejudice*, *in* METACOGNITION: COGNITIVE AND SOCIAL DIMENSIONS 157, 167 (Vincent Y. Yzerbyt et al. eds., 1998).

134. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

135. *See generally* Jennifer S. Hunt, *Implicit Bias and Hate Crimes: A Psychological Framework and Critical Race Theory Analysis*, *in* SOCIAL CONSCIOUSNESS IN LEGAL DECISION MAKING: PSYCHOLOGICAL PERSPECTIVES 247, 255 (Richard L. Wiener et al. eds., 2007) (arguing that implicit stereotypes and prejudice may "tip the scale" in triggering hate crimes by causing hostile interpretations, increasing the likelihood of categorizing an individual as a member of a stigmatized group, activating aggressive behavioral tendencies, and/or lowering the decision threshold for aggressive behavior); Antony Page, *Unconscious Bias and the Limits of Director Independence*, 2009 U. ILL. L. REV. 237 (arguing that rules regarding director independence are flawed because they do not account for sources of bias, especially unconscious bias); Sara R. Benson, *Reviving the Disparate Impact Doctrine to Combat Unconscious Discrimination: A Study of* Chin v. Runnels, 31 T. MARSHALL L. REV. 43, 58–59 (2005) (arguing that the intent doctrine should be struck and the disparate impact doctrine should be reinstated in Equal Protection cases to combat implicit discrimination).

In *Trojan Horses of Race*, an exposition on selected findings in social cognition research, Jerry Kang describes "'racial mechanics'—the ways in which race alters intrapersonal, interpersonal, and intergroup interactions."[136] With an emphasis on implicit bias material, Kang urges that "it is time for a new 'behavioral realist' approach, which draws on the traditions of legal realism and behavioral science."[137] The term "behavioral realism" was coined by a collection of academics to identify a collaboration of legal scholars and social cognitionists that "seeks to apply the best model of human behavior that science has made available to questions of law and policy."[138] The idea of behavioral realism is that law and jurisprudence should be consistent with accepted interpretations of behavioral science.[139] One example of this type of collaboration is Kang and Banaji's proposal to apply implicit social cognition research to create a new framework for affirmative action, using a methodology that "forces the law to confront an increasingly accurate description of human decision making and behavior, as provided by the social, biological, and physical sciences."[140] Kang and Banaji contend, "[b]ehavioral realism identifies naïve theories of human behavior . . . [and] juxtaposes these theories against the best scientific knowledge available to expose gaps between assumptions embedded in law and reality described by science. When behavioral realism identifies a substantial gap, the law should be changed to comport with science."[141]

A number of scholars have employed a behavioral realist approach to evaluate legal doctrines that require a showing of explicit

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136. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1493 (2005).

137. *Id.* at 1494 n.21.

138. *Id.*

139. *See, e.g.*, Dale Larson, *Unconsciously Regarded as Disabled: Implicit Bias and the Regarded-As Prong of the Americans with Disabilities Act*, 56 UCLA L. REV. 451, 476, 484–87 (2008) (citing a study that found "[p]reference for people without disabilities compared to people with disabilities was among the strongest implicit and explicit effects across the social group domains," and concluding that amendments to the Americans with Disabilities Act, which would reinstate a broader definition of a key element of actionable discrimination, are an important step forward in protecting against disability discrimination resulting from implicit bias).

140. Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1064–65 (2006).

141. *Id.* at 1065.

bias and conscious racial motivation. In the area of employment discrimination law, Linda Krieger and Susan Fiske assert that requirements based on intentionality and consciously discriminatory motivations are out of sync with empirical data from psychological science.[142] Relying on studies showing commonly held gender stereotypes and research indicating that implicit stereotypes remain in people who expressly hold egalitarian views, David Faigman, Nilanjana Dasgupta, and Cecilia Ridgeway argue that employment discrimination law requires new interpretations relying on more than explicit motivations.[143]

In articles addressing juror and judicial decision-making, authors present scientific research to show that implicit bias affects courtroom proceedings, suggesting that judges who prohibit references to race or other social characteristics during the proceedings are actually allowing discrimination to continue rather than helping to stop it.[144] Judges who strive to create a prejudice-free courtroom face an additional quandary. Studies confirm that unconscious bias may explain, at least in part, disparities in judicial decision-making, such as with convictions and sentencing.[145] Concerned with the impact of implicit bias in the process of creating a fair cross-section of jurors, one judge recognized that racial dynamics played out in jury deliberations, but she was frustrated in her attempts to remove prejudiced jurors from the pool.[146] Looking at

142. Krieger & Fiske, *supra* note 133, at 1061–62.

143. Faigman et al., *supra* note 65, at 1434 (concluding that expert testimony regarding research on implicit bias should be admissible in Title VII discrimination cases to provide a general background of implicit bias and give triers of fact understanding and context, but not for testimony that implicit bias influenced an employment decision in a specific case).

144. *See* Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, *in* CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY, RACE, AND LAW 11 (Gregory S. Parks et al. eds., 2008).

145. *See* Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1202 (2009). The authors found that the white judges in their study may have been compensating for unconscious racial biases in their decision-making, at least when the defendant's race was clearly identified. *Id.* at 1223. However, the black judges in the study had a greater propensity to convict the African American defendant, perhaps, as the authors speculate, because "[b]lack judges . . . might have been less concerned with appearing to favor the black defendant than the white judges." *Id.* at 1224.

146. Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1030 (2008) ("The harsh reality for judges conducting voir dire aimed at seating only fair and impartial jurors is that the jurors themselves may not be able to assist."); *see also* Turner v.

peremptory challenges, Anthony Page argues that the current three-step *Batson* approach[147] is inadequate to address the phenomenon of racially motivated challenges in jury selection.[148] The *Batson* approach requires that the challenging lawyer actually be conscious of her reason for striking, but research shows that unconscious bias can easily alter our perceptions of others.[149] Page's piece, along with other social science articles, was cited by Justice Breyer in *Miller-El v. Dretke*, a case in which the Supreme Court concluded that a prosecutor's use of peremptory challenges to strike several black jurors constituted purposeful discrimination.[150] Justice Breyer commented that "[s]ubtle forms of bias are automatic, unconscious, and unintentional,"[151] operating outside the knowledge of the person acting in a biased manner.

C. Application to Mediation

Unlike judges, mediators lack the authority to render binding judgments. Nevertheless, they may have significant influence on individual lives. A mediator's actions, judgments, strategic choices, and interactions with the disputants have an undeniable impact on the substance of the mediation and the results of the mediation process. In her book on mediator behavior, Deborah Kolb described her

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Stime, 222 P.3d 1243 (Wash. 2009) (holding that the jurors' racially biased conduct in regards to a Japanese lawyer supported grounds for a new trial); Martha Neil, *New Trial Sought After Jurors Mock Lawyer's Heritage*, ABA JOURNAL (Jan. 15, 2008, 4:34 PM), http://www.abajournal.com/news/new_trial_sought_after_jurors_mock_lawyers_heritage (Washington lawyer sought new trial after jurors mocked his Japanese heritage during deliberations).

147. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court provided a three step approach for constitutional claims regarding the use of peremptory challenges. The first step requires the defendant to raise the inference that the prosecutor used peremptory challenges to exclude possible jurors based on race. *Id.* at 96. In the second step, the prosecution has the burden of producing a race-neutral explanation for the exclusion of the jurors. *Id.* at 97. In the third step, the trial court must determine if the defendant has proven purposeful discrimination. *Id.* at 98.

148. Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005).

149. "[T]he problem with *Batson* is its inability to address the honest, well-intentioned lawyer who nevertheless still discriminates." *Id.* at 179 (emphasis added). The lawyer's lack of self-awareness may lead to peremptory challenges being exercised in a discriminatory manner even though the lawyer states, and believes, she has a non-discriminatory reason. *Id.* at 234–35.

150. Miller-El v. Dretke, 545 U.S. 231, 265–66 (2005).

151. *Id.* at 268 (Breyer, J., concurring) (internal quotations omitted).

observations of labor mediators during several mediations.[152] She observed two contrasting types of mediator behavior, leading her to classify mediators as either "orchestrators" or "dealmakers".[153] Orchestrators tended to require that the parties take more responsibility for negotiating, designing settlement proposals, and convincing their colleagues to accept a given settlement.[154] Dealmakers, on the other hand, saw themselves as responsible for creating, pushing, and "selling" an ultimate settlement to the parties.[155] Mediators in Kolb's study admitted to "manipulat[ing]" the parties to certain outcomes.[156] Kolb observed mediators using "direct persuasion . . . resulting in a deal that bears the imprint of the mediator as much as it does the parties."[157]

This spectrum of mediator behavior has been described in various ways. Leonard Riskin's well-known grid situates mediators within a "facilitative-evaluative/broad-narrow" framework.[158] Ellen Waldman uses "Norm-Generating," "Norm-Educating," and "Norm-Advocating" terminology.[159] Hilary Astor compares a "robust" approach, in which the mediator is "assertive, active, and interventionist," to a "minimalist" approach that entails convening, stimulating information flow, and identifying options.[160] For every mediator who argues that a facilitative model is the better or "correct" approach, another advocates a more directive approach in fulfilling duties.[161] By analyzing mediators in practice, observers

152. DEBORAH M. KOLB, THE MEDIATORS (1983).

153. *Id.* at 25.

154. *Id.* at 34–41, 42–43.

155. *Id.* at 34–42.

156. *Id.* at 41.

157. *Id.* at 42.

158. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 16–35 (1996); Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and The New New Grid System*, 79 NOTRE DAME L. REV. 1, 12–13 (2003) (proposing substituting "directive" and "elicitive" for "evaluative" and "facilitative").

159. Ellen A. Waldman, *The Challenge of Certification: How to Ensure Mediator Competence While Preserving Diversity*, 30 U.S.F. L. REV. 723, 728–43 (1996).

160. Astor, *supra* note 11, at 75–76.

161. *Compare* Kimberlee K. Kovach & Lela P. Love, *"Evaluative" Mediation is an Oxymoron*, 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996) ("An essential characteristic of mediation is facilitated negotiation. . . . 'Evaluative' mediation is an oxymoron. It jeopardizes neutrality because a mediator's assessment invariably favors one side over the other."), *with*

have concluded that evaluative mediators cross the neutrality line in ways that facilitative practitioners do not.[162] It is when mediators move from "educative" and "rational-analytic" roles to "therapeutic" and "normative-evaluative" roles "that an ethics dilemma regarding neutrality and impartiality may arise."[163]

Exoneration of facilitative mediators from neutrality breaches, however, may be too generous. Under the assumption that "mediators themselves routinely and unabashedly engage in manipulation and deception to foster settlements," James Coben argues that "[t]his is not simply a matter of mediator style—the [much-discussed] distinction between facilitative and evaluative approaches."[164] Despite neutrality constraints, Coben asserts that mediators "*are directly involved in influencing disputants toward settlement.*"[165]

Mediator partiality is manifested in subtle ways.[166] Two studies reveal a significant disconnect between the articulated practice goal of neutrality and the actual techniques and strategies of mediators. In the first study, empirical research into community mediation in neighbor disputes showed that mediators (paid staff and trained volunteers) found it difficult to ignore "personal bias and evaluations of the worthiness of particular claims and disputants."[167] Mediators confessed to being so angry or frustrated with a disputant that on occasion "they felt they could not even make a pretence at remaining neutral."[168] Instead of being a rare occurrence, mediators stated their

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Donald T. Weckstein, *In Praise of Party Empowerment—and of Mediator Activism*, 33 WILLAMETTE L. REV. 501, 504 (1997) ("When consistent with the parties' expectations and the mediator's qualifications, activist intervention by the mediator should be encouraged rather than condemned.").

162. Linda Mulcahy, *The Possibilities and Desirability of Mediator Neutrality—Towards an Ethic of Partiality?*, 10 SOC. & LEGAL STUD. 505, 510–11 (2001).

163. Taylor, *supra* note 24, at 221.

164. James R. Coben, *Mediation's Dirty Little Secret: Straight Talk About Mediator Manipulation and Deception*, 2 ALTERNATIVE DISP. RESOL. EMP. 4 (2004).

165. *Id.* at 5 (citing CHRISTOPHER MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 327 (2d ed. 1996)); *see also* Astor, *supra* note 11, at 74 ("Significant attacks on mediator neutrality have come from academics who have pointed out, trenchantly and repeatedly, that mediators are not neutral. Research has clearly demonstrated that mediators do inject their own values into mediation.").

166. Mulcahy, *supra* note 162, at 511.

167. *Id.* at 516.

168. *Id.* at 516–17.

reactions were common.[169] Their mediation training "assumed that they could keep such negative evaluations of the disputants at bay."[170] However, the mediators felt constrained by an expectation of neutrality, as the expectation "was impossible to achieve" and "made them feel as though they were constantly doomed to failure."[171]

A second study showed that mediators influence the content and outcome of mediations by instigating party engagement at certain times in the process to make certain outcomes more likely.[172] This study looked at divorce mediations, analyzing data from forty-five mediation sessions which covered fifteen cases handled by three mediators.[173] Researchers found that mediators directed the process towards the outcomes they favored.[174] "The pressure that the mediator exerts toward the favored and against the disfavored outcome is largely managed by differentially creating opportunities to talk through the favored option rather than, for example, repeatedly producing evaluative statements about the positions of the two clients or the options open to them."[175] The authors label this technique "selective facilitation"[176] and admonish that it should be "introduced with sufficient clarity for clients to be able to recognize it and choose whether to go along with it."[177]

An additional layer should be explored to address concerns of partiality in actual mediator behavior: the danger of unconscious bias against a party. As previously described, research shows the

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169. *Id.* at 517.

170. *Id.*

171. *Id.*

172. David Greatbatch & Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 LAW & SOC'Y REV. 613 (1989).

173. *Id.* at 617.

174. *Id.* at 618. Information from the sessions "demonstrates that the mediator is working with notions of what kind of settlement would be desirable (a favored outcome) and what kind of settlement would be undesirable (a disfavored outcome), and seeks to guide the interaction accordingly." *Id.*

175. *Id.* at 636. "More commonly, mediators seem to proceed not by using the negative power of a veto but through the positive power of encouraging discussion in specific directions." *Id.* at 617.

176. *Id.* at 618.

177. *Id.* at 639. "Mediator influence becomes a problem only when formal and substantive neutrality are confused so that the pressure becomes invisible or when the choice of goals remains a purely personal matter rather than one for which the practitioner may be socially accountable." *Id.*

influence of implicit bias on our evaluation of others, judgments, and behavior, which is often inconsistent with express statements. "[E]x ante exhortation not to be intentionally unfair will do little to counter implicit cognitive processes, which take place outside our awareness yet influence our behavior."[178] In their introductory comments to the parties, mediators generally state that they will act in a neutral and impartial manner. Ethical and professional standards impose on mediators a moral imperative to avoid discrimination in their mediations. It is up to the parties to prove discriminatory treatment, even though people often do not perceive discrimination. "A behavioral realist analysis has demonstrated that such a model of explicit discrimination is not up to the task of responding to implicit bias, which is pervasive but diffuse, consequential but unintended, ubiquitous but invisible."[179]

Decades ago, critics cautioned that the mediation process may be particularly ill-suited to identify and confront discriminatory behavior.[180] As Richard Delgado and his colleagues warned, "ADR might foster racial or ethnic bias in dispute resolution."[181] Because formal adjudication explicitly manifests "societal norms of fairness and even-handedness" through symbols (flag, black robe), ritual, and rules, the adversarial process counteracts bias among legal decision makers and disputants.[182] These commentators conclude that members of the majority are most likely to show prejudicial behavior in informal ADR settings.[183] They argue that

> ADR is most apt to incorporate prejudice when a person of low status and power confronts a person or institution of high status and power. In such situations, the party of high status is more likely than in other situations to attempt to call up prejudiced responses; at the same time, the individual of low status is less

178. Kang & Banaji, *supra* note 140, at 1079.

179. *Id.* at 1079–80 (citing Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1 (2006)) ("Recognition of the pervasiveness of implicit bias lends support to a structural approach to antidiscrimination law.").

180. Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359.

181. *Id.* at 1367.

182. *Id.* at 1387–88.

183. *Id.* at 1391.

> likely to press his or her claim energetically. The dangers increase when the mediator or other third party is a member of the superior group or class.[184]

To test the "informality hypothesis" that the effects of gender and ethnicity will be greater in mediated rather than adjudicated small claims cases, Gary LaFree and Christine Rack examined ethnicity and gender among participants and mediators in Bernalillo County, New Mexico ("MetroCourt study").[185] These researchers compared the impact of disputants' ethnicity and gender on monetary outcomes in 312 adjudicated and 154 mediated civil cases.[186] They found support for the informality hypothesis (i.e., disparities between Anglo males and others will be particularly significant in mediation) in contrasts between minority and Anglo claimants.[187] "The strongest support for the informality hypothesis is for minority male claimants, who received significantly lower MORs [monetary outcome ratios] in mediation, even when case variables are controlled for."[188] The study found no evidence that minorities or women were "especially disadvantaged as respondents in mediation."[189] The researchers concluded there was some support for an informality hypothesis, i.e., "that ethnic and gender disparities are greater in mediation than in adjudication."[190]

LaFree and Rack also sought to test the "disparity hypothesis" that minority and female disputants will achieve less favorable outcomes than majority and male parties whether their cases are adjudicated or mediated, and they found "considerable support" for it.[191] Data for mediated outcomes showed that minority men and women received significantly lower MORs as claimants, and minority men paid

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184. *Id.* at 1402–03. For a response to Delgado's criticisms, see Sara Kristine Trenary, *Rethinking Neutrality: Race and ADR*, 54 DISP. RESOL. J. 40, 44 (1999).

185. *See generally* Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 LAW & SOC'Y REV. 767 (1996).

186. *Id.* at 771.

187. *Id.* at 778.

188. *Id.* at 780.

189. *Id.* at 778.

190. *Id.* at 789.

191. *Id.* at 788.

significantly more as respondents.[192] The study's overall results showed

> the strongest evidence of ethnic and gender disparity in the treatment of minority claimants in mediation. In the analysis including product terms, both minority male and female claimants received significantly lower MORs – even when we included the nine case-specific and repeat-player variables. Of greatest concern is the fact that this disparity was only present in cases mediated by at least one Anglo mediator. Cases mediated by two minorities resulted in lower MORs, regardless of claimant ethnicity.[193]

Rack conducted a second MetroCourt study involving a full data set of 603 small claims cases, of which 323 were adjudicated and 280 were mediated.[194] The study looked at a subset of 138 mediated cases which resulted in monetary agreements.[195] Rack compared party negotiations before the mediation with negotiation movement during the session to assess how the mediation process itself affected disputants.[196] She organized data to view cases as status relationships between claimants and the respondents, using five status dimensions: race-ethnicity, gender, socio-economic, corporate, and legal representation.[197] She found that ethnic minority claimants settled for less than Anglo claimants in mediation.[198] Compared to Anglo counterparts, minority respondents admitted higher liability at the outset and reported similar pre-mediation concessions; however, during the mediation sessions minority respondents conceded proportionally more than Anglo respondents to Anglo claimants.[199]

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192. *Id.* at 780.

193. *Id.* at 789.

194. Christine Rack, *Negotiated Justice: Gender & Ethnic Minority Bargaining Patterns in the MetroCourt Study*, 20 HAMLINE J. PUB. L. & POL'Y 211, 212 (1999).

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 217. In the total sample, those coded as "minority claimants" were: 182 Hispanics (30.4%), 11 African-Americans (1.8%), 4 Asians (0.7%), 7 Native Americans (1.2%), and 5 "others" (0.8%). Those coded as minority respondents were: 216 Hispanics (36.1%), 22 African-Americans (3.7%), 11 Asians (1.8%), 5 Native Americans (0.8%), and 14 "others" (2.3%). *Id.* at 238.

199. *Id.* at 249.

"In sum, patterns shown here reflected firm bargaining by higher structural status claimants (high initial demands, concession resistance, undermatching, and little end stage concession-making). At the opposite pole, minority claimants were the softest bargainers."[200] Interestingly, "claimant ethnicity was the significant factor differentiating respondent concession-making; Anglos and men were more willing to pay Anglo than minority claimants."[201] According to Rack, the study showed that "Anglos and women [are] more likely to show insider bias."[202]

Mediators in Rack's study exhibited "Anglo-protective bias."[203] "Especially when the respondent was Anglo, mediators' status deference and ethic of 'neutrality' became a means through which the mediation environment served to support exploitation of soft bargaining."[204] Rack observed that "[o]vert prejudice was rarely acknowledged by disputants or recognized by mediators although the effects were apparent in the outcomes."[205] Noting that "[n]on-dominant groups may hold different fairness values, hold unequal power in negotiations with more dominant parties, and accept disadvantaged outcomes," Rack concluded that "those who are traditionally perceived as less competent continue to be perceived that way persistently so that hierarchies are recreated through a process of self-fulfilling prophecy. Attempts to break free of others' expectations are often negatively misperceived and actively discouraged until less privileged actors retreat from trying."[206]

Rack's MetroCourt study raises concerns that "insider bias" and "Anglo-protective" behavior on the part of mediators, along with settlement pressure to avoid perceived risks of adjudication, put minority parties at a significant disadvantage. Her case studies "suggest what appeared to be primary mediator patterns in these cases; Anglo mediators leaned on external status characteristics to

200. *Id.* at 253.
201. *Id.* at 258.
202. *Id.* at 289.
203. *Id.* at 273.
204. *Id.* at 262.
205. *Id.* at 276.
206. *Id.* at 230–31 (citing Cecilia L. Ridgeway, *Interaction and the Conservation of Gender Inequality: Considering Employment*, 62 AM. SOC. REV. 218, 218–35 (1997)).

grant legitimacy in the absence of cultural understanding, a pattern that apparently reinforced a pattern of hierarchy acceptance within the minority culture."[207] Rack noted, "The interest-based negotiation process and the mediators' often unexamined and unintended influence (or lack thereof), offered various opportunities for betrayals of justice. . . . Minority disputants, not Anglo women, manifested bargaining patterns that implied socialization patterns that could be and were substantively exploited by more dominant parties."[208] Rack concluded that "data suggested that the most imbalanced outcomes resulted from settlement pressure through constructing non-monetary substitutes for monetary claims, and by invoking, perhaps misrepresenting, evidentiary rules to discourage disputants from adjudication."[209]

Unique conditions of the mediation process may contribute to discriminatory mediator action (or inaction) in another way. In *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, Lu-in Wang examines the influence of situational context on discriminatory behavior in social interactions.[210] Wang argues that race functions as a proxy for negative characteristics associated with skin color, such as "laziness, incompetence, and hostility . . . lack of patriotism or disloyalty to the United States . . . susceptibility to some diseases . . . [and] criminality and deviance."[211] Wang contends that "fewer individuals than in the past are likely to be motivated by discriminatory animus. . . . Most of us are afflicted instead with unconscious cognitive and motivational biases that lead us to reflexively categorize, perceive, interpret the behavior of, remember, and interact with people of different races differently."[212]

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207. *Id.* at 263. The minorities involved were Latinos. Rack expressly stated that the same patterns may not be found in research with other minority groups. *Id.*

208. *Id.* at 294–95. "Disparate outcomes were created by apparently soft bargaining that was leveraged by mediators and exploited by opportunistic respondents into greater concessions. Minority claimants were vulnerable to suggestions that they could not expect much from their judicial alternative." *Id.* at 286.

209. *Id.* at 296.

210. Lu-in Wang, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DEPAUL L. REV. 1013 (2004).

211. *Id.* at 1013–14. Proxy captures the unconscious and habitual "'default' manner in which race often influences decision-making." *Id.* at 1015.

212. *Id.* at 1017.

Wang advocates an examination of "social constraints" as powerful unseen influences on discriminatory behavior.[213] Contextual circumstances and "external factors" work to create "channel factors" which direct behavior by (1) determining how an individual defines a situation, and (2) channeling her behavior by indicating the appropriate conduct for that situation, "essentially opening or closing pathways for action."[214] Wang cites studies that show that "situations that include clear indications of right and wrong behavior [] tend to lessen the likelihood of discrimination."[215] Normative ambiguity tends to promote discrimination and "the power of ambiguity to channel discrimination goes hand-in-hand with its ability to mask it."[216] Normative ambiguity can arise where appropriate behavior in a particular context is not clearly identified and where clearly negative behavior can be justified on a basis other than race.[217] Stated another way, "normative clarity discouraged racial bias, but normative ambiguity channeled it."[218]

Could normative ambiguity in the mediation process channel biased mediator behavior as Wang posits? Mediators lack the surety of clearly defined rules of intervention. Among mediation professionals, there is little normative consensus regarding appropriate actions and behavior. The mediator's judgments about the parties, her decision to intervene or remain passive at any given time, and her use of various techniques to encourage agreement may be rationalized as "neutral," thus masking bias. An individual "is likely to discriminate in ambiguous situations despite her egalitarian values and lack of prejudice, because she may not be aware of the need to monitor her response and because racial stereotypes are

213. *Id.* at 1025.

214. *Id.* at 1026 (citing LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY 10 (1991)).

215. *Id.* at 1038.

216. *Id.*

217. *Id.* at 1038–39. Citing juror studies, Wang notes that subjects were more likely to engage in discriminatory behavior when they could point to a non-discriminatory reason to rationalize their actions. For example, subjects might rationalize that verdicts were motivated by a desire to not let a guilty person go free rather than by racial bias. *Id.* at 1043.

218. *Id.* at 1039.

always accessible and automatically activated, and will lead her to discriminate despite her best intentions."[219]

Against this backdrop of implicit bias research and the operation of mediator partiality in actual practice, the next Part returns to the case scenario as a vehicle to contemplate subtle dynamics that might operate within a discrete mediation context.

IV. APPLICATION TO ASIAN AMERICANS[220] IN MEDIATION

Turning back to the Michigan small claims mediation described in the Introduction, I hope to stimulate a fresh inquiry into mediator actions. What influence, if any, might implicit bias have had on the mediators' perception and judgment of the parties? Is it possible that the mediators unintentionally favored the business owner in the mediation? As in the MetroCourt study, did the mediators demonstrate "insider bias" or in-group protectionism? Could the mediators' attitudes toward the homeowners have been colored by Asian stereotypes? In what ways could unconsciously held stereotypic views of a group operate in a seemingly simple non-racialized dispute? "[S]tereotypes about ethnic groups appear as part of the social heritage of society. They are transmitted across generations as a component of the accumulated knowledge of a society. They are as true as tradition, and as pervasive as folklore. No person can grow up in a society without having learned the stereotypes assigned to the major ethnic groups."[221] At the outset, let me state that I believe the mediators conducted the process earnestly and without indication of explicit negative or positive attitudes toward either party. They showed no outright bias, favoritism, or prejudice during the mediation. They employed a facilitative style of

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219. *Id.* at 1045 (citing Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 15–16 (1989)).

220. The United States Census Bureau defines Asian-American as "[a] person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam. It includes 'Asian Indian,' 'Chinese,' 'Filipino,' 'Korean,' 'Japanese,' 'Vietnamese,' and 'Other Asian.'" U.S. Census Bureau, *State & County QuickFacts*, CENSUS.GOV, http://quickfacts.census.gov/qfd/meta/long_RHI425200.htm (last visited Nov. 30, 2010).

221. HOWARD J. EHRLICH, THE SOCIAL PSYCHOLOGY OF PREJUDICE 35 (1973).

mediation as taught in the required forty-hour Michigan Civil Mediation Training.[222] I suggest that the likelihood that implicit bias operated is as great as, or even greater than, the likelihood it did not.

A. Evolution of Asian American Stereotypes

Asian American stereotypes have notably evolved over the past century. Chinese in the United States in the late 1800s were characterized as opium-smoking, morally deficient sub-humans.[223] Fearing the "yellow peril" at the turn of the nineteenth century, Americans portrayed Chinese as military, cultural, or economic enemies and unfair competitors.[224] Courts and legislatures have a long history of discrimination against Asian Americans.[225] In *People v. Hall*,[226] Chinese were described as people

> whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and

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222. This assumes the training they underwent was similar to the one I completed in order to mediate small claims cases.

223. Neil Gotanda, *Asian American Rights and the "Miss Saigon Syndrome," in* ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 1087 (Hyung-Chan Kim ed., 1992); RONALD T. TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 99–112 (rev. ed. 1998); Keith Aoki, *"Foreign-ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 ASIAN PAC. AM. L.J. 1, 18–23 (1996); Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 12–15 (1994).

224. TAKAKI, *supra* note 223, at 81; *see also* Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71, 72 (1997).

225. For example, the Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, barred Chinese immigration and "caused untold suffering and hardship, separating families, creating a society of single men, and institutionalizing hostility, prejudice against and isolation of Chinese immigrants and Chinese Americans." City & Cnty. of S.F. Bd. Res. 363–09 (San Francisco, Cal. Sept. 15, 2009). Resolution No. 363-09 of the San Francisco Board of Supervisors "acknowledg[es] the regrettable role that San Francisco has played in advancing the policies of the Chinese Exclusion Act of 1882, the first federal law to discriminate against a specific group solely on the basis of race or nationality." *Id.*

226. 4 Cal. 399 (1854).

> physical conformation; between whom and ourselves nature has placed an impassable difference.[227]

The Supreme Court upheld the denial of citizenship to Japanese and Hindus from India, concluding that the forefathers intended to exclude "Asiatics" from naturalization and citizenship.[228] "Alien Land Laws" denied Americans of Japanese ancestry the right to own property.[229] Fervent anti-Japanese sentiment and suspicion ultimately led to the incarceration of 120,000 Japanese American citizens and legal permanent residents during World War II.[230]

The next forty years witnessed a shift in the way Asian Americans were perceived. As time passed, Asian Americans went from being a "bad" minority to a "good" minority. They were viewed as smart, industrious, and unassuming.[231] William Peterson first coined the term "model minority" in a 1966 *New York Times Magazine* article about Japanese Americans.[232] Asian Americans were held up as examples of minority success through hard work, sacrifice, following rules, keeping their noses to the grindstone, and minding their own business. Asian Americans, in short, achieved the American Dream. Americans have embraced the model minority perception as the contemporary Asian American stereotype.[233]

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227. *Id.* at 405. The court found that section 13 of the Act of April 16, 1850, prohibited Chinese people from testifying in favor of or against white men. *Id.* The court thus reversed the conviction of a white man who was found guilty of murder based on the testimony of Chinese witnesses. *Id.*

228. Ozawa v. United States, 260 U.S. 178, 195–96 (1922). In *Ozawa*, the Court found that section 2169 of the Revised Statutes, which limited naturalization to aliens who were "free white persons" and to aliens of African descent, applied to the Naturalization Act of June 29, 1906, ch. 3592, secs. 355–353, § 1, 34 Stat. 596 (1906). *Ozawa*, 260 U.S. at 194. This made the Japanese appellant ineligible for naturalization because he was not a free white person. *Id.* at 198; *see also* United States v. Thind, 261 U.S. 204 (1923) (determining that the term "free white persons" was to be interpreted as a common man would understand it; that the term was found to be synonymous with the word "Caucasian"; and that a high caste Hindu of full Indian blood was not included in that term).

229. Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37, 38 (1998).

230. ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 4 (2001).

231. Saito, *supra* note 224, at 71.

232. Chew, *supra* note 223, at 24 (citing William Petersen, *Success Story, Japanese-American Style*, N.Y. TIMES MAG., Jan. 9, 1966, at 20–21, 33, 36, 40–41, 43).

233. *Id.* at 24.

The model minority stereotype, like all stereotypes, is inaccurate. Lumping all Americans of Asian descent into one homogeneous category ignores vast differences among the many ethnicities. Dozens of different ethnic groups fall under the "Asian American" umbrella.[234] In fact, the pan-Asian identity reflected in the term did not develop until the 1960s.[235] Three main factors complicate any assumption of Asian Americans as a monolithic group: country of ancestry, length of residence in the United States, and gender.[236]

The model minority myth also has a negative side. Quiet, high achieving, workaholic go-getters may also be seen as cut-throat, inscrutable, and sneaky.[237] Asian Americans are viewed as skilled in scientific, technical, and quantitative fields, but lacking in verbal, social, and interpersonal skills.[238] This positive/negative duality of the stereotype is "akin to the paradoxical topology of a mobieus strip. If pressed, the so-called 'good' attributes . . . easily transform into the 'bad' attributes . . . and vice versa."[239]

The model minority myth masks challenges faced by Asian Americans who are over-credited with ascension on the ladder of success. The poverty rate for Asian Americans is almost twice that of white Americans.[240] Family income comparisons fail to recognize that Asian families typically have more workers per family than families with higher individual incomes.[241] Perceptions of Asian

234. *Id.* at 25.

235. YAMAMOTO ET AL., *supra* note 230, at 269–70.

236. Chew, *supra* note 223, at 26. For example, a fourth-generation Japanese American in California has very little in common with a recent Hmong immigrant in Minnesota, and Native Hawaiians have a vastly different set of experiences and perspectives than mainland Asian Americans.

237. Saito, *supra* note 224, at 72; Chew, *supra* note 223, at 38.

238. The "Asians are good at math" stereotype is so strong that it is even internalized by Asian Americans. The Math Test study by Margaret Shih showed that by unconsciously activating a particular identity (Asian) in Asian American female undergraduates, performance on a difficult math test was improved. Conversely, when female identity was unconsciously activated, the students' performance was depressed downward. Margaret Shih et al., *Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance*, 10 PSYCHOL. SCI. 80 (1999).

239. Aoki, *supra* note 223, at 35–36.

240. Saito, *supra* note 224, at 90 (citing William R. Tamayo, *When the "Coloreds" Are Neither Black Nor Citizens: The United States Civil Rights Movement and Global Migration*, 2 ASIAN L.J. 1, 15 n.97 (1995)).

241. TAKAKI, *supra* note 223, at 475.

Americans include the belief that they are not the targets of racial discrimination[242] and that they are represented throughout the ranks of industries and professions.[243] Discussing Asian Americans, one scholar commented that "[a]lthough they are often needy and disadvantaged, they are not perceived as facing any obvious barriers greater than those of previous immigrant groups. . . . For example, there is less concern about [them] than about blacks, and they are less negatively stereotyped."[244] The model minority myth sends a message that Asian American claims of discrimination are not to be taken seriously.[245]

The stereotype that Asian Americans are deferential and unassertive hurts their potential to advance in various professional fields. Asian Americans are under-represented at the top levels of corporate, legal, and commercial management.[246] "[B]eliefs about Asian Americans as individually passive, obedient, hardworking, and socially inept encourage employers to hire them, but not promote them to upper levels of management. The combined effect of these racial beliefs produces a glass ceiling."[247] Stereotyping of this nature is evident in a recent case involving the exclusion of Asian Americans as grand jury forepersons.[248] In *Chin v. Runnels*, a

242. Gotanda, *supra* note 223, at 1091. One study found that nearly 40 percent of whites thought that with regard to job and housing discrimination, Asian Americans experience "little" or "none." Chew, *supra* note 223, at 8 (citing Michael McQueen, *Voters' Responses to Poll Discloses Huge Chasm Between Social Attitudes of Blacks and Whites*, WALL ST. J., May 17, 1991, at A16). In contrast, another study indicated that 49 percent of Asian Americans stated they had experienced discrimination. *Id.* at 8 (citing *Study Says Asians Feel Bias More Than Hispanics*, L.A. DAILY J., Dec. 12, 1985, at 1).

243. Chew, *supra* note 223, at 46.

244. David O. Sears, *Racism and Politics in the United States*, *in* CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 76, 95 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998).

245. Gotanda, *supra* note 223, at 1089.

246. Chew, *supra* note 223, at 47–49.

247. Don Operario & Susan T. Fiske, *Racism Equals Power Plus Prejudice: A Social Psychological Equation for Racial Oppression*, *in* CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 33, 52 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998).

248. *See* Darren Seiji Teshima, *A "Hardy Handshake Sort of Guy": The Model Minority and Implicit Bias About Asian Americans in* Chin v. Runnels, 11 ASIAN PAC. AM. L.J. 122 (2006) (arguing that court officials, implicitly biased because of the model minority stereotype, believed that Asian Americans were not good forepersons because they were not good leaders); *see also* Benson, *supra* note 135, at 47 (hypothesizing that a judge who accepted prejudiced stereotypes of Asian Americans as "introverted and timid" would not select a Chinese American foreperson).

Chinese-American defendant claimed that exclusion of Chinese-Americans, Hispanic-Americans, and Filipino-Americans as grand jury forepersons violated his right to equal protection under the Fourteenth Amendment.[249] Petitioner established a prima facie case of discrimination in the selection of jury forepersons under a process in which the judge and others identified "leadership capabilities."[250] The court expressly entertained the claim that unconscious biases may have contributed to this forty year exclusion, concluding that there may be "a sizeable risk that perceptions and decisions made here may have been affected by unconscious bias."[251]

The second pervasive stereotype of Asian Americans is known as the "perpetual foreigner syndrome."[252] This element of "foreignness" is rooted in the racial categorization of Asians as the "Mongolian or yellow race," as distinguished from the "white or Caucasian race."[253] Even Asian Americans who are native-born citizens have historically been viewed as foreigners.[254] Foreignness became linked with political disloyalty.[255] The imprisonment of Japanese Americans, many of whom were U.S. citizens, during World War II presents a glaring example of this conflation of native-born Asian American citizens with a foreign enemy.[256] Similarly, the foreignness-disloyalty connection has been applied to Korean Americans and Vietnamese Americans during conflicts with Asian countries.[257] The imagery of

249. Chin v. Runnels, 343 F. Supp. 2d 891, 892 (N.D. Cal. 2004).

250. *Id.* at 896–97, 901. Statistical evidence showed that between 1960 and 1996, not one Chinese American, Filipino American, or Hispanic American served as jury foreperson, and that the statistical likelihood of this occurring was 0.0003%. *Id.* at 895.

251. *Id.* at 908. The court denied petitioner's habeas claim but intimated that under de novo review, petitioner likely would have been granted relief. *Id.* at 905–08.

252. FRANK H. WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE 79–129 (2002); Saito, *supra* note 224, at 76; Gotanda, *supra* note 223, at 1097; Chew, *supra* note 223, at 34.

253. *See* Saito, *supra* note 224, at 78 (citing *In re* Ah Yup, 1 F. Cas. 223 (D. Cal. 1878)); *see also* Aoki, *supra* note 223, at 9–10.

254. Saito, *supra* note 224, at 75–76; *see also* Chew, *supra* note 223, at 35.

255. Saito, *supra* note 224, at 82.

256. YAMAMOTO, *supra* note 230, at 4; Saito, *supra* note 224, at 81–83. General John L. DeWitt, leader of the Western Defense Command who favored internment of West Coast Japanese Americans, famously said, "A Jap's a Jap. . . . It makes no difference whether he is an American citizen, [theoretically,] he is still a Japanese." YAMAMOTO ET AL., *supra* note 230, at 99.

257. Saito, *supra* note 224, at 84.

Asian Americans as the enemy persists through economic competition and American trade protectionism, from the 1980s "Japan bashing" caused by automotive competition to imposition of tariffs on cheaper tires imported from China in 2009.[258]

Social cognition research by Thierry Devos and Mahzarin Banaji in 2005 substantiated the perpetual foreigner syndrome. Their study revealed that Asian Americans are perceived as being less American than both Whites and African Americans.[259] Experimental subjects linked American-ness more with white Europeans (e.g., Hugh Grant) than with famous Asian Americans (e.g., Connie Chung).[260] "The conclusion that can be drawn on the basis of the six studies presented here is unambiguous. To be American is to be White."[261] The model minority myth and perpetual foreigner syndrome were confirmed by scientific method in 2009. A survey conducted by Harris Interactive in January 2009 using a computer-assisted telephone interviewing system ("C100 Survey") assessed current attitudes toward Chinese

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258. WU, *supra* note 252, at 70, 88–89; Peter Whoriskey & Anne Kornblut, *U.S. to Impose Tariff on Tires From China*, WASH. POST, Sept. 12, 2009, at A1.

259. Thierry Devos & Mahzarin R. Banaji, *American = White?*, 88 J. PERSONALITY & SOC. PSYCHOL. 447, 463 (2005). Readers may recall MSNBC's gaffe in 1998, running the headline "American Beats Out Kwan" on a story about Tara Lipinski's defeat of her favored U.S. teammate, Michelle Kwan. *See* Steve Mirsky, *Birth of a Notion: Implicit Social Cognition and the 'Birther' Movement*, SCI. AM., Oct. 2009, at 100.

260. Devos & Banaji, *supra* note 259, at 456–57.

261. *Id.* at 463. Devos conducted a more recent study that found that the participants more closely associated Hillary Clinton with American sentiments than they did Barack Obama. This was true regardless of whether race, gender, or personal identity were emphasized, though it was more pronounced when race was emphasized. Thierry Devos, Debbie S. Ma & Travis Gaffud, *Is Barack Obama American Enough to Be the Next President?: The Role of Ethnicity and National Identity in American Politics*, http://www.rohan.sdsu.edu/~tdevos/thd/Devos_spsp2008.pdf. The researchers concluded, "A Black candidate is implicitly conceived of as being less American than a White candidate when perceivers focus on the targets' ethnicity." *Id.*; *see also* Gregory S. Parks, Jeffrey J. Rachlinksi & Richard A. Epstein, Debate: *Implicit Bias and the 2008 Presidential Election: Much Ado about Nothing?*, 157 U. PA. L. REV. PENNUMBRA 210 (2009), *available at* http://www.pennumbra.com/debates/pdfs/Implicit Bias.pdf. Parks, Rachlinski, and Epstein argue that while Obama's election represents a monumental stride forward for race relations, any announcement of a post-racial America is premature because of the race-tinged aspects of the election, including perceptions of Obama as insufficiently patriotic or American. Citing implicit bias, they caution that "[m]odern racism no longer produces an overt smoking gun marking its influence; one has to look fairly carefully to find its influence. It operates not as an absolute barrier, but as a kind of tax on members of racial minorities. It facilitates certain negative assumptions through an invisible influence." *Id.* at 214.

and Asian Americans.[262] The survey covered issues such as "race relations, social equality, immigration, and factors influencing public attitudes."[263] It compared responses from the general population sample and responses from the Chinese American sample. Related to the model minority myth, "[o]ver half of both the general population and Chinese Americans believe Asian Americans achieve a higher degree of overall success often or always in comparison to other Americans."[264] Reflecting perpetual foreigner status, 74 percent of the general population sample overestimated the proportion of the U.S. population that is made up of Asian Americans; contemporaneously, 51 percent underestimated the population of Asians born in the United States.[265] Judging loyalty, three-quarters of the Chinese American over-sample said that Chinese Americans "would support the U.S. in military or economic conflicts between the U.S. and China," but only about half of the general population "believe Chinese Americans would support the U.S. in such conflicts."[266] On racial profiling, only two-fifths of the general population think the FBI might prematurely arrest an Asian American;[267] more than half of the Chinese American respondents believe the FBI would arrest an Asian American without sufficient evidence.[268]

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262. COMMITTEE OF 100 & HARRIS INTERACTIVE, STILL THE "OTHER?": PUBLIC ATTITUDES TOWARD CHINESE AND ASIAN AMERICANS (2009), *available at* http://www.survey.committee100.org/2009/files/FullReportfinal.pdf. The survey followed up on a 2001 study "to gauge shifts in attitudes" and to "explore factors that help formulate perceptions and the reasoning behind attitude changes." *Id.* at 8. The survey used "split samples to compare attitudes toward Chinese Americans, Asian Americans, and other racial or religious groups. In addition to the general population sample, an over-sample of Chinese Americans was conducted." *Id.*

263. *Id.*

264. *Id.* at 42.

265. *Id.* at 40.

266. *Id.* at 43.

267. *Id.* at 45.

268. *Id.* at 44. For a discussion of the Wen Ho Lee case as a recent example of Asian American racial profiling, see Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689, 1692–94 (2000).

B. Revisiting the Small Claims Case

Returning to the small claims mediation, let us reexamine the mediators' conclusion that the door was closed. Presumably, the mediator team was aware of the importance of mediator neutrality to their role and to the sustention of a legitimate process.[269] The Michigan Standards of Conduct for Mediators require the mediators to "remain impartial."[270] Studies find that implicit bias is so pervasive, it is likely most of us are affected.[271] Also, IAT data show unconscious racial bias among European American test takers toward disadvantaged groups.[272] Dissociation between implicit and explicit attitudes is common, so these mediators may hold explicit anti-discrimination attitudes and espouse egalitarian views but still have implicit racial biases.[273]

> At a very early age, young Americans learn the stereotypes associated with the various major social groups. These stereotypes generally have a long history of repeated activation, and are apt to be highly accessible, whether or not they are believed. . . . [O]ne can be "nonprejudiced" as a matter of conscious belief and yet remain vulnerable to the subtle cognitive and behavioral effects of implicit stereotypes.[274]

Also, implicit attitudes are better predictors of some behaviors than explicit attitudes.[275] It is conceivable that the mediators interacted

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269. With regard to impartiality, the Standards of Conduct for Mediators put forward by the State Court Administrative Office of the Michigan Supreme Court state:

> A mediator shall conduct the mediation in an impartial manner. The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which it is possible to remain impartial and even-handed. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

STANDARDS OF CONDUCT FOR MEDIATORS (State Court Admin. Office, Mich. Supreme Court 2001), *available at* http://www.courts.michigan.gov/scao/resources/standards/ odr/conduct.pdf.

270. *Id.*

271. Lane, Kang & Banaji, *supra* note 71, at 433–37.

272. Greenwald & Krieger, *supra* note 66, at 955–58.

273. *Id.* at 955–56.

274. Krieger & Fiske, *supra* note 133, at 1033.

275. Lane, Kang & Banaji, *supra* note 71, at 435–37.

with the parties in a way that was unconsciously more favorable toward the business owner and less favorable toward the homeowners. We learned that group membership implicitly affects a person's identity formation and unconscious expressions of feeling and thought, and that in-group favoritism is strong.[276] "A person may have a view of herself as egalitarian but find herself unable to control prejudicial thoughts about members of a group, perhaps including groups of which she is a member."[277] A person's membership in a group implicitly affects that person's identity formation and "ingroup bias occurs automatically or unconsciously under minimal conditions."[278]

Considering potential mediator bias and favoritism in light of the science of implicit social cognition, it is conceivable that Asian American stereotypes were automatically activated when the mediators met the homeowners. "[M]erely encountering a member of a stereotyped group primes the trait constructs associated with and, in a sense, constituting, the stereotype. Once activated, these constructs can function as implicit expectancies, spontaneously shaping the perceiver's perception, characterization, memory, and judgment of the stereotyped target."[279] Clearly, race alters interpersonal, intrapersonal, and intergroup interactions.[280]

With activation of the stereotype that Asians are untrustworthy, the mediators may have unconsciously viewed the homeowners as less credible or as giving a less reliable account of the rug cleaning situation. They may have implicitly favored the story put forward by the carpet cleaner (in-group) and discredited the version offered by the homeowners (devalued out-group). Perceiving the homeowners as

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276. Thierry Devos & Mahzarin R. Banaji, *Implicit Self and Identity*, *in* HANDBOOK OF SELF AND IDENTITY 153, 154–58 (M.R. Leary & J.P. Tangney eds., 2003), *reprinted in* 1001 ANNALS N.Y. ACAD. SCI. 177, 179–85 (2003).

277. *Id.* at 179.

278. *Id.* at 185.

279. Krieger & Fiske, *supra* note 133, at 1033.

280. Kang, *supra* note 136, at 1493; *see also* Kang & Banaji, *supra* note 140, at 1085 ("An individual (target) is mapped into a social category in accordance with prevailing legal and cultural mapping rules. Once mapped, the category activates various meanings, which include cognitive and affective associations that may be partly hard-wired but are mostly culturally-conditioned. These activated meanings then alter interaction between perceiver and target. These [racial] mechanics occur automatically, without effort or conscious awareness on the part of the perceiver.").

foreign may have activated mental links associating them as an "enemy." The mediators may have unconsciously judged the homeowners as less deserving of relief because of the model minority myth and their "success" in relation to the carpet cleaner.

Mediator memory may have played a role here. Experiments reveal a causal relationship between unconscious stereotypes and biases in perception and memory.[281] Memory errors may occur "because of the human mind's heavy reliance on stereotypes during the encoding and recall of information."[282] Justin Levinson conducted a study testing the effect of implicit racial bias on juror memory.[283] After reading a story about an incident (a fight or employment termination) and performing a distraction task, 153 students of diverse backgrounds[284] answered a questionnaire about the story. The race of the actors in the story was a variable (black/white/Hawaiian).[285] Overall, participants misremembered information in a racially biased way against blacks, less so for Hawaiians.[286] Participants recalled aggressiveness of blacks more easily and generated false memories of their aggression, whereas false memory toward the white actor was positive (receiving an award).[287] Recall is more accurate and false memory generation occurs more with stereotype-consistent information.[288] In addition, "cognitive confirmation effect" has been verified experimentally.[289] Once a social schema (e.g., race, gender) has been activated, a person will often actively search for information that supports that schema

281. *See* Banaji & Greenwald, *supra* note 94.

282. Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 376 (2007).

283. *Id.* at 345.

284. *Id.* at 390–91. The study consisted of 71.2 percent women. Approximately 20 percent of the participants were Japanese American, 20 percent were white, 50 percent were of mixed ethnicity, 2 percent were Hawaiian, 4 percent identified as Other, and there were no African Americans. *Id.*

285. *Id.* at 394.

286. *Id.* at 398.

287. *Id.* at 398–99.

288. *Id.* at 400–01.

289. Page, *supra* note 149, at 216–17 (citing John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCHOL. 20, 20 (1983)).

rather than information that is inconsistent, a process that occurs unconsciously.[290]

Discrimination on the basis of the Asian homeowners' accent is another possible influence on the mediators. Mari Matsuda cautions that "discrimination against accent is the functional equivalent of discrimination against foreign origin."[291] Accent discrimination is triggered by "the collective xenophobic unconscious" bias that operates when a different voice is devalued.[292] A prejudiced listener will attach "a cultural meaning, typically a racist cultural meaning, to the accent."[293] Matsuda suggests that awareness that accent discrimination is a potential problem can help listeners avoid unconscious negative reaction to the accents.[294] Interestingly, not all accents evoke negative reactions. Writing about university tenure decisions, an academic observed that accent is usually a factor in tenure decisions when the professor is a member of an Asian, Indian, African, or Middle Eastern culture; it rarely arises in the case of native speakers of European languages.[295] In the Michigan case, the homeowners' accents, coupled with negative Asian stereotypes, may have caused the mediators to devalue their statements which contradicted the carpet cleaner.

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290. *Id.*

291. Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1349 (1991). Observing that speech can position people socially, Matsuda claims that "certain dialects and accents are associated with wealth and power. Others are low-status with negative associations." *Id.* at 1352 (citing Marc Fisher, *At GWU, Accent is on English for Foreign Instructors: Student Complaints About Teaching Assistants Lead to Testing Program*, WASH. POST, Nov. 29, 1986, at B1); *see also* Beatrice Bich-Dao Nguyen, *Accent Discrimination and the Test of Spoken English: A Call for an Objective Assessment of the Comprehensibility of Nonnative Speakers*, 1 ASIAN L.J. 117, 122 (1994); Kristina D. Curkovic, *Accent and the University: Accent as Pretext for National Origin Discrimination in Tenure Decisions*, 26 J.C. & U.L. 727 (2000); Mary E. Mullin, Comment, *Title VII: Help or Hindrance to the Accent Plaintiff*, 19 W. ST. U. L. REV. 561, 571 (1992); Brant T. Lee, *The Network Economic Effects of Whiteness*, 53 AM. U. L. REV. 1259, 1275 (2004).

292. Matsuda, *supra* note 291, at 1372 (citing ROBERT TAKAKI, FROM DIFFERENT SHORES: PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA (1987)) (asserting that accent discrimination involves "a set of ingrained assumptions that are inevitably lodged in the process of evaluation and in the ways in which we assign values").

293. *Id.* at 1378.

294. *Id.* at 1373.

295. Curkovic, *supra* note 291, at 742–43.

The previous sections of this Article are intended to provoke, not proselytize. The purpose of presenting the small claims scenario is to raise the issue of implicit bias, not to resolve it definitively. As instructors and providers of mediation services, we should understand that mere good intentions to act impartially are insufficient to counter unconscious biases.

> Mediation, despite its image as a neutral procedure in which all values are honored equally and all parties are free to express their points of view, can often be skewed by bias. Mediators often make quick judgments and proffer strong statements infused with their biases, which, though not legally binding, can powerfully impact the outcome of a settlement. . . . Moreover, bias on the part of any mediator can creep into the process in even more subtle ways, such as in the subjective matters of how questioning occurs and how and whether private caucuses are conducted.
>
> Compounding the problem, it is nearly impossible to accurately observe or address issues of bias in the informal consensus-building environment of mediation, especially because there is an unspoken taboo against acknowledging it.[296]

IV. WHAT DO WE DO?

The prospect of mitigating mediator bias is daunting, but myriad acts and practices within the control of mediators may help address the problem. As a first step, mediation professionals must be realistic and frank about the vast range of mediator behavior and the maneuvers mediators employ to meet the ethical standard of neutrality. We should accept that mediator neutrality is elusive and shape-shifting; it is neither a condition nor characteristic that one possesses or lacks. It is a complex, multi-layered relationship and a system of interaction with the parties that requires constant vigilance. A mediator does not enter a mediation as a "neutral" entity, free from

296. Frederick Hertz, *Bias in Mediation and Arbitration*, CAL. LAW., Nov. 2003, at 37–38.

judgments, values, ideologies, attitudes, and pre-conceived perceptions. Like other human beings, mediators bring prejudices and preferences into the sessions. We should envision neutrality as an unending search, not a state of being.

Realistically, pure impartiality cannot exist in a mediation setting. That said, we should not abandon neutrality as a goal. Rather, mediation practitioners and academics must seek greater understanding and candor about what is done in these confidential, closed-door encounters.

> Neutrality is not an attribute that mediators do, or do not, possess but it is an issue which must be attended to throughout a mediation and which requires constant process of evaluation and decision-making. . . . If we view neutrality through a binary lens, so that it is either present or absent, the research demonstrates as it must, that mediators are not neutral."[297]

As mediators, we should increase our efforts to use the best practices to conduct the process in a way that integrates all aspects of neutrality, i.e., no compromising interests held by the mediator, procedural even-handedness, outcome neutrality, and without bias, prejudice or favoritism toward any party.[298]

To fulfill our commitment to act in a nondiscriminatory manner, it is productive to conceive of mediator neutrality as having both external and internal components.[299] External neutrality consists of conduct and statements to show freedom from bias or favoritism in the way the mediation is conducted. Internal neutrality is the state of being aware of the operation of biases toward the disputants and working to minimize it. I separate bias reduction ideas into these two distinct categories, but I recognize that they coalesce in certain instances. In addition to collecting views from a wide variety of observers, I offer experiences from my law school mediation programs as examples of potentially constructive approaches.

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297. Astor, *supra* note 11, at 79–80.

298. *See supra* Part I.

299. Rock, *supra* note 50, at 355 ("Internal neutrality refers to the absence of emotions, values or agendas from the mind of the mediator. External neutrality refers to the absence of emotions, values or agendas from the words, actions, and appearance of the mediator.").

A. External Neutrality

The external aspect of neutrality demands paying attention to process attributes, nuances of language and narrative, and the physicality of mediator actions. As practitioners, we are trained to attend to process management and procedures. We strive for external neutrality by conducting an outwardly even process, eliminating conflicts of interest that may arise from proprietary, monetary, relational, and other interests, and abstaining from advocating or pressing for a particular outcome. We seek to ensure our external neutrality through "process policing" techniques: how we engage the parties, manage their interaction, and orchestrate the sessions.[300] A large part of the mediator's job is "maintaining the orderly character of talking and listening, including such matters as organizing the opening and the closing of the session, keeping the parties focused on the current topic, and managing the changes from one topic to another."[301] Management of the agenda goes to the process of interaction, and therefore "can be thought of as being executed in ways that are both formally and substantively neutral."[302]

1. Process Management and Mediator Communication

Mediators manifest external neutrality by being deliberate in planning and conducting each mediation to "place and keep the power of self-determination with the parties, while protecting all parties' abilities to present issues and concerns equally in the mediation session."[303] Practitioners should be mindful of the difference between even-handed process management and "selective facilitation," or maneuvers that are designed to influence and favor certain outcomes. These maneuvers include inhibiting discussion of a

300. External neutrality techniques would include the "*agenda management* that goes on in any orchestrated encounter. . . . Orchestration is one of the means by which speech exchange is ordered in multi-party encounters." Greatbatch & Dingwall, *supra* note 172, at 636 (citation omitted).

301. *Id.* at 637.

302. *Id.*

303. Rock, *supra* note 50, at 356.

disfavored option or moving to close a session without systematic exploration of both parties' preferences.[304]

External neutrality should be assessed through all stages of the process, from pre-mediation preparation through post-mediation evaluation and debriefing. Rather than routinizing procedures for assembly line mediation, mediators should "customize" the sessions for the special dynamics involved.[305] Departure from procedural defaults may be more appropriate under the circumstances. The Michigan mediators followed the general rule for small claims mediation: they asked the party who initiated the matter to make his presentation first. The mediator team may have considered this to be a neutral selection, but it could be perceived as favoring the businessman and disadvantaging the homeowners. After inviting the business owner to speak first, the Michigan mediators posed more inquiries to the business owner than to the homeowners in the joint session and individual sessions. They may have devoted more time to the carpet cleaner and interacted less with the homeowners for various reasons (such as Mr. D's anger, the Ds' accents, or their "foreignness").

External neutrality efforts include consideration of table arrangements and seating arrangements. In the Michigan scenario, the white male mediator sat closer to the business owner. Such an arrangement could create a more intimate conversational dynamic between the two men and give the impression they are "chummy" or in alignment. Both homeowners were seated farther from the mediators than the business owner, making them seem like more remote "outsiders." Both homeowners should have been placed literally "at the table," rather than letting Mrs. D sit behind her husband. If one party is harder to comprehend (perhaps because of accent, soft voice, or looking down), the mediators could alter the arrangement and form a tight circle with no table. Mediators should be careful about chair placement and body positioning so as not to turn their backs toward one disputant more than the other. Special

304. Greatbatch & Dingwall, *supra* note 172, at 637–38.

305. ABA SECTION OF DISPUTE RESOLUTION, TASK FORCE ON IMPROVING MEDIATION QUALITY FINAL REPORT 12–13 (2008), *available at* http://www.abanet.org/dispute/documents/FinalTaskForceMediation.pdf.

challenges may be presented when language interpreters or other third parties are in attendance, as this may make the unassisted party feel outmanned. Interpreters (of American sign language, for example) may need to be seated to accommodate the need to communicate adequately with their clients. Physical limitations of the participants should be considered with external neutrality in mind.[306]

All subtleties of a mediator's mode of communication, including tone of voice, speed of speech, demeanor, eye contact, facial expressions, body language, and physical signals and gestures, are important for attending to external neutrality.[307] Mediators who are fast talkers may disfavor or alienate parties who speak more slowly or who are less fluent in English. We need to be patient with parties who are less articulate or direct than ourselves, and refrain from interrupting, completing sentences, and filling space with words. Regional differences in speech patterns might create mediator affinity with one party over another.[308] Unevenness in eye contact, body placement and movement (sitting forward or leaning back), and attentiveness (looking down while taking notes) may send signals of mediator approval or friendliness, or a lack thereof. When mediating with parties who have physical, cognitive, or intellectual disabilities, we must monitor habits that may inadvertently slight or alienate them. Mediators must be attuned to unintended differential or compensatory treatment (e.g., speaking in a loud voice to a party for whom English is a second language) that may be regarded as treating one participant more positively or negatively than the other. We should be aware of the inadequacy of our usual mannerisms with certain parties; for example, muted visual cues may disadvantage deaf parties who focus more on visual cues and facial expressions.

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306. For instance, with my limited range of neck motion due to arthritis, as a mediator I must be seated so that I can make eye contact with and view all parties equally.

307. Rock, *supra* note 50, at 358.

308. For example, the East Coast students in my mediation clinic who talk as fast as a "New York minute" often get impatient with parties who speak slowly.

2. Language, Narratives, and Cultural Myths

The importance of language in mediation cannot be overstated. Sarah Burns recommends that mediators be cognizant of the impact of metaphors.[309] Common metaphors may be thought of as mere figures of speech, but they "can have the effect of alienating, excluding, or seeming to disregard certain groups."[310] Burns uses the example of metaphors in which black is a negative referent, which may be awkward or offensive to African Americans.[311] Mediators should be sensitive to terms that may seem innocent but have a hurtful impact on others. An example from my own perspective is the acronym for "Jewish American Princess," "JAP." As a person of Japanese ancestry, I view that abbreviation as a homonym for a racial epithet. Stock phrases in mediation, such as "I hear what you're saying," may come across as insensitive to a hearing-impaired party. Dale Bagshaw observes that "[l]anguage is laden with social values and both carries ideas and shapes ideas."[312] Dominant discourses in Western societies tend to be Anglo-centric, as well as "agist, racist, heterosexist and homophobic."[313] Moreover, "throughout recorded history such discourses have been used by legal and social science professionals to justify categorising people as '(un)deserving,' '(ab)normal,' '(dys)functional,' '(in)competent,' '(mal)adjusted,'

309. Sarah E. Burns, *Thinking About Fairness & Achieving Balance in Mediation*, 35 FORDHAM URB. L.J. 39, 54 (2008). Burns' "Practice Recommendations" are associated with five general aspects of cognition: categorization (naming our world), attribution (explaining our world), metaphor (orienting our world), normative (prescribing behaviors), and framing. *Id.* at 43.

310. *Id.* at 54.

311. *Id.* (e.g., "these were dark times" or "he was one of the guys in a black hat").

312. Dale Bagshaw, *Language, Power and Mediation*, 14 AUSTRALASIAN DISP. RESOL. J. 130, 136 (2003) (citing BENJAMIN LEE WHORF, LANGUAGE, THOUGHT, AND REALITY (John B. Carroll ed., 1956)).

> Dominant dispute resolution discourses in Western cultures have tended to favour adversarial approaches to conflict and rules of law applied in formal law courts are seen as the paramount 'truths'. However, 'law' can be seen as a dominant discourse, elevated by a dominant group in a particular culture at a particular point in time, and as such can marginalise and ignore the 'truths' or ways of knowing of minority cultural groups.

Id. at 132.

313. *Id.*

'subversive,' 'delinquent' or 'deviant.'"[314] When analyzing discourses, Bagshaw notes that "[i]t is therefore crucial to identify the relationship between *what is said* and *who said it*."[315] With this understanding, discourse analysis may reveal sexist or racist assumptions. "Language influences our attitudes and behaviour and can be used to reinforce harmful or hurtful stereotypes, such as those that are agist, sexist, racist and so forth."[316]

Bagshaw cautions mediators "to be careful in the choice of language, interpretations and the meanings they ascribe to a person's identity. Essentialism can contribute to mediators categorising and labelling clients and their problems in a way that impedes opportunities for client-centered practice and reifies and reinforces the power/knowledge of the mediator."[317] To allow parties to "supply the interpretive context for determining the meanings of events, the nature of a presenting problem, intervention and treatment,"[318] Bagshaw urges a "*reflexive* approach to [mediation] practice."[319] "In self-reflexive mediation practice it is recognised that it is impossible to be 'neutral' and the influences of characteristics such as gender, race, class, age, and sexuality on the mediator's relationship with the participants are critically examined."[320] Reflexivity demands awareness and control of the mediator's own personal and cultural biases "in order to understand the standpoint of the 'other.'"[321]

Sara Cobb and Janet Rifkin also emphasize discourse and reflexivity in their critique of mediator neutrality. They view neutrality "as a practice in discourse"[322] and assert that "existing rhetoric about neutrality does not promote reflective critical examination of discursive processes."[323] In their observations of

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314. *Id.*
315. *Id.* at 136.
316. *Id.* at 137.
317. *Id.* at 139 ("Traits such as those linked to ethnicity, age, sexuality, ability or gender, should not be automatically assigned to a person's self-image as any one of those factors may not be seen by the person as relevant or important, depending on the context.").
318. *Id.*
319. *Id.*
320. *Id.* at 140.
321. *Id.* at 141.
322. Cobb & Rifkin, *supra* note 13, at 36.
323. *Id.* at 50.

mediators, they noted that mediators "participate politically by asking questions and making summaries. Their questions bring the focus to one particular event sequence (plot), or particular story logic (theme), and/or adopt the character positions advanced by one disputant *about* another (character)."[324] In addition to mediator actions, "the structure of the mediation session itself contributes to allowing one story to set the semantic and moral grounds on which discussion and dialogue can take place."[325]

Cobb and Rifkin contend that in an effort to reduce adversarialness, mediators explore emotions, interests, fears, hopes, and needs which "obscure[] the role of discourse in the session; the mediators cannot witness their own role in the creation of alternative stories, nor can they address the colonization of one story by another."[326] The end result is that mediators contribute "to the marginalization and delegitimization of disputants."[327] For Cobb and Rifkin,

> [n]eutrality becomes a practice in *discourse*, specifically, the management of persons' positions in stories, the intervention in the associated interactional patterns between stories, and the construction of alternative stories. These processes require that mediators participate by shaping problems in ways that provide all speakers not only an opportunity to tell their story but a discursive opportunity to tell a story that does not contribute to their own delegitimization or marginalization (as is necessarily the case whenever one party disputes or contests a story in which the person is negatively positioned).[328]

Drawing on the work of Cobb and Rifkin, Isabelle Gunning describes mediation as the interaction of narratives in which the parties compete over definitions, moral positioning, and descriptions

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324. *Id.* at 54.

325. *Id.* at 56.

326. *Id.* at 59–60. Cobb and Rifkin "recast ideology in mediation to encompass those discursive practices that privilege one story over another, that legitimize one speaker over another, that reduce any speaker's access to the storytelling process." *Id.* at 51 (citing Stuart Hall, *Signification, Representation, Ideology: Althusser and the Post-Structuralist Debates*, 2 CRITICAL STUD. IN MASS COMM. 91 (1985)).

327. *Id.* at 60.

328. *Id.* at 62.

of social relations.[329] "[T]he process of story-telling or narratives, while it has its positive aspects, may also be at the heart of the problem of bias in mediation."[330] Conversational practice is such that the first, or "primary," narrative sets the sequential and interpretive framework, and subsequent narratives are constructed in relation to that primary narrative.[331] Gunning cautions that speakers draw from the history and norms of the larger society, and when they draw on "bits and pieces of larger cultural myths" during the mediation process, "they must choose some relevant socially constructed category for themselves and others."[332] "[T]he cultural myths surrounding identity groups involving disadvantaged group members are often both negative and purely based upon derogatory conjecture and assumptions about group members."[333]

To heed these caveats about discursive practices, mediators should be extremely careful about making broad assumptions regarding a party's "culture"; "the problem with identifying 'cultural competence' as a form of neutrality is that it downplays the very real choice that mediators make in identifying 'culture.'"[334] In domestic mediations involving persons of color, generalizations about a disputant's cultural orientation based on race, ethnicity, or national origin may reflect stereotypical thinking, be over-inclusive, and be insulting to the party.[335] Cynthia Savage argues that "the common approach of defining 'culture' as being synonymous with one facet of

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329. Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 68.

330. *Id.*

331. *Id.* at 68–69.

332. *Id.* at 70.

333. *Id.* at 72.

334. Clark Freshman, *Privatizing Same-Sex "Marriage" Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687, 1757 (1997) (commenting on a mediation involving a Vietnamese couple and Canadian mediators where "the problematic and unspoken assumption about 'neutrality' and 'cultural competence' is that the only relevant culture is Vietnamese culture").

335. For example, a statement that "blacks might respond to the mediation context by being more expressive, using intense language as a means of communicating sincerity, or remaining fairly distant from the [white] mediator, which may increase the level of biased information coming from the disputing [black] couple" fails to account for vast differences among African Americans as individuals. *See* William A. Donohue, *Ethnicity and Mediation*, *in* COMMUNICATION, CULTURE, AND ORGANIZATIONAL PROCESSES 134, 147 (William B. Gudykunst et al. eds., 1985).

cultural identity, such as race, ethnicity, or gender, is a red herring which diverts attention from the search for a more accurate and constructive approach to exploring the impact of cultural diversity on mediation."[336] Conflating culture with ethnicity may perpetuate stereotypes and ignore subcultures that contribute to an individual's cultural identity.[337]

References to culture are particularly tricky when it comes to Asian Americans who are often mistakenly thought of as natives of Asian countries instead of U.S.-born citizens. Mia Tuan's study of the "Asian ethnic experience" indicates that third- and fourth-generation Asian Americans are generally highly assimilated to white, middle-class American mainstream cultural styles and values and do not retain Chinese or Japanese cultural traditions except for commemorative events.[338] Despite this, "Asian ethnics face societal expectations to *be ethnic* since others assume they should be closer to their ethnic roots than to their American ones."[339]

Gunning exhorts us to explore cultural myths regarding disadvantaged group members in mediation through techniques such as "race-switching," or changing the races of the parties in a case study.[340] In one example, she changes the race of one character from white to Asian. In so doing, she challenges us to contend with "parts of the pre-existing narrative legitimized by the larger society, the myth that they are the 'model minority'."[341] To prevent these cultural myths from contributing to or bolstering the primary narrative, Gunning contends that mediators must "recognize that some of the cultural myths at work in the mediation process are drawn from negative taboos relating to disadvantaged groups."[342] Gunning

336. Cynthia A. Savage, *Culture and Mediation: A Red Herring*, 5 AM. U. J. GENDER & L. 269, 271 (1996) (proposing a "value orientation" framework as a useful way to explore cultural diversity in mediation).

337. *Id.* at 273.

338. MIA TUAN, FOREVER FOREIGNERS OR HONORARY WHITES?: THE ASIAN ETHNIC EXPERIENCE TODAY 155 (1998).

339. *Id.* at 156.

340. Gunning, *supra* note 329, at 74.

341. *Id.* at 75. Gunning observes, "Specifically, Asian-Americans of various national origins face the cultural myth of immutable foreignness . . . . There is always the question with 'foreigners' that they don't really understand 'our ways.'" *Id.*

342. *Id.* at 80.

prescribes intervention to combat negative cultural myths. Her focus on mediator intervention is a situation in which the parties interject cultural myths, urging that the mediator "may also need to flag for the parties that that is what is occurring."[343] Turning the mirror around, I urge constant vigilance and self-correction for instances when the mediator is drawing on cultural myths.

When we re-examine the Michigan mediation, we see a discursive example that disfavored and marginalized the homeowners. After the business owner presented his opening remarks and framed the dispute as a breach of contract case, the mediators questioned him in a way that reinforced his narrative. The homeowners tried to defend themselves by countering the allegation that they failed to comprehend or follow his instructions by shutting the basement door. By asking for the return of the first payment, the homeowners appeared unreasonable. If the mediators had invited the homeowners to go first in the joint session or had refrained from bolstering the carpet cleaner's narrative, the matter may have been framed as a contractor overselling his abilities and overcharging the customers.

We can imagine how the Asian American negative cultural myth of "immutable foreignness" may have bled into the Michigan mediation. In the mediators' encounter with the homeowners, the "simultaneous operation of excitatory and inhibitory cognitive processes" may have determined one category to be more dominant, and the other more suppressed.[344] If the mediators perceive the homeowners' racial category as dominant, xenophobic and race-based biases may have operated against the couple.

3. Reflexivity and Role-Playing

Bagshaw, Cobb, and Rifkin, among others, advocate reflexivity in mediation practice as a check on prejudiced subjectivity. Susan Douglas urges mediators to abandon attempts at objectivity and to instead examine one's own experiences within the mediation.[345]

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343. *Id.*

344. C. Neil Macrae et al., *The Dissection of Selection in Person Perception: Inhibitory Processes in Social Stereotyping*, 69 J. PERSONALITY & SOC. PSYCHOL. 397, 404 (1995).

345. Douglas, *supra* note 35, at 62.

Douglas endorses reflexivity as "a useful means of conceptualising both the impact of mediator predispositions and the co-construction of meaning within the encounter."[346] Viewed this way, "reflexivity represents a rejection of mediator neutrality (in any absolute sense), an acknowledgement of the impact of mediator subjectivity and a means of addressing that subjectivity in practice."[347]

Echoing these views, Linda Mulcahy claims that her study of community mediation validates a reflexive approach in mediation.[348] Her empirical research examined one of the largest community organizations in the United Kingdom.[349] The mediators in her study admitted to having difficulty ignoring personal bias and their subjective evaluations of the merit of particular claims and parties.[350] Acknowledging these feelings, the co-mediators had debriefing sessions to discuss how their personal assessments impacted option development and process management.[351]

The Michigan mediators should have adopted reflexivity as an anti-bias method of self-assessment throughout the session. After reading the file in the small claims case, the mediators could have discussed initial reactions, assumptions, and potential issues of bias during their preparatory caucus. After the joint session, the mediators would have benefitted from a co-mediator caucus to exchange views about the parties and their respective demands. They could have made appropriate adjustments in the individual sessions to counter non-neutral thoughts and behavior. Similarly, a reflexive co-mediator discussion after each individual session may have enabled the pair to steer the mediation in a direction that was more beneficial for the parties. Even if the parties ultimately reached an impasse, they may have gained a fuller understanding of the situation and of one another's perspectives and principles. By diluting the homeowners'

346. *Id.* at 63 ("Reflexivity as mutual collaboration highlights the active role of the mediator in mutually reflexive dialogue . . . . Unavoidably, the mediator, rather than being a neutral facilitator of conversations, is an active coauthor in the construction of dispute narratives.").

347. *Id.* at 65.

348. Mulcahy, *supra* note 162, at 517.

349. *Id.* at 515.

350. *Id.* at 516.

351. *Id.* at 517.

narrative and failing to explore a range of options, the mediators legitimized the business owner's version of entitlement.

Through the use of various practices, we attempt to incorporate discursive and reflective theories in a law school mediation clinic. As Cobb, Rifkin, and Gunning make apparent, the party who speaks first has the advantage of painting a subjective picture of the circumstances underlying the dispute.[352] Student-mediators are eager to ask a litany of "fact-gathering" questions (to the point of interrogation) to the first speaker before listening to the second speaker's narrative. By doing so, students add their own "spin" and make assumptions that may be tainted by their own experiences and expectations. Thus, they may re-characterize or validate the first speaker's presentation through their own additions. Rather than presenting her own "story," the second speaker is reduced to opposing a pre-determined version embellished by the mediators. This can frustrate and incite defensiveness in the second speaker who has been asked to wait her turn and not interrupt.

Recognizing this dynamic, students are directed to refrain from asking questions until both parties have had the opportunity to supply their narratives in their own words and styles. In what may be an atypical practice, we refrain from summarizing and reframing the first person's statements before the second person speaks. While there is always some perceived favoritism that one party goes first, withholding questions and postponing summarizing or reframing lessens the likelihood that the second speaker's narrative will be molded by others.

It is also important to model lack of bias in selecting the party who speaks first. Asking the parties who would like to go first may be perceived as rewarding one party over the other (the more assertive party or the one closest to the mediator, for example). Mediators evidence external neutrality by being transparent in decision-making. Parties should be told why and how the mediators determined the order of presentations (for example, a random method of selection, such as by alphabetical order or coin toss).

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352. Gunning, *supra* note 329, at 68–70.

Reflective learning has been described as "an intentional social process, where context and experience are acknowledged, in which learners are active individuals, wholly present, engaging with others, open to challenge, and the outcome involves transformation as well as improvement for both individuals and their environment."[353] Like many clinical legal educators, I have included role-playing exercises as a reflective teaching opportunity in the mediation clinic for decades.[354] Role-plays contain the essential elements of learning and reflection: (1) "a genuine situation of experience"; (2) a "genuine problem in that situation"; (3) "information and observation about the situation"; (4) "suggested solutions for which the student [is] responsible"; and (5) "opportunity . . . to test ideas by application."[355] By practicing in an academic setting, students will (hopefully) transfer the lessons to their actual cases.

My mediation clinic students participate in five increasingly difficult two-hour role-plays as parties, co-mediators, and observers.[356] In addition to helping the students to improve their mediation skills, the role-plays enable the students to develop empathy and view the process from the perspective of the disputants. Students are encouraged to experiment and put ideas into action. During the role-plays, mediators explore their decision-making processes, assess progress, and consider their reactions to options. Mediators are asked to express how their thoughts and feelings motivated them and evaluate to what extent they pushed options.[357] During class discussion, we deconstruct the mediation role-play and

353. Samantha Hardy, *Teaching Mediation as Reflective Practice*, 25 NEGOTIATION J. 385, 389 (2009) (quoting ANNE BROCKBANK & IAN MCGILL, FACILITATING REFLECTIVE LEARNING IN HIGHER EDUCATION 36 (2d ed. 2007)).

354. For a critique of role-plays as a learning activity, see Nadja Alexander & Michelle LaBaron, *Death of the Role-Play*, *in* RETHINKING NEGOTIATION TEACHING: INNOVATIONS FOR CONTEXT AND CULTURE 179, 179–97 (Christopher Honeyman et al. eds., 2009).

355. Hardy, *supra* note 353, at 390 (citing BROCKBANK & MCGILL, *supra* note 353, at 23).

356. By this time, they have also viewed a small claims mediation at the courthouse, observed an in-class mock mediation demonstration by experienced mediators, and engaged in skills development exercises.

357. Hardy, *supra* note 353, at 397 (quoting MICHAEL D. LANG & ALISON TAYLOR, THE MAKING OF A MEDIATOR: DEVELOPING ARTISTRY IN PRACTICE 54 (2000)) ("Elicitive questioning" presses "mediators to uncover for themselves what was successful or unsuccessful, and to identify the reasoning behind their strategies and approaches, and . . . consider the impact of their interventions on the disputants.").

all students offer oral comments. Both the students and the instructors also complete written critiques.[358] The purpose of feedback is not merely to give mediators a "360 degree" evaluation but also to allow the students and instructors to engage in collective problem-solving and to examine assumptions and reactions.[359] We record the role-plays and make them available for students to view on their laptops. By watching their performances and the reactions of the parties, student mediators can see or contest the validity of the feedback that was offered. They can also see if they were guilty of behavior that reflected bias or favoritism, such as facial expressions, body language, or blinking.

Mediation teachers and trainers should answer Gunning's call for more deliberate confrontation of racial stereotypes and assumptions in training.[360] With that goal in mind, I designed a role-play simulation based on community tensions in Washington, D.C., for use in my mediation course.[361] It is a composite of disputes arising out of years of ongoing tension between Korean American shopkeepers and African American customers.[362] I have varied my approach over time. I initially played the shopkeeper and later opted to recruit volunteers from student groups to play the disputants. For

358. Students complete evaluations as mediators, parties, and observers.

359. Hardy, *supra* note 353, at 393 (quoting BROCKBANK & MCGILL, *supra* note 353, at 5). In this way, "learners and teacher engage and work together so that they jointly construct meaning and knowledge from the material." *Id.*

360. Gunning, *supra* note 329, at 86–88.

361. In fact, as a participant at a conference hosted by the UCLA Center for Study and Resolution of Interracial/Interethnic Conflict, March 28–30, 1996, Professor Gunning offered constructive comments to refine the role-play. For an analysis of Black-Korean tension, see Kyeyoung Park, *Use and Abuse of Race and Culture: Black-Korean Tension in America*, *in* THE CONFLICT AND CULTURE READER 152, 152–62 (Pat K. Chew ed., 2001).

362. *See, e.g.*, Michael A. Fletcher, *Asian-Owned Carryout is Focus of Rally: Small Group Protests Nonblack Business*, WASH. POST, Oct. 19, 1996, at D4 (reporting on African American protestors engaged in a protest rally outside of an Asian-American restaurant in D.C.); *see also Mayor's Proposed Fiscal Year 2010 Budget: Before the Committee on Aging and Community Affairs*, Apr. 24, 2009 (statement of Francey Youngberg, Chair, DC Fair Access Coalition) ("According to the *Washington Post*, two-thirds of all business licenses are owned by Asian Pacific Americans in the District. D.C. agencies estimate that 60% of corner groceries and 57% of lotteries are sold through Asian-owned stores.") (copy on file with author). According to the 2000 U.S. Census, roughly 60 percent of D.C. residents are black. *District of Columbia-DP-1. Profile of General Demographic Characteristics: 2000*, CENSUS.GOV, http://factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=04000US11&-qr_name=DEC_2000_SF1_U_DP1&ds_name (last visited Nov. 8, 2010).

the past few years, I have shown a videotape demonstration; this technique has the advantage of making the discussion about process dynamics and co-mediator choices easier. The demonstration allows students to discuss stereotypes, prejudice, and bias in a controlled and confidential setting. We also use other role-plays and scenarios that involve racial or gender dynamics.

4. Co-Mediation and Race-Matching

Co-mediation offers a number of advantages for advancing external neutrality.[363] We use a co-mediation model exclusively in our community program.[364] Having "two heads" allows the co-mediator team to engage in an explicit discussion of how "neutrally" they are operating within a particular mediation context.[365] In co-mediator caucuses, the team can engage in active reflection to assess the discursive dialogues, interactions with and between disputants, and inclinations to favor or disfavor options. Rather than rushing to an agreement on approach and actions, co-mediators can play "devil's advocate" to affirmatively critique their behavior and choices. A co-mediator provides the eyes and ears for peer evaluation. Although mediators may be reluctant to offer constructive criticism (since it is not anonymous), a mutual co-mediator evaluation can incorporate elements of debriefing, reflection, positive feedback, and suggestions for future improvement. These co-mediator assessments would provide a useful supplement to party evaluations, which are employed by most mediation programs. Peer evaluation of mediators could be accomplished in other ways. For example, the D.C. Superior Court Multi-Door Dispute Resolution Branch uses a one-way mirror so evaluators can observe mediations without being seen by the participants.

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363. Gunning, *supra* note 329, at 88–89 (citing the benefits of using mediator teams to combat negative cultural myths).

364. Students in my Consumer Mediation Clinic are sole mediators of consumer-business disputes, whereas students in my Community Dispute Resolution Center Project co-mediate adult misdemeanor, juvenile delinquency, and police-civilian disputes.

365. For good suggestions on making the most of co-mediation, see Lela P. Love & Joseph B. Stulberg, *Practice Guidelines for Co-Mediation: Making Certain That "Two Heads Are Better Than One,"* 13 MEDIATION Q. 179 (1996).

Co-mediation also leverages differences in perspectives and experiences when you have mediators of different ethnicities, genders, or abilities.[366] This can provide a check on biased and discriminatory mediator actions. For example, a female mediator might help her male partner avoid gendered comments and assumptions. In some mediation contexts, pairing mediators is done deliberately and strategically to create complementary duos.[367] Advocates of "race-matching" co-mediator teams to mirror the racial or ethnic distribution of the parties cite several benefits: symbolic fairness, increased likelihood that mediators and parties will have shared experiences, modeling equality, and broader interpretive frameworks.[368]

Clark Freshman points out several dangers of matching parties with mediators based on common traits or affiliations.[369] "First, psychologists have found it notoriously difficult to predict precisely how individuals, be they mediators or not, will see some as 'we' and others as 'they.'"[370] Second, there may be biases within individual communities. "Leading psychologists of discrimination suggest that, as much as we think we know how others see themselves, individuals may divide the world in many different ways."[371] He adds that "[a] reciprocal problem may arise when some who identify strongly with a community have negative views of those who they feel have betrayed their 'true' identity by trying to assimilate or fit some other community instead."[372] Another problem with matching mediators is that the practice may exacerbate discrimination outside the community.[373] This operates in two ways: positive contact with

366. Gunning, *supra* note 329, at 88–89.

367. For example, in emotional family disputes, a team containing a lawyer and therapeutic counselor might be beneficial. In a heterosexual divorce, a male and female mediator team might be used. *Id.* at 88.

368. *Id.* at 89.

369. Clark Freshman, *The Promise and Perils of "Our" Justice: Psychological, Critical and Economic Perspectives on Communities and Prejudices in Mediation*, 6 CARDOZO J. CONFLICT RESOL. 1, 10–11 (2004).

370. *Id.* at 10.

371. *Id.* at 11. Freshman uses the example of relatively assimilated Jews who "may often express more negative views about those not assimilated than even the most inside group." *Id.* at 12.

372. *Id.*

373. *Id.*

dissimilar persons often reduces prejudice, and unconscious bias against the group may become less prevalent.[374]

Furthermore, race-matching risks essentialism and reflects reductionist assumptions about individuals.[375] Amartya Sen describes a kind of reductionism that he refers to as "singular affiliation."[376] This reductionism "takes the form of assuming that any person preeminently belongs, for all practical purposes, to one collectivity only—no more and no less. Of course, we do know in fact that any real human being belongs to many groups, through birth, associations, and alliances."[377] Individuals should be able to choose which affiliations are more relevant or important in any social context and not have others impose that on them; political affiliation or religion, for example, may trump race.[378] Race-matching the mediators for parties of Asian descent ignores ethnic, national, regional, political, religious, socio-economic, and other differences that may be more relevant or important in a given situation than shared racial category.[379]

Finally, a study of race-matching revealed that "[w]ith regard to mediation outcomes . . . it is not so clear that creating racial matches between mediation participants and mediators is as important as we have thought in the past."[380] A multiyear research project in Maryland community mediation centers determined that

> when the mediator is not of the same race as either participant, participants believe that they have been heard by the mediator. In contrast, when the mediator's race matches that of the opposing party, the participant is less likely to feel that the

374. *Id.* at 12–13. Freshman also notes that matching could "trigger the unconscious stereotype that 'they' are clannish." *Id.* at 13. Moreover, "even if one adopts the less separatist notion of teaching cultural 'sensitivity' to mediators . . . the 'sensitivity' may harden the way mediators automatically divide the world into group terms." *Id.*

375. *See* Bagshaw, *supra* note 312, at 139 (discussing the dangers of essentialism and assigning possibly irrelevant traits to a person's self-image).

376. AMARTYA SEN, IDENTITY AND VIOLENCE: THE ILLUSION OF DESTINY 20 (2006).

377. *Id.*

378. *Id.* at 29–32.

379. Bagshaw, *supra* note 312, at 139.

380. Lorig Charkoudian & Ellen Kabcenell Wayne, *Does It Matter If My Mediator Looks Like Me? The Impact of Racially Matching Participants and Mediators*, DISP. RESOL. MAG., Spring 2009, at 22, 24.

> mediator listened to her. A similar negative effect occurs with regard to participants' sense of control over the conflict situation. This sense of control does not change when the mediators' race is different from both participants, but decreases from the beginning to the end of the mediation when the mediator's race matches only that of the opposing party. Again, it appears less important to have a mediator who 'looks like me' than it is to avoid having a mediator who 'looks like' the other participant and no mediator who 'looks like me.'[381]

The researchers suggest that their finding supports "the value of co-mediation, which creates more options for addressing racial balance amongst participants and mediators."[382]

5. Transformative Mediation and Procedural Justice

Transformative mediation and procedural justice theories suggest that external neutrality would be improved through a process that ensures a high degree of control for the disputants. Joseph Folger and Robert Baruch Bush postulate that neutrality is unachievable because the mediator's interests become part of the problem-solving endeavor; they propose that their transformative model ensures party self-determination.[383] They contend that a problem-solving mediation, which focuses on reaching agreement, "leads mediators to be directive in shaping both the problems and the solutions, and they wind up influencing the outcome of mediations in favor of settlement generally and in favor of terms of settlement that comport with their views of fairness, optimality, and so forth."[384] In transformative mediation, "[n]eutrality means that the mediator's only interest is the interest in using his or her influence to make sure that *the parties maintain control* of decisions about outcomes."[385]

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381. *Id.* at 24.

382. *Id.*

383. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT 22–26, 105 (rev. ed. 2005).

384. *Id.* at 104.

385. *Id.* at 105. Astor also endorses an approach that emphasizes self-determination, party empowerment, and collaboration between the parties. Astor, *supra* note 11, at 78.

Mary Beth Howe and Robert Fiala analyzed randomly assigned small claims court mediation cases in New Mexico to evaluate factors affecting disputant satisfaction with mediation.[386] Data from the study show that certain factors in the mediator's control are strongly associated with party satisfaction. For example, party satisfaction increases when "the mediator appears neutral, is in control of the mediation, and allows participants to feel they are able to tell their story. Greater participant integration, less anger and hostility, and greater power in mediation are also linked to satisfaction."[387] Structural factors associated with social class, gender, and ethnicity showed "few and inconsistent links to satisfaction."[388]

In her exegesis of procedural justice literature, Rebecca Hollander-Blumoff identifies four dominant factors in assessments of process fairness: "opportunity for voice, courteous and respectful treatment, trustworthiness of the decision-maker, and neutrality of the decision-maker."[389] Procedural justice legitimizes the mediation process and increases the likelihood that the outcome will be accepted by the participants. In their well-known compilation of studies of dispute resolution systems, John Thibaut and Laurens Walker concluded that "the maintenance of a high degree of control . . . by disputants and, at the same time, . . . a high degree of regulated contentiousness between the disputants themselves" are important properties for a just procedure.[390] Their research revealed "that a procedure that limits third-party control, thus allocating the preponderance of control to the disputants, constitutes a just procedure."[391]

In short, we can draw upon multiple lessons to check external neutrality. Neutrality is promoted by managing the mediation process to maintain even-handed, respectful treatment of disputants and by

386. Mary Beth Howe & Robert Fiala, *Process Matters: Disputant Satisfaction in Mediated Civil Cases*, 29 JUST. SYS. J. 85 (2008).

387. *Id.* at 93.

388. *Id.* at 94.

389. Rebecca Hollander-Blumoff, The Theoretical and Empirical Case for Procedural Justice in Negotiation 9 (Sept. 9, 2009) (unpublished manuscript) (on file with author).

390. JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 119 (1975).

391. *Id.* at 118.

maximizing party control. In addition, mediators can attend to external neutrality concerns by: being sensitive to language usage; valuing individual party narratives; ensuring that disputants "tell their stories" in their own words and style; self-policing for essentialist assumptions; and monitoring for biased party interventions. Finally, adopting a reflexive approach that is deliberatively self-conscious; using co-mediator teams that leverage differences and similarities; and employing instructional methods that require mediators to grapple with racial and other difficult issues would further reduce the potential for mediator partiality and bias.

B. Internal Neutrality

Having identified steps a mediator may undertake to address external neutrality issues, we now look inward to consider what mediators can do to minimize the operation of biased mental processes that are automatic and not a part of our conscious awareness. Research shows that suppression of stereotyped associations and engagement of non-prejudiced responses requires "intention, attention, and effort."[392] Fortunately, mediators have the power and ability to improve internal neutrality measures to reduce bias and favoritism in mediation. Practical suggestions include setting goals, planning deliberate actions to reduce biased responses, increasing diversity of mediator contacts, applying mindfulness techniques, and developing a habit of practices that remove bias.

1. Awareness, Motivation, and Action

Awareness of bias is critical for mental decontamination success.[393] As one may expect, the first step toward internal neutrality is to acknowledge the existence of unconscious mediator biases and

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392. Armour, *supra* note 144, at 24 (quoting Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 16 (1989)).

393. Laurie A. Rudman et al., *"Unlearning" Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes*, 81 J. PERSONALITY & SOC. PSYCHOL. 856, 866 (2001) (citing Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, PSYCHOL. BULL. 117, 117–42 (1994)).

prejudices. "[I]n order to counter otherwise automatic behavior, one must accept the existence of the problem in the first place. . . . We must be both aware of the bias and motivated to counter it. If we instead trust our own explicit self-reports about bias—namely, that we have none—we will have no motivation to self-correct."[394] Requiring mediators to take the IAT for an implicit bias "reality check" could potentially open their eyes to their own egalitarian shortcomings. I ask my students to do such an exercise early in the semester.[395] Although it is voluntary, I request that they take one of the implicit association tests and complete a questionnaire anonymously.[396] During the semester, we reflect on and refer back to the experience as it relates to actual cases.

When confronted with their own implicit attitudes and stereotypes, mediators can work to counter the operation of bias. With increased awareness of implicit bias and the goals and motivation to self-correct, mediators can begin to tackle the problem of unintentional unequal treatment of parties. Researchers found that merely knowing one's prejudice level was not sufficient to respond in a less prejudiced manner.[397] People who are externally motivated (wanting to appear non-prejudiced to other people) to reduce prejudice-related reactions are more likely to adjust a prejudiced act based on the social context they are in, while those who are only internally motivated (appearing non-prejudiced to oneself) may not be so affected by social pressures.[398] It is possible "that external motivation precedes internal motivation and that to initiate change, the social climate must discourage expressions of prejudice."[399] The

394. Kang, *supra* note 136, at 1529.

395. I got this idea from Gary Blasi, who posted an e-mail on the clinical list serve on August 1, 2007, in response to Gail Silverstein's inquiry about incorporating the IAT in clinic courses. Blasi explained that he has used the IAT, but he always used it in conjunction with reading and discussion of the science behind the IAT and the implication for lawyers." E-Mail from Gary Blasi, Professor of Law, UCLA Sch. of Law, to Gail Silverstein, Clinical Att'y, Civil Justice Ctr., Univ. of Cal. Hastings Coll. of Law (Aug. 1, 2007, 12:21:53 PST) (on file with author).

396. The simple questionnaire asks for their reactions and reflections on the test experience and their "scores."

397. E. Ashby Plant & Patricia G. Devine, *Internal and External Motivation to Respond Without Prejudice*, 75 J. PERSONALITY & SOC. PSYCHOL. 811, 826 (1998).

398. *Id.* at 825.

399. *Id.* at 827.

researchers observed that "although discouraging overtly prejudiced responses may be desirable, it appears that internal motivation may be necessary to sustain efforts to respond without prejudice over time, particularly when no immediate external standards are salient."[400]

Recent studies show that while stereotypes may be automatically *activated*, as conscious actors we may be able to affect the *application* of those stereotypes in our interactions, judgments, and decisions. Irene Blair and Mahzarin Banaji conducted a series of four experiments to observe the automatic activation of gender stereotypes and to assess conditions under which stereotype priming may be moderated.[401] They distinguish between stereotype activation (categorization) and stereotype application as sequential steps in the process. They believe that stereotype activation is an automatic process, whereas stereotype application is a controlled, or at least a controllable, process.[402] Their experiments revealed that even with the "strong and ubiquitous nature of stereotype priming, . . . such effects may be moderated under particular conditions. . . . [s]tereotype priming can be eliminated when perceivers have an intention to process counterstereotypic information and sufficient cognitive resources are available."[403]

In another experiment on reducing the application of stereotypes, Margo Monteith observed that low prejudiced individuals experienced prejudice-related discrepancies (i.e., a prejudiced response such as feeling uncomfortable sitting next to a gay male on a bus) even though they believed the response was inappropriate.[404] She investigated whether people can inhibit prejudiced responses and

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400. *Id.* (citing David P. Ausubel, *Relationships Between Shame and Guilt in the Socializing Process*, 62 PSYCHOL. REV. 378, 378–90 (1955)). Later studies determined the importance of internal motivation, finding that the measure of implicit bias was lowest among individuals with high levels of internal motivation and low level of external motivation. *See* Patricia G. Devine et al., *The Regulation of Explicit and Implicit Race Bias: The Role of Motivations to Respond Without Prejudice*, 82 J. PERSONALITY & SOC. PSYCHOL. 835 (2002).

401. Irene V. Blair & Mahzarin R. Banaji, *Automatic and Controlled Processes in Stereotype Priming*, 70 J. PERSONALITY & SOC. PSYCHOL. 1142 (1996).

402. *Id.* at 1143.

403. *Id.* at 1159.

404. Margo J. Monteith, *Self-Regulation of Prejudiced Responses: Implications for Progress in Prejudice-Reduction Efforts*, 65 J. PERSONALITY & SOC. PSYCHOL. 469, 469 (1993).

respond on the basis of personal non-prejudiced beliefs.[405] She found that the discrepancy experience produced a negative self-directed effect which increased motivation for discrepancy reduction.[406] Increased attention to discrepancy-relevant information and personal discrepancy experiences may help low prejudiced individuals exert control over their biased responses.[407] Importantly, she found that "prejudice-related discrepancy experience enabled the low prejudiced subjects to be more effective at inhibiting prejudiced responses at a later time."[408]

In addition to recognizing implicit bias and having adequate motivation to reduce it, mediators must call upon cognitive control processes. Blair and Banaji's experiments examined the automatic processes underlying stereotyping and the role of intention and cognitive resources in moderating the influence of such processes on one's judgment.[409] The results suggest that people can control or eliminate the effect of stereotypes on their judgments if they have the intention to do so and their cognitive resources are not over-constrained.[410] After reviewing numerous studies, Blair discovered that automatic stereotypes are influenced by social and self-motives, specific strategies, the perceiver's focus of attention, and the configuration of stimulus cues.[411] In a study by Bruce Bartholow and colleagues, participants drinking alcohol showed significantly impaired regulative cognitive control and diminished ability to inhibit race-biased responses, suggesting that controlling racial bias can be a function of implementing cognitive control processes.[412]

With the requisite motivation and cognitive resources to draw upon, mediators are ready to operationalize a bias reduction plan. Gollwitzer, Sayer, and McCulloch propose "implementation-

405. *Id.* at 472.
406. *Id.* at 477.
407. *Id.* (citing JEFFREY A. GRAY, THE NEUROPSYCHOLOGY OF ANXIETY: AN ENQUIRY INTO THE FUNCTIONS OF THE SEPTOHIPPOCAMPAL SYSTEM (1982)).
408. *Id.* at 482.
409. Blair & Banaji, *supra* note 401, at 1142.
410. *Id.* at 1159.
411. Blair, *supra* note 85, at 242.
412. Bruce D. Bartholow et al., *Stereotype Activation and Control of Race Bias: Cognitive Control of Inhibition and Its Impairment by Alcohol*, 90 J. PERSONALITY & SOC. PSYCHOL. 272 (2006).

intention" as an approach to situations that may trigger implicit bias responses.[413] Goal-intention is expressed as "I intend to reach X goal."[414] Goal-directed behavior is important, but might not become part of everyday routine. "As a substitute, people can resort to forming implementation-intentions that strategically place the intended goal-directed behavior under direct situational control."[415] Implementation-intention is expressed as "if X, then I will do Y."[416] Implementation intentions are expressed as plans to reach the goal.[417] Implementation intention studies have shown promising results: participants were generally more likely to attain their goals, were more resistant to distracters, and showed less stereotype activation.[418]

Applying these strategies to mediation clinics and programs, instructors and administrators should articulate explicit program goals and guidelines about expected mediator non-prejudiced behavior and incentivize actions to meet those goals. In one example of an interesting innovation, the American Bar Association (ABA) has offered a continuing legal education program on "Creating a Culture of Inclusion" and made available "Elimination of Bias Credit."[419] In lieu of the typical pro forma "diversity" segment in mediation trainings, teachers and trainers should consider a more robust anti-prejudice curriculum. Gunning advocates inclusion of "misperceptions of different identity groups as part of the mediation training. These discussions and explorations would and should be a

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413. Peter M. Gollwitzer et al., *The Control of the Unwanted*, *in* THE NEW UNCONSCIOUS 485, 486–87 (Ran R. Hassin et al. eds., 2005).

414. *Id.* at 487.

415. *Id.* at 486.

416. *Id.* at 486–87.

417. Gollwitzer and his colleagues use this example:

> When participants had furnished their goal intentions of judging the elderly in a nonstereotypical manner with the respective implementation intention ("If I see an old person, then I will tell myself: Don't stereotype!"), the typical automatic activation of stereotypical beliefs . . . was even reversed. Similarly, when participants had the goal intention to judge female job applicants in a nonstereotypical manner and furnished an implementation intention to ignore a certain applicant's gender, no automatic activation of stereotypical beliefs about the female was observed.

Id. at 495.

418. *Id.* at 496.

419. Am. Bar Ass'n Ctr. for Continuing Legal Educ., *Creating a Culture of Inclusion*, AM. BAR ASS'N, http://www.abanet.org/cle/programs/t10cci1.html (last visited Nov. 8, 2010).

part of the basic mediation training not relegated as they so often are to some advanced form of training on 'cross-cultural mediation' or 'how to deal with power-imbalances'."[420] Mandatory continuing mediation education for mediators practicing in particular programs or jurisdictions could include "elimination of bias" credits and certification of anti-bias coursework.

In addition to the normative (external) incentive, mediators must set their own personal (internal) goals of egalitarianism. A general aspiration to be "neutral" is insufficiently specific. To achieve more fairness in mediation, Burns recommends that mediators affirm that their goal is to be fair and non-discriminatory.[421] She also urges mediators to monitor how they make distinctions and to assume they are biased in favor of members of their own group and against persons in other groups.[422] Internally motivated mediators should develop their own "intention-implementation plans" for goal attainment and tailor them for specific mediation settings. As part of pre-mediation preparation, mediators should consider potential bias pitfalls that might arise in interracial disputes and develop reaction plans to avoid or escape the traps.

2. Salience, Exposure, and Practice

Racially discriminatory behavior may be reduced more effectively when racial issues are made salient rather than ignored or obscured.[423] Research shows that focusing attention on the source of a possible implicit effect that interferes with judgment reduces or eliminates (or even reverses) the interference.[424] For example, the false fame effect was reduced when sufficient attention was focused on the initial list of non-famous names so the subjects would recognize non-famous names as having been encountered earlier in

420. Gunning, *supra* note 329, at 87.

421. Burns, *supra* note 309, at 44.

422. *Id.* at 45. "[E]ven if one somehow has been consciously oblivious to the presence of key social differences, failing to consider the effects of social difference is the strategy most likely to perpetuate historic patterns of bias." *Id.* at 50.

423. Wang, *supra* note 210, at 1038 (citing Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 220–21 (2001)).

424. Greenwald & Banaji, *supra* note 67, at 18.

the experiment.[425] "Drawing social category information into conscious awareness allows mental (cognitive and motivational) resources to overrule the consciously unwanted but unconsciously operative response."[426]

Taking a similar view, Jody Armour agrees that decision-makers would be more likely to become aware of their implicit biases, confront them, and hopefully counteract their effects when such references are explicitly made.[427] Citing the distinction between a habit (an automatic process done many times) and a decision (a conscious action), Armour proposes that "for a person who rejects the stereotype to avoid stereotype-congruent [behavior] responses to blacks (i.e, to avoid falling into a bad habit), she must intentionally inhibit the automatically activated stereotype and activate her newer personal belief structure."[428] Since people may act on stereotypes automatically and without knowledge, they must actively monitor and inhibit the automatic stereotype and replace it with a personal egalitarian belief.[429] "[U]nless a low-prejudiced person consciously

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425. *Id.* (citing Larry L. Jacoby et. al., *Becoming Famous Overnight: Limits on the Ability to Avoid Unconscious Influences of the Past*, 56 J. PERSONALITY & SOC. PSYCHOL. 326 (1989)).

426. Banaji & Greenwald, *supra* note 68, at 70. Some studies, however, imply that stereotypes are more difficult to suppress through controlled processes. In an experiment that required subjects to make a judgment of criminality using names that vary racially (black, white, Asian), researchers found race bias was difficult to remove even when subjects were alerted that racist individuals are more likely to identify black compared to white names. *See* Banaji & Dasgupta, *supra* note 133, at 162. Another study showed that participants "explicitly instructed to *avoid using race* ironically performed worse (although not in a statistically significant way) than participants told nothing at all." Kang, *supra* note 136, at 1529 (citing B. Keith Payne et al., *Best Laid Plans: Effects of Goals on Accessibility Bias and Cognitive Control in Race-Based Misperceptions of Weapons*, 38 J. EXPERIMENTAL SOC. PSYCHOL. 384, 390–91 (2002)). Researchers have also observed an effect called "stereotype rebounding." When people attempt to repress stereotypic thoughts, these thoughts may subsequently reappear with even greater insistence and be even more difficult to ignore. C. Neil Macrae et al., *Out of Mind but Back in Sight: Stereotypes on the Rebound*, 67 J. PERSONALITY & SOC. PSYCHOL. 808 (1994).

Thought suppression operates by searching for a distracter to replace the unwanted thought; however, when cognitive resources are limited, the ability to search for a distracter is precluded and the unwanted thought becomes hyperaccessible. *Id.* at 809 (citing Daniel M. Wegner & Ralph Erber, *The Hyperaccessibility of Suppressed Thoughts*, 63 J. PERSONALITY & SOC. PSYCHOL. 903, 903–12 (1992)).

427. Armour, *supra* note 144, at 13.

428. *Id.* at 24.

429. *Id.* at 23–24.

monitors and inhibits the activation of a stereotype in the presence of a member (or symbolic equivalent) of a stereotyped group, she may unintentionally fall into the discrimination habit."[430] Importing this model to the mediation context, mediators must break the habit of stereotype-consistent behavior by making conscious decisions to act in accordance with their non-discriminatory beliefs.

We use mediation debriefings, case rounds, and journals to give students in the mediation clinic space within which to contemplate and comment on their reactions to situations in which prejudiced behavior and assumptions could, or did, surface. More importantly, students identify lessons they can take into future mediations. The practice of journaling, which is popular in law school clinics, is a learning device that would benefit veterans as well as new mediators. This type of written reflection could be adapted to court and community settings to encourage mediators to measure adherence to their own egalitarian goals throughout their mediations. Requiring mediators to articulate explicit plans for improvement challenges them to name their practice shortcomings and state personal performance goals and intentions. Administrators of mediation programs should embrace these activities by periodically bringing volunteers and staff together for candid conversations and brainstorming sessions on prejudice reduction strategies. Inexpensive "brown bag" lunch discussions on a regular basis would be a cost- and time-effective way to help mediators take basic steps toward bias reduction.

Implicit social cognition research indicates that bias can be reduced through exposure to individuals who are not like us.[431] This exposure can occur through interpersonal interaction and presentation of images. The "Social Contact Hypothesis" postulates that stereotypes and prejudice can be reduced when people of different social categories have face-to-face interaction under certain conditions.[432] A recent meta-analysis of studies found that intergroup contact correlates negatively with prejudice.[433] Intergroup contact

430. *Id.* at 24.
431. Kang & Banaji, *supra* note 140, at 1101.
432. *Id.*
433. *Id.* at 1102–03.

may actually reduce levels of implicit bias.[434] In one study, white subjects were asked to "take the race IAT and report the number of their close out-group friends: African-Americans in one experiment and Latinos in another. . . . The researchers found negative correlations between the number of interracial friendships and level of implicit bias."[435] Consistent with these findings, the C100 study referenced earlier revealed that "the more prejudiced respondents tend to interact less frequently with Chinese and Asian Americans."[436]

Along similar lines, implicit attitudes may be changed by exposure to positive images.[437] In one study, subjects were shown photos of Martin Luther King Jr. and Denzel Washington as positive Black images.[438] The group reduced implicit bias by more than half and the effect persisted for a full day.[439] In the same manner, counter-typical visualizations caused a decrease in implicit stereotypes in another experiment.[440] In an experiment on explicit and implicit bias against women, direct educational instruction by counter-typical exemplars (female faculty) over one year had significant decreasing effects on IAT scores.[441]

These research findings suggest that mediators may be able to reduce implicit bias through increased exposure to and encounters with positive examples of out-group members. Writing about racial

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434. Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 981 (2006) ("A significant body of social science evidence supports the conclusion that the presence of population diversity in an environment tends to reduce the level of implicit bias.").

435. Kang & Banaji, *supra* note 140, at 1103 (citing Christopher L. Aberson et al., *Implicit Bias and Contact: The Role of Interethnic Friendships*, 144 J. SOC. PSYCHOL. 335, 340, 343 (2004)).

436. COMMITTEE OF 100 & HARRIS INTERACTIVE, *supra* note 262, at 68.

437. Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800 (2001).

438. *Id.* at 802.

439. *Id.* at 807; *see also* Irene V. Blair et al., *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCHOL. 828, 837 (2001); Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642 (2004).

440. Kang & Banaji, *supra* note 140, at 1107 (citing Blair et al., *supra* note 439, at 828–29).

441. *Id.* (citing Dasgupta & Asgari, *supra* note 439, at 651).

issues in mediation, Howard Gadlin decries the lack of diversity in the dispute resolution field and urges greater racial and ethnic integration.[442] Homogeneity among mediator ranks has spurred efforts to increase the numbers of minorities and expand practice opportunities for mediators of color.[443] Employing counter-typical mediation trainers and teachers and enlarging mediator diversity would be rational moves toward implicit bias reduction. Because in-group favoritism makes it hard to reduce prejudice, Carwina Weng notes that mere interaction with other groups is insufficient. Contact in a setting that promotes equality and openness is critical.[444] She lists cooperation, constructive conflict resolution and internalized civic values as elements for building an egalitarian community in which non-discriminatory relationships are fostered.[445]

A diversity training experiment supports Weng's suggestion that prejudice reduction is more successful when interaction is coupled with supporting knowledge and efforts. Researchers found that students enrolled in a prejudice and conflict seminar taught by an African American male professor were able to lower their bias by the end of the semester.[446] Specific data indicated that an "[i]ncreased awareness of discrimination against African Americans and motives to overcome prejudice in oneself" was more correlated with a reduction in explicit bias, while a "positive evaluation of the professor and the prejudice and conflict seminar," making friends with out-group members, and reporting feeling less threatened by out-group members, were more correlated with a reduction in implicit prejudice and stereotyping.[447] A control group taught by an African American professor showed no reduction in prejudice and bias, leading to the conclusion that the presence of an African American

442. Howard Gadlin, *Conflict Resolution, Cultural Differences, and the Culture of Racism*, 10 NEGOTIATION J. 33, 44 (1994).

443. Marvin E. Johnson & Homer C. La Rue, *The Gated Community: Risk Aversion, Race, and the Lack of Diversity in Mediation in the Top Ranks*, DISP. RESOL. MAG., Spring 2009, at 17.

444. Carwina Weng, *Individual and Intergroup Processes to Address Racial Discrimination in Lawyering Relationships*, *in* CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY, RACE, AND LAW 64, 70 (Gregory S. Parks et al. eds., 2008).

445. *Id.* at 73.

446. Rudman et al., *supra* note 393, at 856.

447. *Id.* at 865 tbl.7.

figure in a prominent position alone had little to no effect on implicit or explicit bias.[448]

3. Mindfulness Meditation

A growing number of dispute resolution scholars tout the benefits of mindfulness meditation for practicing lawyers, particularly in negotiation.[449] They contend that by adopting a non-judgmental perspective, mindfulness devotees "respond more appropriately to situations—and the thoughts, feelings, and bodily sensations that the situations elicit in us—rather than reacting in habitual ways."[450] Enthusiasts contend that Buddhist principles underlying mindfulness meditation and specific practice techniques can bring clarity of purpose and enhanced attention,[451] greater awareness and cognitive flexibility,[452] and the ability to make better choices.[453]

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448. *Id.*

449. Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and their Clients*, 7 HARV. NEGOT. L. REV. 1 (2002). Riskin claims that mindfulness practice could make lawyers and law students "feel better and perform better at virtually any task" by reducing stress and improving the ability to concentrate. *Id.* at 46. He maintains that mindfulness meditation can help develop five emotional and social competencies of "emotional intelligence": self-awareness, self-regulation, motivation, empathy, and social skills. *Id.* at 47 (citing DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ (1995)); *see also* Darshan Brach, *A Logic for the Magic of Mindful Negotiation*, 24 NEGOTIATION J. 25 (2008); Clark Freshman et al., *Adapting Meditation to Promote Negotiation Success: A Guide to Varieties and Scientific Support*, 7 HARV. NEGOT. L. REV. 67 (2002) [hereinafter Freshman et al., *Adapting Mediation*]; Clark Freshman, *After Basic Mindfulness Meditation: External Mindfulness, Emotional Truthfulness, and Lie Detection in Dispute Resolution*, 2006 J. DISP. RESOL. 511 [hereinafter Freshman, *After Basic Mindfulness Mediation*].

450. Riskin, *supra* note 449, at 29.

451. Brach, *supra* note 449, at 27–28.

452. Freshman et al., *Adapting Mediation*, *supra* note 449, at 74. Freshman et al. identify empirical support for professed benefits of mindfulness, citing psychological studies. *Id.* at 72–77. Research "neatly shows that both regular concentration and mindfulness meditation are associated with greater awareness." *Id.* at 74. Importantly, awareness is essential to changing behavior. *Id.* at 74 (citing John D. Teasdale et al., *Metacognitive Awareness and Prevention of Relapse in Depression: Empirical Evidence*, 70 J. CONSULTING & CLINICAL PSYCHOL. 275 (2002)). "Social science research also suggests another promising object for mindful negotiators involves emotions." *Id.* at 79. Freshman et al. observe that mindfulness of emotions can improve "mood awareness," allowing negotiators to understand what objects and thoughts induce positive mood and better negotiation results. *Id.* at 80.

453. Riskin, *supra* note 449, at 66.

Mindfulness meditation may help mediators attain greater bias reduction competency.[454] If the ability to listen is the mediator's stock in trade and mindfulness helps lawyers surmount barriers to careful listening, mindful mediators would be free from "distracting thoughts and emotions, 'personal agendas,' and bias and prejudice based on the speaker's appearance, ethnicity, gender, speech or manner."[455] Mediators trained in mindfulness would be more conscious of bias and stereotypes seeping into their thoughts and judgments. With that heightened awareness, they could call upon improved concentration to make better choices in the way they conduct their mediations.[456]

In summary, mediators have the ability to enhance internal neutrality by adopting explicit plans to reduce the application of stereotypes activated through encounters with parties and by replacing biased thoughts and reactions with non-prejudiced ones. Mediators must be aware of and acknowledge unconscious biases in order to garner the motivation to self-correct. A mediator's de-biasing action plan should include external and internal motivation to intervene with disputants in an egalitarian manner, attentiveness to prejudice-related discrepancies, and application of cognitive resources to reduce biased judgments and actions. By adopting individual "implementation intention" goals and strategies, mediators can attenuate bias. To encourage and facilitate these efforts, mediation programs should incorporate bias-reduction teaching techniques, make bias and prejudice reduction a robust part of the curriculum, and develop protocols that stress self-awareness, self-monitoring, and self-correction. Practices that sharpen a mediator's awareness, listening skills, and concentration (such as mindfulness meditation) may help mediators attain freedom from bias and prejudice.

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454. *See* Rock, *supra* note 50.

455. Riskin, *supra* note 449, at 50.

456. *See* Brach, *supra* note 449, at 28 (arguing that mindfulness techniques may enhance "capacity to focus and sustain our attention consciously so that we can make the choices that serve our truest purposes").

CONCLUSION

Extensive research and analysis related to mediator behavior, the dynamics of the mediation process, and the science of implicit social cognition reveal a huge gap between the vision of mediator neutrality and the realities of biased mediator thoughts and actions. Well-meaning mediators who espouse egalitarian views need more than a "wish and a prayer" to actualize non-biased feelings, behaviors, and judgments. When confronted with scientific findings and empirical evidence, mediation professionals must concede that the requirements for eliminating racial, gender, and other types of bias in mediation have not been met.

I present the small claims mediation scenario as an example of a situation in which no one refers to race but "race [is] speaking *sotto voce*."[457] These types of cases are can be instructive because they "reveal how profoundly issues of difference have permeated the unconscious as well as the consciousness of people in our society."[458] Reflecting on such a case, Gadlin muses, "At times I feel so conscious of the way my response to peoples' stories and interventions in their conflicts is infiltrated by my own racial/ethnic/gender identity."[459] Mediation practice would be substantially improved if all mediators attained an equally critical self-consciousness.[460]

My goal in writing this Article is to challenge mediation teachers, trainers, and practitioners to admit to impartiality shortcomings and undertake concrete measures to alter the way we think and act. Defining what it means to be racially unbiased also presents difficulties. Many people think that being unbiased means they do not "see" race, gender, or ethnicity. People claim to be "color-blind," viewing this as the achievement of a non-prejudiced state of mind. "According to the most straightforward account, to be racially unbiased would require one to accord race no more significance than,

457. Gadlin, *supra* note 442, at 34.
458. *Id.*
459. *Id.*
460. *Id.*

say, eye or hair color, and to act as though one does not notice race."[461] But

> social practices and legal rules permit, indeed encourage, some species of race consciousness that virtually no one views as morally objectionable. Identifying racial bias, then, must entail deciding that some forms of race consciousness are more, or less, morally objectionable than others, a determination with respect to which reasonable minds may differ.[462]

Race has been such a pervasive and salient feature in our history and current society that everyone is subject to race consciousness.[463] The pervasiveness of implicit bias opens a new route to discussions of bias prevention and mitigation. The existence of unconscious bias does not necessarily mean that people with egalitarian beliefs are racists or liars.[464] Having discriminatory thoughts does not mean a low-prejudiced person endorses the belief; rather, it is an indication of the vigor of well-learned cultural stereotypes.[465]

Along the same lines, the operation of stereotypes need not be illustrative of a person's "moral failure." Gary Blasi points out that moralizing strategies are ineffective in combating stereotypes and prejudice.[466] He contends that "the science [of implicit social cognition] demonstrates in many ways that there is unlikely to be such a thing as a *non*racialized setting in the United States, if we include the various ways in which race operates indirectly."[467] He urges legal scholars and advocates to become knowledgeable about research on cognitive science and social psychology so they may overcome their own biases.[468] I call on mediators to do the same, lest

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461. R. Richard Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169, 1171 (2006) (examining race consciousness in the criminal justice system).

462. *Id.*

463. *Id.* at 1184.

464. Armour, *supra* note 144, at 18–21.

465. *Id.* at 20.

466. Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1271 (2002).

467. *Id.* at 1273.

468. *Id.*

we be well-meaning but ineffective actors in the struggle to eliminate bias in mediation.

In a study of interracial tension, Patricia Devine and Kristin Vasquez considered the problem that the good intentions of low-prejudiced people

> are useful only if they are accurately interpreted by the target of those intentions. Intentions cannot be seen and must be inferred from behavior. This could be a problem if, for example, minority group members rely on the types of nonverbal behaviors that do not distinguish between anxiety and hostility.[469]

The authors note the potential for miscommunication that could escalate rather than alleviate tension.[470] They suggest that "the single most important problem facing us over time is that we are afraid to communicate."[471] They provoke with questions:

> What if we gave up the pretense that we 'should know what to do'? What if we admitted ignorance when it exists and confessed our desire to learn and understand? . . . But this approach may be a better starting point for alleviating tension than trying to fake it through the interaction and worrying the whole time about what we're doing wrong.[472]

The veneer of neutrality is stripped away by research findings that show convincingly that mediators fall far short of the ethical duty to treat parties impartially and without bias. Under current conditions, we are failing to meet our articulated goals and the expectations of the parties. Surely, it is naïve to think we can completely eliminate bias in mediation. It is equally certain that nondiscrimination in mediation is attainable only with more deliberate, informed, and self-conscious practices by mediators.

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469. Patricia G. Devine & Kristin A. Vasquez, *The Rocky Road to Positive Intergroup Relations*, *in* CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE, *supra* note 244, at 234, 261.

470. *Id.*

471. *Id.* at 262.

472. *Id.*

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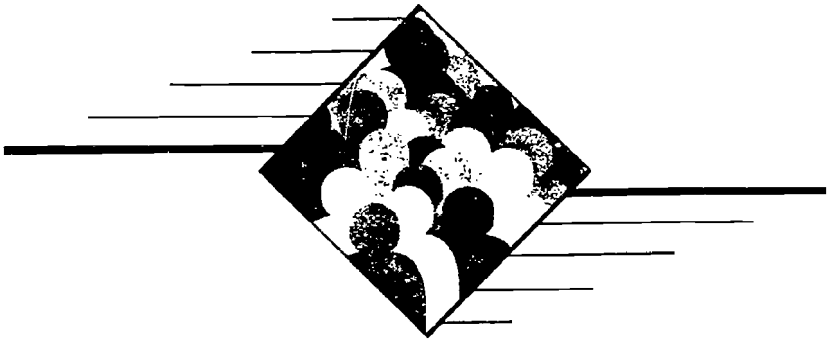
ABSTRACT

This paper discusses the problems faced by Minnesota's Supporting Diversity in Schools organization in communicating their goal of making schools responsive to students of differing ethnic backgrounds. It was found that using terms such as "multicultural curriculum" and "isolation of schools and communities of color from one another," brought out different meanings. While some saw it as equal education with less ethnic bias, others saw it as the creation of special units of study, displays of artifacts, multicultural fairs, and shaded faces in textbooks. Also, people's points of view regarding how they see reality created problems in the sense that, while people of color saw a need for greater multicultural efforts in the schools, whites mostly did not. This disagreement caused a continual barrier to communication and sound problem solving. The dominance of whites in the community power structure limited decision making on issues relevant to racial equity and fostered continued isolation of white people from the issues and realities shared by people of color. To solve the communication dilemma, words that describe were substituted for words that label. Gaps in reality perceptions were narrowed through use of cultural artistic events and the use of incentives to encourage attendance. Finally, competent and informed people of color were used to head meetings and to act as liaisons in district staff discussions which helped to enrich the content and perspectives of these gatherings as well as to lessen the dominating influence of the white majority. (GLR)

SDS

Supporting Diversity in Schools through
Family and Community Involvement



LANGUAGE AND RACE:

BARRIERS TO COMMUNICATING

A VISION

The first in a series of reflective issue papers by SDS participants.

November, 1991

Supporting Diversity in Schools (SDS) is a six-year program inaugurated in September 1989, in Saint Paul, Minnesota. The program seeks to address the educational inequities experienced by children as a result of their race or culture by building school environments that welcome, appreciate and effectively teach children of color.

LANGUAGE AND RACE: BARRIERS TO COMMUNICATING A VISION

by Ruth Anne Olson, SDS Program Director

The purpose of SDS has always been clear to those who created it. Put simply, we want schools to be equally-fine places for children of all races. We want them to be places where adults and children are as excited and supportive of a classmate's experience of a pow-wow as they are of childish pleasures over a birthday party; where parents are confident that their fears of racial barriers will receive unhesitating respect and action; and where every child is reflected in the literature being read, the history being examined, and the customs being recognized.

A recent national newscast described Hispanic students in New York as feeling like guests in their own schools. People of color, and others who have been privileged to listen carefully to their experiences, know what that means. We know those feelings are as true in Saint Paul, Minnesota, as they are in New York City. The goal of SDS is to change that.

Throughout the first two years of the program, we have found great difficulties in communicating that purpose. Three overlapping dimensions appear to contribute to this problem: the broad range of meanings given to words such as multicultural curriculum and instruction, the differences in the importance and intensity of our mission as experienced by white people and by people of color, and the structural barriers to adequate communication within largely-white power realities. This brief issue-paper will examine each of these.

WORDS AS BARRIERS TO COMMUNICATION

From the beginning, the creators of SDS struggled with choosing the words that best describe our purposes. We talked of "multicultural curriculum and instruction," of breaking down the "isolation of schools and communities of color from one another," and of "family involvement." Those words and phrases brought powerful images to our minds; we quickly learned that they brought equally powerful but quite-different images to the minds of others.

When people in SDS talk of multicultural curriculum and instruction we mean full and complete integration of all races and cultures into the curricular content, instructional process, and all interactions related to schools. We learned the hard way that many people hear the words to mean something quite different — special units of study, display of artifacts, multicultural fairs, and shaded faces in textbooks.

The English say that America and Great Britain are countries separated by their common language. Similarly, words were creating a mischief of misunderstanding in SDS. In fact, the program nearly stalled-out over the confusion and conflict that resulted from its unclear language.

TWO VIEWS OF THE WORLD

SDS was born of the hopes, dreams and anger of people of color in St. Paul. It's true that many white people, myself included, have tagged onto those realities. But I'm confident that I can touch only the surface of the urgency and agony felt by people who have "lived" the issues and who become steeped in the hope for life to be different for their own children.

Many people involved in these issues are white. We choose to get involved because its the right thing to do, we're stimulated by the personal growth that results, and it's an opportunity to bring together many varied strands of the values that underlie our lives.

But the key in that paragraph is the word "choose." Involvement is my choice. For most of my colleagues and many of my friends involvement is no choice at all. It is synonymous with living. I'm convinced that it is nearly impossible to fully bridge the gap between those two realities, that it is not possible to fully communicate the mission of SDS across large numbers of people when the experiences that individuals bring to reality are so widely disparate.

The differences are visible in a thousand ways in SDS. One can hear it in the varying intensities with which people talk of what needs to be done. One can feel it in the great differences in how two people interpret the realities of day-to-day interactions. And one can see it in the differing body language of people listening to strong presentations about education, race and prejudice.

"Two worlds" are even reflected objectively in the split responses written on the evaluation forms about many of the speakers we sponsor and the performances we host. The vast majority of our participants of color give a thumbs up and, "Right on"; large numbers of our white participants either ho-hum with, "This was not new," or protest, "We addressed those issues long ago."

The reality of these two worlds serves as a continuous barrier to communication and sound problem solving. Trying to step from one world to the other, even for a glimpse of the differences that exist, is risky business. Honest communication falls victim to the protections that people create for themselves.

THE DOMINANCE OF WHITE POWER

Because of those "two worlds," discussions on virtually any topic vary enormously depending on the racial/cultural balance of those involved. All white, predominantly white, predominantly of-color and (I'm told) all of-color groups yield tremendous variations — in tone, content and conclusion.

SDS is about racial/cultural diversity, and early-on I made a promise to myself that I would never arrange any "official" discussion about the program that would involve an all-white group of people. In fact, I pledged, people of color would be in the *majority* in all such discussions.

I knew, of course, that the power-structures within our community are predominantly white. Even so I assumed that accomplishment of my first promise to myself would be easy. The second, I reluctantly acknowledged, would be a bit harder.

I quickly discovered that I had underestimated the intensity of the problem. Consider. There are times when it is important to meet with the foundation funders of SDS. All are headed by white people. Some program issues call for frank discussions with the principals of all the schools in SDS partnerships. All are white. Evaluation issues occasionally create the need to meet with the evaluation staff of the school district. All white. And often, of course, I need to meet with people above me in the hierarchy of The Saint Paul Foundation which created and administers SDS. All white. Even the heads of many of the participating community agencies that serve communities of color are white.

What this means, of course, is that the people who head organizations and make daily decisions relevant to the achievement of racial equity have, in fact, little opportunity to hear the realities of their fellow citizens of color. Even more rarely do they have the opportunity to hear them in settings in which the people of color feel the confidence of expression possible only when the majority of those present have shared the daily reality of discrimination. The isolation of white people from these issues inevitably leads to our inability to learn, to understand, and to respond effectively.

GETTING UNSTUCK

The problem for SDS has been to figure out how to get unstuck from these issues of communication and commitment. We've worked hard at it, we've made some progress, and we recognize that much more effort is yet to come. I believe that our attempts at solutions are worth sharing.

To address the issue of a common language, we've gone through a long and intense process to fully comprehend what we're about. A great diversity of people has been part of that process, and we've tried to shy away from words that label and to focus, instead, on those that describe.

Continued on back

We're also trying several strategies to bridge the gap created by the fact that some people live and others only observe the issues of racial discrimination. We believe, for example, that the arts and humanities play a major role in the process of bridging the gap. To that end, we have a multicultural book group in which teachers and community people together discuss *Yellow Raft in Blue Water, Joy Luck Club, Their Eyes Were Watching God* and other works that bring forward human experience in all its richness. We provide incentives and encourage people to attend artistic events within the community — productions by an African American theater company, an Indian pow-wow, classical Cambodian dance, and exhibits of Latino visual arts. All of these, we believe, are important vehicles toward making realities of race come alive for white people.

We also try to end white people's isolation from their colleagues of color. We try to assure that the predominance of people in the formal and informal interactions organized by SDS are of color; and we try to reinforce the resulting confidence for people by arranging that such discussions be led by persons of color.

Sometimes these strategies require that we redefine the makeup of meetings to include a broader range of roles, including people who carry little formal power. Our funders, for example, now meet with the larger program staff which is predominately of color, and discussions with the district's evaluation staff now include evaluation liaisons, primarily of color, from our school-community partnerships.

While each of these efforts is slow in the making and may even feel a bit cumbersome at first, the effects are immediate and powerful, and the incentives to stick with them are strong indeed. The people of color who join these discussions are competent and informed. The resulting discussions are infinitely richer in content, perspective and conclusion.

And finally, all of these efforts empower of us all. They free people of color to express the strengths of their feelings and experiences, and they invite white people to listen hard.

CONCLUSION

When SDS was inaugurated in 1989, I anticipated few if any of the problems that I've described. But I suspect that they are not unique as people in government agencies, school districts, private industry and a wide variety of other organizations in our city and throughout the country work to enhance the cultural richness of our communities.

The effort required to move forward is enormous; the rewards are profound. Our attempts at reaching solutions in SDS are only small steps toward the fundamental goals of equity and involvement. I hope this brief issue-paper will lend confirmation and support to others who share our goals. ♦

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Local Rules of the
United States District Courts for the
Southern and Eastern Districts of New York

Effective October 29, 2018

with amendments to S.D.N.Y. Rule for Division of Business 19

Adopted by the Board of Judges of the
Eastern District of New York and the
Southern District of New York
Approved by the Judicial Council of the Second Circuit

Local Rules of the
United States District Courts for the
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JOINT LOCAL CIVIL RULES
UNITED STATES DISTRICT COURTS FOR THE
SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

Local Civil Rule 1.1. Application of Rules

These Local Civil Rules apply in all civil actions and proceedings governed by the Federal Rules of Civil Procedure.

COMMITTEE NOTE

The Committee recommends that Local Civil Rule 1.1 be reworded in order to make clear that the Local Civil Rules apply in all civil actions and proceedings governed by the Federal Rules of Civil Procedure.

Local Civil Rule 1.2. Night Depository

A night depository with an automatic date stamp shall be maintained by the Clerk of the Southern District in the Pearl Street Courthouse and by the Clerk of the Eastern District in the Brooklyn Courthouse. After regular business hours, papers for the District Court only may be deposited in the night depository. Such papers will be considered as having been filed in the District Court as of the date stamped thereon, which shall be deemed presumptively correct.

COMMITTEE NOTE

The Committee believes that it is unnecessary to have a Local Rule dealing with the hours of opening of the Clerk's Office, which are best set forth in the websites of the respective Courts. Because the Advisory Committee note to the 2009 amendment to Fed. R. Civ. P. 6(a)(4) indicates that a local rule is necessary to authorize the use of night depositories, the Joint Committee recommends the retention of the portion of Local Civil Rule 1.2 dealing with night depositories.

Local Civil Rule 1.3. Admission to the Bar

(a) A member in good standing of the bar of the State of New York, or a member in good standing of the bar of the United States District Court in Connecticut or Vermont and of the bar of the State in which such district court is located, provided such district court by its rule extends a corresponding privilege to members of the bar of this Court, may be admitted to practice in this Court

on compliance with the following provisions:

Each applicant for admission is required to file an application for admission in electronic form and pay the required fee through the Public Access to Court Electronic Records (PACER) system at www.pacer.gov. This one application will be utilized both to admit and then to provide the applicant to the bar of this Court with electronic filing privileges for use on the Court's Electronic Case Filing (ECF) system. The applicant shall adhere to all applicable rules of admission.

The application for admission shall state:

(1) applicant's residence and office address;

(2) the date(s) when, and courts where, admitted;

(3) applicant's legal training and experience;

(4) whether applicant has ever been held in contempt of court, and, if so, the nature of the contempt and the final disposition thereof;

(5) whether applicant has ever been censured, suspended, disbarred or denied admission or readmission by any court, and, if so, the facts and circumstances connected therewith;

(6) that applicant has read and is familiar with

(A) the provisions of the Judicial Code (Title 28, U.S.C.) which pertain to the jurisdiction of, and practice in, the United States District Courts;

(B) the Federal Rules of Civil Procedure;

(C) the Federal Rules of Criminal Procedure;

(D) the Federal Rules of Evidence;

(E) the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York; and

(F) the New York State Rules of Professional Conduct as adopted from time

to time by the Appellate Divisions of the State of New York; and

(7) that applicant will faithfully adhere to all rules applicable to applicant's conduct in connection with any activities in this Court.

The application shall be accompanied by a certificate of the clerk of the court for each of the states in which the applicant is a member of the bar, which has been issued within thirty (30) days of filing and states that the applicant is a member in good standing of the bar of that state court. The application shall also be accompanied by an affidavit of an attorney of this Court who has known the applicant for at least one year, stating when the affiant was admitted to practice in this Court, how long and under what circumstances the attorney has known the applicant, and what the attorney knows of the applicant's character and experience at the bar.

Such application shall be placed at the head of the calendar and, on the call thereof, the attorney whose affidavit accompanied the application shall, for the Eastern District of New York, and may, and is encouraged to, for the Southern District of New York, personally move the admission of the applicant. If the application is granted, the applicant shall take the oath of office and sign the roll of attorneys.

A member of the bar of the state of New York, Connecticut, or Vermont who has been admitted to the bar of this Court pursuant to this subsection and who thereafter voluntarily resigns from membership in the bar of the state pursuant to which he was admitted to the bar of this Court, and who does not within 30 days of that voluntary resignation file an affidavit with the Clerk of this Court indicating that such person remains eligible to be admitted to the bar of this Court pursuant to other provisions of this subsection (such as because he is still a member of the bar of another eligible state and, where applicable, a corresponding district court), shall be deemed to have voluntarily resigned from the bar of this Court as of the same date the member resigned from the bar of the underlying state, provided that such resignation shall not be deemed to deprive this Court of jurisdiction to impose discipline on this person, pursuant to Rule 1.5 infra, for conduct preceding the date of such resignation.

(b) A member in good standing of the bar of either the Southern or Eastern District of New York may be admitted to the bar of the other district without formal application

(1) upon electronically filing through the PACER website a certificate of the Clerk of the United States District Court for the district in which the applicant is a member of the bar, which has been issued within thirty (30) days of filing and states that the applicant is a member in good standing of the bar of that Court;

(2) an affidavit by the applicant stating

(A) whether the applicant has ever been convicted of a felony,

(B) whether the applicant has ever been censured, suspended, disbarred or denied admission or readmission by any court,

(C) whether there are any disciplinary proceedings presently against the applicant and

(D) the facts and circumstances surrounding any affirmative responses to (a) through (c); and

(3) upon taking the oath of office, signing the roll of attorneys of that district, and paying the fee required in that district. Each district retains the right to deny admission based upon the content of the affidavit in response to item (2).

(c) A member in good standing of the bar of any state or of any United States District Court may be permitted to argue or try a particular case in whole or in part as counsel or advocate, upon motion as described below.

After requesting pro hac vice electronic filing privileges through the PACER website, applicants shall electronically file a motion for admission pro hac vice on the court's ECF system and pay the required fee.

The motion must be accompanied by a certificate of the court for each of the states in which the

applicant is a member of the bar, which has been issued within thirty (30) days of filing and states that the applicant is a member in good standing of the bar of that state court, and an affidavit by the applicant stating

(1) whether the applicant has ever been convicted of a felony,

(2) whether the applicant has ever been censured, suspended, disbarred or denied admission or readmission by any court,

(3) whether there are any disciplinary proceedings presently against the applicant and

(4) the facts and circumstances surrounding any affirmative responses to (a) through (c);

Attorneys appearing for the Department of Justice may appear before the Court without requesting pro hac vice admission. Such attorneys shall request electronic filing privileges through the PACER website. Attorneys appearing for other federal agencies must move for pro hac vice admission but the fee requirement is waived and the certificate(s) of good standing may have been issued within one year of filing. Only an attorney who has been so admitted or who is a member of the bar of this Court may enter appearances for parties, sign stipulations or receive payments upon judgments, decrees or orders.

(d) If an attorney who is a member of the bar of this Court, or who has been authorized to appear in a case in this Court, changes his or her residence or office address, the attorney shall immediately notify the Clerk of the Court, in addition to serving and filing a notice of change of address in each pending case in which the attorney has appeared.

2011 COMMITTEE NOTE

The Committee recommends that Local Civil Rule 1.3(c) be amended to clarify that a motion for admission pro hac vice may be made by the applicant, and does not need to be made by a member of the Court's bar. This is a logical corollary of the fact that the Southern and Eastern Districts no longer require that attorneys admitted pro hac vice be associated with local counsel who are members of the Court's bar.

2013 COMMITTEE NOTE

The amendments to Local Civil Rule 1.3(c) have two purposes. First, to conform the rule to local practice, i.e., to reflect the required fee for pro hac vice admission and the practice, mandated by 28 U.S.C. ' 517, of not requiring Department of Justice attorneys, who are not members of the bar of this Court, to be admitted pro hac vice before appearing. The second purpose of the rule is to make pro hac vice admission less onerous for other federal agency attorneys by waiving the fee requirement and easing the certificate of good standing requirement. It was the considered judgment of the Court that pro hac vice admission remains necessary to ensure recourse in the event of any violation of the rules of court.

2016 COMMITTEE NOTE

A candidate for admission to the bar must respond to inquiries on the application regarding the candidate's criminal and disciplinary history. The amendment requires that the same information be supplied in two circumstances not previously covered by the Rule: (1) an application for admission pro hac vice; and (2) the admission to a second district (whether the Southern or Eastern District of New York) upon the filing of a certificate of good standing from the first district (whether the Southern or Eastern District of New York) within 30 days of admission in the first district. In the latter circumstance, the amendment also provides that the second district may deny admission based upon the disclosed criminal and disciplinary history.

2018 COMMITTEE NOTE

Local Rule 1.3 is revised solely to reflect the new process for electronically filing an application for admission and obtaining electronic filing privileges.

Local Civil Rule 1.4. Withdrawal or Displacement of Attorney of Record

An attorney who has appeared as attorney of record for a party may be relieved or displaced only by order of the Court and may not withdraw from a case without leave of the Court granted by order. Such an order may be granted only upon a showing by affidavit or otherwise of satisfactory reasons for withdrawal or displacement and the posture of the case, including its position, if any, on the calendar, and whether or not the attorney is asserting a retaining or charging lien. All applications to withdraw must be served upon the client and (unless excused by the Court) upon all other parties.

COMMITTEE NOTE

The Committee recommends that Local Civil Rule 1.4 be amended to require that the affidavit in support of a motion to withdraw state whether or not a retaining or charging lien is being asserted, and to clarify that all applications to withdraw must be served upon the client and (unless excused by the Court) upon all other parties. This is not meant to preclude the Court from permitting the reasons for withdrawal to be stated in camera and under seal in an appropriate case. It is also not meant to preclude

substitution of counsel by a stipulation which has been signed by counsel, the counsel's client, and all other parties, and which has been so ordered by the Court.

Local Civil Rule 1.5. Discipline of Attorneys

(a) Committee on Grievances. The Chief Judge shall appoint a committee of the Board of Judges known as the Committee on Grievances, which under the direction of the Chief Judge shall have charge of all matters relating to the discipline of attorneys. The Chief Judge shall appoint a panel of attorneys who are members of the bar of this Court to advise or assist the Committee on Grievances. At the direction of the Committee on Grievances or its chair, members of this panel of attorneys may investigate complaints, may prepare and support statements of charges, or may serve as members of hearing panels.

(b) Grounds for Discipline or Other Relief. Discipline or other relief, of the types set forth in paragraph (c) below, may be imposed, by the Committee on Grievances, after notice and opportunity to respond as set forth in paragraph (d) below, if any of the following grounds is found by clear and convincing evidence:

(1) Any member of the bar of this Court has been convicted of a felony or misdemeanor in any federal court, or in a court of any state or territory.

(2) Any member of the bar of this Court has been disciplined by any federal court or by a court of any state or territory.

(3) Any member of the bar of this Court has resigned from the bar of any federal court or of a court of any state or territory while an investigation into allegations of misconduct by the attorney was pending.

(4) Any member of the bar of this Court has an infirmity which prevents the attorney from engaging in the practice of law.

(5) In connection with activities in this Court, any attorney is found to have engaged

in conduct violative of the New York State Rules of Professional Conduct as adopted from time to time by the Appellate Divisions of the State of New York. In interpreting the Code, in the absence of binding authority from the United States Supreme Court or the United States Court of Appeals for the Second Circuit, this Court, in the interests of comity and predictability, will give due regard to decisions of the New York Court of Appeals and other New York State courts, absent significant federal interests.

(6) Any attorney not a member of the bar of this Court has appeared at the bar of this Court without permission to do so.

(c) Types of Discipline or Other Relief.

(1) In the case of an attorney admitted to the bar of this Court, discipline imposed pursuant to paragraph (b)(1), (b)(2), (b)(3), or (b)(5) above may consist of a letter of reprimand or admonition, censure, suspension, or an order striking the name of the attorney from the roll of attorneys admitted to the bar of this Court.

(2) In the case of an attorney not admitted to the bar of this Court, discipline imposed pursuant to paragraph (b)(5) or (b)(6) above may consist of a letter of reprimand or admonition, censure, or an order precluding the attorney from again appearing at the bar of this Court.

(3) Relief required pursuant to paragraph (b)(4) above shall consist of suspending the attorney from practice before this Court.

(d) Procedure.

(1) If it appears that there exists a ground for discipline set forth in paragraph (b)(1), (b)(2), or (b)(3), notice thereof shall be served by the Committee on Grievances upon the attorney concerned by first class mail, directed to the address of the attorney as shown on the rolls of this Court and to the last known address of the attorney (if any) as shown in the complaint and any materials submitted therewith. Service shall be deemed complete upon mailing in

accordance with the provisions of this paragraph.

In all cases in which any federal court or a court of any state or territory has entered an order disbarring or censuring an attorney or suspending the attorney from practice, whether or not on consent, the notice shall be served together with an order by the Clerk of this Court, to become effective twenty-four days after the date of service upon the attorney, disbarring or censuring the attorney or suspending the attorney from practice in this Court upon terms and conditions comparable to those set forth by the other court of record. In all cases in which an attorney has resigned from the bar of any federal court or of a court of any state or territory while an investigation into allegations of misconduct by the attorney was pending, even if the attorney remains admitted to the bar of any other court, the notice shall be served together with an order entered by the Clerk for this Court, to become effective twenty-four days after the date of service upon the attorney, deeming the attorney to have resigned from the bar of this Court. Within twenty days of the date of service of either order, the attorney may file a motion for modification or revocation of the order. Any such motion shall set forth with specificity the facts and principles relied upon by the attorney as showing cause why a different disposition should be ordered by this Court. The timely filing of such a motion will stay the effectiveness of the order until further order by this Court. If good cause is shown to hold an evidentiary hearing, the Committee on Grievances may direct such a hearing pursuant to paragraph (d)(4) below. If good cause is not shown to hold an evidentiary hearing, the Committee on Grievances may proceed to impose discipline or to take such other action as justice and this rule may require. If an evidentiary hearing is held, the Committee may direct such interim relief pending the hearing as justice may require.

In all other cases, the notice shall be served together with an order by the Committee on Grievances directing the attorney to show cause in writing why discipline should not be imposed.

If the attorney fails to respond in writing to the order to show cause, or if the response fails to show good cause to hold an evidentiary hearing, the Committee on Grievances may proceed to impose discipline or to take such other action as justice and this rule may require. If good cause is shown to hold an evidentiary hearing, the Committee on Grievances may direct such a hearing pursuant to paragraph (d)(4) below. If an evidentiary hearing is held, the Committee may direct such interim relief pending the hearing as justice may require.

(2) In the case of a ground for discipline set forth in paragraph (b)(2) or (b)(3) above, discipline may be imposed unless the attorney concerned establishes by clear and convincing evidence (i) that there was such an infirmity of proof of misconduct by the attorney as to give rise to the clear conviction that this Court could not consistent with its duty accept as final the conclusion of the other court, or (ii) that the procedure resulting in the investigation or discipline of the attorney by the other court was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process, or (iii) that the imposition of discipline by this Court would result in grave injustice.

(3) Complaints in writing alleging any ground for discipline or other relief set forth in paragraph (b) above shall be directed to the Chief Judge, who shall refer such complaints to the Committee on Grievances. The Committee on Grievances, by its chair, may designate an attorney, who may be selected from the panel of attorneys established pursuant to paragraph (a) above, to investigate the complaint, if it deems investigation necessary or warranted, and to prepare a statement of charges, if the Committee deems that necessary or warranted. Complaints, and any files based on them, shall be treated as confidential unless otherwise ordered by the Chief Judge for good cause shown.

(4) A statement of charges alleging a ground for discipline or other relief set forth in paragraph (b)(4), (b)(5), or (b)(6) shall be served upon the attorney concerned by certified mail, return receipt requested, directed to the address of the attorney as shown on the rolls of this Court and to the last known address of the attorney (if any) as shown in the complaint and any

materials submitted therewith, together with an order by the Committee on Grievances directing the attorney to show cause in writing why discipline or other relief should not be imposed. Upon the respondent attorney's answer to the charges the matter will be designated by the Committee on Grievances for a prompt evidentiary hearing before a Magistrate Judge of the Court or before a panel of three attorneys, who may be selected from the panel of attorneys established pursuant to paragraph (a) above. The Magistrate Judge or panel of attorneys conducting the hearing may grant such pre-hearing discovery as they determine to be necessary, shall hear witnesses called by the attorney supporting the charges and by the respondent attorney, and may consider such other evidence included in the record of the hearing as they deem relevant and material. The Magistrate Judge or panel of attorneys conducting the hearing shall report their findings and recommendations in writing to the Committee on Grievances and shall serve them upon the respondent attorney and the attorney supporting the charges. After affording the respondent attorney and the attorney supporting the charges an opportunity to respond in writing to such report, or if no timely answer is made by the respondent attorney, or if the Committee on Grievances determines that the answer raises no issue requiring a hearing, the Committee on Grievances may proceed to impose discipline or to take such action as justice and this rule may require.

(e) Reinstatement. Any attorney who has been suspended or precluded from appearing in this Court or whose name has been struck from the roll of the members of the bar of this Court may apply in writing to the Chief Judge, for good cause shown, for the lifting of the suspension or preclusion or for reinstatement to the rolls. The Chief Judge shall refer such application to the Committee on Grievances. The Committee on Grievances may refer the application to a Magistrate Judge or hearing panel of attorneys (who may be the same Magistrate Judge or panel of attorneys who previously heard the matter) for findings and recommendations, or may act

upon the application without making such a referral. Absent extraordinary circumstances, no such application will be granted unless the attorney seeking reinstatement meets the requirements for admission set forth in Local Civil Rule 1.3(a).

(f) Remedies for Misconduct. The remedies provided by this rule are in addition to the remedies available to individual District Judges and Magistrate Judges under applicable law with respect to lawyers appearing before them. Individual District Judges and Magistrate Judges may also refer any matter to the Chief Judge for referral to the Committee on Grievances to consider the imposition of discipline or other relief pursuant to this rule.

(g) Notice to Other Courts. When an attorney is known to be admitted to practice in the court of any state or territory, or in any other federal court, and has been convicted of any crime or disbarred, precluded from appearing, suspended or censured in this court, the Clerk shall send to such other court or courts a certified or electronic copy of the judgment of conviction or order of disbarment, preclusion, suspension or censure, a certified or electronic copy of the Court's opinion, if any, and a statement of the attorney's last known office and residence address.

(h) Duty of Attorney to Report Discipline.

(1) In all cases in which any federal, state or territorial court, agency or tribunal has entered an order disbarring or censuring an attorney admitted to the bar of this Court, or suspending the attorney from practice, whether or not on consent, the attorney shall deliver a copy of said order to the Clerk of this Court within fourteen days after the entry of the order.

(2) In all cases in which any member of the bar of this Court has resigned from the bar of any federal, state or territorial court, agency or tribunal while an investigation into allegations of misconduct against the attorney was pending, the attorney shall report such resignation to the Clerk of this Court within fourteen days after the submission of the resignation.

(3) In all cases in which this Court has entered an order disbarring or censuring an

attorney, or suspending the attorney from practice, whether or not on consent, the attorney shall deliver a copy of said order within fourteen days after the entry of the order to the clerk of each federal, state or territorial court, agency and tribunal in which such attorney has been admitted to practice.

(4) Any failure of an attorney to comply with the requirements of this Local Civil Rule 1.5(h) shall constitute a basis for discipline of said attorney pursuant to Local Civil Rule 1.5(c).

COMMITTEE NOTE

Because Local Civil Rule 1.5 has been the subject of a recent review by the Courts, the Committee has not proposed any substantive changes therein. An amendment is recommended to Local Civil Rule 1.5(g) to recognize the fact that today the Clerks of the Courts often give notice of disciplinary actions to other courts by electronic means.

Local Civil Rule 1.6. Duty of Attorneys in Related Cases

(a) It shall be the continuing duty of each attorney appearing in any civil or criminal case to bring promptly to the attention of the Court all facts which said attorney believes are relevant to a determination that said case and one or more pending civil or criminal cases should be heard by the same Judge, in order to avoid unnecessary duplication of judicial effort. As soon as the attorney becomes aware of such relationship, said attorney shall notify the Judges to whom the cases have been assigned.

(b) If counsel fails to comply with Local Civil Rule 1.6(a), the Court may assess reasonable costs directly against counsel whose action has obstructed the effective administration of the Court's business.

COMMITTEE NOTE

The Committee recommends that Local Civil Rule 1.6(a) be amended to provide simply that notification must be given to the Judges to whom the case has been assigned.

Local Civil Rule 1.7. Fees of Court Clerks and Reporters

(a) The Clerk shall not be required to render any service for which a fee is prescribed by statute or by the Judicial Conference of the United States unless the fee for the particular service is paid to the

Clerk in advance or the Court orders otherwise.

(b) Every attorney appearing in any proceeding who orders a transcript of any trial, hearing, or any other proceeding, is obligated to pay the cost thereof to the court reporters of the Court upon rendition of the invoice unless at the time of such order, the attorney, in writing, advises the court reporter that only the client is obligated to pay.

COMMITTEE NOTE

Local Civil Rule 1.7(a) serves a useful purpose in light of 28 U.S.C. § 1914(c), which provides that "[e]ach district court by rule or standing order may require advance payment of fees."

Local Civil Rule 1.8. Photographs, Radio, Recordings, Television

Unless authorized to do so by an administrative order of each respective Court, no one other than Court officials engaged in the conduct of Court business shall (a) bring any camera, transmitter, receiver, recording device, cellular telephone, computer or other electronic device into any courthouse; or (b) make an audio or video recording of any proceeding or any communication with the Court, an employee of the Court or any person acting at the direction of the Court, including a mediator.

COMMITTEE NOTE

The recommended revised language of Local Civil Rule 1.8, which the Committee understands has been worked out by the respective Courts, recognizes that both Courts have adopted administrative orders dealing with the extent to which cameras, recording devices, and other electronic devices will be permitted to be brought into their respective courthouses. The environs of the courthouses are excluded from the proposed local rule in accordance with the spirit of the settlement agreement so ordered by the Court in Antonio Musumeci v. United States Department of Homeland Security, 10 Civ. 3370 (RJH).

2016 COMMITTEE NOTE

The Rule has long restricted the act of bringing certain devices into any courthouse without authorization. The amendment now prohibits the making of any audio or video recording of a proceeding or communication with the Court, even if the device was brought into the courthouse with authorization. The amendment encompasses activities regardless of location, including the recording from a remote location of a telephone conversation with a Judge, a member of a Judge's staff or the Court's staff or other persons acting at the Court's direction, including a mediator.

Local Civil Rule 1.9. Acceptable Substitutes for Affidavits [formerly Local Civil Rule 1.10]

In situations in which any Local Rule provides for an affidavit or a verified statement, the following are acceptable substitutes: (a) a statement subscribed under penalty of perjury as prescribed in 28 U.S.C. § 1746; or (b) if accepted by the Court as a substitute for an affidavit or a verified statement, (1) a statement signed by an attorney or by a party not represented by an attorney pursuant to Federal Rule of Civil Procedure 11, or (2) an oral representation on the record in open court.

COMMITTEE NOTE

The Committee believes that this Local Civil Rule continues to serve a useful function, particularly in pro se cases, and therefore recommends its retention.

Local Civil Rule 5.1. Filing of Discovery Materials

A party seeking or opposing relief under Fed. R. Civ. P. 26 through 37 inclusive, or making or opposing any other motion or application, shall quote or attach only those portions of the depositions, interrogatories, requests for documents, requests for admissions, or other discovery or disclosure materials, together with the responses and objections thereto, that are the subject of the discovery motion or application, or that are cited in papers submitted in connection with any other motion or application. See also Civil Local Rule 37.1.

COMMITTEE NOTE

The Committee believes that Local Civil Rule 5.1 continues to serve a very useful purpose by making clear that only those discovery materials that are necessary to the decisional process should be filed in connection with a motion or application. The Committee recommends that language be added to confirm that this principle applies to parties opposing motions as well as to those making motions.

Local Civil Rule 5.2. Electronic Service and Filing of Documents

(a) Parties serving and filing papers shall follow the instructions regarding Electronic Case Filing (ECF) published on the website of each respective Court. A paper served and filed by electronic means in accordance with such instructions is, for purposes of Fed. R. Civ. P. 5, served and filed in

compliance with the Local Civil Rules of the Southern and Eastern Districts of New York.

(b) Subject to the instructions regarding ECF published on the website of each respective Court and any pertinent Individual Judge's Practices, letter-motions permitted by Local Civil Rule 7.1(d) and letters addressed to the Court (but not letters between the parties) may be filed via ECF.

(c) Parties have an obligation to review the Court's actual order, decree, or judgment (on ECF), which controls, and should not rely on the description on the docket or in the ECF Notice of Electronic Filing (NEF).

COMMITTEE NOTE

The substance of the last sentence of Local Civil Rule 5.3(b) has been moved to this local rule, so as to consolidate in this local rule everything in the Local Civil Rules dealing with the subject of ECF. The local rule has been revised to refer to the instructions regarding ECF on the website of each respective Court, because the instructions change with sufficient frequency to make it unfeasible to incorporate them into the local rules.

2013 COMMITTEE NOTE

Recommended new Local Civil Rule 5.2(b) would authorize the filing of letter-motions and letters to the Court by ECF. ECF filing of letters to the Court is already required by the ECF instructions in the Eastern District of New York, and in the Southern District of New York this Local Rule amendment would authorize (but not require) ECF filing of letters to the Court that generally now are accepted by judges in the Southern District of New York. Allowing such letters to be filed will improve the record on appeal in cases where an appeal is taken, and will allow the press and the public to follow more fully what is happening in pending cases. Recommended Local Civil Rule 5.2(b) does not authorize the filing of letters exchanged between the parties.

Parties should remember to review the Individual Judge's Practices for any pertinent restrictions on the filing of letters or letter-motions, such as requirements for courtesy copies and any page limitations. Moreover, before filing a letter via ECF, parties should consider whether the letter contains information about settlement discussions or personal information (including medical information regarding a party or counsel) that should not be in the public file, in which case the letter should be sent directly to chambers instead of via ECF, or, in the Eastern District, if chambers permits, may be filed under seal via ECF.

Recommended new Local Civil Rule 5.2(c) reminds parties that they should review the actual order, decree, or judgment of the Court on ECF, rather than relying upon the description of the order, decree, or judgment on the docket or in the ECF Notice of Electronic Filing, which is often just a short summary of a more detailed order.

Local Civil Rule 5.3. Service by Overnight Delivery

Service upon an attorney may be made by overnight delivery service. "Overnight delivery

service" means any delivery service which regularly accepts items for overnight delivery. Overnight delivery service shall be deemed service by mail for purposes of Fed. R. Civ. P. 5 and 6.

COMMITTEE NOTE

Local Civil Rule 5.3(a), dealing with overnight delivery service, is still necessary, because Fed. R. Civ. P. 5 has not been amended to deal with overnight delivery service. However, many of the detailed provisions of present Local Civil Rule 5.3(a) are unnecessary once it is made clear that overnight delivery service shall be treated the same as service by mail.

In Local Civil Rule 5.3(b), the first two sentences, dealing with service by facsimile, are unnecessary in light of Fed. R. Civ. P. 5(b)(2)(E), and the substance of the last sentence, dealing with ECF, has been moved to Local Civil Rule 5.2.

Local Civil Rule 6.1. Service and Filing of Motion Papers

Except for letter-motions as permitted by Local Rule 7.1(d), and unless otherwise provided by statute or rule, or by the Court in a Judge's Individual Practice or in a direction in a particular case, upon any motion, the notice of motion, supporting affidavits, and memoranda shall be served and filed as follows:

(a) On all motions and applications under Fed. R. Civ. P. 26 through 37 inclusive and 45(d)(3), (1) the notice of motion, supporting affidavits, and memoranda of law shall be served by the moving party on all other parties that have appeared in the action, (2) any opposing affidavits and answering memoranda of law shall be served within seven days after service of the moving papers, and (3) any reply affidavits and reply memoranda of law shall be served within two days after service of the answering papers. In computing periods of days, refer to Fed. R. Civ. P. 6 and Local Civil Rule 6.4.

(b) On all civil motions, petitions, and applications, other than those described in Rule 6.1(a), and other than petitions for writs of habeas corpus, (1) the notice of motion, supporting affidavits, and memoranda of law shall be served by the moving party on all other parties that have appeared in the action, (2) any opposing affidavits and answering memoranda shall be served within fourteen days after service of the moving papers, and (3) any reply affidavits and memoranda of law shall be served within seven days after service of the answering papers. In computing periods of days, refer to Fed. R. Civ.

P. 6 and Local Civil Rule 6.4.

(c) The parties and their attorneys shall only appear to argue the motion if so directed by the Court by order or by a Judge's Individual Practice.

(d) No *ex parte* order, or order to show cause to bring on a motion, will be granted except upon a clear and specific showing by affidavit of good and sufficient reasons why a procedure other than by notice of motion is necessary, and stating whether a previous application for similar relief has been made.

COMMITTEE NOTE

In the initial paragraph of Local Civil Rule 6.1, the Committee recommends the deletion of the parenthetical reference to Fed. R. Civ. P. 56, because Fed. R. Civ. P. 56, as amended effective December 1, 2010, no longer provides for a different period of time to make a motion for summary judgment than that prescribed by Local Civil Rule 6.1. In Local Civil Rule 6.1(c), the Committee recommends the deletion of the words "or upon application" in order to prevent any implication that oral argument will be granted automatically upon application. This change is not intended to suggest that the parties cannot apply to the Court for oral argument.

2013 COMMITTEE NOTE

This is a conforming amendment designed to bring Local Civil Rule 6.1 into conformity with recommended new Local Civil Rule 7.1(d), which authorizes letter-motions in the case of certain non-dispositive matters.

Local Civil Rule 6.2. Orders on Motions

A memorandum signed by the Court of the decision on a motion that does not finally determine all claims for relief, or an oral decision on such a motion, shall constitute the order unless the memorandum or oral decision directs the submission or settlement of an order in more extended form. The notation in the docket of a memorandum or of an oral decision that does not direct the submission or settlement of an order in more extended form shall constitute the entry of the order. Where an order in more extended form is required to be submitted or settled, the notation in the docket of such order shall constitute the entry of the order.

COMMITTEE NOTE

Local Civil Rule 6.2 remains necessary because the Federal Rules of Civil Procedure do not

specify what constitutes the entry of an order. The Committee believes that the existing language of Local Civil Rule 6.2 is broad enough to encompass notations in the ECF docket, and that no change is required for this reason.

Local Civil Rule 6.3. Motions for Reconsideration or Reargument

Unless otherwise provided by the Court or by statute or rule (such as Fed. R. Civ. P. 50, 52, and 59), a notice of motion for reconsideration or reargument of a court order determining a motion shall be served within fourteen (14) days after the entry of the Court's determination of the original motion, or in the case of a court order resulting in a judgment, within fourteen (14) days after the entry of the judgment. There shall be served with the notice of motion a memorandum setting forth concisely the matters or controlling decisions which counsel believes the Court has overlooked. The time periods for the service of answering and reply memoranda, if any, shall be governed by Local Civil Rule 6.1(a) or (b), as in the case of the original motion. No oral argument shall be heard unless the Court directs that the matter shall be reargued orally. No affidavits shall be filed by any party unless directed by the Court.

COMMITTEE NOTE

Local Civil Rule 6.3 is necessary because the Federal Rules of Civil Procedure do not specify the time periods governing a motion for reconsideration or reargument. In the first sentence of Local Civil Rule 6.3, the Committee recommends an amendment to clarify that the Court may set a different time for the filing of a motion for reconsideration or reargument.

Local Civil Rule 6.4. Computation of Time

In computing any period of time prescribed or allowed by the Local Civil Rules or the Local Admiralty and Maritime Rules, the provisions of Fed. R. Civ. P. 6 shall apply unless otherwise stated. In these Local Rules, as in the Federal Rules as amended effective December 1, 2009, Saturdays, Sundays, and legal holidays are no longer excluded in computing periods of time. If the last day of the period is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

COMMITTEE NOTE

Recommended Local Civil Rule 6.4 is unchanged in substance from the version that became effective on December 1, 2009, pursuant to the time computation amendments to the Federal Rules of Civil Procedure.

Local Civil Rule 7.1. Motion Papers

(a) Except for letter-motions as permitted by Local Rule 7.1(d) or as otherwise permitted by the Court, all motions shall include the following motion papers:

(1) A notice of motion, or an order to show cause signed by the Court, which shall specify the applicable rules or statutes pursuant to which the motion is brought, and shall specify the relief sought by the motion;

(2) A memorandum of law, setting forth the cases and other authorities relied upon in support of the motion, and divided, under appropriate headings, into as many parts as there are issues to be determined; and

(3) Supporting affidavits and exhibits thereto containing any factual information and portions of the record necessary for the decision of the motion.

(b) Except for letter-motions as permitted by Local Rule 7.1(d) or as otherwise permitted by the Court, all oppositions and replies with respect to motions shall comply with Local Civil Rule 7.1(a)(2) and (3) above, and an opposing party who seeks relief that goes beyond the denial of the motion shall comply as well with Local Civil Rule 7.1(a)(1) above.

(c) Unless otherwise ordered by the District Judge to whom the appeal is assigned, appellate briefs on bankruptcy appeals shall comply with the briefing format and length specifications set forth in Federal Rules of Bankruptcy Procedure 8015 to 8017.

(d) Applications for extensions or adjournments, applications for a pre-motion conference, and similar non-dispositive matters as permitted by the instructions regarding ECF published on the website of each respective Court and any pertinent Individual Judge's Practices, may be brought by letter-

motion filed via ECF pursuant to Local Civil Rule 5.2(b).

COMMITTEE NOTE

Recommended Local Civil Rule 7.1 is designed to collect in one place the requirements for motion papers. It includes the substance of the present Local Civil Rule 7.1 on memoranda of law, and of the present Local Civil Rule 7.2 regarding notices of motion and orders to show cause. The Committee believes that it will be helpful, especially to lawyers from out of state and to lawyers who practice primarily in the state courts, to have a Local Rule that sets forth the types of papers that are required in support of or in opposition to a motion.

2013 COMMITTEE NOTE

Local Civil Rule 7.1(d) would authorize the use of letter-motions for applications for extensions or adjournments, applications for a pre-motion conference, and similar non-dispositive matters. Pursuant to recommended Local Civil Rule 5.2(b), such letter-motions may be filed by ECF.

The use of letter-motions is intended to follow existing practice in which counsel request certain non-dispositive relief by letter. Using a letter-motion instead of a letter will ensure that the Court is aware that relief is requested (as distinguished from, for example, a status update letter where no relief is requested). Local Civil Rule 7.1(d) is not intended to expand the types of motions that can be made by letter-motion. For example, motions to dismiss or motions for summary judgment may not be made by letter-motion.

Parties should remember to review the Individual Judge's Practices for any pertinent restrictions on the filing of letter-motions, such as requirements for courtesy copies and any page limitations.

2016 COMMITTEE NOTE

Local Rule 7.l(c) is amended to conform to the Federal Rules of Bankruptcy Procedure.

Local Civil Rule 7.1.1 Disclosure Statement

For purposes of Fed. R. Civ. P. 7.1(b)(2), "promptly" shall mean "within fourteen days," that is, parties are required to file a supplemental disclosure statement within fourteen days of the time there is any change in the information required in a disclosure statement filed pursuant to those rules.

COMMITTEE NOTE

The Committee believes that Local Civil Rule 7.1.1 continues to serve a useful purpose in helping to ensure that Judges will be given prompt notice of changes that might require consideration of possible recusal.

Local Civil Rule 7.2. Authorities to Be Provided to Pro Se Litigants

In cases involving a pro se litigant, counsel shall, when serving a memorandum of law (or other

submissions to the Court), provide the pro se litigant (but not other counsel or the Court) with copies of cases and other authorities cited therein that are unpublished or reported exclusively on computerized databases. Upon request, counsel shall provide the pro se litigant with copies of such unpublished cases and other authorities as are cited in a decision of the Court and were not previously cited by any party.

COMMITTEE NOTE

The Committee recommends the addition of an additional sentence to Local Civil Rule 7.2 in order to facilitate compliance with the decision of the Second Circuit in Lebron v. Sanders, 557 F.3d 76 (2d Cir. 2009).

Local Civil Rule 11.1. Form of Pleadings, Motions, and Other Papers

(a) Every pleading, written motion, and other paper must (1) be plainly written, typed, printed, or copied without erasures or interlineations which materially deface it, (2) bear the docket number and the initials of the District Judge and any Magistrate Judge before whom the action or proceeding is pending, and (3) have the name of each person signing it clearly printed or typed directly below the signature.

(b) The typeface, margins, and spacing of all documents presented for filing must meet the following requirements: (1) all text must be 12-point type or larger, except for text in footnotes which may be 10-point type; (2) all documents must have at least one-inch margins on all sides; (3) all text must be double-spaced, except for headings, text in footnotes, or block quotations, which may be single-spaced.

COMMITTEE NOTE

The provisions of Local Civil Rule 11.1 deal with topics that are not covered in Fed. R. Civ. P. 11. Recommended Local Civil Rule 11.1(b), which is based upon similar provisions in other local rules, is intended to set simple and easily followed minimum standards for legibility of documents filed with the Court.

Local Civil Rule 12.1. Notice to Pro Se Litigant Who Opposes a Rule 12 Motion Supported by Matters Outside the Pleadings

A represented party moving to dismiss or for judgment on the pleadings against a party proceeding pro se, who refers in support of the motion to matters outside the pleadings as described in Fed. R. Civ. P. 12(b) or 12(c), shall serve and file the following notice with the full text of Fed. R. Civ. P. 56 attached at the time the motion is served. If the Court rules that a motion to dismiss or for judgment on the pleadings will be treated as one for summary judgment pursuant to Fed. R. Civ. P. 56, and the movant has not previously served and filed the notice required by this rule, the movant shall amend the form notice to reflect that fact and shall serve and file the amended notice within fourteen days of the Court's ruling.

Notice to Pro Se Litigant Who Opposes a Rule 12 Motion Supported by Matters Outside the Pleadings

The defendant in this case has moved to dismiss or for judgment on the pleadings pursuant to Rule 12(b) or 12(c) of the Federal Rules of Civil Procedure, and has submitted additional written materials. This means that the defendant has asked the Court to decide this case without a trial, based on these written materials. You are warned that the Court may treat this motion as a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. For this reason, THE CLAIMS YOU ASSERT IN YOUR COMPLAINT MAY BE DISMISSED WITHOUT A TRIAL IF YOU DO NOT RESPOND TO THIS MOTION ON TIME by filing sworn affidavits as required by Rule 56(c) and/or other documents. The full text of Rule 56 of the Federal Rules of Civil Procedure is attached.

In short, Rule 56 provides that you may NOT oppose the defendant's motion simply by relying upon the allegations in your complaint. Rather, you must submit evidence, such as witness statements or documents, countering the facts asserted by the defendant and raising specific facts that support your claim. If you have proof of your claim, now is the time to submit it. Any witness statements must be

in the form of affidavits. An affidavit is a sworn statement of fact based on personal knowledge stating facts that would be admissible in evidence at trial. You may submit your own affidavit and/or the affidavits of others. You may submit affidavits that were prepared specifically in response to defendant's motion.

If you do not respond to the motion on time with affidavits and/or documents contradicting the facts asserted by the defendant, the Court may accept defendant's facts as true. Your case may be dismissed and judgment may be entered in defendant's favor without a trial.

If you have any questions, you may direct them to the Pro Se Office.

COMMITTEE NOTE

Local Civil Rule 12.1 plays a valuable role in alerting pro se litigants to the potentially serious consequences of a motion to dismiss based upon evidence outside the pleadings, and to the requirements for controverting such evidence. The Committee recommends certain changes in the text of the notice required by the rule in order to make it more understandable to non-lawyers.

Local Civil Rule 16.1. Exemptions from Mandatory Scheduling Order

Matters involving habeas corpus petitions, social security disability cases, motions to vacate sentences, forfeitures, and reviews from administrative agencies are exempted from the mandatory scheduling order required by Fed. R. Civ. P. 16(b).

COMMITTEE NOTE

The Committee recommends the retention of Local Civil Rule 16.1. It serves an important function, because Fed. R. Civ. P. 16(b)(1) requires that any exemption of categories of cases from the mandatory scheduling order requirement must be accomplished by a local rule.

Local Civil Rule 16.2. Entry and Modification of Mandatory Scheduling Orders by Magistrate Judges

In any case referred to a Magistrate Judge, the Magistrate Judge may issue or modify scheduling orders pursuant to Fed. R. Civ. P. 16(b).

COMMITTEE NOTE

Local Civil Rule 16.2 is necessary because Fed. R. Civ. P. 16(b)(1) requires a local rule in order to confer upon Magistrate Judges the power to issue or modify scheduling orders. The Committee recommends that the language of the rule be simplified, and that it be applicable to all cases in which a case has been referred to a Magistrate Judge.

Local Civil Rule 23.1. Fees in Class Action and Shareholder Derivative Actions

Fees for attorneys or others shall not be paid upon recovery or compromise in a class action or a derivative action on behalf of a corporation except as allowed by the Court after a hearing upon such notice as the Court may direct. The notice shall include a statement of the names and addresses of the applicants for such fees and the amounts requested respectively and shall disclose any fee sharing agreements with anyone. Where the Court directs notice of a hearing upon a proposed voluntary dismissal or settlement of a class action or a derivative action, the above information as to the applications shall be included in the notice.

COMMITTEE NOTE

The Committee recommends the retention of Local Civil Rule 23.1.1. Unlike Fed. R. Civ. P. 23 (which deals with class actions), Fed. R. Civ. P. 23.1 (dealing with shareholder derivative actions) does not contain any provisions dealing with attorney's fees. Local Civil Rule 23.1.1 has been part of the local rules for many years, and has proven its usefulness in derivative actions.

2016 COMMITTEE NOTE

The Committee in 2011 recommended that prior Local Rule 23.1 regarding class actions be deleted as unnecessary. The Second Circuit's recent decision in Bernstein v. Bernstein Litowitz Berger & Grossman LLP, 814 F.3d 132, 137 n.2 (2d Cir. 2016), stated that the prior Local Rule is not redundant with Fed. R. Civ. P. 23(h) regarding fee sharing arrangements. The Committee therefore recommends reinstating Local Rule 23.1 and combining it with Local Rule 23 .1.1 to cover both class actions and derivative actions.

Local Civil Rule 26.1. Address of Party and Original Owner of Claim to Be Furnished

A party shall furnish to any other party, within seven (7) days after a demand, a verified statement setting forth:

(a) If the responding party is a natural person, that party's residence and domicile, and any state

or other jurisdiction of which that party is a citizen for purposes of 28 U.S.C. § 1332;

(b) If the responding party is a partnership, limited liability partnership, limited liability company, or other unincorporated association, like information for all of its partners or members, as well as the state or other jurisdiction of its formation;

(c) If the responding party is a corporation, its state or other jurisdiction of incorporation, principal place of business, and any state or other jurisdiction of which that party is a citizen for purposes of 28 U.S.C. § 1332; and

(d) In the case of an assigned claim, corresponding information for each original owner of the claim and for any assignee.

COMMITTEE NOTE

Local Civil Rule 26.1 has been revised in order to make it a more effective tool for determining quickly whether or not there is a basis to challenge diversity jurisdiction.

Local Civil Rule 26.2. Assertion of Claim of Privilege

(a) Unless otherwise agreed by the parties or directed by the Court, where a claim of privilege is asserted in objecting to any means of discovery or disclosure, including but not limited to a deposition, and an answer is not provided on the basis of such assertion,

(1) The person asserting the privilege shall identify the nature of the privilege (including work product) which is being claimed and, if the privilege is governed by state law, indicate the state's privilege rule being invoked; and

(2) The following information shall be provided in the objection, or (in the case of a deposition) in response to questions by the questioner, unless divulgence of such information would cause disclosure of the allegedly privileged information:

(A) For documents: (i) the type of document, *e.g.*, letter or memorandum; (ii) the general subject matter of the document; (iii) the date of the document; and (iv) the

author of the document, the addressees of the document, and any other recipients, and, where not apparent, the relationship of the author, addressees, and recipients to each other;

(B) For oral communications: (i) the name of the person making the communication and the names of persons present while the communication was made and, where not apparent, the relationship of the persons present to the person making the communication; (ii) the date and place of communication; and (iii) the general subject matter of the communication.

(b) Where a claim of privilege is asserted in response to discovery or disclosure other than a deposition, and information is not provided on the basis of such assertion, the information set forth in paragraph (a) above shall be furnished in writing at the time of the response to such discovery or disclosure, unless otherwise ordered by the Court.

(c) Efficient means of providing information regarding claims of privilege are encouraged, and parties are encouraged to agree upon measures that further this end. For example, when asserting privilege on the same basis with respect to multiple documents, it is presumptively proper to provide the information required by this rule by group or category. A party receiving a privilege log that groups documents or otherwise departs from a document-by-document or communication-by-communication listing may not object solely on that basis, but may object if the substantive information required by this rule has not been provided in a comprehensible form.

COMMITTEE NOTE

With the advent of electronic discovery and the proliferation of e-mails and e-mail chains, traditional document-by-document privilege logs may be extremely expensive to prepare, and not really informative to opposing counsel and the Court. There is a growing literature in decisions, law reviews, and other publications about the need to handle privilege claims in new and more efficient ways. The Committee wishes to encourage parties to cooperate with each other in developing efficient ways to communicate the information required by Local Civil Rule 26.2 without the need for a traditional privilege log. Because the appropriate approach may differ depending on the size of the case, the volume of privileged documents, the use of electronic search techniques, and other factors, the purpose

of Local Civil Rule 26.2(c) is to encourage the parties to explore methods appropriate to each case. The guiding principles should be cooperation and the "just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. See also The Sedona Cooperation Proclamation, available at www.TheSedonaConference.org, whose principles the Committee endorses.

Local Civil Rule 26.3. Uniform Definitions in Discovery Requests

(a) The full text of the definitions and rules of construction set forth in paragraphs (c) and (d) is deemed incorporated by reference into all discovery requests. No discovery request shall use broader definitions or rules of construction than those set forth in paragraphs (c) and (d). This rule shall not preclude (1) the definition of other terms specific to the particular litigation, (2) the use of abbreviations, or (3) a more narrow definition of a term defined in paragraph (c).

(b) This rule is not intended to broaden or narrow the scope of discovery permitted by the Federal Rules of Civil Procedure.

(c) The following definitions apply to all discovery requests:

(1) Communication**.** The term "communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise).

(2) Document**.** The term "document" is defined to be synonymous in meaning and equal in scope to the usage of the term "documents or electronically stored information" in Fed. R. Civ. P. 34(a)(1)(A). A draft or non-identical copy is a separate document within the meaning of this term.

(3) Identify (with respect to persons). When referring to a person, "to identify" means to give, to the extent known, the person's full name, present or last known address, and when referring to a natural person, additionally, the present or last known place of employment. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

(4) Identify (with respect to documents). When referring to documents, "to identify" means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s) and recipient(s). In the alternative, the responding party may produce the documents, together with identifying information sufficient to satisfy Fed. R. Civ. P. 33(d).

(5) Parties**.** The terms "plaintiff" and "defendant" as well as a party's full or abbreviated name or a pronoun referring to a party mean the party and, where applicable, its officers, directors, employees, partners, corporate parent, subsidiaries or affiliates. This definition is not intended to impose a discovery obligation on any person who is not a party to the litigation.

(6) Person. The term "person" is defined as any natural person or any legal entity, including, without limitation, any business or governmental entity or association.

(7) Concerning. The term "concerning" means relating to, referring to, describing, evidencing or constituting.

(d) The following rules of construction apply to all discovery requests:

(1) All/Any/Each**.** The terms "all," "any," and "each" shall each be construed as encompassing any and all.

(2) And/Or. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

(3) Number. The use of the singular form of any word includes the plural and vice versa.

COMMITTEE NOTE

Local Civil Rule 26.3 has performed a useful role in simplifying definitions that are commonly used in discovery requests. The Committee recommends certain changes to reflect current practice.

The definition of "document" in Local Civil Rule 26.3(c)(2) has been updated to include the term "electronically stored information," which is now used in Fed. R. Civ. P. 34(a)(1)(A).

Local Civil Rule 26.4. Cooperation Among Counsel in Discovery [formerly Local Civil Rules 26.5 and 26.7]

(a) Counsel are expected to cooperate with each other, consistent with the interests of their clients, in all phases of the discovery process and to be courteous in their dealings with each other, including in matters relating to scheduling and timing of various discovery procedures.

(b) Discovery requests shall be read reasonably in the recognition that the attorney serving them generally does not have the information being sought and the attorney receiving them generally does have such information or can obtain it from the client.

COMMITTEE NOTE

This recommended Local Civil Rule is derived from prior Local Civil Rules 26.5 and 26.7, which applied to the Eastern District only. The Committee endorses the goals of professional cooperation and courtesy embodied in this recommended Local Civil Rule, and recommends that the rule be made applicable to both the Southern and Eastern Districts.

Local Civil Rule 26.5. Form Discovery Requests [formerly Local Civil Rule 26.6]

Attorneys using form discovery requests shall review them to ascertain that they are consistent with the scope of discovery under Fed. R. Civ. P. 26(b)(l). Non-compliant requests shall not be used.

COMMITTEE NOTE

While this Local Civil Rule is a straightforward corollary of Fed. R. Civ. P. 26(g)(1)(B), the Committee understands that it is frequently relied upon, and therefore recommends its retention in the Eastern District and its adoption in the Southern District.

2016 COMMITTEE NOTE

The change to Local Rule 26.5 is necessary because the December 2015 amendments to the Federal Rules of Civil Procedure eliminated discovery about the "subject matter," instead limiting discovery to the claims and defenses, as further limited by proportionality factors.

Local Civil Rule 30.1. Counsel Fees on Taking Depositions More Than 100 Miles From Courthouse

When a deposition upon oral examination is to be taken at a place more than one hundred (100) miles from the courthouse, any party may request the Court to issue an order providing that prior to the examination, another party shall pay the expense (including a reasonable counsel fee) of the attendance of one attorney for each other party at the place where the deposition is to be taken. The amounts so paid, unless otherwise directed by the Court, may be taxed as a cost at the conclusion of the action or proceeding.

COMMITTEE NOTE

The Committee believes that Local Civil Rule 30.1 serves a useful purpose in directing the attention of the parties to their ability to request expenses in the event that a deposition is taken more than 100 miles from the courthouse. Whether or not to award such expenses, and whether or not to tax them as costs at the conclusion of the case, remain in the discretion of the Court.

Local Civil Rule 30.2. Telephonic and Other Remote Depositions [formerly Local Civil Rule 30.3]

The motion of a party to take the deposition of an adverse party by telephone or other remote means will presumptively be granted. Where the opposing party is a corporation, the term "adverse party" means an officer, director, managing agent or corporate designee pursuant to Fed. R. Civ. P. 30(b)(6).

COMMITTEE NOTE

The Committee recommends that this Local Civil Rule be broadened to encompass the taking of depositions by remote means other than telephonic means, as has been done with Fed. R. Civ. P. 30(b)(4).

Local Civil Rule 30.3. Persons Attending Depositions [formerly Local Civil Rule 30.4]

A person who is a party in the action may attend the deposition of a party or witness. A witness or potential witness in the action may attend the deposition of a party or witness unless otherwise ordered by the Court.

COMMITTEE NOTE

This rule provides a useful summary of the rules regarding who may attend a deposition, and the Committee recommends that it be extended to the Southern District as well as the Eastern District. The exclusion-of-witnesses rule of Fed. R. 615 is made inapplicable to depositions by Fed. R. Civ. P. 30(c)(1), but Fed. R. Civ. P. 26(c)(1)(E) allows the Court, for good cause, to "designat[e] the persons who may be present while the discovery is conducted."

Local Civil Rule 30.4. Conferences Between Deponent and Defending Attorney [formerly Local Civil Rule 30.6]

An attorney for a deponent shall not initiate a private conference with the deponent while a deposition question is pending, except for the purpose of determining whether a privilege should be asserted.

COMMITTEE NOTE

The Committee believes that this Local Civil Rule serves a useful purpose, and that it is consistent with (although not duplicative of) Fed. R. Civ. P. 30(c)(2) and 20(d)(2). The Committee believes that there is a broad consensus that it is improper for the deponent's attorney to initiate a private conference with the deponent while a question is pending. By recommending that this minimum standard be stated in the rule, the Committee does not intend any negative implication that other types of obstructive conduct during depositions may not be dealt with by appropriate orders of the Court.

[Local Civil Rule 33.1 Intentionally Omitted]

Local Civil Rule 33.2. Standard Discovery in Prisoner Pro Se Actions

(a) This rule shall apply in any action commenced pro se in which the plaintiff's complaint includes any claim described in paragraph (b) of this rule, in which the events alleged in the complaint occurred while the plaintiff was in the custody of the New York State Department of Corrections & Community Supervision, the Department of Correction of the City of New York, or any other jail, prison or correctional facility operated by or for a city, county, municipal or other local governmental entity (collectively, the "Department"). Defendants represented by the Office of the Attorney General, the Office of the Corporation Counsel of the City of New York, or counsel for or appointed by the Department responsible for the jail, prison or correctional facility (collectively, the

"Facility"), shall respond to the standing discovery requests adopted by the Court, in accordance with the instructions and definitions set forth in the standing requests, unless otherwise ordered by the Court.

(b) The claims to which the standard discovery requests shall apply are Use of Force Cases, Inmate Against Inmate Assault Cases and Disciplinary Due Process Cases, as defined below.

(1) "Use of Force Case" refers to an action in which the complaint alleges that an employee of the Department or Facility used physical force against the plaintiff in violation of the plaintiff's rights.

(2) "Inmate against Inmate Assault Case" refers to an action in which the complaint alleges that an employee of the Department or Facility was responsible for the plaintiff's injury resulting from physical contact with another inmate.

(3) "Disciplinary Due Process Case" refers to an action in which (i) the complaint alleges that an employee of the Department or Facility violated or permitted the violation of a right or rights in a disciplinary proceeding against plaintiff, and (ii) the punishment imposed upon plaintiff as a result of that proceeding was placement in a special housing unit for more than 30 days.

(c) If a response to the requests is required to be made on behalf of an individual defendant represented by the Office of the Corporation Counsel, the Office of the Attorney General or counsel for or appointed by the Department responsible for the Facility, it shall be made on the basis of information and documents within the possession, custody or control of the Department or Facility in accordance with the instructions contained in the requests. If no defendant is represented by such counsel, responses based upon such information need not be made pursuant to this Local Rule, without prejudice to such other discovery procedures as the plaintiff shall initiate.

(d) The requests, denominated "Plaintiff's Local Civil Rule 33.2 Interrogatories and Requests for Production of Documents," shall be answered within 120 days of service of the complaint on any

named defendant except (i) as otherwise ordered by the Court, for good cause shown, which shall be based upon the facts and procedural status of the particular case and not upon a generalized claim of burden, expense or relevance or (ii) if a dispositive motion is pending. The responses to the requests shall be served upon the plaintiff and shall include verbatim quotation of the requests. Copies of the requests are available from the Court, including the Court's website.

(e) Except upon permission of the Court, for good cause shown, the requests shall constitute the sole form of discovery available to plaintiff during the 120-day period designated above.

JULY 2011 COMMITTEE NOTE

Local Civil Rule 33.2 has worked well, and the Committee recommends its continuation. The Committee recommends that the rule be revised to make it applicable on the same basis in the Eastern District as in the Southern District. In addition, the Committee recommends extension of the rule to other prison facilities in addition to State and New York City prison facilities (12/2014). Because this Local Civil Rule and Local Civil Rule 33.3 are frequently cited, the Committee does not recommend that they be renumbered.

DECEMBER 2011 COMMITTEE NOTE

The Committee recommends extension of the rule to other prison facilities in addition to State and New York City prison facilities. Also, the trigger for a Disciplinary Due Process Case is reduced from 100 days in SHU to 30 days to better reflect the case law in this area.

2014 COMMITTEE NOTE

The Committee recommends deleting Local Civil Rule 33.2(f). The Rule is intended to be automatic and the standard discovery requests are available on the Courts' websites and in most prison libraries. The second sentence of Local Rule 33.2(d) also is amended to require that the responses include verbatim quotation of the requests, to further insure that the pro se plaintiff has the language of the requests.

Local Civil Rule 33.3. Interrogatories (Southern District Only)

(a) Unless otherwise ordered by the Court, at the commencement of discovery, interrogatories will be restricted to those seeking names of witnesses with knowledge of information relevant to the subject matter of the action, the computation of each category of damage alleged, and the existence, custodian, location and general description of relevant documents, including pertinent

insurance agreements, and other physical evidence, or information of a similar nature.

(b) During discovery, interrogatories other than those seeking information described in paragraph (a) above may only be served (1) if they are a more practical method of obtaining the information sought than a request for production or a deposition, or (2) if ordered by the Court.

(c) At the conclusion of other discovery, and at least 30 days prior to the discovery cut-off date, interrogatories seeking the claims and contentions of the opposing party may be served unless the Court has ordered otherwise.

COMMITTEE NOTE

Local Civil Rule 33.3 reflects the general practice in the Southern District, and the Committee recommends its continuation there. Practice in the Eastern District is more receptive to the use of interrogatories, and the Committee therefore does not recommend that this Local Civil Rule be extended to the Eastern District.

Local Civil Rule 37.1. Verbatim Quotation of Discovery Materials

Upon any motion or application involving discovery or disclosure requests or responses under Fed. R. Civ. P. 37, the moving party shall specify and quote or set forth verbatim in the motion papers each discovery request and response to which the motion or application is addressed. The motion or application shall also set forth the grounds upon which the moving party is entitled to prevail as to each request or response. Local Civil Rule 5.1 also applies to the motion or application.

COMMITTEE NOTE

Local Civil Rule 37.1 continues to serve a clearly useful purpose, and the Committee recommends its retention.

Local Civil Rule 37.2. Mode of Raising Discovery Disputes With the Court (Southern District Only)

No motion under Rules 26 through 37 inclusive of the Federal Rules of Civil Procedure shall be heard unless counsel for the moving party has first requested an informal conference with the Court

by letter-motion for a pre-motion discovery conference (subject to the instructions regarding ECF published on the Court's website and the Judge's Individual Practices) and such request has either been denied or the discovery dispute has not been resolved as a consequence of such a conference.

COMMITTEE NOTE

The modes of raising discovery disputes with the Court are sufficiently different in the Southern and Eastern Districts that the Committee is constrained to recommend the continuation of two different rules – Local Civil Rule 37.2 applying to the Southern District, and Local Civil Rule 37.3 applying to the Eastern District.

2013 COMMITTEE NOTE

This amendment would make clear that the request to the Court required by Local Civil Rule 37.2 shall now be made by letter-motion as authorized by Local Civil Rule 7.1(d), instead of by letter as before, without any substantive change in practice.

Local Civil Rule 37.3. Mode of Raising Discovery and Other Non-Dispositive Pretrial Disputes With the Court (Eastern District Only)

(a) Good-Faith Effort to Resolve. Prior to seeking judicial resolution of a discovery or non-dispositive pretrial dispute, the attorneys for the affected parties or non-party witness shall attempt to confer in good faith in person or by telephone in an effort to resolve the dispute, in conformity with Fed. R. Civ. P. 37(a)(1).

(b) Disputes Arising During Depositions. Where the attorneys for the affected parties or a non-party witness cannot agree on a resolution of a discovery dispute that arises during a deposition, they shall, to the extent practicable, notify the Court by telephone and seek a ruling while the deposition is in progress. If a prompt ruling cannot be obtained, and the dispute involves an instruction to the witness not to answer a question, the instruction not to answer may stand and the deposition shall continue until a ruling is obtained pursuant to the procedure set forth in paragraph (c) below.

(c) Other Discovery and Non-Dispositive Pretrial Disputes. Where the attorneys for the

affected parties or non-party witness cannot agree on a resolution of any other discovery dispute or non-dispositive pretrial dispute, or if they are unable to obtain a telephonic ruling on a discovery dispute that arises during a deposition as provided in paragraph (b) above, they shall notify the Court by letter not exceeding three pages in length outlining the nature of the dispute and attaching relevant materials. Within four days of receiving such a letter, any opposing affected party or non-party witness may submit a responsive letter not exceeding three pages attaching relevant materials. Except for the letters and attachments authorized herein, or where a ruling which was made exclusively as a result of a telephone conference is the subject of *de novo* review pursuant to paragraph (d) hereof, papers shall not be submitted with respect to a dispute governed by this rule unless the Court has so directed.

(d) Motion for Reconsideration. A ruling made exclusively as a result of a telephone conference may be the subject of *de novo* reconsideration by a letter not exceeding five pages in length attaching relevant materials submitted by any affected party or non-party witness. Within four days of receiving such a letter, any other affected party or non-party witness may submit a responsive letter not exceeding five pages in length attaching relevant materials.

(e) Decision of the Court. The Court shall record or arrange for the recording of the Court's decision in writing. Such written order may take the form of an oral order read into the record of a deposition or other proceeding, a handwritten memorandum, a handwritten marginal notation on a letter or other document, or any other form the Court deems appropriate.

COMMITTEE NOTE

As explained in the Committee Note to Local Civil Rule 37.2, the Committee believes that it is necessary to have a separate Local Civil Rule setting forth the mode of raising discovery and other non-dispositive pretrial disputes in the Eastern District. In Local Civil Rule 37.3(c), the Committee concluded that, except in the context of an ongoing deposition (which is covered by Local Civil Rule 37.3(b)), disputes should be raised by letter rather than by a telephone call to the Court.

Local Civil Rule 39.1. Custody of Trial and Hearing Exhibits

(a) Unless the Court orders otherwise, trial and hearing exhibits shall not be filed with the Clerk, but shall be retained in the custody of the respective attorneys who produced them in court.

(b) Trial and hearing exhibits which have been filed with the Clerk shall be removed by the party responsible for them (1) if no appeal is taken, within ninety (90) days after a final decision is rendered, or (2) if an appeal has been taken, within thirty (30) days after the final disposition of the appeal. Parties failing to comply with this rule shall be notified by the Clerk to remove their exhibits and upon their failure to do so within thirty (30) days, the Clerk may dispose of them as the Clerk may see fit.

COMMITTEE NOTE

The Committee believes that this Local Civil Rule is useful in alerting counsel to the Courts' practice concerning the custody of trial and hearing exhibits, which differs from the practices of many other courts.

Local Civil Rule 39.2. Order of Summation

After the close of evidence in civil trials, the order of summation shall be determined in the discretion of the Court.

COMMITTEE NOTE

The Committee believes that Local Civil Rule 39.2 serves a useful role in clarifying the power of the Court to determine the order of summation.

Local Civil Rule 47.1. Assessment of Jury Costs

All counsel in civil cases shall seriously discuss the possibility of settlement a reasonable time prior to trial. The Court may, in its discretion, assess the parties or counsel with the cost of one day's attendance of the jurors if a case is settled after the jury has been summoned or during trial, the amount

to be paid to the Clerk of the Court. For purposes of this rule, a civil jury is considered summoned for a trial as of Noon one day prior to the designated date of the trial.

COMMITTEE NOTE

The Committee understands that the power to impose the cost of one day's attendance of jurors upon parties who have failed to reach (or notify the Court of) a settlement at least one business day before trial is exercised only infrequently and in egregious cases. The Committee agrees that the Court should have this power in order to deal with such egregious cases, and that the rule serves a useful purpose in notifying the bar that the Court has this power.

Local Civil Rule 53.1. Masters

(a) Oath. Every person appointed pursuant to Rule 53 shall before entering upon his or her duties take and subscribe an oath, which, except as otherwise prescribed by statute or rule, shall be the same as the oath prescribed for Judges pursuant to 28 U.S.C. § 453, with the addition of the words "in conformance with the order of appointment" after the words "administer justice." Such an oath may be taken before any federal or state officer authorized by federal law to administer oaths, and shall be filed in the office of the Clerk.

(b) May Sit Outside District. A person appointed pursuant to Rule 53 may sit within or outside the district. When the person appointed is requested to sit outside the district for the convenience of a party and there is opposition by another party, he or she may make an order for the holding of the hearing, or a part thereof, outside the district, upon such terms and conditions as shall be just. Such order may be reviewed by the Court upon motion of any party, served within twenty-one (21) days after service on all parties by the master of the order.

COMMITTEE NOTE

The Committee believes that Local Civil Rule 53.1 serves a useful purpose by clarifying two subjects that are not dealt with in Fed. R. Civ. P. 53.

Local Civil Rule 54.1. Taxable Costs

(a) Notice of Taxation of Costs. Within thirty (30) days after the entry of final judgment, or, in the case of an appeal by any party, within thirty (30) days after the final disposition of the appeal, unless this period is extended by the Court for good cause shown, any party seeking to recover costs shall file with the Clerk a notice of taxation of costs by Electronic Case Filing, except a pro se party may do so in writing, indicating the date and time of taxation which shall comply with the notice period prescribed by Fed. R. Civ. P. 54, and annexing a bill of costs. Costs will not be taxed during the pendency of any appeal, motion for reconsideration, or motion for a new trial. Within thirty (30) days after the determination of any appeal, motion for reconsideration, or motion for a new trial, the party seeking tax costs shall file a new notice of taxation of costs. Any party failing to file a notice of taxation of costs within the applicable thirty (30) day period will be deemed to have waived costs. The bill of costs shall include an affidavit that the costs claimed are allowable by law, are correctly stated and were necessarily incurred. Bills for the costs claimed shall be attached as exhibits.

(b) Objections to Bill of Costs. A party objecting to any cost item shall serve objections by Electronic Case Filing, except a pro se party may do so in writing, prior to the date and time scheduled for taxation. The parties need not appear at the date and time scheduled for taxation unless requested by the Clerk. The Clerk will proceed to tax costs at the time scheduled and allow such items as are properly taxable. In the absence of written objection, any item listed may be taxed within the discretion of the Clerk.

(c) Items Taxable as Costs

(1) Transcripts. The cost of any part of the original trial transcript that was necessarily obtained for use in this Court or on appeal is taxable. Convenience of counsel is not sufficient. The cost of a transcript of Court proceedings prior to or subsequent to trial is taxable only when authorized in advance or ordered by the Court.

(2) Depositions. Unless otherwise ordered by the Court, the original transcript of a deposition, plus one copy, is taxable if the deposition was used or received in evidence at the trial, whether or not it was read in its entirety. Costs for depositions are also taxable if they were used by the Court in ruling on a motion for summary judgment or other dispositive substantive motion. Costs for depositions taken solely for discovery are not taxable. Counsel's fees and expenses in attending the taking of a deposition are not taxable except as provided by statute, rule (including Local Civil Rule 30.1), or order of the Court. Fees, mileage, and subsistence for the witness at the deposition are taxable at the same rates as for attendance at trial if the deposition taken was used or received in evidence at the trial.

(3) Witness Fees, Travel Expenses and Subsistence. Witness fees and travel expenses authorized by 28 U.S.C. § 1821 are taxable if the witness testifies. Subsistence pursuant to 28 U.S.C. § 1821 is taxable if the witness testifies and it is not practical for the witness to return to his or her residence from day to day. No party to the action may receive witness fees, travel expenses, or subsistence. Fees for expert witnesses are taxable only to the extent of fees for ordinary witnesses unless prior court approval was obtained.

(4) Interpreting Costs. The reasonable fee of a competent interpreter is taxable if the fee of the witness involved is taxable. .

(5) Exemplifications and Copies of Papers. A copy of an exhibit is taxable if the original was not available and the copy was used or received in evidence. The cost of copies used for the convenience of counsel or the Court are not taxable. The fees for a search and certification or proof of the non-existence of a document in a public office is taxable.

(6) Maps, Charts, Models, Photographs and Summaries. The cost of photographs, 8" x 10" in size or less, is taxable if used or received in evidence. Enlargements greater than 8" x 10" are not taxable except by order of the Court. Costs of maps, charts, and models,

including computer generated models, are not taxable except by order of the Court. The cost of compiling summaries, statistical comparisons and reports is not taxable.

(7) Attorney Fees and Related Costs. Attorney fees and disbursements and other related fees and paralegal expenses are not taxable except by order of the Court. A motion for attorney fees and related nontaxable expenses shall be made within the time period prescribed by Fed. R. Civ. P. 54.

(8) Fees of Masters, Receivers, Commissioners and Court Appointed Experts. Fees of masters, receivers, commissioners, and Court appointed experts are taxable as costs, unless otherwise ordered by the Court.

(9) Costs for Title Searches. A party is entitled to tax necessary disbursements for the expenses of searches made by title insurance, abstract or searching companies.

(10) Docket and Miscellaneous Fees. Docket fees, and the reasonable and actual fees of the Clerk and of a marshal, sheriff, and process server, are taxable unless otherwise ordered by the Court.

COMMITTEE NOTE

Local Civil Rule 54.1 serves a very useful purpose by outlining what costs are and are not taxable unless otherwise ordered by the Court. This is a subject that is not addressed with specificity by 28 U.S.C. § 1920 and Fed. R. Civ. P. 54(d)(1). Local Civil Rule 54.1 has been updated with the valuable assistance of the Clerks of the two Courts to reflect more precisely which costs are and are not taxable without an order of the Court.

[August 2014 Note]: Local Rule 54.1 is modified to indicate that the Bill of Costs, and any objection thereto, shall be filed via ECF (except for Pro Se parties) in both Districts.

[July 2013 Note]: The seven-day notice period previously set forth in Local Civil Rule 54.1(a) was in conflict with the 14-day notice period provided by Rule 54(d)(1) of the Federal Rules of Civil Procedure, and the Committee recommends that the Local Rule be changed to conform with Rule 54(d)(1). Instead of prescribing a particular time period (which might be changed by a future amendment to Fed. R. Civ. P. 54), the Committee recommends that the Local Rule refer the reader to Fed. R. Civ. P. 54.

The term "request to tax costs" has misled some parties into not realizing that they need to file a notice of taxation of costs specifying the date and time of taxation. For this reason, the Committee recommends that Local Civil Rule 54.1(a) be amended to substitute the term "notice of taxation of costs" for the term "request to tax costs", and to add an explicit requirement that the notice specify

the date and time fixed for taxation.

Local Civil Rule 54.1(a) presently provides that costs will not be taxed during the pendency of an appeal. At the suggestion of the Clerk's Offices, the Committee recommends that the Rule be amended to provide that costs will likewise not be taxed during the pendency of a motion for reconsideration or a motion for a new trial. Also at the suggestion of the Clerk's Offices, the Committee recommends that the Rule be amended to provide that the party seeking to tax costs shall file a new notice of taxation of costs within 30 days after the determination of any appeal, motion for reconsideration, or motion for a new trial.

At the suggestion of the Eastern District Clerk's Office, the Committee recommends that Local Civil Rule 54.1(b) be amended to place parties on notice that, in the Eastern District, the parties need not appear at the date and time scheduled for taxation.

The Committee recommends that Local Civil Rule 54.1(c)(1) remain unchanged. It is authorized by 28 U.S.C. § 1920(2), which allows taxation of "fees for printed or electronically recorded transcripts necessarily obtained for use in this case."

The Committee recommends that Local Civil Rule 54.1(c)(2) remain unchanged. 28 U.S.C. § 1920 does not by its terms specifically address costs related to depositions. However the practice of taxing the expenses of a deposition when it is received in evidence or employed on a successful motion for summary judgment is widespread, and can be regarded as authorized by 28 U.S.C. § 1920(2) as "expenses for transcripts necessarily obtained for use in this case." *See* 10 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2676 (3d ed. 1998) ("There is general agreement that expenses of a deposition may be taxed as costs when it was received in evidence."); 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 54.103(3)(c)(i) (3d ed. 2011) ("§1920 also contains several provisions for the recovery of costs that, alone or in conjunction, have been interpreted to permit the awarding of the routine expenses incurred in taking depositions."). *See also Anderson v. City of New York ,* 132 F. Supp. 2d 239, 246 (S.D.N.Y. 2001) (allowing deposition transcripts to be taxed as costs under § 1920).

The Committee recommends that Local Civil Rule 54.1(c)(3) remain unchanged. This subsection is authorized by 28 U.S.C. § 1920(3), which allows taxation of "fees and disbursements for printing and witnesses."

The Committee recommends that the second sentence of Local Civil Rule 54.1(c)(4) be deleted in light of the Supreme Court's ruling in *Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997 (2012). The rest of Local Civil Rule 54.1(c)(4) is authorized by § 1920(6), which allows taxation of "compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services" under 28 U.S.C. § 1828.

The Committee recommends that Local Civil Rule 54.1(c)(5) remain unchanged. This subsection is authorized by § 1920(4), which allows taxation of "fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in this case."

Courts in other circuits have begun to address the question whether and to what extent the costs of electronic discovery can be taxed as costs of copying or exemplification. See, e.g., Race Tires America, Inc. v. Hoosier Racing Tire Corp., 674 F.3d 158 (3d Cir. 2012). Particularly in the absence of authoritative guidance from the Second Circuit on this issue, the Committee has concluded that it is premature to address this question in Local Civil Rule 54.1(c).

The Committee recommends that Local Civil Rule 54.1(c)(6) remain unchanged. This subsection is authorized by 28 U.S.C. § 1920(4), which allows taxation of "fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in this case."

The Committee recommends that Local Civil Rule 54.1(c)(7) be retained, because it does not

authorize taxation of any costs, but instead serves a useful purpose by pointing out that attorney's fees are addressed in Fed. R. Civ. P. 54, and are not taxable except by order of the Court. For the reasons explained in the Committee Note to Local Civil Rule 54.1(a), the Committee recommends that the Local Rule refer the reader to Fed. R. Civ. P. 54 for the time period within which attorney's fees must be sought.

The Committee recommends that Local Civil Rule 54.1(c)(8) remain unchanged. Although 28 U.S.C. § 1920 does not by its terms address fees for masters, receivers, or commissioners, Fed. R. Civ. P. 53(g) authorizes the Court to allocate payment for a master's compensation, and commentators have observed that appropriate expenditures incurred in connection with a special master may be taxed as costs by the prevailing party. 10 Fed. Prac. & Proc. Civ. §2677 (3d ed.).

The Committee recommends that Local Civil Rule 54.1(c)(9) remain unchanged. This subsection is authorized by 28 U.S.C. § 1920(4), which allows a taxation of "fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in this case."

The Committee recommends that Local Civil Rule 54.1(c)(10) remain unchanged. This subsection is authorized by 28 U.S.C. § 1920(5), which allows taxation of docket fees under 28 U.S.C. § 1923.

Local Civil Rule 54.2. Security for Costs

The Court, on motion or on its own initiative, may order any party to file an original bond for costs or additional security for costs in such an amount and so conditioned as it may designate. For failure to comply with the order the Court may make such orders in regard to noncompliance as are just, and among others the following: an order striking out pleadings or staying further proceedings until the bond is filed or dismissing the action or rendering a judgment by default against the non-complying party.

COMMITTEE NOTE

Local Civil Rule 54.2 has been applied by the District Courts with the approval of the Second Circuit. The Committee recommends its retention.

Local Civil Rule 54.3. Entering Satisfaction of Money Judgment

Satisfaction of a money judgment entered or registered in this district shall be entered by the Clerk as follows:

(a) Upon the payment into the Court of the amount thereof, plus interest, and the

payment of the Clerk's and marshal's fees, if any;

(b) Upon the filing of a satisfaction executed and acknowledged by: (1) the judgment creditor; or (2) the judgment creditor's legal representatives or assigns, with evidence of their authority; or (3) the judgment creditor's attorney if within ten (10) years of the entry of the judgment or decree;

(c) If the judgment creditor is the United States, upon the filing of a satisfaction executed by the United States Attorney;

(d) Pursuant to an order of satisfaction entered by the Court; or

(e) Upon the registration of a certified copy of a satisfaction entered in another court.

COMMITTEE NOTE

The Committee recommends a few clarifying changes in the wording of this Local Civil Rule.

Local Civil Rule 55.1. Certificate of Default

A party applying for entry of default under Fed. R. Civ. P. 55(a) shall file:

(a) a request for a Clerk's Certificate of Default; and

(b) an affidavit demonstrating that:

(1) the party against whom a notation of default is sought is not an infant, in the military, or an incompetent person;

(2) the party has failed to plead or otherwise defend the action; and

(3) the pleading to which no response has been made was properly served.

A proposed Clerk's Certificate of Default form must be attached to the affidavit.

COMMITTEE NOTE

The Committee believes that Local Civil Rule 55.1 is helpful in setting forth the contents of the affidavit to be submitted by a party seeking a certificate of default pursuant to Fed. R. Civ. P. 55(a).

2018 COMMITTEE NOTE

The revision to Local Rule 55.1 incorporates the revised ECF Rule requiring the electronic

filing of a request for a Clerk's Certificate of Default.

Local Civil Rule 55.2. Default Judgment

(a) By the Clerk. Upon issuance of a Clerk's certificate of default, if the claim to which no response has been made only sought payment of a sum certain, and does not include a request for attorney's fees or other substantive relief, and if a default judgment is sought against all remaining parties to the action, the moving party shall submit an affidavit showing the principal amount due and owing, not exceeding the amount sought in the claim to which no response has been made, plus interest, if any, computed by the party, with credit for all payments received to date clearly set forth, and costs, if any, pursuant to 28 U.S.C. § 1920.

(b) By the Court. In all other cases the party seeking a judgment by default shall apply to the Court as described in Fed. R. Civ. P. 55(b)(2), and shall append to the application (1) the Clerk's certificate of default, (2) a copy of the claim to which no response has been made, and (3) a proposed form of default judgment.

(c) Mailing of Papers. Unless otherwise ordered by the Court, all papers submitted to the Court pursuant to Local Civil Rule 55.2(a) or (b) above shall simultaneously be mailed to the party against whom a default judgment is sought at the last known residence of such party (if an individual) or the last known business address of such party (if a person other than an individual). Proof of such mailing shall be filed with the Court. If the mailing is returned, a supplemental affidavit shall be filed with the Court setting forth that fact, together with the reason provided for return, if any.

COMMITTEE NOTE

Although Fed. R. Civ. P. 55(b) does not require service of notice of an application for a default judgment upon a party who has not appeared in the action, the Committee believes that experience has shown that mailing notice of such an application is conducive to both fairness and efficiency, and has therefore recommended a new Local Civil Rule 55.2(c) providing for such mailing.

Local Civil Rule 56.1. Statements of Material Facts on Motion for Summary Judgment

a) Upon any motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried. Failure to submit such a statement may constitute grounds for denial of the motion.

(b) The papers opposing a motion for summary judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party, and if necessary, additional paragraphs containing a separate, short and concise statement of additional material facts as to which it is contended that there exists a genuine issue to be tried.

(c) Each numbered paragraph in the statement of material facts set forth in the statement required to be served by the moving party will be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party.

(d) Each statement by the movant or opponent pursuant to Rule 56.1(a) and (b), including each statement controverting any statement of material fact, must be followed by citation to evidence which would be admissible, set forth as required by Fed. R. Civ. P. 56(c).

COMMITTEE NOTE

The requirement embodied in Local Civil Rule 56.1 is firmly rooted in the local practice of the Southern and Eastern Districts, and the Committee recommends its retention. The language of Local Civil Rule 56.1 was revised in 2004 to make clear that any statement pursuant to Local Civil Rule 56.1 must be divided into brief, numbered paragraphs, that any opposing statement must respond specifically and separately to each numbered paragraph in the statement, and that all such paragraphs in both statements and opposing statements must be supported by citations to specific evidence of the kind required by Fed. R. Civ. P. 56(c). The Committee believes that the language adopted in 2004 sets forth these requirements clearly, and does not recommend any changes in that language.

Local Civil Rule 56.2. Notice to Pro Se Litigant Who Opposes a Summary Judgment

Any represented party moving for summary judgment against a party proceeding *pro se* shall

serve and file as a separate document, together with the papers in support of the motion, the following "Notice To Pro Se Litigant Who Opposes a Motion For Summary Judgment" with the full texts of Fed. R. Civ. P. 56 and Local Civil Rule 56.1 attached. Where the pro se party is not the plaintiff, the movant shall amend the form notice as necessary to reflect that fact.

Notice To Pro Se Litigant
Who Opposes a Motion For Summary Judgment

The defendant in this case has moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. This means that the defendant has asked the Court to decide this case without a trial, based on written materials, including affidavits, submitted in support of the motion. THE CLAIMS YOU ASSERT IN YOUR COMPLAINT MAY BE DISMISSED WITHOUT A TRIAL IF YOU DO NOT RESPOND TO THIS MOTION ON TIME by filing sworn affidavits and/or other documents as required by Rule 56(c) of the Federal Rules of Civil Procedure and by Local Civil Rule 56.1. The full text of Rule 56 of the Federal Rules of Civil Procedure and Local Civil Rule 56.1 is attached.

In short, Rule 56 provides that you may NOT oppose summary judgment simply by relying upon the allegations in your complaint. Rather, you must submit evidence, such as witness statements or documents, countering the facts asserted by the defendant and raising specific facts that support your claim. If you have proof of your claim, now is the time to submit it. Any witness statements must be in the form of affidavits. An affidavit is a sworn statement of fact based on personal knowledge stating facts that would be admissible in evidence at trial. You may submit your own affidavit and/or the affidavits of others. You may submit affidavits that were prepared specifically in response to defendant's motion for summary judgment.

If you do not respond to the motion for summary judgment on time with affidavits and/or documents contradicting the material facts asserted by the defendant, the Court may accept defendant's

facts as true. Your case may be dismissed and judgment may be entered in defendant's favor without a trial.

If you have any questions, you may direct them to the Pro Se Office.

COMMITTEE NOTE

Local Civil Rule 56.2 plays a valuable role in alerting pro se litigants to the potentially serious consequences of a motion for summary judgment, and to the requirements for opposing such a motion. The Committee recommends certain changes in the text of the notice required by the rule in order to make it more understandable to non-lawyers.

Local Civil Rule 58.1. Remand by an Appellate Court

Any mandate, order, or judgment of an appellate court, when filed in the office of the Clerk of the District Court, shall automatically become the order or judgment of the District Court and be entered as such by the Clerk without further order, except if such mandate, order, or judgment of the appellate court requires further proceedings in the District Court other than a new trial, an order shall be entered making the order or judgment of the appellate court the order or judgment of the District Court.

COMMITTEE NOTE

The Committee recommends that the word "mandate" be added to Local Civil Rule 58.1 in order to clarify that the mandate of the Court of Appeals, when filed in the Clerk's Office of the District Court as provided in Local Civil Rule 58.1, automatically becomes the judgment of the District Court. The mandate, which consists of "a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs," Fed. R. App. P. 41(a), is the normal means by which the judgment of the Court of Appeals is transmitted to the District Court.

Local Civil Rule 65.1.1. Sureties

(a) Whenever a bond, undertaking or stipulation is required, it shall be sufficient, except as otherwise prescribed by law, if the instrument is executed by the surety or sureties only.

(b) Except as otherwise provided by law, every bond, undertaking or stipulation must be secured by: (1) the deposit of cash or government bonds in the amount of the bond, undertaking or

stipulation; or (2) the undertaking or guaranty of a corporate surety holding a certificate of authority from the Secretary of the Treasury; or (3) the undertaking or guaranty of two individual residents of the district in which the case is pending, each of whom owns real or personal property within the district worth double the amount of the bond, undertaking or stipulation, over all his or her debts and liabilities, and over all obligations assumed by said surety on other bonds, undertakings or stipulations, and exclusive of all legal exemptions.

(c) Except as otherwise provided by law, all bonds, undertakings and stipulations of corporate sureties holding certificates of authority from the Secretary of the Treasury, where the amount of such bonds or undertakings has been fixed by a Judge or by court rule or statute, may be approved by the Clerk.

(d) In the case of a bond, or undertaking, or stipulation executed by individual sureties, each surety shall attach the surety's affidavit of justification, giving the surety's full name, occupation, residence and business addresses, and showing that the surety is qualified as an individual surety under paragraph (b) of this rule.

(e) Members of the bar who have appeared in the case shall not act as a surety in the case. Administrative officers and employees of the Court, the marshal, and the marshal's deputies and assistants, shall not act as a surety in any suit, action or proceeding pending in this Court.

(f) Whenever a notice of motion to enforce the liability of a surety upon a bond is served upon the Clerk pursuant to Fed. R. Civ. P. 65.1 or Fed. R. App. P. 8(b), the party making such motion shall deposit with the clerk the original, three copies, and one additional copy for each surety to be served.

COMMITTEE NOTE

Local Civil Rule 65.1.1 contains useful provisions concerning sureties which supplement the provisions of Fed. R. Civ. P. 65(c) and 65.1. The Committee recommends that Local Civil Rule 65.1.1(f) be broadened to encompass proceedings to enforce the liability of sureties under Fed. R. Civ. P. 65.1 as well as under Fed. R. App. P. 8(b).

Local Civil Rule 67.1. Order for Deposit in Interest-Bearing Account

(a) Whenever a party seeks a court order for money to be deposited by the Clerk in an interest-bearing account, the party shall file the proposed order. The Clerk shall inspect the proposed order for proper form and content and compliance with this rule prior to submission to the Judge for signature.

(b) Proposed orders directing the Clerk to invest such funds in an interest-bearing account or other instrument shall include the following:

(1) The exact United States dollar amount of the principal sum to be invested; and

(2) Wording which directs the Clerk to deduct from the income on the investment a fee consistent with that authorized by the Judicial Conference of the United States and set by the Director of the Administrative Office.

(c) Unless otherwise ordered by the court, interpleader funds shall be deposited in the Disputed Ownership Fund in an interest bearing account. Income generated from fund investments in each case will be distributed after the appropriate fee has been applied and tax withholdings have been deducted from the fund.

COMMITTEE NOTE

Local Civil Rule 67.1 contains useful provisions concerning orders for the deposit of money into interest-bearing accounts which supplement the provisions of Fed. R. Civ. P. 67(a). The Committee recommends a clarifying change to Local Civil Rule 67.1(a) in order to make clear that what is required is delivery of the proposed order directly to the Clerk or the Financial Deputy, not personal delivery to them in the sense of hand delivery.

2018 COMMITTEE NOTE

Local Civil Rule 67.1 contains practical provisions concerning orders for the deposit of money into interest-bearing accounts which supplement the provisions of Fed. R. Civ. P. 67(a). The Committee recommends revision to Local Civil Rule 67.1(a) to conform to the new requirement for the electronic filing and subsequent processing of a proposed order for the deposit of funds. The Committee recommends revision to Local Civil Rule 67.1(b)(2) for consistency with S.D.N.Y. Standing

Order M10-1468 [11-MC-173 (LAP)]. The Committee recommends the addition of Local Civil Rule 67.1(c) in order to address the tax administration requirements for certain Court Registry interpleader funds deposited pursuant to 28 U.S.C. § 1335.

Local Civil Rule 72.1. Powers of Magistrate Judges

In addition to other powers of Magistrate Judges:

(a) Full-time Magistrate Judges are hereby specially designated to exercise the jurisdiction set forth in 28 U.S.C. § 636(c).

(b) Magistrate Judges are authorized to entertain *ex parte* applications by appropriate representatives of the United States government for the issuance of administrative inspection orders or warrants.

(c) Magistrate Judges may issue subpoenas, writs of *habeas corpus ad testificandum* or *ad prosequendum* or other orders necessary to obtain the presence of parties or witnesses or evidence needed for court proceedings, and may sign in forma pauperis orders.

(d) Matters arising under 28 U.S.C. §§ 2254 and 2255 or challenging the conditions of the confinement of prisoners may be referred to a Magistrate Judge by the District Judge to whom the case has been assigned. A Magistrate Judge may perform any or all of the duties imposed upon a District Judge by the rules governing such proceedings in the United States district courts. In so doing, a Magistrate Judge may issue any preliminary orders and conduct any necessary evidentiary hearing or other appropriate proceeding and shall submit to a District Judge a report containing proposed findings of fact and recommendations for disposition of the matter by the District Judge.

COMMITTEE NOTE

Local Civil Rule 72.1 confirms and continues the Courts' intent to give their Magistrate Judges the maximum powers authorized by law. Local Civil Rule 72.1(a) is necessary in order to authorize full-time Magistrate Judges to exercise the consent jurisdiction conferred by 28 U.S.C. § 636(c)(1). Local Civil Rule 72.1(b) and (c) confer useful administrative powers upon Magistrate Judges. Although Local Civil Rule 72.1(d) may be unnecessary in light of 28 U.S.C. § 636(b)(1)(B), the Committee decided that it would be prudent to retain it in order to avoid any possible question on this

point. The final sentence of Local Civil Rule 72.1(d) seems unnecessary in light of the sentence preceding it.

Local Civil Rule 72.2. Reference to Magistrate Judge (Eastern District Only)

A Magistrate Judge shall be assigned to each case upon the commencement of the action, except in those categories of actions set forth in Local Civil Rule 16.1. In any courthouse in this District in which there is more than one Magistrate Judge such assignment shall be at random on a rotating basis. Except in multi-district cases and antitrust cases, a Magistrate Judge so assigned is empowered to act with respect to all non-dispositive pretrial matters unless the assigned District Judge orders otherwise.

COMMITTEE NOTE

Local Civil Rule 72.2 sets forth the practices governing the automatic assignment of Magistrate Judges to cases in the Eastern District of New York. Local Civil Rule 72.2(b) is unnecessary in light of the modern practice of electronic filing of orders, and the Committee recommends its deletion.

Local Civil Rule 73.1. Consent Jurisdiction Procedure

(a) When a civil action is filed with the Clerk, the Clerk shall give the filing party notice of the Magistrate Judge's consent jurisdiction in a form approved by the Court, with sufficient copies to be served with the complaint on adversary parties. A copy of such notice shall be attached to any third-party complaint served by a defendant.

(b) When a completed consent form has been filed, the Clerk shall forward the form for final approval to the District Judge to whom the case was originally assigned. Once the District Judge has approved the transfer and returned the consent form to the Clerk for filing, the clerk shall reassign the case for all purposes to the Magistrate Judge previously designated to receive any referrals or to whom the case has previously been referred for any purpose, except that, in the Eastern District of New York, upon application of the parties, the Clerk shall select a new Magistrate Judge at random. If no

designation or referral has been made, the Clerk shall select a new Magistrate Judge at random.

COMMITTEE NOTE

The Committee believes that Local Civil Rule 73.1(a) continues to serve a useful function by focusing the attention of the parties at the outset of the case upon the consent jurisdiction of the Magistrate Judges. The Committee proposes a rewording of Local Civil Rule 73.1(b) for purposes of clarification; no change in meaning is intended.

Local Civil Rule 77.1. Submission of Orders, Judgments and Decrees

Proposed orders, judgments and decrees shall be presented as directed by the ECF rules published on the website of each respective Court. Unless the form of order, judgment or decree is consented to in writing, or unless the Court otherwise directs, four (4) days' notice of settlement is required. One (1) day's notice is required of all counter-proposals.

COMMITTEE NOTE

The Committee recommends the deletion of Local Civil Rule 77.1(b), whose provisions have been overtaken by the age of electronic filing. The Committee recommends the retention of Local Civil Rule 77.1(a), which is necessary to specify the timing of the submission of proposed orders, judgments, and decrees.

2018 COMMITTEE NOTE

Local Rule 77.1 is revised to be consistent with ECF Rules and practice.

Local Civil Rule 81.1. Removal of Cases from State Courts

If the Court's jurisdiction is based upon diversity of citizenship, and regardless of whether or not service of process has been effected on all parties, the notice of removal shall set forth (1) in the case of each individual named as a party, that party's residence and domicile and any state or other jurisdiction of which that party is a citizen for purposes of 28 U.S.C. § 1332; (2) in the case of each party that is a partnership, limited liability partnership, limited liability company, or other unincorporated association, like information for all of its partners or members, as well as the state or other jurisdiction of its formation; (3) in the case of each party that is a corporation, its state or other

jurisdiction of incorporation, principal place of business, and any state or other jurisdiction of which that party is a citizen for purposes of 28 U.S.C. § 1332; (4) in the case of an assigned claim, corresponding information for each original owner of the claim and for each assignee; and (5) the date on which each party that has been served was served. If such information or a designated part is unknown to the removing party, the removing party may so state, and in that case plaintiff within twenty-one (21) days after removal shall file in the office of the Clerk a statement of the omitted information.

COMMITTEE NOTE

The Committee recommends the deletion of Local Civil Rule 81.1(b), because 28 U.S.C. § 1446(a) already provides that the removing party or parties shall file with the notice of removal "a copy of all process, pleadings, and orders served upon such defendant or defendants in such action." The Committee recommends that Local Civil Rule 81.1(a) be reworded, in the same manner as Local Civil Rule 26.1, to describe with greater specificity the information needed to assess the presence of diversity jurisdiction.

Local Civil Rule 83.1. Transfer of Cases to Another District

In a case ordered transferred from this District, the Clerk, unless otherwise ordered, shall upon the expiration of seven (7) days effectuate the transfer of the case to the transferee court.

COMMITTEE NOTE

Local Civil Rule 83.1 needs to be reworded, because the transfer of cases is normally carried out today electronically rather than by mail. On balance, the Committee believes that the seven-day waiting period in Local Civil Rule 83.1 should be retained, in order to allow the party opposing transfer the same opportunity as the current rule affords to seek rehearing or appellate review.

Local Civil Rule 83.2. Settlement of Actions by or on Behalf of Infants or Incompetents, Wrongful Death Actions, and Actions for Conscious Pain and Suffering of the Decedent

(a) Settlement of Actions by or on Behalf of Infants or Incompetents.

(1) An action by or on behalf of an infant or incompetent shall not be settled or compromised, or voluntarily discontinued, dismissed or terminated, without leave of the Court

embodied in an order, judgment or decree. The proceeding upon an application to settle or compromise such an action shall conform, as nearly as may be, to the New York State statutes and rules, but the Court, for cause shown, may dispense with any New York State requirement.

(2) The Court shall authorize payment to counsel for the infant or incompetent of a reasonable attorney's fee and proper disbursements from the amount recovered in such an action, whether realized by settlement, execution or otherwise and shall determine the said fee and disbursements, after due inquiry as to all charges against the fund.

(3) The Court shall order the balance of the proceeds of the recovery or settlement to be distributed as it deems may best protect the interest of the infant or incompetent.

(b) Settlement of Wrongful Death Actions and Actions for Conscious Pain and Suffering of the Decedent.

In an action for wrongful death or conscious pain and suffering of the decedent:

(1) Where required by statute or otherwise, the Court shall apportion the avails of the action, and shall approve the terms of any settlement.

(2) The Court shall approve an attorney's fee only upon application in accordance with the provisions of the New York State statutes and rules.

COMMITTEE NOTE

The Committee believes that paragraph (b) of this Local Civil Rule should logically apply to actions for conscious pain and suffering of the decedent as well as to wrongful death actions, and therefore recommends that the present distinction between the Southern and Eastern District versions of the Local Rule in this regard be eliminated.

Local Civil Rule 83.3. Habeas Corpus

Unless otherwise provided by statute, applications for a writ of habeas corpus made by persons under the judgment and sentence of a court of the State of New York shall be filed, heard and

determined in the District Court for the district within which they were convicted and sentenced; provided, however, that if the convenience of the parties and witnesses requires a hearing in a different district, such application may be transferred to any district which is found by the assigned Judge to be more convenient. The Clerks of the Southern and Eastern District Courts are authorized and directed to transfer such applications to the District herein designated for filing, hearing and determination.

COMMITTEE NOTE

The Committee believes that this Local Civil Rule performs a very useful function by establishing a presumptive rule that habeas corpus applications shall be filed, heard, and determined in the district within which conviction and sentencing occurred.

Local Civil Rule 83.4. Publication of Advertisements [formerly Local Civil Rule 83.6]

(a) Unless otherwise provided by statute, rule, or order of the Court, all advertisements except notices of sale of real estate or of any interest in land shall be published in a newspaper which has a general circulation in this district or a circulation reasonably calculated to give public notice of a legal publication. The Court may direct the publication of such additional advertisement as it may deem advisable.

(b) Unless otherwise ordered, notices for the sale of real estate or of any interest in land shall be published in a newspaper of general circulation in the county in which the real estate or the land in question is located.

COMMITTEE NOTE

This Local Civil Rule continues to be useful in foreclosure and execution cases. The Committee recommends that new introductory language be added to recognize that other means of notice may be authorized by such provisions as Rule G(4)(a)(iv) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, which became effective in 2007.

Local Civil Rule 83.5. Notice of Sale [formerly Local Civil Rule 83.7]

In any civil action, the notice of any proposed sale of property directed to be made by any order

or judgment of the Court, unless otherwise ordered by the Court, need not set out the terms of sale specified in the order or judgment, and the notice will be sufficient if in substantially the following form:

UNITED STATES DISTRICT COURT

……..DISTRICT OF NEW YORK

[Docket No. and Judge's Initials]

[CAPTION],

NOTICE OF SALE

Pursuant to .....(Order or Judgment)..... of the United States District Court for the ..... District of New York, filed in the office of the clerk on .....(Date)..... in the case entitled .....(Name and Docket Number)..... the undersigned will sell at .....(Place of Sale)..... on .....(Date and Hour of Sale)..... the property in said .....(Order or Judgment)..... described and therein directed to be sold, to which .....(Order or Judgment)..... reference is made for the terms of sale and for a description of the property which may be briefly described as follows:

Dated:

_____

Signature and Official Title

The notice need not describe the property by metes and bounds or otherwise in detail and will be sufficient if in general terms it identifies the property by specifying its nature and location. However, it shall state: the approximate acreage of any real estate outside the limits of any town or city; the street, lot and block number of any real estate within any town or city; and a general statement of the character of any improvements upon the property.

COMMITTEE NOTE

As with Local Civil Rule 83.3, this Local Civil Rule continues to be useful in foreclosure and execution cases.

Local Civil Rule 83.6. Contempt Proceedings in Civil Cases [formerly Local Civil Rule 83.9]

(a) A proceeding to adjudicate a person in civil contempt, including a case provided for in Fed. R. Civ. P. 37(b)(1) and 37(b)(2)(A)(vii), shall be commenced by the service of a notice of motion or order to show cause. The affidavit upon which such notice of motion or order to show cause is based shall set out with particularity the misconduct complained of, the claim, if any, for damages occasioned thereby and such evidence as to the amount of damages as may be available to the moving party. A reasonable counsel fee, necessitated by the contempt proceedings, may be included as an item of damage. Where the alleged contemnor has appeared in the action by an attorney, the notice of motion or order to show cause and the papers upon which it is based may be served upon said attorney; otherwise service shall be made personally, together with a copy of this Local Civil Rule 83.6, in the manner provided for by the Federal Rules of Civil Procedure for the service of a summons. If an order to show cause is sought, such order may, upon necessity shown, embody a direction to the United States marshal to arrest the alleged contemnor and hold such person unless bail is posted in an amount fixed by the order, conditioned on the appearance of such person in all further proceedings on the motion, and further conditioned that the alleged contemnor will hold himself or herself amenable to all orders of the Court for surrender.

b) If the alleged contemnor puts in issue his or her alleged misconduct or the damages thereby occasioned, said person shall upon demand be entitled to have oral evidence taken, either before the Court or before a master appointed by the Court. When by law such alleged contemnor is entitled to a trial by jury, said person shall make written demand before the beginning of the hearing on the application; otherwise the alleged contemnor will be deemed to have waived a trial by jury.

(c) If the alleged contemnor is found to be in contempt of court, an order shall be entered (1) reciting or referring to the verdict or findings of fact upon which the adjudication is based; (2) setting forth the amount of damages, if any, to which the complainant is entitled; (3) fixing the fine, if any, imposed by the Court, which fine shall include the damages found and naming the person to whom such fine shall be payable; (4) stating any other conditions, the performance of which will operate to purge the contempt; and (5) directing, where appropriate, the arrest of the contemnor by the United States marshal and confinement until the performance of the condition fixed in the order and the payment of the fine, or until the contemnor be otherwise discharged pursuant to law. A certified copy of the order committing the contemnor shall be sufficient warrant to the marshal for the arrest and confinement of the contemnor. The complainant shall also have the same remedies against the property of the contemnor as if the order awarding the fine were a final judgment.

(d) If the alleged contemnor is found not guilty of the charges, said person shall be discharged from the proceedings and, in the discretion of the Court, may have judgment against the complainant for costs and disbursements and a reasonable counsel fee.

COMMITTEE NOTE

The Committee recommends the deletion of the second sentence of paragraph (c) of this Local Civil Rule on the ground that it is substantive rather than procedural in nature. See generally Armstrong v. Guccione, 470 F.3d 89 (2d Cir.), cert. denied, 552 U.S. 989 (2007).

Local Civil Rule 83.7. Court-Annexed Arbitration (Eastern District Only) [formerly Local Civil Rule 83.10]

(a) Certification of Arbitrators.

(1) The Chief Judge or a Judge or Judges authorized by the Chief Judge to act (hereafter referred to as the certifying Judge) shall certify as many arbitrators as may be determined to be necessary under this rule.

(2) An individual may be certified to serve as an arbitrator if he or she: (A) has been

for at least five years a member of the bar of the highest court of a state or the District of Columbia, (B) is admitted to practice before this court, and (C) is determined by the certifying Judge to be competent to perform the duties of an arbitrator.

(3) Each individual certified as an arbitrator shall take the oath or affirmation required by Title 28, U.S.C. § 453 before serving as an arbitrator.

(4) A list of all persons certified as arbitrators shall be maintained in the Office of the Clerk.

(b) Compensation and Expenses of Arbitrators. An arbitrator shall be compensated $250 for services in each case. If an arbitration hearing is protracted, the certifying Judge may entertain a petition for additional compensation. If a party requests three arbitrators then each arbitrator shall be compensated $100 for service. The fees shall be paid by or pursuant to the order of the Court subject to the limits set by the Judicial Conference of the United States.

(c) Immunity of Arbitrators. Arbitrators shall be immune from liability or suit with respect to their conduct as such to the maximum extent permitted by applicable law.

(d) Civil Cases Eligible for Compulsory Arbitration.

(1) The Clerk of Court shall, as to all cases filed after January 1, 1986, designate and process for compulsory arbitration all civil cases (excluding social security cases, tax matters, prisoners' civil rights cases and any action based on an alleged violation of a right secured by the Constitution of the United States or if jurisdiction is based in whole or in part on Title 28, U.S.C. § 1343) wherein money damages only are being sought in an amount not in excess of $150,000.00 exclusive of interest and costs.

(2) The parties may by written stipulation agree that the Clerk of Court shall designate and process for court-annexed arbitration any civil case that is not subject to compulsory arbitration hereunder.

(3) For purposes of this Rule only, in all civil cases damages shall be presumed to be not in excess of $150,000.00 exclusive of interest and costs, unless:

(A) Counsel for plaintiff, at the time of filing the complaint, or in the event of the removal of a case from state court or transfer of a case from another district to this Court, within thirty (30) days of the docketing of the case in this district, files a certification with the Court that the damages sought exceed $150,000.00, exclusive of interest and costs; or

(B) Counsel for a defendant, at the time of filing a counterclaim or cross-claim files a certification with the court that the damages sought by the counter-claim or cross-claim exceed $150,000.00 exclusive of interest and costs.

(e) Referral to Arbitration.

(1) After an answer is filed in a case determined eligible for arbitration, the arbitration clerk shall send a notice to counsel setting forth the date and time for the arbitration hearing. The date of the arbitration hearing set forth in the notice shall be approximately four months but in no event later than 120 days from the date the answer was filed, except that the arbitration proceeding shall not, in the absence of the consent of the parties, commence until 30 days after the disposition by the District Court of any motion to dismiss the complaint, motion for judgment on the pleadings, motion to join necessary parties, or motion for summary judgment, if the motion was filed during a time period specified by the District Court. The 120-day and 30-day periods specified in the preceding sentence may be modified by the court for good cause shown. The notice shall also advise counsel that they may agree to an earlier date for the arbitration hearing provided the arbitration clerk is notified with 30 days of the date of the notice. The notice shall also advise counsel that they have 90 days to complete discovery unless the Judge to whom the case has been assigned orders a shorter or longer period for

discovery. The Judge may refer the case to a Magistrate Judge for purposes of discovery. In the event a third party has been brought into the action, this notice shall not be sent until an answer has been filed by the third party.

(2) The Court shall, *sua sponte*, or on motion of a party, exempt any case from arbitration in which the objectives of arbitration would not be realized

(A) because the case involves complex or novel issues,

(B) because legal issues predominate over factual issues, or

(C) for other good cause.

Application by a party for an exemption from compulsory arbitration shall be made by written letter to the Court not exceeding three pages in length, outlining the basis for the request and attaching relevant materials, which shall be submitted no later than 21 days after receipt of the notice to counsel setting forth the date and time for the arbitration hearing. Within four days of receiving such a letter, any opposing affected party may submit a responsive letter not exceeding three pages attaching relevant materials.

(3) Cases not originally designated as eligible for compulsory arbitration, but which in the discretion of the assigned Judge, are later found to qualify, may be referred to arbitration. A U.S. District Judge or a U.S. Magistrate Judge, in cases that exceed the arbitration ceiling of $150,000 exclusive of interest and costs, in their discretion, may suggest that the parties should consider arbitration. If the parties are agreeable, an appropriate consent form signed by all parties or their representatives may be entered and filed in the case prior to scheduling an arbitration hearing.

(4) The arbitration shall be held before one arbitrator unless a panel of three arbitrators is requested by a party, in which case one of whom shall be designated as chairperson of the panel. If the amount of controversy, exclusive of interest and costs, is $5,000 or less, the

arbitration shall be held before a single arbitrator. The arbitration panel shall be chosen at random by the Clerk of the Court from the lawyers who have been duly certified as arbitrators. The arbitration panel shall be scheduled to hear not more than three cases.

(5) The Judge to whom the case has been assigned shall, 30 days prior to the date scheduled for the arbitration hearing, sign an order setting forth the date and time of the arbitration hearing and the names of the arbitrators designated to hear the case. If a party has filed a motion for judgment on the pleadings, summary judgment or similar relief, the Judge shall not sign the order before ruling on the motion, but the filing of such a motion on or after the date of the order shall not stay the arbitration unless the Judge so orders.

(6) Upon entry of the order designating the arbitrators, the arbitration clerk shall send to each arbitrator a copy of all pleadings, including the order designating the arbitrators, and the guidelines for arbitrators.

(7) Persons selected to be arbitrators shall be disqualified for bias or prejudice as provided in Title 28, U.S.C. § 144, and shall disqualify themselves in any action which they would be required under title 28, U.S.C. § 455 to disqualify themselves if they were a justice, judge, or magistrate.

(f) Arbitration Hearing.

(1) The arbitration hearing shall take place in the United States Courthouse in a courtroom assigned by the arbitration clerk on the date and at the time set forth in the order of the Court. The arbitrators are authorized to change the date and time of the hearing provided the hearing is commenced within 30 days of the hearing date set forth in the order of the Court. Any continuance beyond this 30 day period must be approved by the Judge to whom the case has been assigned. The arbitration clerk must be notified immediately of any continuance.

(2) Counsel for the parties shall report settlement of the case to the arbitration clerk and all members of the arbitration panel assigned to the case.

(3) The arbitration hearing may proceed in the absence of any party who, after notice, fails to be present. In the event, however, that a party fails to participate in the arbitration process in a meaningful manner, the Court may impose appropriate sanctions, including, but not limited to, the striking of any demand for a trial de novo filed by that party.

(4) Rule 45 of the Federal Rules of Civil Procedure shall apply to subpoenas for attendance of witnesses and the production of documentary evidence at an arbitration hearing under this Rule. Testimony at an arbitration hearing shall be under oath or affirmation.

(5) The Federal Rules of Evidence shall be used as guides to the admissibility of evidence. Copies or photographs of all exhibits, except those intended solely for impeachment, must be marked for identification and delivered to adverse parties at least fourteen (14) days prior to the hearing. The arbitrators shall receive exhibits in evidence without formal proof unless counsel has been notified at least seven (7) days prior to the hearing that the adverse party intends to raise an issue concerning the authenticity of the exhibit. The arbitrators may refuse to receive in evidence any exhibit, a copy or photograph of which has not been delivered to the adverse party as provided herein.

(6) A party may have a recording and transcript made of the arbitration hearing, but that party shall make all necessary arrangements and bear all expenses thereof.

(g) Arbitration Award and Judgment.

(1) The arbitration award shall be filed with the Court promptly after the hearing is concluded and shall be entered as the judgment of the Court after the 30 day period for requesting a trial de novo pursuant to Section (h) has expired, unless a party has demanded a trial de novo. The judgment so entered shall be subject to the same provisions of law and

shall have the same force and effect as a judgment of the Court in a civil action, except that it shall not be appealable. In a case involving multiple claims and parties, any segregable part of an arbitration award as to which an aggrieved party has not timely demanded a trial de novo shall become part of the final judgment with the same force and effect as a judgment of the Court in a civil action, except that it shall not be appealable.

(2) The contents of any arbitration award shall not be made known to any Judge who might be assigned the case,

(A) except as necessary for the Court to determine whether to assess costs or attorneys fees,

(B) until the District Court has entered final judgment in the action or the action has been otherwise terminated, or

(C) except for purposes of preparing the report required by section 903(b) of the Judicial Improvement and Access to Justice Act.

(3) Costs may be taxed as part of any arbitration award pursuant to 28 U.S.C. § 1920.

(h) Trial De Novo.

(1) Within 30 days after the arbitration award is entered on the docket, any party may demand in writing a trial de novo in the District Court. Such demand shall be filed with the arbitration clerk, and served by the moving party upon all counsel of record or other parties. Withdrawal of a demand for a trial de novo shall not reinstate the arbitrators' award and the case shall proceed as if it had not been arbitrated.

(2) Upon demand for a trial de novo and the payment to the Clerk required by paragraph (4) of this section, the action shall be placed on the calendar of the Court and treated for all purposes as if it had not been referred to arbitration, and any right of trial by jury that a party would otherwise have shall be preserved inviolate.

(3) At the trial de novo, the Court shall not admit evidence that there had been an arbitration proceeding, the nature or amount of the award, or any other matter concerning the conduct of the arbitration proceeding.

(4) Upon making a demand for trial de novo the moving party shall, unless permitted to proceed in forma pauperis, deposit with the Clerk of the Court an amount equal to the arbitration fees of the arbitrators as provided in Section (b). The sum so deposited shall be returned to the party demanding a trial de novo in the event that party obtains a final judgment, exclusive of interest and costs, more favorable than the arbitration award. If the party demanding a trial de novo does not obtain a more favorable result after trial or if the Court determines that the party's conduct in seeking a trial de novo was in bad faith, the sum so deposited shall be paid by the Clerk to the Treasury of the United States.

COMMITTEE NOTE

Because this Local Civil Rule has been recently reviewed and updated by the Court, the Committee has not undertaken to review it in detail.

Local Civil Rule 83.8. Court-Annexed Mediation (Eastern District Only) [formerly Local Civil Rule 83.11]

(a) Description. Mediation is a process in which parties and counsel agree to meet with a neutral mediator trained to assist them in settling disputes. The mediator improves communication across party lines, helps parties articulate their interests and understand those of the other party, probes the strengths and weaknesses of each party's legal positions, and identifies areas of agreement and helps generate options for a mutually agreeable resolution to the dispute. In all cases, mediation provides an opportunity to explore a wide range of potential solutions and to address interests that may be outside the scope of the stated controversy or which could not be addressed by judicial action. A hallmark of mediation is its capacity to expand traditional settlement discussions and broaden

resolution options, often by exploring litigant needs and interests that may be formally independent of the legal issues in controversy.

(b) Mediation Procedures.

(1) Eligible cases. Judges and Magistrate Judges may designate civil cases for inclusion in the mediation program, and when doing so shall prepare an order to that effect. Alternatively, and subject to the availability of qualified mediators, the parties may consent to participation in the mediation program by preparing and executing a stipulation signed by all parties to the action and so-ordered by the Court.

(A) Mediation deadline. Any court order designating a case for inclusion in the mediation program, however arrived at, may contain a deadline not to exceed six months from the date of entry on the docket of that order. This deadline may be extended upon motion to the Court for good cause shown.

(2) Mediators. Parties whose case has been designated for inclusion in the mediation program shall be offered the options of (a) using a mediator from the Court's panel, a listing of which is available in the Clerk's Office; (b) selecting a mediator on their own; or (c) seeking the assistance of a reputable neutral ADR organization in the selection of a mediator.

(A) Court's panel of mediators. When the parties opt to use a mediator from the Court's panel, the Clerk's Office will appoint a mediator to handle the case who (i) has been for at least five years a member of the bar of a state or the District of Columbia; (ii) is admitted to practice before this Court; and (iii) has completed the Court's requirements for mediator training and mediator expertise. If any party so requests, the appointed mediator also shall have expertise in the area of law in the case. The Clerk's Office will provide notice of their appointment to all counsel.

(B) Disqualification. Any party may submit a written request to the Clerk's

Office within fourteen days from the date of the notification of the mediator for the disqualification of the mediator for bias or prejudice as provided in 28 U.S.C. § 144. A denial of such a request by the Clerk's Office is subject to review by the assigned Judge upon motion filed within fourteen (14) days of the date of the Clerk's Office denial.

(3) Scheduling the mediation. The mediator, however chosen, will contact all attorneys to fix the date and place of the first mediation session, which shall be held within thirty days of the date the mediator was appointed or at such other time as the Court may establish.

(A) The Clerk's Office will provide counsel with copies of the Judge's order referring the case to the mediation program, the Clerk's Office notice of appointment of mediator (if applicable), and a copy of the program procedures.

(4) Written mediation statements. No less than fourteen (14) days prior to the first mediation session, each party shall submit directly to the mediator a mediation statement not to exceed ten pages double-spaced, not including exhibits, outlining the key facts and legal issues in the case. The statement will also include a description of motions filed and their status, and any other information that will advance settlement prospects or make the mediation more productive. Mediation statements are not briefs and are not filed with the Court, nor shall the assigned Judge or Magistrate Judge have access to them.

(5) Mediation session(s). The mediator meets initially with all parties to the dispute and their counsel in a joint session. The mediator may hold mediation sessions in his/her office, or at the Court, or at such other place as the parties and the mediator shall agree. At this meeting, the mediator explains the mediation process and gives each party an opportunity to explain his or her views about the matters in dispute. There is then likely to be discussion and questioning among the parties as well as between the mediator and the parties.

(A) Separate caucuses. At the conclusion of the joint session, the mediator will typically caucus individually with each party. Caucuses permit the mediator and the parties to explore more fully the needs and interests underlying the stated positions. In caucuses the mediator strives to facilitate settlement on matters in dispute and the possibilities for settlement. In some cases the mediator may offer specific suggestions for settlement; in other cases the mediator may help the parties generate creative settlement proposals.

(B) Additional sessions. The mediator may conduct additional joint sessions to promote further direct discussion between the parties, or she/he may continue to work with the parties in private caucuses.

(C) Conclusion. The mediation concludes when the parties reach a mutually acceptable resolution, when the parties fail to reach an agreement, on the date the Judge or Magistrate Judge specified as the mediation deadline in their designation order, or in the event no such date has been specified by the Court, at such other time as the parties and/or the mediator may determine. The mediator has no power to impose settlement and the mediation process is confidential, whether or not a settlement is reached.

(6) Settlement. If settlement is reached, in whole or in part, the agreement, which shall be binding upon all parties, will be put into writing and counsel will file a stipulation of dismissal or such other document as may be appropriate. If the case does not settle, the mediator will immediately notify the Clerk's Office, and the case or the portion of the case that has not settled will continue in the litigation process.

(c) Attendance at Mediation Sessions.

(1) In all civil cases designated by the Court for inclusion in the mediation program,

attendance at one mediation session shall be mandatory; thereafter, attendance shall be voluntary. The Court requires of each party that the attorney who has primary responsibility for handling the trial of the matter attend the mediation sessions.

(2) In addition, the Court may require, and if it does not, the mediator may require the attendance at the mediation session of a party or its representative in the case of a business or governmental entity or a minor, with authority to settle the matter and to bind the party. This requirement reflects the Court's view that the principal values of mediation include affording litigants with an opportunity to articulate their positions and interests directly to the other parties and to a mediator and to hear, first hand, the other party's version of the matters in dispute. Mediation also enables parties to search directly with the other party for mutually agreeable solutions.

(d) Confidentiality.

(1) The parties will be asked to sign an agreement of confidentiality at the beginning of the first mediation session to the following effect:

(A) Unless the parties otherwise agree, all written and oral communications made by the parties and the mediator in connection with or during any mediation session are confidential and may not be disclosed or used for any purpose unrelated to the mediation.

(B) The mediator shall not be called by any party as a witness in any court proceeding related to the subject matter of the mediation unless related to the alleged misconduct of the mediator.

(2) Mediators will maintain the confidentiality of all information provided to, or discussed with, them. The Clerk of Court and the ADR Administrator are responsible for program administration, evaluation, and liaison between the mediators and the Court and will

maintain strict confidentiality.

(3) No papers generated by the mediation process will be included in Court files, nor shall the Judge or Magistrate Judge assigned to the case have access to them. Information about what transpires during mediation sessions will not at any time be made known to the Court, except to the extent required to resolve issues of noncompliance with the mediation procedures. However, communications made in connection with or during a mediation may be disclosed if all parties and, if appropriate as determined by the mediator, the mediator so agree. Nothing in this section shall be construed to prohibit parties from entering into written agreements resolving some or all of the case or entering and filing with the Court procedural or factual stipulations based on suggestions or agreements made in connection with a mediation.

(e) Oath and Disqualification of Mediator.

(1) Each individual certified as a mediator shall take the oath or affirmation prescribed by 28 U.S.C. § 453 before serving as a mediator.

(2) No mediator may serve in any matter in violation of the standards set forth in 28 U.S.C. § 455. If a mediator is concerned that a circumstance covered by subparagraph (a) of that section might exist, e.g., if the mediator's law firm has represented one or more of the parties, or if one of the lawyers who would appear before the mediator at the mediation session is involved in a case on which an attorney in the mediator's firm is working, the mediator shall promptly disclose that circumstance to all counsel in writing. A party who believes that the assigned mediator has a conflict of interest shall bring this concern to the attention of the Clerk's Office in writing, within fourteen (14) days of learning the source of the potential conflict or the objection to such a potential conflict shall be deemed to have been waived. Any objections that cannot be resolved by the parties in consultation with the Clerk's Office

shall be referred to the Judge or Magistrate Judge who has designated the case for inclusion in the mediation program.

(3) A party who believes that the assigned mediator has engaged in misconduct in such capacity shall bring this concern to the attention of the Clerk's Office in writing, within fourteen (14) days of learning of the alleged misconduct or the objection to such alleged misconduct shall be deemed to have been waived. Any objections that cannot be resolved by the parties in consultation with the Clerk's Office shall be referred to the Judge who has designated the case for inclusion in the mediation program.

(f) Services of the Mediators.

(1) Participation by mediators in the program is on a voluntary basis. Each mediator shall receive a fee of $600 for the first four hours or less of the actual mediation. Time spent preparing for the mediation will not be compensated. Thereafter, the mediator shall be compensated at the rate of $250 per hour. The mediator's fee shall be paid by the parties to the mediation. Any party that is unable or unwilling to pay the fee may apply to the referring judge for a waiver of the fee, with a right of appeal to the district judge in the event the referral was made by a magistrate judge. Each member of the panel will be required to mediate a maximum of two cases pro bono each year, if requested by the Court. Attorneys serving on the Court's panel will be given credit for pro bono work.

(2) Appointment to the Court's panel is for a three year term, subject to renewal. A panelist will not be expected to serve on more than two cases during any twelve month period and will not be required to accept each assignment offered. Repeated rejection of assignments will result in the attorney being dropped from the panel.

(g) Immunity of the Mediators. Mediators shall be immune from liability or suit with respect to their conduct as such to the maximum extent permitted by applicable law.

COMMITTEE NOTE

Because this Local Civil Rule has been recently reviewed and updated by the Court, the Committee has not undertaken to review it in detail.

Local Civil Rule 83.9. Alternative Dispute Resolution (Southern District Only) [formerly Local Civil Rule 83.12]

(a) Alternative Dispute Resolution Options:

The U.S. District Court for the Southern District of New York provides litigants with opportunities to discuss settlement through judicial settlement conferences and mediation.

(b) Definition of Mediation

In mediation, parties and counsel meet, sometimes collectively and sometimes individually, with a neutral third party (the mediator) who has been trained to facilitate confidential settlement discussions. The parties articulate their respective positions and interests and generate options for a mutually agreeable resolution to the dispute. The mediator assists the parties in reaching their own negotiated settlement by defining the issues, probing and assessing the strengths and weaknesses of each party's legal positions, and identifying areas of agreement and disagreement. The main benefits of mediation are that it can result in an expeditious and less costly resolution of the litigation, and can produce creative solutions to complex disputes often unavailable in traditional litigation.

(c) Administration of the Mediation Program

(1) The Mediation Supervisor, appointed by the Clerk of the Court, shall administer the Court's mediation program. The Chief Judge shall appoint one or more District Judges or Magistrate Judges to oversee the program.

(2) The Mediation Supervisor, in consultation with other Court personnel, shall ensure that information about the Court's mediation program is available on the Court's website which will be updated as needed.

(3) The mediation program shall be governed by the "Procedures of the Mediation Program for the Southern District of New York," which sets forth specific and more detailed information regarding the mediation program, and which is available on the Court's official website (www.nysd.uscourts.gov) or from the Mediation Office.

(4) In no event is the scheduling of mediation to interfere with any scheduling order of the Court.

(d) Consideration of Alternative Dispute Resolution

In all civil cases, including those eligible for mediation pursuant to paragraph (e), each party shall consider the use of mediation or a judicial settlement conference and shall report to the assigned Judge at the initial Rule 16(b) case management conference, or subsequently, whether the party believes mediation or a judicial settlement conference may facilitate the resolution of the lawsuit. Judges are encouraged to note the availability of the mediation program and/or a judicial settlement conference before, at, or after the initial Rule 16(b) case management conference.

(e) Mediation Program Eligibility

(1) All civil cases other than social security, habeas corpus, and tax cases are eligible for mediation, whether assigned to Manhattan or White Plains.

(2) The Board of Judges may, by Administrative Order, direct that certain specified categories of cases shall automatically be submitted to the mediation program. The assigned District Judge or Magistrate Judge may issue a written order exempting a particular case with or without the request of the parties.

(3) For all other cases, the assigned District Judge or Magistrate Judge may determine that a case is appropriate for mediation and may order that case to mediation, with or without the consent of the parties, before, at, or after the initial Rule 16(b) case management conference. Alternatively, the parties should notify the assigned Judge at any time of their desire to mediate.

(f) Judicial Settlement Conferences

Judicial settlement conferences may be ordered by District Judges or Magistrate Judges with or without the request or consent of the parties.

COMMITTEE NOTE

Local Civil Rule 83.9 has been revised to refer to the "Procedures of the Mediation Program for the Southern District of New York." This revision is intended to increase flexibility in the administration of the Mediation Program. Local Civil Rule 83.9 has been revised to make clear that judicial settlement conferences are an available form of alternative dispute resolution.

Local Civil Rule 83.10 Plan for Certain § 1983 Cases Against the City of New York

(Southern District Only)

Supporting documents to the rule can be found at http://nysd.uscourts.gov/mediation.

Unless otherwise ordered, in civil cases filed by a represented plaintiff against the City of New York ("City") and/or the New York City Police Department ("NYPD") or its employees alleging the use of excessive force, false arrest, or malicious prosecution by employees of the NYPD in violation of 42 U.S.C. § 1983, the procedures set forth below shall apply, except that the procedures and Protective Order identified in paragraphs 3 through 12 shall not apply to class actions, actions brought by six or more plaintiffs, complaints requesting systemic equitable reform, or actions requesting immediate injunctive relief.

1. Service of Releases with Complaint

   a. At the same time that plaintiff serves the complaint, plaintiff must serve on the City the release annexed as Exhibit A ("§ 160.50 Release") for sealed arrest records for the arrest that is the subject of the complaint, and for a list of all prior arrests. In the case of class actions, plaintiff must serve § 160.50 Releases for the named putative class representatives.

b. If plaintiff seeks compensation for any physical or mental injury caused by the conduct alleged in the complaint other than "garden variety" emotional distress, plaintiff must serve on the City the medical release annexed as Exhibit B ("Medical Release") for all medical and psychological treatment records for those injuries at the same time that plaintiff serves the § 160.50 Release. Where plaintiff has a pre-existing physical or mental condition that reasonably appears to be related to the injury for which compensation is sought, plaintiff must at that same time serve Medical Releases on the City for all records of treatment for such pre-existing condition(s). Failure to so serve the above-described Medical Release(s) will constitute a waiver of plaintiff's claims for compensation for that physical or mental injury.

2. Failure to Serve § 160.50 Release

If no § 160.50 Release is served on the City with the complaint, the City will promptly send a letter to plaintiff's counsel requesting the § 160.50 Release and attaching a copy of Local Civil Rule 83.10.

3. Time to Answer

If the § 160.50 Release is served on the City at the time the complaint is first served on a defendant, that defendant will have 80 days from the date of such service to answer the complaint. Any subsequently-served defendant will have the greater of (i) 60 days or (ii) the date by which the first-served defendant must answer, to answer the complaint. If the § 160.50 Release is served on the City after the complaint is first served on a defendant, each defendant will have the greater of (i) 60 days from the date the § 160.50 Release is served on the City, or (ii) 60 days after that defendant is served, to answer the complaint. If any defendant moves to dismiss the entire complaint rather than filing an answer, the deadlines in this Rule shall be stayed unless the Court orders otherwise.

4. Rule 26(f) Conference, Initial Disclosures, and Applying for Exemption from the Rule

a. Within 14 days after the first defendant files its answer, the parties shall meet and confer pursuant to Fed. R. Civ. P. 26(f). The parties shall also discuss whether to request that the court (i) refer the case for settlement purposes to a magistrate judge; or (ii) exempt the case from Local Civil Rule 83.10. Any such application by a party must be submitted to the presiding judge no later than 21 days after the first defendant files its answer. Absent any such application from a party, the case shall automatically proceed under the Rule and shall automatically be referred to a mediator selected from the Southern District Mediation Panel.

b. Within 21 days after the first defendant files its answer, the parties shall exchange their initial disclosures.

5. Limited Discovery

Within 28 days after the first defendant files its answer, the parties must complete production of the following discovery. All other discovery is stayed. Unless otherwise ordered, the discovery stay shall expire at the conclusion of the mediation or settlement conference.

a. The City shall serve on plaintiff:

i. Subject to any applicable privileges, any items on the list attached as Exhibit C that were not part of the City's initial disclosures; documents received from the District Attorney's office; and documents obtained from the court file.

ii. Any CCRB records and the IAB closing report regarding the incident that forms the basis of the complaint. If the incident or the conduct of defendants involved in the incident is the subject of an ongoing CCRB investigation, NYPD investigation or disciplinary proceeding, criminal investigation or outstanding indictment or information, discovery under this paragraph shall be suspended, and the City will produce the investigative records 30 days after the investigation or

proceeding has been terminated (whether by completion of the investigation without charges being brought or by disposition of such charges). This suspension shall not apply to documents related to any investigation or proceeding that has concluded.

iii. For each defendant, the CCRB and CPI indices of complaints or incidents that are similar to the incident alleged in the complaint or that raise questions about the defendant's credibility. If the complaint alleges that a defendant officer used excessive force, the City will state whether that defendant officer has been or is on NYPD "force monitoring."

iv. For each officer named as a defendant, a list identifying all prior Section 1983 lawsuits filed against and served on the defendant.

v. Any records obtained by the City pursuant to the Medical Releases. Medical records received after this date shall be produced to plaintiff within 7 days of receipt.

b. Plaintiff shall serve on the City:

i. Any documents identified in Exhibit C; documents received from the District Attorney's office; and documents obtained from the court file.

ii. Any medical records for which plaintiff has served a Medical Release on the City.

iii. Any video and photographs of the incident.

6. Amended Pleadings

The complaint may be amended to name additional defendants without leave of the presiding judge within six weeks after the first defendant files its answer. The filing of the amended complaint shall not affect any of the duties imposed by Local Civil Rule 83.10.

7. Settlement Demand and Offer

Within six weeks after the first defendant files its answer, plaintiff must serve a written

settlement demand on the City. The City must respond in writing to plaintiff's demand within 14 days thereafter. The parties shall thereafter engage in settlement negotiations.

8. Mediation or Settlement Conference

Unless the presiding judge has referred the case to a magistrate judge to conduct a settlement conference, within 14 days after the first defendant files its answer, the Mediation Office will assign a mediator. The mediator shall promptly confer with counsel for the parties to schedule a mediation session to occur no later than 14 weeks after the first defendant files its answer. The mediator shall inform the Mediation Office no later than 60 days after the first defendant files its answer of the schedule for the mediation session. Unless the parties have filed a Stipulation of Dismissal with the Clerk of Court, the parties shall appear at the mediation session or at a settlement conference before a magistrate judge. The plaintiff shall attend the mediation or settlement conference. The City's representative must have full authority to settle the case; if the City requires additional approvals in order to settle, the City must have arranged for telephone access to such persons during the mediation or settlement conference.

9. Failure to Timely Comply with the Requirements of this Rule

If any party fails to comply with any requirement under this Rule, the other party shall promptly write to the presiding judge indicating the nature of the failure and requesting relief.

10. Request for Initial Pre-Trial Conference

Unless the presiding judge has already scheduled or held an initial pre-trial conference, if the mediation or settlement conference is unsuccessful, the parties shall promptly request that the presiding judge schedule an initial pre-trial conference.

11. Protective Order

The Protective Order attached as Exhibit D shall be deemed to have been issued in all cases governed by this Rule.

12. Preservation

Local Civil Rule 83.10 does not relieve any party of its obligation to preserve documents and to issue preservation instructions

LOCAL ADMIRALTY AND MARITIME RULES

Local Admiralty Rule A.1. Application of Rules

(a) These Local Admiralty and Maritime Rules apply to the procedure in the claims and proceedings governed by the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure.

(b) The Local Civil Rules also apply to the procedure in such claims and proceedings, except to the extent that they are inconsistent with the Supplemental Rules or with these Local Admiralty and Maritime Rules.

[Source: Former Local Admiralty Rule 1 and Supplemental Rule 1]

Local Admiralty Rule B.1. Affidavit That Defendant Is Not Found Within the District

The affidavit required by Supplemental Rule B(1) to accompany the complaint, and the affidavit required by Supplemental Rule B(2) (c), shall list the efforts made by and on behalf of the plaintiff to find and serve the defendant within the district.

[Source: Maritime Law Association Model Rule (b)(1)]

Local Admiralty Rule B.2. Notice of Attachment

The plaintiff shall give prompt notice to the defendant of an attachment following plaintiff's being advised of such an attachment by the garnishee. Such notice shall be in writing, and may be given by fax, email or other verifiable electronic means.

[Source: Former Local Admiralty Rule 10(b)]

Local Admiralty Rule C.1. Intangible Property

The summons issued pursuant to Supplemental Rule C(3)(c) shall direct the person having

control of freight or proceeds of property sold or other intangible property to show cause at a date which shall be at least fourteen (14) days after service (unless the court, for good cause shown, shortens the period) why the intangible property should not be delivered to the court to abide the judgment. The person who is served may deliver or pay over to the marshal the intangible property proceeded against to the extent sufficient to satisfy the plaintiff's claim. If such delivery or payment is made, the person served is excused from the duty to show cause.

[Source: Former Local Admiralty Rule 2]

Local Admiralty Rule C.2. Publication of Notice of Action and Arrest; Sale

(a) The notice required by Supplemental Rule C(4) shall be published at least once and shall contain (1) the fact and date of the arrest, (2) the caption of the case, (3) the nature of the action, (4) the amount demanded, (5) the name of the marshal, (6) the name, address, and telephone number of the attorney for the plaintiff, and (7) a statement that claimants must file their claims with the clerk of this court within fourteen (14) days after notice or first publication (whichever is earlier) or within such additional time as may be allowed by the court and must serve their answers within twenty one (21) days after the filing of their claims. The notice shall also state that all interested persons should file claims and answers within the times so fixed otherwise default will be noted and condemnation ordered.

(b) Except in the event of private sale pursuant to 28 U.S.C. §§ 2001 and 2004, or unless otherwise ordered as provided by law, notice of sale of the property after condemnation in suits in rem shall be published daily for at least six (6) days before sale.

[Source: Former Local Admiralty Rule 3(a), c]

Local Admiralty Rule C.3. Notice Required for Default Judgment in Action In Rem

(a) Notice Required in General. A party seeking a default judgment in an action in rem must satisfy the court that due notice of the action and arrest of the property has been given:

(1) By publication as required in Supplemental Rule C(4) and Local Admiralty Rule C.2;

(2) By service upon the master or other person having custody of the property; and

(3) By service under Federal Rule of Civil Procedure 5(b) upon every other person who has not appeared in the action and is known to have an interest in the property.

(b) Notice Required to Persons With Recorded Interests.

(1) If the defendant property is a vessel documented under the laws of the United States, plaintiff must attempt to notify all persons named in the certificate of ownership issued by the United States Coast Guard, or other designated agency of the United States, as holding an ownership interest in or as holding a lien in or as having filed a notice of claim of lien with respect to the vessel.

(2) If the defendant property is a vessel numbered as provided in 46 U.S.C. § 12301(a), plaintiff must attempt to notify the persons named in the records of the issuing authority.

(3) If the defendant property is of such character that there exists a governmental registry of recorded property interests or security interests in the property, the plaintiff must attempt to notify all persons named in the records of each such registry.

[Source: Maritime Law Association Model Rule (c)(3)]

Local Admiralty Rule D.1. Return Date in Possessory, Petitory, and Partition Actions

In an action under Supplemental Rule D, the court may order that the claim and answer be

filed on a date earlier than twenty one (21) days after arrest, and may by order set a date for expedited hearing of the action.

[Source: Maritime Law Association Model Rule (d)(1)]

Local Admiralty Rule E.1. Adversary Hearing Following Arrest, Attachment or Garnishment

The adversary hearing following arrest or attachment or garnishment that is called for in Supplemental Rule E(4)(f) shall be conducted by a judicial officer within seven (7) days, unless otherwise ordered.

[Source: Maritime Law Association Model Rule (e)(8)]

Local Admiralty Rule E.2. Intervenors' Claims

(a) Presentation of Claim. When a vessel or other property has been arrested, attached, or garnished, and is in the hands of the marshal or custodian substituted therefor, anyone having a claim against the vessel or property is required to present the claim by filing an intervening complaint, and not by filing an original complaint, unless otherwise ordered by a judicial officer. Upon the satisfaction of the requirements of Federal Rule of Civil Procedure 24, the clerk shall forthwith deliver a conformed copy of the complaint to the marshal, who shall deliver the copy to the vessel or custodian of the property. Intervenors shall thereafter be subject to the rights and obligations of parties, and the vessel or property shall stand arrested, attached, or garnished by the intervenor.

(b) Sharing Marshal's Fees and Expenses. An intervenor shall have a responsibility to the first plaintiff, enforceable on motion, consisting of the intervenor's share of the marshal's fees and expenses in the proportion that the intervenor's claim bears to the sum of all the claims. If a party plaintiff permits vacation of an arrest, attachment, or garnishment, remaining plaintiffs share the

responsibility to the marshal for the fees and expenses in proportion to the remaining claims and for the duration of the marshal's custody because of each claim.

[Source: Maritime Law Association Model Rule (e)(11)]

Local Admiralty Rule E.3. Claims by Suppliers for Payment of Charges

A person who furnishes supplies or services to a vessel, cargo, or other property in custody of the court who has not been paid and claims the right to payment as an expense of administration shall submit an invoice to the clerk in the form of a verified claim at any time before the vessel, cargo or other property is released or sold. The supplier must serve copies of the claim on the marshal, substitute custodian if one has been appointed, and all parties of record. The court may consider the claims individually or schedule a single hearing for all claims.

[Source: Maritime Law Association Model Rule (e)(12)(d)]

Local Admiralty Rule E.4. Preservation of Property

Whenever property is attached or arrested pursuant to the provisions of Supplemental Rule E(4)(b) that permit the marshal or other person having the warrant to execute the process without taking actual possession of the property, and the owner or occupant of the property is thereby permitted to remain in possession, the court, on motion of any party or on its own motion, may enter any order necessary to preserve the value of the property, its contents, and any income derived therefrom, and to prevent the destruction, removal or diminution in value of such property, contents and income.

LOCAL CRIMINAL RULES

Local Criminal Rule 1.1. Application of Rules

(a) These Local Criminal Rules apply in all criminal proceedings.

(b) In addition to Local Civil Rules referenced elsewhere in these Local Criminal Rules, the following Local Civil Rules also apply in criminal proceedings:

1.2. *Clerk's Office*

1.3. *Admission to the Bar*

1.4. *Withdrawal or Displacement of Attorney of Record*

1.5. *Discipline of Attorneys*

1.6. *Duty of Attorney in Related Cases* (to the extent cases may be considered related under the Courts' Rules (SDNY) or Guidelines (EDNY) for the Division of Business)

1.7. *Fees of Court Reporters*

1.8. *Photographs, Radio, Recordings, Television*

1.9 *Acceptable Substitutes for Affidavits*

5.2. *Electronic Service and Filing of Documents*

5.3. *Service by Overnight Delivery*

6.2. *Orders on Motions*

39.1. *Custody of Trial and Hearing Exhibits*

58.1. *Remand by an Appellate Court*

67.1. *Order for Deposit in Interest-Bearing Account.*

COMMITTEE NOTE

The titles of cross-referenced rules have been added for clarity. The parenthetical to Local Civil Rule 1.6 harmonizes that rule's otherwise broad concept of relatedness with the narrow concepts of relatedness specified in the Courts' Rules (SDNY) or Guidelines (EDNY)

for the Division of Business. Finally, the Committee believed it useful to add cross-references to Local Civil Rules 5.2, 5.3, 6.2, 58.1 and 67.1, since they address procedures useful in criminal as well as in civil proceedings.

Local Criminal Rule 1.2. Notice of Appearance

Attorneys representing defendants in criminal cases shall file a notice of appearance. Once a notice of appearance has been filed, the attorney may not withdraw except upon prior order of the Court pursuant to Local Civil Rule 1.4.

COMMITTEE NOTE

This rule, derived from former Local Criminal Rule 44.1, has been renumbered to place it in closer proximity to the cross-references in Local Criminal Rule 1.1 to admission to the bar and withdrawal from a case. Former Local Criminal Rule 44.1(b) has been stricken. That rule required attorneys to submit a certificate of good standing from at least one of the states in which the attorney was admitted and was intended to ensure that criminal defendants are in fact represented by admitted attorneys. However, the rule only required an attorney to submit such a certificate once and thus does not appear to serve a substantially different function from the provisions of Local Civil Rule 1.3 on admission to the bar. In addition, former Local Criminal Rule 44.1(b) did not appear to be enforced in practice.

Local Criminal Rule 12.4. Disclosure Statement

For purposes of Fed. R. Crim. P. 12.4 (b)(2), "promptly" shall mean "within fourteen (14) days," that is, parties are required to file supplemental disclosure statement within fourteen (14) days of the time there is any change in the information required in a disclosure statement filed pursuant to those rules.

Local Criminal Rule 16.1. Conference of Counsel

No motion addressed to a bill of particulars or any discovery matter shall be heard unless counsel for the moving party files in or simultaneously with the moving papers an affidavit certifying that counsel has conferred with counsel for the opposing party in an effort in good faith to resolve by agreement the issues raised by the motion without the intervention of the Court and has been unable to reach agreement. If some of the issues raised by the motion have been resolved by agreement, the

affidavit shall specify the issues remaining unresolved.

COMMITTEE NOTE

The rule was simplified to refer to "a bill of particulars or any discovery matter," and to make clear that the requisite certification could be filed as part of the motion papers.

Local Criminal Rule 23.1. Free Press-Fair Trial Directives

(a) It is the duty of the lawyer or law firm, and of non-lawyer personnel employed by a lawyer's office or subject to a lawyer's supervision, private investigators acting under the supervision of a criminal defense lawyer, and government agents and police officers, not to release or authorize the release of non-public information or opinion which a reasonable person would expect to be disseminated by means of public communication, in connection with pending or imminent criminal litigation with which they are associated, if there is a substantial likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

(b) With respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in or associated with the investigation (including government lawyers and lawyers for targets, subjects, and witnesses in the investigation) shall refrain from making any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers or otherwise to aid in the investigation, if there is a substantial likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the administration of justice.

(c) During a jury trial of any criminal matter, including the period of selection of the jury, no lawyer or law firm associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview relating to the trial or the parties or issues in the trial which a reasonable person

would expect to be disseminated by means of public communication if there is a substantial likelihood that such dissemination will interfere with a fair trial; except that the lawyer or the law firm may quote from or refer without comment to public records of the Court in the case.

(d) Statements concerning the following subject matters presumptively involve a substantial likelihood that their public dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice within the meaning of this rule:

(1) The prior criminal record (including arrests, indictments or other charges of crime), or the character or reputation of the accused, except that the lawyer or law firm may make a factual statement of the accused's name, age, residence, occupation and family status; and if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in the accused's apprehension or to warn the public of any dangers the accused may present;

(2) The existence or contents of any confession, admission or statement given by the accused, or the refusal or failure of the accused to make any statement;

(3) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

(4) The identity, testimony or credibility of prospective witnesses, except that the lawyer or law firm may announce the identity of the victim if the announcement is not otherwise prohibited by law;

(5) The possibility of a plea of guilty to the offense charged or a lesser offense;

(6) Information the lawyer or law firm knows is likely to be inadmissible at trial and would if disclosed create a substantial likelihood of prejudicing an impartial trial; and

(7) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

(e) Statements concerning the following subject matters presumptively do not involve a substantial likelihood that their public dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice within the meaning of this rule:

(1) An announcement, at the time of arrest, of the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit and use of weapons), the identity of the investigating and arresting officer or agency and the length of investigation;

(2) An announcement, at the time of seizure, stating whether any items of physical evidence were seized and, if so, a description of the items seized (but not including any confession, admission or statement);

(3) The nature, substance or text of the charge, including a brief description of the offense charged;

(4) Quoting or referring without comment to public records of the Court in the case;

(5) An announcement of the scheduling or result of any stage in the judicial process, or an announcement that a matter is no longer under investigation;

(6) A request for assistance in obtaining evidence; and

(7) An announcement, without further comment, that the accused denies the charges, and a brief description of the nature of the defense.

(f) Nothing in this rule is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile or other offenders, to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative or investigative bodies, or to preclude any lawyer from replying to charges of misconduct that are publicly made against said lawyer.

(g) All Court supporting personnel, including, among others, marshals, deputy marshals,

Court Clerks, bailiffs and Court reporters and employees or sub-contractors retained by the Court-appointed official reporters, are prohibited from disclosing to any person, without authorization by the Court, information relating to a pending grand jury proceeding or criminal case that is not part of the public records of the Court. The divulgence by such Court supporting personnel of information concerning grand jury proceedings, in camera arguments and hearings held in chambers or otherwise outside the presence of the public is also forbidden.

(h) The Court, on motion of either party or on its own motion, may issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury, the seating and conduct in the courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses and any other matters which the Court may deem appropriate for inclusion in such order. In determining whether to impose such a special order, the Court shall consider whether such an order will be necessary to ensure an impartial jury and must find that other, less extreme available remedies, singly or collectively, are not feasible or would not effectively mitigate the pretrial publicity and bring about a fair trial. Among the alternative remedies to be considered are: change of venue, postponing the trial, a searching voir dire, emphatic jury instructions, and sequestration of jurors.

(i) Any lawyer who violates the terms of this rule may be disciplined pursuant to Local Civil Rule 1.5.

COMMITTEE NOTE

This rule was the subject of substantial debate and compromise at the time of the 1997 revisions to the Local Rules. During the 2011 revision, the Committee, in the absence of intervening decisions substantially impacting the subject of the rule, decided not to recommend any changes to the rule.

Local Criminal Rule 34.1. Post-Trial Motions

Post-trial motions in criminal cases, including motions for correction or reduction of sentence

under Federal Rule of Criminal Procedure 35, or to suspend execution of sentence, or in arrest of judgment under Federal Rule of Criminal Procedure 34, shall be referred to the trial Judge. If the trial Judge served by designation and assignment under 28 U.S.C. §§ 291-296, and is absent from the district, such motions may be referred to that Judge for consideration and disposition.

Local Criminal Rule 45.1. Computation of Time

In computing any period of time prescribed or allowed by the Local Criminal Rules, the provisions of Federal Rule of Criminal Procedure 45 shall apply unless otherwise stated. In these Local Rules, as in the Federal Rules as amended effective December 1, 2009, Saturdays, Sundays, and legal holidays are no longer excluded in computing periods of time. If the last day of the period is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

COMMITTEE NOTE

Specific references to subsections (a) and (e) of Fed. R. Crim. P. 45, which have been re-lettered in any event, were deleted.

Local Criminal Rule 47.1. Applications for Ex Parte Orders

Any application for an ex parte order shall state whether a previous application for similar relief has been made and, if so, shall state (a) the nature of the previous application, (b) the judicial officer to whom such application was presented, and (c) the disposition of such application.

COMMITTEE NOTE

This rule, former Local Criminal Rule 1.2, was renumbered to associate it with the relevant Federal Rule of Criminal Procedure, Rule 47, *Motions and Supporting Affidavits*.

Local Criminal Rule 49.1. Service and Filing of Motion Papers

Unless otherwise provided by statute or rule, or unless otherwise ordered by the Court in a Judge's Individual Practices or in a direction in a particular case, upon any motion, the papers shall be served and filed as follows:

(a) All papers in support of the motion shall be filed and served by the moving party on all other parties that have appeared in the action.

(b) Any opposing papers shall be filed and served within fourteen (14) days after service of the motion papers.

(c) Any reply papers shall be filed and served within seven (7) days after service of the opposing papers.

(d) A motion for reconsideration or reargument of a Court order determining a motion shall be filed and served within fourteen (14) days after the Court's determination of the original motion. A memorandum setting forth concisely the matters or controlling decisions which counsel believes the Court has overlooked shall accompany the motion.

COMMITTEE NOTE

This rule, former Local Criminal Rule 12.1, was renumbered to associate it with the relevant Federal Rule of Criminal Procedure, Rule 49, *Serving and Filing Papers*. The phrase "filed and" was added to the text of subparts (a)-(c). Former subpart (d), relating to computation of time, was deleted as duplicative of Local Criminal Rule 45.1. A new subpart (d) was added to provide guidance regarding motions for reconsideration in criminal cases.

Local Criminal Rule 58.1. Petty Offenses--Collateral and Appearance

(a) A person who is charged with a petty offense as defined in 18 U.S.C. § 19, or with violating any regulation promulgated by any department or agency of the United States government, may, in lieu of appearance, post collateral in the amount indicated in the summons or other accusatory instrument, waive appearance before a United States Magistrate Judge, and consent to forfeiture of collateral.

(b) For all other petty offenses the person charged must appear before a Magistrate Judge.

COMMITTEE NOTE

This rule (formerly Local Criminal Rule 58.2) authorizes the forfeiture of collateral pursuant to Federal Rule of Criminal Procedure 58(d)(1).

Local Criminal Rule 59.1 Powers of Magistrate Judges

In addition to other powers of Magistrate Judges:

(a) Full-time Magistrate Judges are hereby specially designated to exercise the jurisdiction set forth in 18 U.S.C. § 3401, *Misdemeanors: application of probation laws.* Unless there is a pending related indictment before a District Judge, the Clerk shall automatically refer misdemeanor cases initiated by information or indictment or transferred to the district under Federal Rule of Criminal Procedure 20 to a Magistrate Judge for arraignment. A petition by the government that the trial of a misdemeanor proceed before a District Judge pursuant to 18 U.S.C. § 3401(f) shall be filed prior to arraignment of the defendant.

(b) Magistrate Judges are hereby authorized to exercise the jurisdiction set forth in 18 U.S.C. § 3184, *Fugitives from foreign country to United States.*

(c) Local Civil Rule 72.1, *Powers of Magistrate Judges*, also applies in criminal proceedings.

COMMITTEE NOTE

This rule, formerly Local Criminal Rule 58.1, has been redesignated Local Criminal Rule 59.1 to associate it with the relevant Federal Rule of Criminal Procedure, Rule 59, *Matters Before a Magistrate Judge*. The general statutory authority of Magistrate Judges is set forth in 28 U.S.C. § 636; however, certain provisions, including 18 U.S.C. §§ 3401 & 3184, and 28 U.S.C. § 636(c), require specific authorization by the District Court for the Magistrate Judge to exercise the designated authority. This rule, and Local Civil Rule 72.1, which new subpart (c) specifically makes applicable to criminal proceedings, confirm and continue the Courts' intent to give their Magistrate Judges the maximum powers authorized by law. For the sake of clarity, the titles of the statutes referenced in the rule have been added. Former subpart (c), relating to the power of Magistrate Judges to issue subpoenas and writs, has been stricken as duplicative–the same provision already appears in Local Civil Rule 72.1(c) and will thus continue to apply in criminal proceedings.

LOCAL PATENT RULES

Local Patent Rule 1. Application of Rules

(a) These Local Patent Rules apply to patent infringement, validity and unenforceability actions and proceedings. The Court may modify the obligations or deadlines set forth in these Local Patent Rules based on the circumstances of any particular case, including, without limitation, the simplicity or complexity of the case as shown by the patents, claims, technology, products, or parties involved.

(b) The Local Civil Rules also apply to such actions and proceedings, except to the extent they are inconsistent with these Local Patent Rules.

Local Patent Rule 2. Initial Scheduling Conference

When the parties confer pursuant to Fed. R. Civ. P. 26(f), in addition to the matters covered by Fed. R. Civ. P. 26, the parties must discuss and address in the report filed pursuant to Fed. R. Civ. P. 26(f):

i. any proposed modification of the deadlines or proceedings set forth in these Local Patent Rules;

ii. proposed format of and deadlines for claim construction filings and proceedings, including a proposal for any expert discovery the parties propose to take in connection therewith; and

iii. proposed format of and deadlines for service of infringement, invalidity and/or unenforceability contentions, including any proposed deadlines for supplementation thereof.

Local Patent Rule 3. Certification of Disclosures

All statements, disclosures, or charts filed or served in accordance with these Local Patent Rules

are deemed disclosures subject to Rule 26(g) of the Federal Rules of Civil Procedure.

Local Patent Rule 4. Admissibility of Disclosures

Statements, disclosures or charts governed by these Local Patent Rules are admissible to the extent permitted by the Federal Rules of Evidence or Civil Procedure. However, the statements and disclosures provided for in Local Patent Rule 11 are not admissible for any purpose other than in connection with motions seeking an extension or modification of the time periods within which actions contemplated by these Local Patent Rules shall be taken.

Local Patent Rule 5. Discovery Objections Based on Local Patent Rules

A party may object to a mandatory disclosure under Fed. R. Civ. P. 26(a) or to a discovery request as conflicting with or premature under these Local Patent Rules only if the mandatory disclosure or discovery request would require disclosure of information of the kind dealt with by Local Patent Rules 6, 7, 8, 10, 11 and 12.

Local Patent Rule 6. Disclosure of Asserted Claims and Infringement Contentions

Unless otherwise specified by the Court, not later than forty-five (45) days after the Initial Scheduling Conference, a party claiming patent infringement must serve on all parties a "Disclosure of Asserted Claims and Infringement Contentions," which identifies for each opposing party, each claim of each patent-in-suit that is allegedly infringed and each product or process of each opposing party of which the party claiming infringement is aware that allegedly infringes each identified claim.

Local Patent Rule 7. Invalidity Contentions

Unless otherwise specified by the Court, not later than forty-five (45) days after service of the "Disclosure of Asserted Claims and Infringement Contentions," each party opposing a claim of patent infringement must serve upon all parties its "Invalidity Contentions," if any. Invalidity Contentions must identify each item of prior art that the party contends allegedly anticipates or renders obvious each asserted claim, and any other grounds of invalidity, including any under 35 U.S.C. § 101 or § 112, or unenforceability of any of the asserted claims.

Local Patent Rule 8. Disclosure Requirement in Patent Cases Initiated by Declaratory Judgment

In all cases in which a party files a pleading seeking a declaratory judgment that a patent is not infringed, is invalid, or is unenforceable, Local Patent Rule 6 shall not apply with respect to such patent unless and until a claim for patent infringement of such patent is made by a party. If a party does not assert a claim for patent infringement in its answer to the declaratory judgment pleading, unless otherwise specified in the Court's Scheduling Order, the party seeking a declaratory judgment must serve upon all parties its Invalidity Contentions with respect to such patent that conform to Local Patent Rule 7 not later than forty-five (45) days after the Initial Scheduling Conference.

Local Patent Rule 9. Duty to Supplement Contentions

The duty to supplement in Fed. R. Civ. P. 26(e) shall apply to the Infringement Contentions and the Invalidity Contentions required by Local Patent Rules 6 and 7.

Local Patent Rule 10. Opinion of Counsel

Not later than thirty (30) days after entry of an order ruling on claim construction, each party

that will rely on an opinion of counsel as part of a defense to a claim of willful infringement or inducement of infringement, or that a case is exceptional, must produce or make available for inspection and copying the opinion(s) and any other documents relating to the opinion(s) as to which attorney-client or work product protection has been waived as a result of such production.

Local Patent Rule 11. Joint Claim Terms Chart

By a date specified by the Court, the parties shall cooperate and jointly file a Joint Disputed Claim Terms Chart listing the disputed claim terms and phrases, including each party's proposed construction, and cross-reference to each party's identification of the related paragraph(s) of the invalidity and/or infringement contention(s) disclosures under Local Rules 6 and 7.

Local Patent Rule 12. Claim Construction Briefing

Unless otherwise specified by the Court:

(a) Not later than thirty (30) days after filing of the Joint Disputed Claim Terms Chart pursuant to Local Patent Rule 11, the party asserting infringement, or the party asserting invalidity if there is no infringement issue present in the case, must serve and file an opening claim construction brief and all supporting evidence and testimony.

(b) Not later than thirty (30) days after service of the opening claim construction brief, the opposing party must serve and file a response to the opening claim construction brief and all supporting evidence and testimony.

(c) Not later than seven (7) days after service of the response, the opening party may serve and file a reply solely rebutting the opposing party's response.

RULES FOR THE DIVISION OF BUSINESS AMONG DISTRICT JUDGES

SOUTHERN DISTRICT

These rules are adopted for the internal management of the case load of the court and shall not be deemed to vest any rights in litigants or their attorneys and shall be subject to such amendments from time to time as shall be approved by the court.

Rule 1. Individual Assignment System

This court shall operate under an individual assignment system to assure continuous and close judicial supervision of every case. Each civil and criminal action and proceeding, except as otherwise provided, shall be assigned by lot to one judge for all purposes. The system shall be administered by an assignment committee in such a manner that all active judges, except the chief judge, shall be assigned substantially an equal share of the categories of cases of the court over a period of time. There shall be assigned or transferred to the chief judge such matters as the chief judge is willing and able to undertake, consistent with the chief judge's administrative duties.

Rule 2. Assignment Committee

An assignment committee is established for the administration of the assignment system. The committee shall consist of the chief judge and two other active judges selected by the chief judge, each to serve for one year. The chief judge shall also select two other active judges, each to serve for a period of one year, as alternate members of the committee.

The assignment committee shall supervise and rule upon all issues relating to assignments under this system, in accordance with these rules, as amended from time to time by the board of judges.

Rule 3. Part I

(a) Establishment of Part I

Part I is established for hearing and determining certain emergency and miscellaneous matters in civil and criminal cases. Judges shall choose assignment to Part I from an appropriate schedule, in order of their seniority, for periods not to exceed three weeks in each year. The judge(s) assigned full-time to White Plains do not sit in Part I in Manhattan. The assignment committee may, on consent of the judges affected, change such assignments, if necessary, to meet the needs of the court.

Part I shall be open from 9:00 a.m. to 5:00 p.m. Monday through Friday except on holidays. The judge presiding in Part I may fix such other times for any proceeding as necessary.

(b) Civil Proceedings in Part I

Admissions to the bar shall be heard in Manhattan on Tuesdays at 10:00 a.m. Admissions to the bar shall be held in White Plains on a schedule to be published annually. Civil matters other than emergencies shall be heard in Manhattan on Tuesdays at 11:00 a.m. Naturalization proceedings shall be conducted in Manhattan on Fridays at 11:00 a.m.

(i) Miscellaneous Civil Matters.

The judge presiding in Part I shall hear and determine those miscellaneous proceedings in civil matters not assigned to a judge.

(ii) Civil Emergency Matters.

The Part I judge shall hear and determine all emergency matters in civil cases which have been assigned to a judge when the assigned judge is absent or has expressly referred the matter to Part I only when that judge is unavailable due to extraordinary circumstances. In the absence of a judge at the White Plains Courthouse, emergency matters are heard in Part I at the Manhattan Courthouse. Depending on the procedures the Part I judge deems the more efficient, the Part I judge may either dispose of an emergency matter only to the extent

necessary to meet the emergency, or, on consent of the assigned judge and notice to the clerk, transfer the action to himself or herself for all further proceedings.

(iii) Subsequent Emergency Proceedings.

If a civil emergency matter is brought before the Part 1 judge and the judge concludes that for lack of emergency or otherwise the proceeding should not be determined in Part I, the party who brought the proceeding shall not present the same matter again to any other Part I judge unless relevant circumstances have changed in the interim in which case the party shall advise the judge of the prior proceedings and changed circumstances.

(iv) Modifications

When a modification or further action on a Part I determination is sought, it shall be referred in the first instance to the judge who made the original determination even though that judge is no longer sitting in Part I.

(c) Criminal Proceedings in Part I

The judge presiding in Part I shall:

(i) Hear and determine all emergency matters in criminal cases which have been assigned to a judge when the assigned judge is absent or has expressly referred the matter to Part I only when that judge is unavailable due to extraordinary circumstances. In the absence of a judge at the White Plains Courthouse, emergency matters are heard in Part I at the Manhattan Courthouse.

(ii) Hear and determine appeals from orders of a magistrate judge in cases that have not yet been assigned to a district judge.

Rule 4. Civil Actions or Proceedings (Filing and Assignment)

(a) Filing with the Clerk.

All civil actions and proceedings shall be numbered consecutively by year upon the filing of the first document in the case.

When a complaint or the first document is filed in a civil action or proceeding, counsel shall accurately complete and file form JS44C-SDNY: Civil Court Cover Sheet, in triplicate, consistent with Rule 18 below.

(b) Assignment by the Clerk by Lot.

Each civil action and proceeding, except applications for leave to proceed *in forma pauperis*, upon being filed and each appeal from the bankruptcy court upon being docketed in this court shall be assigned by lot within each designated category to a district judge for all purposes.

An action, case or proceeding may not be dismissed and thereafter refiled for the purpose of obtaining a different judge. If an action, case or proceeding, or one essentially the same, is dismissed and refiled, it shall be assigned to the same judge. It is the duty of every attorney appearing to bring the facts of the refiling to the attention of the clerk.

Rule 5. Criminal Actions or Proceedings (Filing and Assignment)

(a) Filing With the Clerk.

Criminal actions shall be numbered consecutively by year upon the filing of the indictment or information. The number of a superseding indictment or information shall be preceded by the letter "S".

When an indictment or information is filed, the United States Attorney shall simultaneously file the original and two copies of the indictment or information. The United States Attorney shall also supply form AO257: Defendant Information Relative to a Criminal Action and the Designation Form issued by the United States Attorney, in triplicate.

Rule 6. Criminal Proceedings

(a) Indictments designated for Manhattan may be returned by the grand jury in open court to the magistrate judge presiding in the criminal part. Indictments designated for White Plains may be returned by the grand jury to the magistrate judge presiding in the White Plains Courthouse.

(b) Assignments.

In a criminal case, after an indictment has been returned by the Grand Jury or a notice has been filed by the United States Attorney's Office of an intention to file an information upon the defendant's waiver of indictment, the magistrate judge on duty will randomly draw from the criminal wheel, in open court, the name of a judge to whom the case should be assigned for all purposes. The notice to file an information upon the defendant's waiver of indictment shall be signed by the Unites States Attorney's Office and by the defendant's attorney. Waiver of indictment cases will not be assigned a criminal docket number until the waiver has been accepted by the assigned judge. Sealed indictments will be assigned a criminal docket number upon filing, but a judge will not be selected until such time that the indictment is unsealed.

(c) Arraignments.

The United States Attorney's Office will promptly contact the judge to whom the case is assigned and request the scheduling of a pretrial conference at which the defendant will be arraigned.

(d) Waiver of Indictments.

When any person offers to waive indictment, the judge to whom the case has been assigned will conduct or refer to a magistrate judge such proceedings as may be required by law to establish that the waiver is both knowing and voluntary before an information is filed. The judge or the assigned magistrate judge shall then arraign the defendant. If the defendant fails to waive indictment and is subsequently indicted on the same or similar charges, the case shall be assigned by the clerk to the same judge to whom the original information was assigned.

(e) Assignment of Superseding Indictments and Informations.

An indictment or information designated by the grand jury or the United States Attorney as a superseding indictment or information will be assigned to the same judge to whom the original indictment or information was assigned and may not be reassigned from that judge except pursuant to the order of that judge or in the circumstances outlined in Rules 14 through 17. Any questions with respect to such designation as a superseding indictment or information shall be decided by that judge subject to appellate review where applicable. The judge may require the United States Attorney to explain in writing, either under seal or otherwise, the reasons for proceeding by superseding indictment or information before that judge rather than in another manner.

(f) With the exception of Rules 6(a) and 6(e), which apply in Manhattan and White Plains, this rule applies only to Manhattan. The judges in White Plains will continue to follow such procedures as they find convenient.

Rule 7. Cases Certified for Prompt Trial or Disposition

When the assignment committee certifies that a case requires extraordinary priority or a prompt trial or other disposition, it shall so advise the judge to whom the case has been assigned. The judge so assigned shall advise the assignment committee whether that judge can accord the case the required priority. In the event the judge so assigned advises the assignment committee that he or she cannot accord the required priority, the case shall immediately be assigned to another judge by lot and the same procedure followed until the case is assigned to a judge able to accord it the required priority. The name of the judge to be so assigned shall be drawn by lot in the same manner as other civil and criminal actions are initially assigned.

Rule 8. Criminal Motions

Motions in criminal actions shall be made returnable before the assigned judge at such time as that judge directs. Criminal motions must be made within the time required by the Federal Rules of Criminal Procedure and the Criminal Rules of this court.

Rule 9. Petitions for Collateral Relief from Convictions

(a) Federal Convictions.

When a motion for collateral relief under 28 U.S.C. § 2255 or an audita querellas is filed, it shall be assigned for all further proceedings to the judge to whom the underlying case was assigned. That judge may either act on the motion without responsive papers or advise the United States attorney of the date(s) when responsive papers are due.

When a motion under Fed. R. Crim. P. 41(g) for the return of property seized in a criminal case is filed, it shall be assigned for all further proceedings to the judge to whom the underlying case was assigned. The judge may either act on the motion without responsive papers or advise the United States attorney of the date(s) when responsive papers are due. Rule 41(g) motions that are filed after the related criminal case is closed, shall be opened as a new civil action, and all filings shall be docketed therein.

If the judge to whom the underlying case was assigned is unable to entertain the motion, the motion shall be assigned by lot, or to the Chief Judge where appropriate.

(b) State Convictions

When a *pro se* petition under 28 U.S.C. § 2254 for collateral relief from a state conviction is filed, the *Pro Se* Office shall first ascertain whether the petition is properly filed and, if not, the Office shall take proper steps to have it corrected. The *Pro Se* Office shall ascertain if the petition is related to any prior application and, if so, send a memorandum to that judge pursuant to Rule 13 of these

Rules for a determination on relatedness. If there was a related case but the judge to whom that case was assigned is unable or declines to entertain the petition, or if the petition is unrelated to any prior application, the petition shall be assigned pursuant to Rule 21 of these Rules, or to the Chief Judge where appropriate.

Rule 10. Assignments to New Judges

When a new judge is inducted, the assignment committee shall transfer to the new judge an equal share of all cases then pending (including cases on the suspense docket).

The cases shall be taken equally, by lot, from the dockets of each of the judges' most recent chronological list of cases which have been designated by the transferor as eligible for transfer, except if the Assignment Committee determines that the interests of court administration requires an alternative method of reassignment. No case shall be transferred without the consent of the transferor judge. The assignment committee shall also direct the clerk to add the name of the new judge to the random selection system for assigning new cases to active judges.

Rule 11. Assignments to Senior Judges

If a senior judge is willing and able to undertake assignment of new cases for all purposes, that judge shall advise the assignment committee of the number and categories of new cases which that judge is willing and able to undertake. New cases in the requested number in each category shall then be assigned to that judge in the same manner as new cases are assigned to active judges.

If a senior judge is willing and able to undertake assignment of pending cases from other judges, that judge may (1) accept assignment of all or any part of any case from any judge on mutual consent, or (2) advise the assignment committee of the number, status and categories of pending cases which

that judge is willing to undertake. Such cases will be drawn by lot from current lists provided to the assignment committee by the judges wishing to transfer cases under this rule. If a senior judge does not terminate any action so transferred, it shall be reassigned to the transferor judge.

Rule 12. Assignments to Visiting Judges

When a visiting judge is assigned to this district, that judge shall advise the assignment committee of the number and categories of pending cases which that judge is required or willing to accept. The assignment committee shall then transfer to that judge the required number of cases in each category with the consent of the transferor judge. If the visiting judge does not terminate the action, it shall be reassigned to the transferor judge.

Rule 13. Related Cases

(a) Determination of Relatedness

(1) General Rule. Subject to the limitations set forth below, a civil case, bankruptcy appeal, or motion to withdraw the bankruptcy reference will be deemed related to one or more civil cases, appeals or motions when the interests of justice and efficiency will be served. In determining relatedness, a judge will consider whether (A) the actions concern the same or substantially similar parties, property, transactions or events; (B) there is substantial factual overlap; (C) the parties could be subjected to conflicting orders; and (D) whether absent a determination of relatedness there would be a substantial duplication of effort and expense, delay, or undue burden on the Court, parties or witnesses. Bankruptcy appeals are deemed related if they arise from the same order or judgment of the bankruptcy court. Motions to withdraw the bankruptcy reference are deemed related if they seek withdrawal with respect to all or part(s) of the same adversary proceeding. Nothing in this Rule is intended to preclude parties from moving for consolidated proceedings under Fed. R. Civ. P. 42.

(2) Limitations on General Rule. Notwithstanding paragraph (a)(1):

(A) Civil cases shall not be deemed related merely because they involve common legal issues or the same parties.

(B) Other than cases subject to Rule 4(b) and actions seeking the enforcement of a judgment or settlement in or of an earlier case, civil cases presumptively shall not be deemed related unless both cases are pending before the Court (or the earlier case is on appeal).

(C) Criminal cases are not treated as related to civil cases. Criminal cases are not treated as related to each other unless a motion is granted for a joint trial.

(D) Bankruptcy appeals and motions to withdraw the reference are not treated as related merely because they arise from the same bankruptcy proceeding.

(b) Procedure in Regard to Cases Said to be Related

(1) Disclosure of contention of relatedness. When a civil case is filed or removed or a bankruptcy appeal or motion to withdraw the reference of an adversary proceeding from the bankruptcy court is filed, the person filing or removing shall disclose on form JSC44C any contention of relatedness and shall file a Related Case Statement stating clearly and succinctly the basis for the contention. A copy of the civil cover sheet and Related Case Statement shall be served with the complaint, notice of removal, notice of appeal, or motion. Any party may contest a claim of relatedness by any other in writing addressed to the judge having the case with the lowest docket number of all cases claimed to be related. However, the foregoing shall not delay the assignment process or the operation of this Rule.

(2) Assignment of cases that are designated as related. A case, bankruptcy appeal, or motion to withdraw the bankruptcy reference that is designated as related shall be forwarded to the judge before whom the allegedly related case, appeal or motion having the lowest docket number is or was pending, who shall decide whether to accept or reject the case. The decision of the judge with

the lowest docket number shall control unless the Assignment Committee determines otherwise, applying the standards of relatedness set forth in this Rule. The judge with the lowest docket number shall notify the Assignment Committee of his or her decision to accept or reject the case, appeal or motion and provide the Committee with the Related Case Statement and any submission in opposition to the contention that the cases are related. If the Assignment Committee does not concur with the judge's decision to accept the allegedly related case, appeal or motion, the matter shall be assigned by the Clerk by random selection.

(3) Claims of relatedness by other parties. A party other than the one filing a case, bankruptcy appeal or motion to withdraw the reference that contends its case is related to another may so advise in writing the judge assigned in its case and request a transfer of its case to the judge that the party contends has the related case with the lowest docket number. If the assigned judge believes the case is related under paragraph (a), he or she shall refer the question to the judge having the case with the lowest docket number. In the event the latter judge agrees, the case shall be transferred to that judge unless the Assignment Committee disagrees.

(c) Other Matters

(1) Motions in civil and criminal cases to consolidate, or for a joint trial, are regulated by the Federal Rules. A defendant in a criminal case may move on notice to have all of his or her sentences in this district imposed by a single judge. All such motions shall be noticed for hearing before the judge having the lowest docket number, with courtesy copies to be provided to the judge or judges having the cases with the higher docket numbers.

COMMITTEE NOTE

This rule authorizes the transfer of later-filed cases to the judge to whom an earlier-filed related case is assigned while recognizing the difficulty of formulating a definitive and entirely objective definition of "relatedness." It seeks to strike a balance between the benefits that may be achieved by avoiding unnecessary duplication of effort, expense and burden on the Court and parties through the assignment of related matters to a single judge and the desirability of enriching the development of the

law by having a plurality of judges examine in the first instance common questions of law. This rule is designed to be sufficiently specific to enable litigants to present, and judges to determine, issues of relatedness in a consistent manner.

Rule 14. Transfer of Cases by Consent

Any judge, upon written advice to the assignment committee, may transfer directly any case or any part of any case on that judge's docket to any consenting judge except where Rule 16 applies.

Rule 15. Transfers from Senior Judges

A senior judge may keep as much of his or her existing docket as that judge desires and furnish the assignment committee with a list of all cases which the judge desires to have transferred. The assignment committee will distribute the cases equally by lot to each active judge.

Rule 16. Transfer Because of Disqualification, etc.

If a judge is disqualified or if a judge has presided at a mistrial or former trial of the case, and requests reassignment, the assignment committee shall transfer the case by lot.

Rule 17. Transfer of Cases Because of a Judge's Death, Resignation, Prolonged Illness, Disability, Unavoidable Absence, or Excessive Backlog

The assignment committee shall, in the case of death or resignation, and may, in the event of a judge's prolonged illness, disability, unavoidable absence, or the build up of an excessive backlog, transfer any case or cases pending on the docket of that judge by distributing them to any judge or visiting judge willing to accept such case and thereafter, distributing them as equally as is feasible by lot, to all remaining active judges and to such senior judges who are willing and able to undertake them.

Rule 18. Designation of White Plains Cases

(a) Civil.

At the time of filing, the plaintiff's attorney shall designate on the civil cover sheet whether the case should be assigned to White Plains or Manhattan in accordance with these rules.

A civil case shall be designated for assignment to White Plains if:

(i) The claim arose in whole or in major part in the Counties of Dutchess, Orange, Putnam, Rockland, Sullivan and Westchester (the "Northern Counties") and at least one of the parties resides in the Northern Counties; or

(ii) The claim arose in whole or in major part in the Northern Counties and none of the parties resides in this District.

A civil case may also be designated for assignment to White Plains if:

(iii) The claim arose outside this district and at least some of the parties reside in the Northern Counties; or

(iv) At least half of the parties reside in the Northern Counties.

All civil cases other than those specified in the foregoing paragraphs (i), (ii), (iii), and (iv) and social security and habeas corpus petitions brought under 28 U.S.C. §2241 which are assigned on a district-wide basis shall be designated for assignment to Manhattan.

(b) Criminal.

The U.S. attorney designates on the criminal cover sheet that the case is to be assigned to White Plains if the crime was allegedly committed in whole or predominant part in the Northern Counties.

Defendants in any criminal case designated for White Plains may be arraigned at the White Plains Courthouse before a magistrate judge or a district judge.

Bail applications in any case designated for White Plains may be heard before a magistrate judge at White Plains, or, if unavailable, before a judge in White Plains, or a magistrate judge in Manhattan.

Rule 19. Reassignment of Cases to/from White Plains

If the Judge to whom the case is assigned believes that it should be assigned to the other courthouse under these rules, a request for reassignment shall be sent to the Assignment Committee, which shall determine if the case should be reassigned. If the case is reassigned, it will be reassigned as if it were a new filing, but will retain its original case number.

2018 COMMITTEE NOTE

Rule 19 is revised to require approval of the Assignment Committee before a case is reassigned to or from the White Plains courthouse.

Rule 20. Removed Actions and Bankruptcy Matters

Actions removed from a state court in New York County or Bronx County will be assigned to Manhattan. Actions removed from a state court in any of the other counties within the district will be assigned to White Plains. In either case, the attorney for the defendant may move for reassignment as provided in the section entitled Reassignment of Cases.

Bankruptcy appeals from the White Plains and Poughkeepsie bankruptcy courts are also assigned to White Plains.

Rule 21. Social Security Actions and *Habeas Corpus* Petitions

Social security cases and petitions for *habeas corpus* relief under 28 U.S.C. § 2241 shall be assigned proportionately to all judges of the Court, whether sitting in White Plains or Manhattan.

Habeas corpus petitions brought under 28 U.S.C. § 2254 shall be assigned as follows: where the *habeas corpus* petitions arise out of state convictions obtained in the counties of Westchester, Rockland, Putnam, Dutchess, Orange and Sullivan, the cases shall be assigned to

district judges assigned to White Plains; where the *habeas corpus* petitions arise out of state convictions obtained in the counties of Bronx and New York, the cases shall be assigned to district judges assigned to Manhattan.

Rule 22. Filing at Either Courthouse

Complaints and all subsequent papers are accepted at either courthouse, regardless of the place for which the case is designated.

GUIDELINES FOR THE DIVISION OF BUSINESS AMONG DISTRICT JUDGES

EASTERN DISTRICT

ADOPTED PURSUANT TO 28 U.S.C. § 137

These rules are adopted for the internal management of the case load of the court and shall not be deemed to vest any rights in litigants or their attorneys and shall be subject to such amendments from time to time as shall be approved by the court.

50.1 Categories and Classification of Cases; Information on Cases and Parties

(a) Categories of Cases.

Cases shall be divided into the following main categories:

(1) Civil.

(A) Regular.

(B) Multidistrict litigation.

(C) Patent.

(2) Criminal.

(3) Miscellaneous.

(b) Information Sheet.

The party filing the initial paper in a civil or criminal case shall complete and attach an information sheet. The information sheet shall be placed in the case file.

Where it appears to the Court that the filing party's reasons for joinder of parties are not apparent from the face of the complaint, the Clerk of Court is authorized to request a written explanation consistent with Federal Rule of Civil Procedure 19 and any other appropriate Federal Rule.

The response of the filing party will be docketed and a copy forwarded to the assigned judicial officer.

(c) Disclosure of Interested Parties.

To enable judges and magistrates to evaluate possible disqualification or recusal, counsel for a private (nongovernmental) party shall submit at the time of initial pleading a certificate identifying any corporate parent, subsidiaries, or affiliates of that party.

(d) Long Island Cases.

(1) A criminal case shall be designated a "Long Island case" if the crime was allegedly committed wholly or in substantial part in Nassau or Suffolk County.

2) A civil case shall be designated a Long Island case if:

a) the case has been removed to this Court from a New York State court located in Nassau or Suffolk County, or

b) in any other case,

i) a substantial part of the events or omissions giving rise to the claim or claims occurred in Nassau or Suffolk County, or

ii) a substantial part of the events or omissions giving rise to the claim or claims did not occur in the Eastern District of New York and the defendant (or a majority of the defendants if there is more than one) resides in Nassau or Suffolk County or, in an interpleader action, the claimant (or a majority of the claimants if there is more than one) resides in Nassau or Suffolk County.

For purposes of this rule, a corporation shall be considered a resident of the county in which it has the most significant contacts.

(3) As provided in 50.2(f) a party may move to designate a case as a Long Island case or to cancel such designation on the grounds that such action will serve the

convenience of the parties and witnesses or is otherwise in the interests of justice.

(e) Miscellaneous Cases.

All matters that do not receive a civil or criminal docket number shall be given a miscellaneous docket number and assigned as provided in 50.5 of these rules.

[Amended: September 9th, 2014]

50.2 Assignment of Cases

(a) Time of Assignment.

The clerk shall assign a civil case upon the filing of the initial pleading. In a criminal case after an indictment is returned or after an information (including a juvenile information under 18 U.S.C. § 5032) or a motion to transfer under 18 U.S.C. § 5032 has been filed, the United States Attorney shall refer the case to the clerk who shall then assign the case. The United States attorney shall arrange with the judge to whom the case is assigned, or if that judge is absent or unavailable as provided in 50.5, with the miscellaneous judge, to have the defendant arraigned and a plea entered as promptly as practicable.

(b) Random Selection Procedure.

All cases shall be randomly assigned by the clerk or his designee in public view in one of the clerk's offices in such a manner that each active judge shall receive as nearly as possible the same number of cases, except as provided in paragraph (h) Where a party or his counsel requests prior to selection that he or she be present at the selection, the clerk shall make reasonable efforts to comply with the request. In Brooklyn civil cases a magistrate judge shall be drawn at the same time and in the same manner as a judge. All Long Island civil cases shall be assigned to the Long Island magistrate judge. The parties to any Long Island case assigned to a Brooklyn judge may stipulate that the case be assigned to the Long Island magistrate judge, for pretrial purposes.

(c) Assignment of Civil Cases.

(1) There shall be separate Brooklyn and Long Island civil assignment wheels. At least quarterly the Chief Judge shall fix the proportion of cases to be assigned to the Long Island courthouses so as to distribute the civil cases relatively equally among all the active judges.

(2) There shall be separate patent assignment wheels for district judges and magistrate judges. A district judge or magistrate judge not in the patent assignment wheel who received a new patent case by random selection from the civil assignment wheel may elect, within thirty (30) days of assignment for district judges and seven (7) days of assignment for magistrate judges, to direct reassignment of the case. A new district or magistrate judge, or both, will then be assigned by random selection from the appropriate patent assignment wheel(s).

(d) Assignment of Criminal Cases.

(1) There shall be a Brooklyn criminal and a Long Island criminal assignment wheel.

(2) There shall be a Brooklyn and Long Island criminal misdemeanor assignment wheels for the random assignment of these matters to a magistrate.

(e) Place of Trial.

Except in emergencies a case shall be tried at the place to which it has been assigned.

(f) Objection.

Any objection by a party to designation of a judge or to place of trial shall be made by letter or motion to the judge assigned

(1) in a criminal case, within fourteen (14) days from arraignment or from initial notice of appearance, whichever is earlier; or

(2) in a civil case, within the time allowed to respond to the complaint.

(g) Special Cases.

(1) The miscellaneous judge shall send all narcotics addict commitment cases involving

"eligible individuals" as defined by 28 U.S.C. § 2901(g) to the clerk for assignment as provided in paragraph (b).

(2) *Pro se* applications or claims by persons in custody shall be filed without prepayment of fees upon receipt, prior to decision on their *in forma pauperis* petitions.

(3) Multidistrict litigation is to be assigned to the judge selected by the multidistrict litigation panel; subject to reassignment by the Chief Judge of the Eastern District of New York, according to the usual reassignment rules of the district, to adjust caseload distribution in the interests of justice.

(h) Chief Judge; Senior Judges; Temporarily Overloaded Judges; Notice of Removal from Wheel.

The chief judge and each senior judge shall indicate from time to time to the clerk the percentage of a full caseload that he or she elects to have assigned. The chief judge, with the consent of a judge, may remove that judge from any wheel temporarily to reduce the number of pending cases and prevent delay in the disposition of cases by a judge who is then overburdened by cases or due to ill health. The chief judge shall return that judge to the wheel only on consent of the judge. The clerk shall upon request inform any attorney or party of the identity of judges whose names have been removed from a wheel.

(i) Visiting Judge.

The chief judge shall approve the assignment or transfer of cases to a visiting judge.

(j) Proceedings After Assignment.

All proceedings in a case after assignment shall be conducted by the assigned judge, except as provided by these guidelines.

(k) Recusal.

A judge or magistrate judge may recuse himself or herself at any time in accordance with

28 U.S.C. § 455. This guideline takes precedence over any other guideline.

(l) Appeals-Assignment on Reversal or Remand.

(1) In a criminal case upon reversal of a judgment and a direction for retrial or resentence, on receipt of the mandate of the appellate court the clerk shall randomly select a different judge to preside over the case. Notwithstanding this provision the chief judge may order the case assigned to the original presiding judge to avoid placing an excessive burden on another judge.

(2) In a civil case upon reversal the case shall remain assigned to the judge who was previously assigned, unless the chief judge or his designee orders otherwise.

[Amended: January 10th, 2012]

50.3.1 Related Civil Cases

(a) "Related" Civil Case Defined. A civil case is "related" to another civil case for purposes of this guideline when, because of the similarity of facts and legal issues or because the cases arise from the same transactions or events, a substantial saving of judicial resources is likely to result from assigning both cases to the same judge and magistrate judge.

(b) Civil Cases Not Deemed "Related". A civil case shall not be deemed "related" to another civil case merely because the civil case: (A) involves identical legal issues, or (B) involves the same parties.

(c) Civil Cases Presumptively Not "Related": Unless Both Cases Are Still Pending.

Presumptively, and subject to the power of a judge to determine otherwise pursuant to paragraph (d), civil cases shall not be deemed to be "related" unless both cases are still pending before the court.

(d) Judicial Determination That Civil Cases Are "Related". Except for the cases

described in the final sentence of paragraph (e), all civil cases shall be randomly assigned when they are filed. Other than the cases described in the final sentence of paragraph (e), civil cases shall not be deemed to be "related" for purposes of this guideline at the instance of any litigant or attorney unless and until there has been a determination by a judge of this court that the standard of paragraph (a) is met, i.e., that because of the similarity of facts and legal issues or because the cases arise from the same transactions or events, a substantial saving of judicial resources is likely to result from assigning both cases to the same judge and magistrate judge. Any party may apply for such a determination by filing with the clerk a letter of no more than three single-spaced pages explaining why the standard of paragraph (a) is met and serving copies of the letter on all other parties. Such an application must be made after the date when at least a majority of the defendants have been served with the complaint, but not more than 30 days after that date unless the judge passing on the application permits a later filing for good cause shown. Before making such an application, the applicant must confer in good faith with all other parties in an effort to reach an agreement on whether or not the case is "related". After such an application is made, any other party may serve and file within seven (7) days a letter of no more than three single-spaced pages supporting or opposing the application. Any determination by a judge of this court that the standard of paragraph (a) is or is not met shall be made by a judge or judges designated by the chief judge, who shall not include the judge to whom the case has been randomly assigned or the judge to whom the case will be assigned if it is determined to be "related".

(e) Assignment of Related Cases. Cases which have been judicially determined to be related shall be assigned by the clerk to the judge to whom was assigned the case with the lowest docket number in the series of related cases. The clerk shall advise the judge of such assignment of a related case. In the interest of judicial economy, the following categories of civil cases shall be deemed to be "related" without further order of the court: (1) all habeas corpus petitions filed by the same

petitioner; (2) all pro se civil actions filed by the same individual; and (3) any other subject-matter category of cases where the chief judge finds that the standard of paragraph (a) is met.

(f) No Vested Rights. As stated in the Introduction to these Division of Business Rules, this rule is adopted for the internal management of the case load of the court and shall not be deemed to vest any rights in litigants or their attorneys and shall be subject to such amendments from time to time as shall be approved by the court. This rule shall not be deemed to prevent the reassignment of cases at the initiative of and by agreement of the judges involved.

[Amended: September 22, 2008]

50.3.2 Related Criminal Cases

(a) In General

(1) For purposes of this rule, a "case" refers to a criminal proceeding commenced by indictment or information. It does not include wiretap applications, motions in connection with grand jury proceedings, or ex parte motions made outside of a proceeding commenced by indictment or information.

(2) All criminal cases shall be randomly assigned upon filing.

(3) This rule shall not be deemed to prevent the reassignment of cases at the initiative of and by agreement of the judges involved.

(4) As stated in the Introduction to these Division of Business Rules, this rule is adopted for the internal management of the case load of the court and shall not be deemed to vest any rights in litigants or their attorneys and shall be subject to such amendments from time to time as shall be approved by the court.

(b) Relevant Considerations in Relating Cases

(1) There shall be a presumption that one case is "related" to another when the

facts of each arise out of the same charged criminal scheme(s), transaction(s), or event(s), even if different defendants are involved in each case.

(2) The presumption shall be overcome upon a determination by the relevant judges that reassignment would not achieve a significant savings of judicial resources or serve the interests of justice.

(3) In a case involving racketeering charges, the determination of whether that case should be related to another shall be made on the basis of the predicate acts charged, not the criminal enterprise.

(4) If a defendant has been convicted in more than one case and the sentences are pending before different judges, each of the pending sentences shall be imposed by a single judge determined by all of the relevant judges to be best suited to do so.

(c) Obligation of the United States Attorney's Office

(1) It is the affirmative obligation of the United States Attorney's Office ("USAO") to give notice to all relevant judges whenever it appears that one case may be presumptively related to another pursuant to Section (b)(1). Such notice shall be by letter and filed together with the indictment, information or Federal Criminal Rule 7(b) motion and addressed to each of the judges concerned. The letter shall set forth the facts relevant to deciding whether the indictment or information should be related to another case. The letter shall in addition state clearly whether its purpose is solely to provide notice to the Court under this rule, or whether the USAO seeks reassignment.

(2) The USAO may move for leave to file a notice required by the rule ex parte and under seal for good cause shown. The USAO shall promptly move to unseal the notice once the need for ex parte and sealed filing no longer exists. Absent leave of court, the USAO shall publicly file a notice indicating that an ex parte sealed filing pursuant to this rule is being

submitted.

(3) These obligations are continuing. The USAO should endeavor to provide notice that could avoid having two or more judges sentence different defendants or the same defendant in related cases.

(d) Input from Defendants

Any defendant may request reassignment to a judge whom the defendant contends has a case that is presumptively related pursuant to Section (b)(1). In addition, any defendant may request that a case previously assigned to a judge as related be reassigned to the original judge on the ground that it was not properly related. Such requests shall be made by filed letter in both cases, addressed to both judges.

(e) Joint Application for Reassignment

Nothing in this rule shall preclude the USAO and defendant from jointly seeking reassignment to another judge in the interests of justice or on the grounds that a significant savings of judicial resources would be achieved.

50.4 Reassignment of Cases

No case shall be reassigned except in the interest of justice and the efficient disposition of the business of the court. The chief judge may at any time, with the consent of the judges involved, reassign individual cases. Reassignment of cases to accommodate changes in the complement of judges shall be made in accordance with the order of the Board of Judges.

50.5 Miscellaneous Judge and Duty Magistrate Judge

(a) Duties and Functions of the Miscellaneous Judge

(1) All matters, including those requiring immediate action or brought as special proceedings which cannot be assigned in the ordinary course, shall be randomly assigned pursuant to the procedures set forth in 50.2(b) of these rules.

(2) The miscellaneous judge shall hear and determine matters requiring immediate action in cases already assigned to any judge of the court, if that judge is unavailable or otherwise unable to hear the matter only for such immediate emergency action. The matter or case will remain assigned to the judge originally selected at random.

(3) The miscellaneous judge shall preside over admissions to the bar and naturalization proceedings.

(b) Duties and Functions of the Duty Magistrate Judge

(1) Preside over the arraignment part;

(2) Empanel grand juries, receive indictments and enter presentment orders, refer criminal cases to the clerk for assignment pursuant to 50.2, and discharge grand juries;

(3) Decide requests to be excused from service on the grand and petit juries; and

(4) Preside over admissions to the bar and naturalization proceedings when requested.

(c) Limitation of Duties in Matters Already Assigned.

The miscellaneous judge shall dispose of matters under paragraph (a)(2) only to the extent necessary and shall continue the case before the assigned judge. All applications for emergency action or relief shall disclose any prior application to a judge for the same or related relief and the outcome thereof.

50.6 Calendars

(a) Numbers; Order of Cases.

The docket number of each case shall be the calendar number. No note of issue shall be

required to place the case on the calendar. Each judge shall dispose of cases assigned to him or her as required by law and the efficient administration of justice.

(b) Preferences.

Each judge shall schedule cases appearing on his or her docket in such order as seems just and appropriate, giving preference to the processing and disposition of the following:

(1) *habeas corpus* petitions and motions attacking a federal sentence;

(2) Proceedings involving recalcitrant witnesses before federal courts or grand juries, under 28 U.S.C. § 1846;

(3) Actions for temporary or preliminary injunctive relief; and

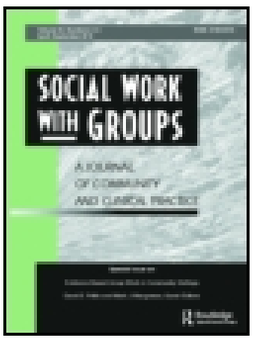
(4) Any other action if good cause is shown.

(c) Publication of Calendars.

Each court day the clerk shall post on bulletin boards throughout the courthouse and provide to legal newspapers for publication copies of the judges' calendars.

50.7 Conference

The judge assigned to any case may direct the attorneys to appear to discuss the case informally, to entertain oral motions, to discuss settlement, or to set a schedule for the events in the case, including completion of discovery, pretrial and trial.



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More Than Just Talk: The Use of Racial Dialogues to Combat Racism

Joshua Miller
Susan Donner

ABSTRACT. This article describes the use of structured, public conversations about race and racism, known as racial dialogues, as a means of responding to racism. The importance of understanding racial identity development and the dynamics of intergroup conflict when conducting racial dialogues is considered. Different models of racial dialogues are reviewed. The authors sponsored a racial dialogue at a school of social work that was tape-recorded and transcribed. Participants completed questionnaires. An analysis of the dialogue is presented and recommendations about the future use of racial dialogues are offered.

KEYWORDS. Racism, racial dialogue, racial identity, intergroup conflict, public conversations

I say hi to everybody, touch everybody, but that is normal. I don't even see what color you are when I do that. But when a white student comes up to me in the cafeteria, where I am sitting,

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> minding my own business, and a white student wants to talk about her burning issues of race, that is another level for me and I can't do that if I'm not in a good space . . . it is hard when I get angry and voice it: I am getting angry with the people who I love and kiss. That is a horrible feeling for me.
>
> –Latina Participant in Racial Dialogue

> I need to check my own internalized oppression and voice it. I need the opportunity to talk about how I feel and how offended I am by constant references to [white] people's privilege and safety that I don't ever have the safety to experience. I need to allow myself to be angry.
>
> –African-American Woman Participant in Racial Dialogue

> It's the longest process you are going to go through probably in your life, if you are really committed to it. It is unlearning something so codified in the culture. It is both interrupting a racist joke and making a racist joke and being interrupted and hearing that; somebody having the courage to say to me, 'you're screwing up.'
>
> –White Woman Participant in Racial Dialogue

INTRODUCTION

This article explores the use of racial dialogues: structured, public conversations about race and racism. As background, the article will consider how people form social identities, particularly racial identities, identify with social groups and how group conflict is one manifestation of racism in the United States. After considering different models of racial dialogues, the article describes and analyzes a racial dialogue sponsored by the authors at a school of social work, from which the opening quotes came. We will conclude with recommendations about the use of racial dialogues by social workers as a means of challenging oppression and working for social justice.

Racism in the United States is ubiquitous, complex and pernicious, an undeniable part of our past and a contested reality of today. It strongly determines where we live, our friends and neighbors, access to education, jobs and resources, and overall life chances and opportu-

nities. There are different views of what constitutes racism. Although there is variation within groups, whites often conceive of racism as individual acts of prejudice or egregious and blatant attacks or denial of rights, while people of color often view racism as a pervasive part of our social fabric, woven into culture, institutions, social structures and relationships, and both the collective and individual psyches of our nation (Akamatsu, 1998; Blauner, 1994; Shipler, 1997). In this paper, racism is defined as: The systematic subordination of members of targeted racial groups who have less political, social, and economic power in the United States (African Americans, Latinos/as, Native Americans, and Asian Americans–collectively referred to as people of color) by members of a privileged racial group (whites/Caucasians/ European descended) who have relatively more social power. This subordination is supported by actions of individuals, cultural norms and values, and institutional structures and practices of society (Wijeyesinghe, Griffin, & Love, 1997) and is based on assumptions of natural, invariant, biologically or culturally determined racial categories (Winant, 1998).

Underlying this definition are two assumptions. The first is that the notion of race as a social construction, not a biologically determined category. As the American Anthropological Association (AAA) concluded:

> Historical research has shown that the idea of race has always carried more meanings than mere physical differences: indeed physical variations in the human species have no meaning except the social ones that humans put on them. Today scholars in many fields argue that race as it is understood in the USA was a social mechanism invented during the 18th Century to refer to those populations brought together in Colonial America: the English and other European settlers, the conquered Indian peoples and those people of Africa brought to provide slave labor. (AAA statement on race, 1999: 712)

Race has always been a historical and legal creation, a category that is a repository of symbols, language and meanings that shift and mutate (Omi & Winant, 1994). The rights, privileges and burdens of being a member of this category of people have changed significantly over time. The second assumption is that although race is a social construction, racism is a concrete reality. Whether examining the dif-

ferential application of justice, unequal wealth and income, group differences in health and life expectancy, representation in the political system, access to high status jobs and industries, whites have a consistent advantage over other racial/ethnic groups (Council on Economic Advisors, 1998).

Given the dualistic nature of racism, a two-track approach is also called for when challenging it. Combating racism requires both challenging the social hierarchies and systems of privilege that sustain it while also challenging the attitudes and beliefs that support this system and which are derived from it. Racial dialogues, the focus of this paper, directly respond to individual and group racism but hopefully also lead to challenges against institutional racism. Social workers, obligated to contest racism by their code of ethics, are well suited to confront all levels and manifestations of racism by virtue of the emphasis on the person in their environment.

When writing about racism it is important to place one's self racially. Both authors are white although the work described in this article has been with a multi-racial coalition.

RACIAL DIALOGUES

Dialogues about race and racism offer individuals an opportunity to explore who they are in relation to others while also affording them the opportunity to ponder the meanings of their own and others' social identity and group membership. Racial dialogues are essentially structured conversations that encourage expressing one's self and listening to others talk about race and racism. It is hoped that by having direct, open, and honest contact there will be improved understanding and cooperation between groups (Bargal & Bar, 1994; Fisher, 1990; Lawson, Koman, & Rose, 1998; McCoy & Sherman, 1994; Norman, 1994). The learning that can result from such conversations can involve a better appreciation of differing historical and social circumstances, actions and behaviors, fears and grievances, and differences of opinion and interpretations of events (Becker, Chasin, Chasin, Herzig & Roth, 1995; Chasin, Herzig, Roth, Chasin, Becker & Stains, 1996; Fisher; Lawson et al.; Muldoon, 1997; Templegrove Action Research [TARL], 1996) Finally, improved understanding will hopefully lead to actions that will challenge racism in all of its forms (Study Circles, 1998b).

GROUP CONFLICT AS A MANIFESTATION OF RACISM

Racial dialogues engage people in a reflective process that responds to their social identities and group affiliations. These allegiances can anchor individuals but also be a source of group conflict (Group for The Advancement of Psychiatry [GAP], 1987). Therefore, it is helpful to briefly consider the dynamics of group conflict and the nature of social identity.

As a social construction, race reifies people into social categories, such as white/black or white/people of color. People identify with social groups but are also assigned to social groups based on assumptions about who they are. Whites often value a color-blind stance, in an earnest effort to transcend racism (Winant, 1998), yet colorblindness is a privilege, an illusion, which only whites can sustain.

Membership in racial groups is reinforced by the dynamics of group conflict and competition. Some theories of ethnic and racial group conflict stress the ''realistic'' nature of that conflict and examine areas where groups are in conflict with one another–housing, jobs, political power, control of schools (Bayor, 1988; Bodner, Weber, & Simon, 1988; Fisher, 1990). However, group conflict is not always or solely based on competition for resources and power. It can also be precipitated by attitudes and perceptions, even if groups have not had actual contact (Bayor, 1988). For example, Jews are targeted by neo-nazis in areas of the country, such as rural Idaho, that have few, if any, Jews. Whites form biased images about people of color from many sources other than direct contact, including history textbooks that gloss over white oppression and persistent negative media stereotypes (Shipler, 1997). Regardless of whether the prejudice stems from actual competition, negative attitudes, or a combination of both, it leads to poor intergroup relations (Miller, 1999; Taylor, 1998). Erikson (1968), among others, has postulated that group members gain from denigrating members of another group because they can project the negative aspects of their identity on to the others. The members of the other group become symbolic ''others,'' who are seen as being different, ''diabolical,'' morally deficient, less human (Fisher, 1990; GAP, 1987). Viewing members of another group as deficient can enhance the positive identities of members of the in-group (Triandafyllidou, 1998). Conflict with members of other groups can also enhance the bonds among members of the in-group (Coser, 1956).

Racial intergroup conflict leads to winners and losers. One group

can dominate and oppress another group, achieving economic, political, social and cultural dominance, as whites have done in this country. This not only has social ramifications but negative psychological consequences for both the oppressor and the oppressed.

RACIAL IDENTITY FORMATION

The evolution of a sense of self in a racialized society includes notions of who one is and who others are according to differential racial group membership. Though racial identity development occurs for everyone in the United States, the process, outcome, and associated beliefs are in general different for people who are white and for people of color (Helms, 1990). Though it is beyond the scope of this paper to outline the many schemas of racial and ethnic identity, there are many well developed models that do so (see Cross, 1991; Helms, 1990; Salett & Kaslow, 1994; Smith, 1991). It is important to consider the following variables of racial identity development for members of a racial dialogue because they influence group dynamics in the following ways:

- The process of identity formation is different for whites and people of color.
- Individuals within the same racial identity groups are likely to be at different stages from each other.
- Individuals may be located at more than one stage simultaneously and move back and forth between stages.
- Racial identities include and interact with other social identities.

The level of one's racial identity shapes self-perception, comfort with self and others, degree of willingness to work towards change, understanding of racial realities in society, and openness to listen and accept new information.

According to Helms (1990), the development of a positive white racial identity involves two fundamental and not frequently achieved tasks: eliminating one's own racism and evolving a positive non-racist white identity. In doing so, a white person must consistently confront the political, historical, cultural, economic, and interpersonal contexts in which whiteness maintains a privileged social status. Because the journey is a painful one and because society offers whites' numerous

escape routes, many retreat from full engagement with this process and progressive movement through the stages of white racial identity may become derailed.

While for whites, identity development requires a deconstruction of whiteness as a previously unexamined position of dominance and privilege, for people of color movement through the stages involves an immersion in the positive life affirming aspects of one's racial and cultural community and history (Cross, 1990; Helms, 1990; Salett & Kaslow, 1994). The more complex and advanced stages of racial identity for people of color encompass a secure, positive, and flexible sense of racial identity, which as Helms states " . . . frees the person to let other people be as long as by doing so one does not encourage oppression and victimization" (p. 31). This also applies to committed white allies.

Formal information on racial identity may be a useful tool in ongoing racial dialogue groups. Though in and of itself it will not solve conflicts, it may help participants bring some perspective to bear in what otherwise may seem to be inexplicable, unmovable conflict. Akamatsu (1998) provides an instructive insight:

> Theories of racial identity development for whites and people of color . . . are helpful, highlighting the relativity and context-dependent nature of our experience of our own race. Inevitable collisions can be analyzed and demystified, such as the mismatch between a student of color invested in networking with other people of color and a white student anxious to initiate cross-race connections. (p. 137)

DIMENSIONS OF RACIAL DIALOGUES

Two important variables, which affect the dynamics of interaction in any racial dialogue, are unequal power and differential racial identity development. As with all groups, racial dialogues occur in a larger institutional and societal context where there are unequal power relationships (Schwartz, 1971). Care must be taken not to replicate these inequities. The different stages of racial identity formation of participants will strongly influence the dynamics of the racial dialogue and at times can lead to misunderstandings, confusion and pain. A person at an earlier stage of racial identity formation may say things in a racial

conversation that are well intentioned but painful to others by virtue of their naivete. A common example of this is when white participants describe how they have always been color-blind. Conversely, people impatient with others who have done less work in this area can at times come on too strong and through vociferous advocacy or sophistication, intimidate less experienced participants, who may withdraw.

The actual models of racial dialogue can vary considerably. There are a number of variables that distinguish different forms of racial dialogue:

1. *Who participates?* President Clinton sponsored a racial dialogue on a national level for prominent invited participants (White House Government Initiatives, 1998), often referred to as 'elites.' Offering another model, Lani Guinier (1996) leads an organization called ''Commonplace'' that is searching for models of racial dialogue that permit ''real conversations'' between people who are not elites.
2. *Who sponsors the dialogue and where is it held?* National organizations such as Study Circles and Hope in the Cities have sponsored on-going racial conversations in local communities (Lawson et al., 1998; McCoy & Sherman, 1994). Some of these have been under religious auspices and others secular: both have created small mixed-race groups that meet regularly to discuss the dynamics of race and racism in their communities.
3. *Is the dialogue a single event or an ongoing group?* The dialogue that we will describe in this paper was a single event. Social workers in Northern Ireland have organized single event sessions between Catholics and Protestants (TARL, 1996). However other groups meet on an ongoing basis (Study Circles, 1998a) or for a series of meetings designed to reduce tensions and create trust between ethnic groups that have experienced conflict (Bargal & Bar, 1994; Norman, 1994).
4. *How are the groups facilitated?* Racial dialogues can be facilitated by one person, two people or by teams of people. All racial dialogues benefit from some form of facilitation but some groups are appropriately facilitated by ''experts'' while others can be run by local residents, such as Study Circle community dialogues (Study Circles, 1998a).

5. *How structured or spontaneous are the conversations?* The Public Conversations Project of Cambridge has been experimenting with a model of structured, small-group discussion, with agreed upon norms of conduct, that permits people of opposing views to talk about controversial issues, such as abortion (Becker et al., 1995; Chasin et al., 1996). In Northern Ireland there have been structured debates and discussions about issues that have divided Catholics and Protestants, such as the different names that each group uses for the same community (TARL, 1996). Study Circle (1998b) community groups often allow for more free-flowing conversation. The composition and size of the group, the goals of the conversation and the ''ground-rules'' are all important variables that influence this dimension.
6. *What is the goal of the conversation?* Racial dialogues can be set up for a variety of reasons: to clarify competing historical narratives (White House Government Initiatives, 1998; TARL, 1996), to resolve conflict between two specific ethnic and/or racial groups (Bar & Bargal, 1994; Norman, 1994; TARL), to discuss controversial issues (Becker et al., 1995; Chasin et al., 1996), to reduce tensions and expand understandings between groups (Bar & Bargal, 1994; Norman, 1994; Study Circles, 1998a,b), to create coalitions that work together to take social action (Study Circles, 1998b).

Although the format and structure of racial dialogues vary, they seek to achieve similar goals. These include greater understanding, respect for others, less suspicion and negative stereotypes, less ethnocentrism, a process that fosters trust, genuine dialogue that is not formulaic or dogmatic (Becker et al., 1995; Chasin et al., 1995; Fisher, 1990; Guinier, 1996; Lawson et al., 1998; Study Circles, 1998a, b; TARL, 1996), and concrete actions to dismantle racism (Study Circles, 1998b). Also, racial dialogues are more effective when they take place in the context of a comprehensive community or institutional commitment to uproot racism.

A CASE EXAMPLE OF A RACIAL DIALOGUE

A racial dialogue was sponsored by the authors and held on the campus of a school of social work during an academic session. The

dialogue was part of an ongoing, comprehensive project by the school to become an anti-racism institution. Although there were numerous discussions about race and racism in classes, many students and faculty felt more could be done to improve the overall climate of the campus with regard to race and racism. The dialogue was open to anyone associated with the program–master's students, doctoral students, full-time faculty, adjunct faculty and staff. Master's students were asked to complete questionnaires immediately after the event, which was also tape-recorded and transcribed.

The Process

The authors and the facilitators mapped out the structure and form of the racial dialogue before the event. Once the overall form of the event was decided, the facilitators, on their own, developed the specific details. The co-facilitators, an African American woman and a white woman, had extensive experience and expertise in teaching and facilitation in this area.

Eighty people attended the dialogue: 58 master's students, the rest faculty, doctoral students and staff. It was held in a medium sized room with chairs arranged in a circle, with a fishbowl arrangement of six chairs at a table in the center.

There were a number of discrete phases to the dialogue:

1. An opening conversation between the facilitators.
2. A ''fishbowl'' discussion by participants that responded to two questions posed by the facilitators.
3. Large group reactions to the fishbowl discussion.
4. Reflections on the discussions by the facilitators in the form of a conversation.
5. A brainstorming session about manifestations of racism and ways to combat them.
6. A brief closing video.

OPENING CONVERSATION

The facilitators began with their own conversation about race and racism that lasted for 1/2 hour. The general theme was why it is

difficult for white people and people of color to discuss race and racism in a way that is both tolerable and meaningful. Both discussants described their own feelings and perceptions, as well as anecdotes from classes and workshops that they had taught, linking this to their racial identities. They expressed empathy for positions held by their co-discussant and people from racial backgrounds other than their own.

This conversation was characterized by the ability of each facilitator to address both the experiences of their own racial identity group and that of their partner. For example, the white facilitator normalized the fears of whites entering racial dialogues, their socialized need never to appear ignorant while also noting the frustrations for people of color in watching whites become aware of racism that they have had to grapple with continually. The white facilitator also empathized with the struggle whites have in owning racism but was unequivocal about their responsibility for doing so. The facilitator of color spoke of the pain of people of color in the face of white silence but also addressed how hard it may be for whites, embracing an anti-racism stance, to deal with white family, friends and community who do not. Both reflected an understanding of what different racial groups experience while embracing their racial identity. Both recognized the pernicious, though differential impact that racism has on all. Their conversation emphasized common cause, different experience, and the need to work together and, at times, apart.

THE FISHBOWL AND LARGE GROUP DISCUSSIONS

The facilitators then invited participants to respond to a question: ''What do you need to respond to a cross-racial dialogue at this school of social work?'' Participants were invited to occupy five out of the six fishbowl seats, always leaving one open. The non-fishbowl participants were asked not to engage in the discussion, although anyone could move to the fishbowl by occupying the empty seat. As one seat would always need to be empty, if someone from the audience joined the fishbowl, then one of the fishbowl participants was expected to voluntarily leave.

After 15 minutes of discussion, the facilitators, who had not participated in this discussion interrupted and posed a second question: ''How do I use what I have learned here beyond the gates of the

university or in a clinical setting with a client?'' Although this question had been planned in advance, it had been adumbrated by the direction of the discussion. After 10 minutes the facilitators ended this part of the discussion.

All of the discussants were female masters students. There were always at least two people of color out of the five fishbowl participants and the conversation generally alternated between whites and people of color, although the facilitators had not asked for this. Although there were disagreements between participants and some very different perspectives and experiences shared, there was no severe conflict. The facilitators briefly then opened up the discussion to the entire group. Themes that had been developed in the fishbowl were further amplified, questioned, and clarified.

REFLECTIONS ON THE DISCUSSIONS BY THE FACILITATORS, BRAINSTORMING AND THE FINAL VIDEO

The facilitators then returned to the fishbowl area and had a reflective conversation about the previous discussion in front of the participants. They linked what was said by participants with their introductory comments and made other general points about discussing racism. The next phase was a brainstorming session, led by the facilitators that explored examples of active and passive racism and ways to actively resist racism which lasted 25 minutes. The final phase of the event was the screening of a 10-minute video that showed different hued faces melting into one another.

The Questionnaire

A questionnaire was developed to gauge participants' responses to the event. This was an attempt to gather information about the impact and meaning of the racial dialogue. Statistical correlations were not sought, as the goal was to describe and understand rather than to confirm cause and effect relationships.

The questionnaire was offered to all of the 58 MSW students who attended the event. (Other participants, such as faculty, did not complete questionnaires in order to limit the numbers of variables contributing to responses.) The questionnaire included two sections:

1. Fifteen statements each respondent was asked to rate on a Likert scale.
2. Open-ended questions designed to elicit more thorough and personalized responses.

Fifty-six of the fifty-eight students who attended the event completed the questionnaire with 95% declaring their racial identity. Sixty-one percent were white and 34% people of color. The majority of people of color were African American (64%) while the remainder were Asian American and Latina/Latino American.

QUESTIONNAIRE RESULTS

As can be seen from Table 1, on some questions there was accordance between racial groups while in several instances responses differed significantly by race, with white students reporting gaining more than students of color. With the following questions, people of color and white participants were more congruent in their responses:

- Close to 100% of participants strongly agreed or agreed that the racial dialogue was helpful.
- 100% of participants agreed or strongly agreed that racial dialogues are one important way to deal with racism.
- All participants agreed or strongly agreed with the statement that the facilitators were skilled at assisting the expression of diverse points of view.
- 72.8% of students of color and 97.6% of white students stated that they came away with increased hope that people from different racial backgrounds would *listen* to each other. However, it is interesting to note that only 54.6% of people of color compared to 100% of whites thought that people from different racial backgrounds could *learn* from each other. The most salient areas of difference were as follows:

    - A majority of white participants (92.7%) agreed with the statement that the dialogue would better enable them to talk about racial issues on campus while only 36.4% of participants of color agreed.
    - 45.5% of respondents of color agreed or strongly agreed with the statement that the dialogue increased their understanding

of how people from a different racial background might think or feel about issues of race in their school of social work. For white respondents, the percentage was 85.7.

- Only 18.2% of participants of color agreed or strongly agreed with the statement that perspectives were put forward in the event that they had not considered before in contrast to 66.7% of white participants.
- While a majority of the total participants agreed or strongly agreed that the dialogue helped clarify some of their own thoughts and feelings about race, 95.1% of white students concurred while a smaller percentage of people of color (45.5%) did so.
- Of white participants, 63.4% reported that the dialogue challenged some of their own feelings and opinions about race. For participants of color, the percentage was 27.3.
- Of people of color, 45.5% agreed or strongly agreed that participation in the dialogue motivated them to want to become more involved with antiracism efforts. Of whites, 92.7% agreed or strongly agreed.
- In response to a question about who has responsibility for racism, a majority of respondents, both white and people of color, agreed that whites and people of color have shared responsibility. However, a larger percentage of white participants (39%) than participants of color (26%) stated they thought mostly whites were responsible. In addition, 12% of white respondents indicated that only whites are responsible while no respondents of color agreed with this.

DISCUSSION

The racial dialogue was a single-event group that combined a focus on task (combating racism) and self reflection and awareness. It had a number of characteristics of mutual aid and support groups (Gitterman, 1989; Shulman, 1986): an emphasis on strengths, reciprocity and the expectation that group members would support, challenge and help one another. The group was grappling with a subject that if not ''taboo'' (Shulman) is certainly charged. Everyone had come together to talk about race and racism and there was a focus on self-disclosure and

TABLE 1. Results of Questionnaire

Percent of respondents who strongly agree (1) or agree (2).

	Total	People of Color[1] (n = 11)	White People (n = 42)
I found this event to be helpful	98.1	90.9	100
My experience in this dialogue increased my desire to participate in further racial dialogues	98.2	90.9	100
A person's race is a central element in one's experience in this society	98.1	90.9	100
Racial dialogues are one important way to deal with racism in this country	100	100	100
This dialogue increased my understanding of how people from a racial background different from my own think and feel about racial issues at SSW	77.4	45.5	85.7
Perspectives were put forward that I had not considered before	56.6	18.2	66.7
The dialogue inereased my hope that people from different racial backgrounds can listen to each other	92.4	72.8	97.6
The dialogue gave me hope that people from different racial backgrounds can learn from each other	90.5	54.6	100
My experience with this event will better enable me to talk about racial issues on campus and in the classroom	80.8	36.4	92.7
The dialogue was just an exchange of monologues	0	0	0
The dialogue complements other anti-racism activities on campus	86.3	72.8	90
The dialogue helped me clarify some of my own thoughts and feeling about race and racism	84.6	45.5	95.1
The dialogue challenged some of my feelings and opinions about race	55.8	27.3	63.4
Participating in this event motivated me to want to become more involved in anti-racism efforts	82.7	45.5	92.7
The facilitators were skilled at assisting the expression of diverse points of view	100	100	100

[1]African American, Asian, and Latina.

insight, but in the service of taking action, individually and collectively, to combat racism.

The co-facilitators structured the group so that it had a number of phases common to most group processes (Toseland & Rivas, 1998). There was preparation before the group, with attention paid to content, process and physical location (such as sitting in a circle). There was a beginning phase, modeled by the co-facilitators and then a middle phase, involving the fishbowl and subsequent reflections about the fishbowl discussion. The use of the fishbowl permitted the facilitators to create a small group experience within the context of a large group. The ending phase was initiated when the facilitators asked the group to brainstorm about active and passive racism and ways to respond to it. This refocused discussion from the subjective experience of participants to ways that they could individually and collectively engage in social action. This acted as a transition, preparing people for activities after the group ended. The final video served as a brief ritual that emphasized healing and similarity between people, ending the group on a positive note.

Student comments and responses to the questionnaire indicated that the opening dialogue between the facilitators was extremely meaningful. Many commented that the dialogue provided hope that constructive and substantive conversations could take place across racial lines and connected it to their willingness to take risks in dialogue themselves. Because most in American society have neither experienced it nor seen it, watching others who are experienced, committed, and skilled at having racial dialogue may be an important component to build into any racial dialogue format.

The content of the opening discussion may have been one of the reasons that it was so positively embraced by participants. The themes in the opening conversation touched upon many issues central to racism and interracial dialogue, as well as perspectives, fears and resentments experienced differentially along racial lines. The conversation also included strategies for dealing with stuck conversations and for doing anti-racism work.

The facilitators spoke in an informal, yet respectful way, which can be an important stance to take with ethnically-diverse groups (Davis & Proctor, 1989). They also modeled self-disclosure, which has a more powerful impact on group participants than telling them to self-disclose (Congress & Lynn, 1995). Their comfort with one another and

with the topic may have also set a tone, as lack of anxiety by group leaders can help calm and stabilize a group (MacKensie, 1990). They also laid out clear ground rules, which helps establish a structure and process conducive to delving into difficult material (Gitterman, 1988). They achieved a balance between being attentive and flexible with directing a highly structured group session, which is useful with single session groups (Northen, 1988). It is also important that in a racially and ethnically diverse group discussing racism there is a multi-racial facilitation team (Davis & Proctor, 1989).

When the two questions were posed to the fishbowl participants, similar themes as in the opening dialogue emerged: fear on the part of white students of making a mistake; hesitancy on the part of students of color about the degree of commitment of white students to go beyond talk; the difficulty of dealing with racial insensitivity on the part of friends; the tendency by whites to claim aspects of oppressed identities rather than deal with privileged parts of one's self awareness of defending against one's own racism by projecting it onto others.

Participants did not try to look good. The quality of discourse was one of openness, which contrasts with what frequently occurs in other contexts. This may be attributable to several factors: the modeling that occurred in the opening dialogue between the biracial team of facilitators; the commitment of those who attended the event; the confidence participants felt in the skill of the facilitators; the hunger participants expressed for a forum in which to meaningfully discuss race and racism; prior events and courses on campus highlighting race; and perhaps the relationships many students had with each other prior to the event.

A significant finding from the questionnaire was that close to 100% of the participants strongly agreed that the racial dialogue was helpful to them. However, the results also make clear that although for most participants the event was worthwhile, there were significant differences in how white students and students of color viewed it; the results indicate more learning opportunities for white participants than participants of color. It is not surprising that in dialogues that have racism as a central theme, whites, who in general tend to know less about it and who are not its primary target, will have more to learn about it. An event that removes the veil of white privilege is also more likely to move white participants than participants of color, for whom this is no news at all.

It is also possible that members of certain ethnic groups have differential responses to large and small group processes (Davis & Proctor, 1989). Group composition can also affect satisfaction levels. For example, some research has indicated that African Americans may feel more comfortable in groups that are composed of an even racial split while whites prefer groups more reflective of the demographics of society at large (Davis & Proctor).

Differential satisfaction levels are consistent with findings from evaluations of other dialogue groups (Study Circles Resource Center, 1998b) and from literature on classroom discussion in which race and diversity are a focus (Smith, 1997). In the latter, though most students gain from exposure to the topic, benefits are likely to be greatest for those who are white (Smith). This may make sense in light of the fact that whites tend to have less experience with discussing race and racism and in their daily lives. Whites usually have more to learn. Whites are also more likely to view racial dialogue as a useful end in and of itself while people of color are more apt to judge it according to whether or not it leads to action (Study Circles Resource Center, 1998b).

Racial dialogues are not risk-free. Whites can fear shame and humiliation for saying the wrong thing. Conversely, listening to whites' naïve and uniformed perspective on what constitutes racism and the devastation it wreaks is often a source of frustration and anger for people of color (Wan, 1994). In racial dialogues this phenomenon is probably unavoidable but comes at a cost. Some people may opt out of them all together (Haynes, 1998). Consequently, assuring that the needs of people of color are addressed as well as those of whites is an area in need of further study and attention. Suggestions for dealing with this issue will follow in the section on future recommendations.

FUTURE RECOMMENDATIONS

This dialogue was a single event and as such its utility and impact are limited. Participants commented that it was both too brief and constituted only a beginning. Though there can be gains from single events, they are modest in comparison to the potential of ongoing dialogue. A few hours of skillfully facilitated dialogue, however open and meaningful, is hardly a match for several hundred years of racism.

Like most groups, dialogues are more likely to be successful if attention is paid to preparation, facilitation, and follow up.

Preparation

A context must be built which increases the likelihood that a racial dialogue will be effective and constructive. Talking about race in an interracial context is not an activity many are used to and the playing field is rarely level. As is often the case in public discourse, policy debates, and classrooms, people of different races talk past each other. Participants should be informed at the outset that racial dialogue is difficult and people of different racial backgrounds will enter with different levels of racial awareness and understanding. Though no exact map of the terrain is possible, it may help to know ahead of time that the journey is likely to be arduous. Also, in preparation for ongoing racial dialogue, or during the process itself, historical and sociological information about race and racism may be helpful. In general, with mutual aid groups, sharing such data is helpful (Shulman, 1986). Because of the lack of balance in participants' knowledge and experience of racism, there is always the danger that dialogue often means people of color spending much of their time and energy helping whites ''get it.'' Then it is less of a dialogue and more a class with whites as the students and people of color as the exasperated teachers. Consequently, readings or formal presentations may relieve people of color of some of this burden.

Preparation might also include information about racial identity development and its complexities. At any given moment in time the understandings of participants will vary from each other, in part because of differing and fluctuating racial identity stages. It helps participants to know that this is an inherent dynamic in such a group. It may help anticipate some conflicts, help participants understand some of their own reactions as well as those of others, and serve as a marker for forward movement. It normalizes a difficult process.

Facilitation

Skilled facilitation is an absolute necessity. At least two facilitators, each from different racial backgrounds, are ideal. Participants' safety lies not in lack of conflict or anxiety but in confidence that there are

guides who are familiar with the territory, have varied life experiences and world views, and know how to use conflict constructively. Participants will also look to a multi-racial team to model what is possible in racial dialogue.

As suggested earlier, facilitators might want to demonstrate racial dialogue by having a conversation themselves in front of the larger group. Modeling comfort, self-disclosure and respect are critical (Congress & Lynn, 1995; Davis & Proctor, 1989). This is particularly useful in the beginning, as it creates possibilities. Dialogue between skilled facilitators can also move the group when inevitable impasses arise. The skill and strength of relationship in a multi-racial team may help them wend their way through sticking points that the group cannot. Skilled facilitation also includes engaging the group in establishing mutually agreed-upon ground rules. If rules are broken participants need to know that facilitators will refer back to them and enforce them.

Though racial dialogues are conversations between people from different racial backgrounds, there may be times that groups need to temporarily separate into more racially homogenous caucuses. As described earlier, wounding statements can be made however well intentioned. Conversations can become destructively heated and feelings can boil over. Breaking up into groups, each led by a different facilitator, may allow a cooling-off period and provide needed safety and support about how to go forward. Homogenous groups can lead to greater candor and deeper exploration of self and promote greater group cohesion (Davis & Proctor, 1989). Care must be taken to let people self-select caucus groups, as many people have multiple ethnic and racial identities. Ultimately, caucus groups are a temporary phase. They can be productive as long as the goal of eventually bringing the groups back together is paramount.

Follow-Up

Lastly, there should be more than just talk. A decrease in racist attitudes and beliefs, better cross-racial understanding, and an amelioration of racial tension are certainly substantial goals for racial dialogue groups. For many white participants, such achievements are a goal in and of themselves (Study Circles, 1998b) and are a major purpose of racial dialogues. They challenge individual racism and intergroup conflict. However, because racism is embedded in our cul-

tural, economic, and institutional life, much more is needed. Because people of color are the recipients of institutional racism, they are, understandably, more likely than some white participants to judge the effectiveness of racial dialogue groups on the basis of whether they lead to concrete action. The context in which the racial dialogue occurs will influence the nature of action steps taken, but for a racial dialogue group to maximize its potential, it should eventually lead to some form of concrete change.

Racism ultimately hurts everyone, those who are targeted and those who are privileged. Effective interracial conversation, given the paucity of it, is not really "just talk." If the talk is genuine talk, informed talk, and persistent talk, it will identify the waste, cost, evil, and tragedy of institutional racism. Action will follow because there will be no other viable choice.

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Racial Color Blindness: Emergence, Practice, and Implications

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Abstract

In this article, we examine the pervasive endorsement of racial color blindness—the belief that racial group membership should not be taken into account, or even noticed—as a strategy for managing diversity and intergroup relations. Despite research demonstrating the automatic perception of race (and thus the seeming improbability of actual color blindness), the color-blind approach to race has become increasingly prevalent in a variety of important domains, from education and business to law and societal discourse. An emerging research literature has revealed the many ways in which color blindness shapes individual, group, and institutional efforts to handle issues related to diversity. We offer an integrative assessment of this work, highlighting recent psychological investigations that have explored the emergence, practice, and implications of color blindness. We conclude by discussing alternative strategies for managing diversity and underscoring the importance of an approach that simultaneously accommodates the concerns of Whites and minorities.

Keywords

color blindness, diversity, race, discrimination, bias, affirmative action

Laypeople, educators, professionals, and institutions are regularly faced with difficult questions about how to handle issues of race in contemporary society. Concerns about being labeled racist leave many people unsure as to whether it is appropriate to notice skin color or mention race in everyday interactions (Apfelbaum, Sommers, & Norton, 2008). Questions also emerge as to what role, if any, race should have in the development of school curricula, college-admissions criteria, promotion guidelines, public policy, and legal adjudication (Plaut, 2010). In this article, we examine recent evidence from a range of domains that highlights one increasingly prevalent approach to the issue of race: *color blindness*.

Color blindness is rooted in the belief that racial group membership and race-based differences should not be taken into account when decisions are made, impressions are formed, and behaviors are enacted. The logic underlying the belief that color blindness can prevent prejudice and discrimination is straightforward: If people or institutions do not even notice race, then they cannot act in a racially biased manner. This notion that color blindness has the capacity to "short-circuit" the typical processes by which bias emerges was epitomized by U.S. Supreme Court Chief Justice John Roberts' opinion in a 2007 case involving a local school district's efforts to achieve diversity: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race" (*Parents Involved in Community Schools v. Seattle School District*, 2007).

Despite the pervasiveness of this color-blind approach to race relations, new evidence from psychological research has called its supposed benefits into question. We document the practice and implications of color blindness in a wide range of contexts: interpersonal, educational, organizational, legal, and societal. In each domain, despite the ubiquity of the color-blind approach, there is mixed evidence as to its effectiveness in accomplishing intended goals. We conclude with a discussion of multiculturalism, a perspective that is often proposed as an alternative to color blindness but is not without its own limitations.

Interpersonal Color Blindness

Perhaps the most compelling critique of the color-blind approach is the fact that people *do* notice race when perceiving others. Perceptual differentiation of race occurs rapidly—in less than one-seventh of a second—and emerges as early as 6 months of age (Bar-Haim, Ziv, Lamy, & Hodes, 2006; Ito & Urland, 2003). Yet recent work has highlighted the prevalent tendency for people to avoid acknowledging that they "see"

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racial differences during social interactions. For example, we and our colleagues (Norton, Sommers, Apfelbaum, Pura, & Ariely, 2006) presented White participants with an array of photos of people—half of whom were Black and half of whom were White—and challenged respondents to guess which of the photos a partner was holding by asking as few questions as possible. Although asking about race was an obvious way to home in on the target photo, many participants avoided mentioning race despite knowing that their performance on the task would suffer—a tendency most evident when their partner was Black.

Although this tendency to sidestep mention of race may stem from a well-intentioned desire to avoid bias (or at least a desire to appear unbiased), such color-blind behavior has been found to result in various negative social consequences. Ironically, for example, White individuals who avoid mentioning race appear more biased in the eyes of Black observers than do White individuals who openly talk about race (Apfelbaum, Sommers, & Norton, 2008). Recent work has also suggested that, beyond efforts to avoid mention of race, deemphasizing race more broadly as an approach to racial diversity can shape individuals' attitudes toward racial out-groups. But in this context, too, color blindness has not been an elixir to racial bias. To the contrary, people exposed to arguments promoting color blindness have been shown to subsequently display a greater degree of both explicit and implicit racial bias (Richeson & Nussbaum, 2004; Son & Shelton, 2012; Vorauer, Gagnon, & Sasaki, 2009; Wolsko, Park, Judd, & Wittenbrink, 2000), a pattern of results suggesting that a color-blind ideology not only has the potential to impair smooth interracial interactions but can also facilitate—and be used to justify—racial resentment (see Norton & Sommers, 2011).

Educational Color Blindness

The color-blind approach can also be observed outside of face-to-face dyadic interactions. In recent years, for instance, it has become clear that manifestations of color blindness cascade down various levels of the U.S. educational system. Color blindness is reflected by the ways in which districts are permitted to regulate the diversity of their schools (*Parents Involved in Community Schools v. Seattle School District*, 2007), reinforced by standard school curricula that portray a generalized cultural identity but leave group differences unaddressed (Schofield, 2007), and routinely exhibited by teachers seeking to model equality in their classrooms by emphasizing that "race does not matter" (Pollock, 2004). Consistent with these developments, evidence suggests that by the age of 10, color blindness becomes children's modal approach for dealing with race-relevant situations (Apfelbaum, Pauker, Ambady, Sommers, & Norton, 2008).

Recent psychological research has cast doubt on the utility of color blindness in educational contexts. Apfelbaum, Pauker, Sommers, and Ambady (2011) presented elementary school children with a story about a teacher who either endorsed color blindness or did not. Children then read about a series of schoolyard conflicts, some of which involved instances of racial discrimination. Children who were initially exposed to the color-blind story, compared with children who were not, were later *less* likely to identify bias when it had clearly occurred and tended to describe instances of discrimination in a manner that seemed less serious to certified teachers. Such findings are troubling: The fact that color blindness makes children *less* likely to identify overt instances of bias could lead people to mistakenly conclude that color blindness is an effective tool for reducing bias—perhaps one factor contributing to its continued support and proliferation in the educational system.

Organizational Color Blindness

Faced with the challenge of recruiting and managing an increasingly diverse workforce, many contemporary organizations have come to endorse an internal culture of color blindness (Ely & Thomas, 2001; Thomas & Ely, 1996). The perceived utility of color blindness lies in its capacity to normalize employees by shifting attention from their racial and cultural differences to a unifying organizational identity or goal (i.e., an organization may stress that employees are all the same, working toward the same goal; Stevens, Plaut, & Sanchez-Burks, 2008). Recent research has suggested that the credibility and effectiveness of color-blind employee-recruitment efforts depend in large part on whether the organizations implementing them are actually racially diverse. For example, Purdie-Vaughns, Steele, Davies, Ditlmann, and Randall-Crosby (2008) demonstrated that minority applicants respond favorably to racially diverse organizations that endorse a culture of color blindness but are skeptical of such messages when they are endorsed by organizations predominantly composed of Whites. Minority applicants may have good reason to be suspicious: Organizations that claim to show no racial preference may still discriminate on the basis of race and justify race-based hiring decisions under the guise of more acceptable criteria (e.g., Bertrand & Mullainathan, 2004; Norton, Vandello, & Darley, 2004; Pager & Qullian, 2005).

The implications of organizational color blindness for minorities who are already employed also remain unclear. Consider, for example, Plaut, Thomas, and Goren's (2009) analysis of 3,758 employees' responses to a survey about the diversity climate (i.e., how people viewed, felt, and approached issues of diversity) at a large healthcare organization. The researchers found that White employees' endorsement of color blindness predicted decreases in psychological engagement among minority employees and *increases* in minority employees' belief that the organizational climate was racially biased. Interestingly, they also found that White employees' endorsement of multiculturalism—an alternative approach to diversity in which racial differences are acknowledged and even celebrated—led to the opposite pattern of results, predicting increases in engagement and decreases in perceptions of organizational bias among minority employees.

Legal Color Blindness

Color blindness was ushered to the forefront of legal discussions about race by way of decisive legislation passed during the civil rights movement. More recently, however, color blindness has come to represent the legal standard against which acts of bias are judged—exemplified by the view that no form of race-based consideration is acceptable in a lawfully egalitarian society (e.g., *Gratz v. Bollinger*, 2003; *Grutter v. Bollinger*, 2003). Whereas legal arguments for color blindness were once emblematic of the fight for equal opportunity among racial minorities marginalized by openly discriminatory practices, they have become increasingly geared toward *combating* race-conscious policies. If racial minority status confers an advantage in hiring, in school admissions, in the drawing of voting districts, and in the selection of government subcontractors—the argument goes—then *Whites'* right for equal protection may be violated (*Adarand v. Peña*, 1995; *Bakke v. Board of Regents*, 1978; *Shaw v. Reno*, 1993; *Wygant v. Jackson Board of Education*, 1986).

More broadly, legal notions of color blindness have become increasingly relevant for efforts to adjudicate racial bias, including employment discrimination lawsuits (Kang & Lane, 2010; Peery, 2011; Sommers & Norton, 2008). For instance, one recent case, *Ricci v. DeStefano* (2009), involved a claim of racial bias made by 20 New Haven, Connecticut, firefighters; the unique aspect of the discrimination claim was that all but one of the plaintiffs alleging bias were White (the remaining plaintiff was Hispanic). At issue was the fact that an exam used to determine promotions had yielded disproportionate results by race—namely, no Black firefighters had achieved passing scores—prompting city officials to abandon the exam and forgo the promotions altogether. The U.S. Supreme Court ultimately ruled in favor of the plaintiffs, determining that invalidating the exam (and thereby invalidating the plaintiffs' potential for promotion) was as a race-based decision at odds with the Equal Protection Clause and the spirit of a color-blind ideal.

Societal Color Blindness

The emergence of color blindness as an ideology of diversity has also altered the broader cultural discourse on race and equality by transforming the conversation on how best to improve intergroup relations (Markus, Steele, & Steele, 2000; Pearson, Dovidio, & Gaertner, 2009; Plaut, 2002). To many individuals, an ethos of color blindness epitomizes the dawn of a "post-racial" society, but recent research has demonstrated that color blindness may actually perpetuate existing racial inequities (Knowles, Lowery, Hogan, & Chow, 2009): When race is made salient, many Whites shift from viewing color blindness as a distributive principle (i.e., everyone should have equal outcomes) to viewing it as a procedural principle (i.e., everyone should receive equal treatment, regardless of existing race-based inequalities).

Indeed, it has become increasingly clear that many contemporary Whites feel that they are victims of discrimination themselves. Norton and Sommers (2011) administered a national survey in which Americans reported their beliefs about the extent to which Blacks and Whites are the targets of discrimination. The results revealed that, although both Whites and Blacks agree that anti-Black bias was pervasive in previous eras, the average White American now believes that Whites are *more* victimized by racial bias than Blacks are. As a result, many Whites believe that policies that continue to favor Blacks are no longer reducing inequities in outcomes between Blacks and Whites, but are actually increasing what Whites perceive to be an unfair advantage. With the rise in sentiments like these, it stands to reason that the appeal of racial color blindness—and the between-race disparities in its endorsement—will only continue to grow.

Alternative Approaches and Conclusions

The allure of color blindness is that it seems to offer a relatively simple framework for managing issues of race in contemporary society: If people do not notice race, then race will no longer matter. Yet as the research reviewed in this article shows, color blindness is far from a panacea, sometimes representing more of an obstacle than an asset to facilitating constructive race relations and equitable race-related policies.

As an alternative to color blindness, researchers have examined multiculturalism: an approach to diversity in which group differences are openly discussed, considered, and even highlighted. For example, faced with the prospect of training a racially diverse team, a leader utilizing a color-blind approach might shift attention away from demographic differences and toward issues that unite or homogenize the team, whereas a leader opting for a multicultural approach might explicitly discuss the nature and implications of team members' ethnic and cultural differences. Research has demonstrated that multiculturalism offers a variety of benefits, from fostering appreciation for other people's perspectives to sharpening assessments of discrimination (Apfelbaum et al., 2011; Todd & Galinsky, 2011). For instance, Todd and Galinsky (2011) found that individuals exposed to a multicultural message, as opposed to a color-blind message, subsequently demonstrated heightened perspective-taking tendencies, underscored by efforts to understand other people better by actively imagining their point of view.

However, a multicultural approach has its limitations, too. Perhaps most notably, it has the potential to alienate Whites. Whites tend to be less favorable toward multiculturalism than color blindness (Apfelbaum, Sommers, & Norton, 2008; Ryan, Hunt, Weible, Peterson, & Casas, 2007), as traditional conceptualizations of multiculturalism may leave Whites feeling as though minorities have received attention at their expense (Norton & Sommers, 2011). Illustrative of this zero-sum mind-set, recent research has indicated that simply making Whites aware of projected changes in ethnic demography (i.e.,

declines in the proportion of White residents in an area) is sufficient to elicit feelings of threat and anger toward minorities (Outten, Schmitt, Miller, & Garcia, 2012). Frustration with the seemingly one-sided nature of multiculturalism may also ultimately undercut minorities' experience on college campuses and in the workplace by fueling Whites' belief that it was race—not qualifications—that earned minority candidates a spot. Moreover, Purdie-Vaughns and Walton (2011) note a variety of limitations of multiculturalism from the perspective of Blacks, including the fact that multicultural approaches often fail to explicitly challenge extant racial inequality.

So where, then, do we go from here? Is there an approach to diversity that accommodates the often divergent concerns of minority and majority group members? Stevens and her colleagues (2008) examined one possibility for dismantling the zero-sum mind-set that many White individuals bring to the issue of race. They proposed a hybrid form of multiculturalism that aims to espouse a culture in which a wide range of racial differences is acknowledged while affirming the need for Whites to be included in this process. In such an approach, Whites might be encouraged to individuate themselves by drawing on unique aspects of their own identity (e.g., their family heritage) in a way that mirrors the personal individuation multiculturalism typically elicits from minorities. Alternatively, organizational mission statements and promotional materials could convey a vision of diversity that explicitly includes nonminorities as well as minorities. Allowing *everyone* to contribute to diversity and take pride in their own uniqueness preserves one of the most attractive principles of color blindness—that race should not dictate outcomes—without denying that race represents a distinctive social identity that is real and often does matter.

Future research is needed to more fully assess the viability of this and other approaches for managing diversity—and to do so in a racial context outside the White–Black binary in order to reflect the broader demographic shifts occurring in contemporary organizations, institutions, and interpersonal contexts. However, our review suggests that one conclusion is already clear: Shutting our eyes to the complexities of race does not make them disappear, but does make it harder to see that color blindness often creates more problems than it solves.

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Pollock, M. (2004). (See References). A user-friendly book that offers a more detailed examination of color blindness in education.

Declaration of Conflicting Interests

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Racism, anti-racism and intercultural dialogue

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Abstract

Dialogue has been widely used as a communication model in interpersonal and inter–group interaction. Some empirical evidence indicates its promising role in bridging differences and improving intergroup relations (Nagda 2006). Yet, more research is needed to determine the effectiveness of dialogue among ethnically and culturally diverse groups in combating prejudice, particularly racial prejudice. In this study, we explore the utility of intercultural dialogue, a concept that emphasises the importance of 'respectful exchange of views' among members of different racial/ethnic groups to mutually understand their values and practices, ways of life and views of the world (Council of Europe 2008, p. 17). Whereas the established concepts of multiculturalism, integration, and cultural diversity practically focused on "cultural minorities", intercultural dialogue de–emphasises this focus, and it tends to focus on the dialogue as an egalitarian strategy rather than on group composition. Such dialogue maintains that listening, acknowledgement of difference and a concerted effort to understand others are vital in fostering positive awareness. With these tools, intercultural dialogue, can be utilised to nurture the cultural competency of participants which can be deployed to eliminate racism. Through the engagement of actual or perceived differences and critical self-reflection, intercultural dialogue can lead to the toleration or bridging of such differences that sometimes underlie racial prejudice (Nagda 2006).

Keywords: Racism, anti–racism, cultural diversity, intergroup contact, intercultural dialogue

Introduction

Amid rising anti–immigrant and xenophobic sentiments in Europe, and the recent exploitation of such sentiments by far right groups, European policymakers have stressed the necessity of intercultural dialogue as a strategy to foster social cohesion, reduce racism and prejudice, and create understanding (Hunyadi & Molnár 2016; Council of Europe 2008). Particularly, given the utility of dialogue in clearing preconceived bias and prejudice, exploring intercultural dialogue as an anti-racism tool is worthwhile. Research indicates that the utility of a one–way anti–racism strategy is limited at best; a more effective strategy is one that engages people to contribute in the course of discussions designed to reduce racism (Pedersen et al 2005). In this sense, intercultural dialogue can be useful as it creates a space for members of ethnically and culturally diverse groups to share their views and values. To what extent this can lead to a reduction of racial prejudice is an empirical question. However, there is emerging evidence that a strategy that provides favourable contact among groups tends to have the greatest attenuating effect on racial prejudice (Jensen et al 2010).

Drawing on intergroup contact literature, the purpose of this chapter is to explore the utility of intercultural dialogue, an aspect of positive intergroup contact that emphasises dialogue as a method of communication. Intercultural dialogue, has been defined as ‘a process that comprises an open and respectful exchange of views between individuals and groups with different ethnic, cultural, religious and linguistic backgrounds and heritage, on the basis of mutual understanding and respect’ (Council of Europe 2008, p. 17). The concept assumes a context characterised by the difference and plurality of group characteristics. In a climate of growing diversity where immigration and globalisation continue to push the boundaries of socio–demographic transformation both in the global north and south, estrangement between racially and ethnically diverse groups can lead to the fear of the “other” and interracial conflict (Eric Oliver & Wong 2003). By enabling interpersonal contact, proponents of

intercultural dialogue argue that dialogue can bridge and narrow social distance, thereby removing the estrangement between majority and minority groups. For example, Christian Stokke and Lena Lybæk (2016, p. 1) note that 'interculturalism as policy opens up a space for dialogue where minoritised people, individually and collectively, can find their own voices and negotiate their own identities and interests as well as the shared values of larger society.' There is evidence that lends credence to this argument, to some degree, particularly in some culturally diverse societies such as Canada and Australia, with multicultural policies achieving better cooperation between cultural minorities and the majority group (Adams 2008; Ho & Alcorso 2004). However, in Europe, multicultural policies have come under criticism both from policymakers and researchers (Cantle 2012; Stokke & Lybæk 2016). In its 2008 White Paper, the Council of Europe cited the inadequacy of multicultural policies in creating understanding among ethnically and culturally diverse communities (Council of Europe 2008, p. 9). Whether the proposed alternative, that is, *intercultural dialogue* can fix the alleged "failures" of multiculturalism has been the subject of growing debate in the literature. For example, in concluding their critique of intercultural dialogue as a policy concept, Shiv Ganesh and Prue Holmes (2011, p. 85) pose the following research question:

> To what extent is intercultural co–production the outcome of dialogue rather than multicultural co–existence? How can local and international levels of intercultural dialogue be brought together in complementary and informing ways? What are the potentialities and limitations of intercultural dialogue for resolving intercultural conflicts? How can intercultural dialogue productively resolve problems of social (in)justice? How can we articulate an explicitly intercultural ethic of dialogue?

Other researchers have cast conceptual doubts on intercultural dialogue, arguing that it lacks conceptual distinction and universal applicability (Phipps 2014). Some scholars, argue that there is little more than semantic differences between the theoretical underpinnings of multiculturalism and the tenets of intercultural dialogue (Modood & Meer 2012). This argument holds that, whereas multiculturalism tends to be a well–developed system involving coherent policies encouraging the recognition of ethnically, linguistically and/or religiously diverse groups, intercultural dialogue adds little more than interaction within the multicultural environment. It also contends that countries abandoning multiculturalism as a social–political policy in favour of interculturalism risk the loss of an important legal and policy framework that allows for the intended dialogue to take place and for 'the voices of minoritised groups and individuals [to be] heard' (Stokke & Lybæk 2016, p. 1). Generally, the criticism that interculturalism cannot be considered distinctly superior alternative to multiculturalism is in direct contrast to the Council of Europe's assertion regarding the inadequacy of multiculturalism.

Another argument against intercultural dialogue is the view that it is not applicable universally under all conditions. Citing her experience in Palestinian Gaza as an example, Alison Phipps (2014, p. 107), argues that intercultural dialogue requires cooperation and engagement, thus it is intractable in states of war and conflicts.[1] Based on this notion, she concludes that intercultural dialogue is intractable in current global security climate which is characterised by multiple conflicts and the absence of peace.

[1] In her article, Phipps distinguishes between 'Intercultural Dialogue' and intercultural dialogue, with the former signifying the type of dialogue that has emerged under peaceful European context and the latter signifying her ideal version of dialogue that is robust to emergency conditions created by war and insecurity.

The conceptual and practical critiques of intercultural dialogue as well as the nuanced questions Ganesh and Holmes (2011) ask raise a legitimate challenge for researchers and proponents of intercultural dialogue. To what extent these criticisms have validity is a matter of theoretical and empirical debate. Although I agree that the concept of intercultural dialogue needs conceptual clarity and generalisability before it can be deployed as an effective alternative to multiculturalism (Modood & Meer 2012), the above criticisms do not preclude the examination of its utility as an anti–racism and intergroup prejudice mitigating tool. As such, dialogue as a mode of contact can be effectual whether it is among members of the same group or among diverse groups. Therefore, in the rest of this chapter, as I explore intercultural dialogue, I will review its intersectionality with cultural diversity, racism and anti–racism.

Intercultural dialogue

Dialogue is at the heart of the concept of intercultural dialogue, the goal of which is the creation of understanding among the interacting parties and not necessarily the resolution of differences via a rationalistic deductive reasoning. Via a process of listening and the respectful exchange of views, this dialogue seeks to engage participants in ‘a deeper understanding of diverse world views and practices, to increase co–operation and participation (or the freedom to make choices), to allow personal growth and transformation, and to promote tolerance and respect for the other’ (Council of Europe 2008, p. 17). Although dialogue has a salient history in the evolution of Western philosophy, the idea of intercultural dialogue is novel in the sense that it has some distinct features that are not uniquely part of traditional liberal rationalism. These features include the accommodation of cultural identity, differences and alternative worldviews while acknowledging universally shared values (Stokke & Lybæk 2016).

Indeed, dialogue as a communication technique to clear misunderstanding and conflict is an ancient concept. The Socratic dialogues are the prominent examples of how dialogue has been shown as an epistemological tool to disprove false assumptions. Eliminating false assumptions and irrationalities by applying a kind of Occam's razor technique, Socratic dialogue leads to a reasonable conclusion via consensus. In this sense, intercultural dialogue might not lead to consensus as an outcome. Instead, it allows for differences, irrational beliefs, contradictions to remain with each party respectfully tolerating these differences. Yet, in the process of addressing mutual misconceptions and prejudices, such dialogue seeks to achieve an atmosphere of understanding and tolerance. The emphasis of dialogue in this context is, on the production of knowledge or learning through collaborative and interactive communication that involves listening and engagement (Ganesh and Holmes 2011). Highlighting the role of collaboration in the process of dialogue, Ganesh and Holmes (2011, p. 83) note:

> While scholars from a multitude of theoretical perspectives argue that a wide range of communication practices, including conflict, have dialogic aspects, and that dialogue is, and should not be, restricted to practices involving consensus, still dialogue is often culturally constructed as collaboration. Theoretical expansions of dialogue, therefore, need to be contrasted with and contextualised within its practice in speech communities across the world; in this sense, Carbaugh et al. [2006] make a valuable contribution towards sensitising theories of dialogue to the (intercultural) meanings of dialogue in use.

Collaboration is critical for a constructive intercultural dialogue. As culturally distinct individuals or groups participate in dialogue, intercultural value conflicts are bound to

emerge in the process. The way the framework of the dialogue is constructed, determines the integrity and outcomes of the process. As cited previously, a positive outcome of intercultural contact requires the existence of equality in status, absence of completion, common goal(s) among participants, and the availability of mechanisms to address tensions. Dialogue within this setting ensures an atmosphere for respectful communication where participants can listen to one another and learn from their unique experiences. This allows them to appreciate diverse perspectives and cultural values while at the same time enabling them to evaluate their own values and perspectives.

Even though intercultural dialogue seeks to achieve understanding, this shouldn't give the impression that the evolution of understanding and knowledge transformation is straightforward. Value conflicts, contradictions and difficulties in communication are bound to emerge due to the specificity and diversity of the experiences of the participant individuals and groups in intercultural dialogue (Brie 2011). Such diversity depicts the unique traditions and cultural heritages shaped and reshaped over the course of each participant's history. Recognition of these heritages is an integral part of the dialogue, as such dialogue seeks to partake in a deeper understanding of other cultures, worldviews and values. Via the complex interaction of listening, learning, participation, reflection and reflexivity, the goal of intercultural dialogue is to achieve transformative growth and competence in intercultural relationships by focusing on shared values (Stokke & Lybæk 2016).

Under conditions that encourage participants to open up and engage reflectively, intercultural dialogue allows for the critical examination of alternative views and practices. Michael James (1999, p. 589) proposes that 'members of conflicting cultures should practice *critical intercultural dialogue*, whereby they try first to understand and only then to criticise cultural practices they find offensive' (emphasis in original). Via open ended questions, previously held values are subjected to critical examination in this tradition sometimes leading to change

in views. This indicates that dialogue can lead to change, although the change may come only gradually. Overtime, after repeated periods of intercultural interactions, the diffusion of values allows for the mixing and transformation of cultural values. James (1999, p. 592) summarises this process as follows:

> On the most basic level, it is clear that most, if not all, living cultures change over time. As a result, if one seeks to understand a new culture within which one does not regularly participate, then one's understanding may become outdated or inaccurate. On a more complex level, the content and even the boundaries of a culture may change as it encounters other cultures. While critical intercultural dialogue provides one intentional process whereby intercultural contact may lead to cultural change, other, less conscious processes can also be important.

It should be noted though that this change is not unidirectional, with minority group members assimilating into the mainstream culture. The outcome of intercultural encounters and dialogue can lead to change in values, perceptions and attitudes in both directions, where the participating individuals and groups mutually change their views of each other (Dessel & Rogge 2008; Gawlewicz 2015).

It is conceivable for racism to thrive more in the absence of intergroup contact. The fact that intercultural dialogue affords more intergroup contact, it can be an effective strategy for combating racism. Particularly, its provision of space(s) for the critical and reflexive examination of personal bias and prejudices can prompt the desired attitudinal change that is vital in prejudice reduction.

Conditions for intercultural dialogue

As a special case of dialogue, intercultural dialogue can constructively be carried out if it is contextualised and adapted, taking into account the diverse composition of the participants.

With this in mind, I outline here, a few minimum conditions necessary for the successful execution of intercultural dialogue as have been identified in the literature.

Participation in intercultural dialogue requires an outlook of openness to alternative cultural perspectives. As such dialogue can only proceed in a state of openness, where participants can reflexively mirror each other's thoughts back and forth (Bohm et al. 1991; Isaacs 2008). So long as this condition is met, participants have the opportunity to clear mutually held assumptions, inferred intentions and preconceptions about one another. Indeed, reflective dialogue in an atmosphere of openness gives participants the opportunity to explore their assumptions about themselves and others (Isaacs 2008). Thus, James (1999, p. 599) considers openness the minimum for such dialogue and notes that there are situations when:

> the commitment to dialogue is superseded by a strategic attempt to secure a prudential modus vivendi. But even within a modus vivendi, residual duties still apply to adherents of critical intercultural dialogue. At minimum, they must retain a stance of openness. This entails the willingness to try to understand their cultures and to hold their own values as open to revision.

Openness, which can be reinforced through mutual commitment to dialogue, allows for trust to develop among participants which can in turn nurture collaboration in achieving common goals. The common goal, in this case, would be mutual understanding of respective cultural perspectives.

The framework of the dialogue in the conduct of intercultural dialogue should also ensure fairness to all participants. There shouldn't be an asymmetrical power relationship among participants which allows some participants to exercise power over others. Power here can mean social, economic, or political power. James (1999) proposes that for intercultural dialogue to be fairly prosecuted, both the capacity to coercively manipulate other

participants' words or actions and to selectively remove topics as discussion points without unanimous agreement should be stripped off all participants. Ensuring these two conditions enhances and frames the rules for dialogue, while ensuring the grounds of fairness. Without these grounds, it is inconceivable to realise understanding and the critical evaluation of other cultural perspectives through dialogue. James (1999, p. 596) summarises the argument for abstaining from the exercise of power in the dialogic process as follows:

> because power relations contradict the fair conditions for critical intercultural dialogue, groups may bear asymmetrical residual duties within a modus vivendi. Just as asymmetrical capacities to overcome the empirical limitations to understanding give groups asymmetrical opportunities to engage in intercultural criticisms, so too does the asymmetrical possession of power provide asymmetrical duties to remain open and to generate trust. In this way, critical intercultural dialogue, even when it confronts its most difficult limits, nevertheless prescribes substantial normative duties.

Another essential factor for the success of intercultural dialogue is the willingness and capacity of participants to engage and learn from each other. The capacity to engage and learn is an aspect of competence which we discuss later, at this stage, I delve more on the concepts "willingness to engage" and "willingness to learn" as essential elements of intercultural dialogue. Whether dialogue can be successfully conducted or not depends on the willingness of participants to engage. This relates to the behaviour of the participants in the process of the dialogue, their behaviour depicting whether they are prepared to make genuine effort to be active participants. In the absence of genuine engagement, intercultural dialogue fails to progress materially. Therefore, participants are required to reasonable effort to listen and understand the views of others while at the same time expressing their own perspectives.

“Willingness to learn” in the context of intercultural dialogue involves a cognitive process, in that it requires mental readiness to accommodate new knowledge from others’ experience. Participation in intercultural dialogue with such readiness is likely to enhance the opportunity for mutual understanding (Isaacs 2008). In this context, the preparedness to learn and understand others, presupposes an acknowledgement of difference and plurality of cultures. Such preparedness also indicates an element of curiosity within each participant; a curiosity to explore the views, perspectives and cultural values of others (Isaacs 2008). Intercultural dialogue is likely to flourish where people are motivated to go beyond their cultural comfort zone to dialogically experience the way others think, view the world and make sense of reality. Ultimately, the fact that participants are willing to learn from others’ experiences is a step towards the attitudinal transformation that intercultural dialogue seeks to effect. This in turn intersects with the main goal of anti-racism, namely, the goal of reducing racial prejudice through intercultural competency training, education, empathy building, and so on.

Generally, openness, fairness and genuine engagement are particularly vital in the context of anti-racism. Within the intercultural dialogue model, racial prejudice can be addressed and reduced only if participants critically and reflectively confront their mutual views, prejudices and preconceptions. A reduction of racism through dialogic interaction is also possible under an atmosphere of egalitarian interaction where individuals do not feel coerced to change their views. Otherwise, the outcome can instead be a reinforcement of prejudice rather than its reduction. Finally, a successful anti-racism strategy presupposes the genuine engagement of people. Thus, voluntary cooperation is a key precondition for the effectiveness of intercultural dialogue as a prejudice reduction strategy.

Cultural Diversity and Intercultural Dialogue

The recognition of cultural, racial, ethnic and religious diversity is an essential element of multicultural policies and practices in pluralistic Western societies (Wilk-Woś 2010). These policies seek to achieve tolerance and the appreciation of collective identities among groups. Similarly, recognition of diversity and difference is also the benchmark for intercultural dialogue as proposed in the White Paper (Council of Europe 2008). The idea of balancing diversity with the notions of cultural and national identity has been challenging policymakers and scholars in Europe in general and Western nations in particular, although diversity appears to be accommodated in both multiculturalism and interculturalism.

In academia, a growing body of research has been produced on the causal effect of diversity on economic, social, and political outcomes. Yet, the evidence as to whether diversity has beneficial or adverse impact across the range of these outcomes is mixed (Alesina & La Ferrara 2004; Elias & Paradies 2016; Fearon & Laitin 2003; Homberg & Bui 2013; Pelled et al. 1999; Putnam 2007; Qin et al. 2013; Stahl et al. 2010). However, a consensus view has long since emerged on the need for coherent policies and structures to incorporate inclusive strategies aimed at addressing diversity across every aspect of life, including the workplace, business, service delivery, community, entertainment and so on. Multicultural policies that were advanced across Europe, Canada and Australia have involved strategies that encourage tracking diversity in management and workplaces; ensuring public services and spaces catering for diversified clients; promoting positive media coverage; and supporting cultural and community associations with the goal of ‘accommodat[ing] culture–based differences of value, language and social practice’ (Vertovec 2010, p. 83).

Today, the policy environment has apparently shifted towards the idea of social cohesion and there is renewed debate surrounding diversity and the policies that espoused it. Multicultural policies are now subjected to continued criticisms, particularly by policymakers who hold the view that it has failed to deliver. The snowball effect of the enunciation of the failure of

multicultural policies in Western society is visible at the grassroots level. Largely fomented by public discourse around anti–immigration and anti–globalisation, opposition to cultural diversity has received traction among Euro–sceptics in England and France and among far right activists in Eastern Europe, Australia and the United States. In England, these groups and the politicians who catered to their fears were able to influence the outcome of the 2016 referendum on Britain's European Union membership, which saw Britain leave the Union. Despite the substantial progress in the intercultural relationships attributable to the range of multicultural policies, the recent rise of neo–nationalism and neo–conservatism will be a challenge to policies that seek to accommodate diversity.

Intercultural dialogue sets a framework for balancing diversity and social cohesion around shared national identity with a focus on shared universal values (Stokke & Lybæk 2016). Generally, the criticisms levelled against multiculturalism centre around the notion that it has created segregated communities by highlighting difference and group identity (Amin 2002). The idea of intercultural dialogue is to counter these negative social outcomes by creating an environment for communication and social interaction. As Stokke and Lybæk (2016, p. 4) note, '[t]he goals of interculturalism are to counteract processes of segregation and exclusion which presumably take place in culturally diverse societies, while also promoting democratic values and respect for human rights through positive interaction between groups and individuals.'

As it attempts to counteract the push for exclusion, segregation and discrimination, intercultural dialogue can be viewed as having an element of anti–racism strategies. Its focus on bridging differences through dialogue can lead to respectful understanding which is a step towards mitigating intergroup tension and prejudice. In the next sections, I discuss the role of intergroup contact on racism and further explore the conceptual and practical utility of dialogue within the context of diversity and cultural plurality.

Racism and intergroup contact

Racism as a social psychological construct forms racial categories based on prejudices and misconceptions construing and essentialising the "otherness" of racial outgroups (Blascovich et al. 1997; Chao et al. 2013; Hook 2005). These racial categories in turn enable societies to promote racially exclusive practices and policies (Feagin 2014; McVeigh 2004). Such emphasis on the difference of the "other" can have a polarising effect among groups, particularly in culturally diverse societies (Dessel & Rogge 2008). Above and beyond curiosity, racism goes so far as to depict the "other" as hostile or antagonising. Studies indicate that racially discriminatory practices are more prevalent in the context of amplified outgroup hostility (Habtegiorgis et al. 2014; Pedersen et al. 2003). Like any other prejudice, such views of cultural outgroups relies heavily on stereotypes and ethnocentric attitudes. The prejudices are likely to be exaggerated when the social distance between groups is widened by the absence of intergroup contact (Eric Oliver & Wong 2003). As it narrows social distance, intergroup contact can offer an avenue for intergroup understanding via intergroup communication (and more specifically, intercultural dialogue).

Research indicates that intergroup contact either reduces or worsens intergroup prejudice depending on the nature of the contact (Pettigrew 1997; Sigelman & Welch 1993). Negative intergroup contact tends to lead to racism and the avoidance of other group members (Barlow et al. 2012; Paolini et al. 2010). However, prejudice towards outgroups is attenuated by positive intergroup contact, provided that the groups enjoy equal status, are not competing against each other, envisage common goals and that institutional structures exist to reduce emerging tensions (Pettigrew 1997). Further research demonstrates the moderating impact of positive intergroup contact, with studies suggesting that such contact can foster intergroup trust and friendship by eliminating social distance (Barlow et al. 2009; Turner et al. 2013; Wagner et al. 2003).

In race relations, research indicates that positive intergroup contact reduces prejudice and racial discrimination (Pedersen et al. 2003). For example, some studies have reported that participants enjoying positive contact were less likely to express racist attitudes (Pettigrew 1997; Stolle et al. 2008). This is consistent with the argument that positive contact can improve attitudes towards out–group members such as racial minorities and immigrants (Pettigrew & Tropp 2008). It could therefore be argued that policies and practices that encourage close and positive contact among members of different racial, ethnic and religious groups are likely to yield harmonious relationships by reducing intergroup tensions and prejudices (Davies et al. 2011; Hewstone et al. 2006). However, the positive effect of such intergroup contact depends on the interaction between contextual and behavioural aspects of the contact. The intergroup contact literature has demonstrated that the mitigating effect of frequent interpersonal contact on racial prejudice depends on behavioural changes that are effected through reduced anxiety and increased empathy (Pettigrew et al. 2011; Stein et al. 2000).

Intercultural dialogue as a communication strategy creates space(s) for the occurrence of intergroup contact which is vital in combating racism. The fact that the contact occurs through dialogue enables reflexivity and self-reflection which are critical in prejudice reduction. Through openness and respectful interaction, dialogic contact can also lead to the bridging of differences. By fostering an engagement of actual or perceived differences and critical self-reflection, intercultural dialogue can lead to the toleration or bridging of such differences that sometimes underlie racial prejudice (Nagda 2006). I discuss this further in the next section.

Intercultural dialogue as an anti–racism approach

The effectiveness of any anti–racism strategy depends on its ability to address the factors and processes underlying racism (Pedersen et al. 2003). Likewise, the utility of intercultural

dialogue in countering racism depends on its effectiveness in addressing these factors. At issue here is the ability of such dialogue to dislodge prejudicial racial stereotypes. Although all stereotypes are not necessarily racist, all racism involves stereotypes (Hook 2005; Lusky 1963). Similarly, although all race related stereotypes are not necessarily driven by prejudice (Bonilla-Silva 1997), yet at the heart of racism lies prejudice (Blascovich et al. 1997). Racial prejudice serves as an epistemological prism through which members of particular groups perceive themselves and outgroups by exaggerating the difference of the "other" (Hook 2005). By dividing people into respective groups, they assign negative traits and stereotypes to outgroup members. Depending on the degree of the prejudice, the strength of the negative stereotypes vary from subtle racial epithets to extreme dehumanising characterisations.

Racism as such benefits from these denigrating projections against outgroups which starts with the assignment of negative stereotypes. Researchers and practitioners have long held that education and awareness campaigns are key to combating negative stereotypes that underlie racism (see Pedersen et al. 2003). Yet, despite the increase in awareness campaigns, the resurgence of far right groups with strong views against immigrants, Muslims and so on in Europe and other Western countries appear to have emboldened traditional prejudices. Therefore, in addition to awareness campaigns and education, countering racism should also focus on delegitimising prejudicial stereotypes by fostering intergroup communication and dialogue.

The power of intercultural dialogue lies in its ability to establish communication among otherwise culturally segregated individuals and groups. Segregation in the context of diversity can weaken social cohesion by reinforcing stereotypes and outgroup hostility. The long history of racism indicates that in the absence of meaningful and frequent intercultural contact, increased level of diversity can create an atmosphere for racism and other forms of intergroup conflict (Kesler & Bloemraad 2010; Putnam 2007). Today, across the world,

cultural diversity has rapidly increased thanks to the constant movement of people, capital and data across countries and continents (Faist 2009). Across countries, cities have become more cosmopolitan and cultural diversity has become a norm that Steven Vertovec (2007, p. 1024) dubbed 'superdiversity', an attribution that is 'distinguished by a dynamic interplay of variables among an increased number of new, small and scattered, multiple–origin, transnationally connected, socio–economically differentiated and legally stratified immigrants who have arrived over the last decade.' Referring to London as the hub of the 'world in one city', Vertovec highlights the unprecedented complex condition diversity has brought to global cities with the continuous flow of immigrants. Faced with the continuous surge of diversity, the mega cities of the West face the challenge of creating harmonious citizenry, while at the same time safeguarding the ethno–cultural rights of majority and minority groups. Cognisant of their interpersonal and group rights, these groups in turn face the constant questions of identity and acculturation issues on the one hand and self–segregation, intergroup conflict and prejudices on the "other".

The early reaction of policymakers in Europe and other advanced countries was to protect minority rights in the face of rising diversity through the enactment of multicultural policies. I have discussed above the debate surrounding the argument that multicultural policies that give recognition to difference have enabled the development of self–segregated communities. Although this is contested in the literature, the thrust that negative intergroup views supported by preconceived prejudices and stereotypes can take hold in the absence of meaningful interethnic, intercultural and/or intergroup communication is a reasonable contention. This view has historical precedents in the pre–Civil Rights and Apartheid eras as well as the frequent race riots in the United Kingdom, Australia and so on. In the current globalised climate, where sentiments against globalisation abound, racism and outgroup prejudice tend to find refuge in neo–nationalism and anti–immigration policies. These are likely to be

aggravated by economic downturns, which can fuel prejudicial attitudes towards minorities and immigrants that can lead to racist and xenophobic outbursts targeting these groups. Thus, increasingly diverse and pluralistic societies face the immense risk of the lack of cohesion unless they create bridges to encourage inclusive communication.

Intercultural communication may serve as a bridge among individuals and groups hailing from diverse ethno–cultural backgrounds. This has been cited as something that multicultural policies failed to bring about. However, intercultural dialogue can facilitate rapprochement by de–emphasising the salience of separate identities and precluding the development of a cultural chasm between minorities and majorities. By fostering dialogue and an atmosphere for civil conversation within the framework of shared universal values, it may offer an avenue for tackling racism and prejudice. As critical intercultural dialogue focuses on the willingness and ability of participants to respectfully listen to and learn from the experiences of cultural outgroups, it offers participants the opportunity to reflect on preconceived racial and cultural prejudices. By creating an environment for reflexivity between communication with members of minority groups and the critical examination of preconceived prejudice towards these groups, such dialogue provides a potential for attitudinal change to emerge. This potential for change at the individual level results from a ‘wider recognition of cultural heritage, tolerance and full respect for different cultural, linguistic, ethnic and religious groups’ (Wilk-Woś 2010, p. 82). By bridging understanding through mutual appreciation of differences among cultures, ‘it helps prevent racism, isolation and discrimination of immigrants’ (ibid.).

To summarise, in addition to the reduction of racial prejudice, there are a range of beneficial values that people can learn through participation in the conduct of intercultural dialogue. For example, in the process, participants can enhance their intercultural competence, relational empathy, and egalitarian attitude. Intercultural competence can be defined as the proficiency

to conduct effective communication with individuals from different cultures in an appropriate way. Although some level of intercultural competence is essential in the conduct of such dialogue, the participants' level of competence can also increase in the dialogic process. Empathy is another value that can be nurtured through intercultural dialogue. Milton Bennett (1979) defines empathy as 'the imaginative, intellectual and emotional participation in another person's experience' (p. 418). This aspect of empathy is relational as it focuses on the knowledge of other's views and values through interpretative communication rather than through psychological perception.[2] Finally, participants can develop egalitarian attitudes in the process of intercultural dialogue which is one of the key factors for combating racism. As they reflexively evaluate their prejudices and preconceptions, they can learn about their shared values which they can then use to re-evaluate their attitudes.

Limitations of intercultural dialogue

In the introduction of this chapter, I discussed some of the conceptual criticisms that scholars levelled against intercultural dialogue. These include its apparent lack of distinction from some elements of multiculturalism; its conceptual ambiguity; and its intractability under abnormal circumstances (for example, war). In this section I outline a few additional limitations regarding the universal applicability of intercultural dialogue, particularly as an anti–racism tool.

Firstly, dialogic interaction framed within the rules of openness, fairness and genuine engagement is likely to lead to fruition. However, this can occur only after each party has decided to participate in dialogue. The challenge is getting individuals and groups to come to dialogue as a means to narrow differences and solve problems. An absence of readiness to collaborate and consent to abide by a set of rules continues to be the main obstacle in conflict

[2] Bennett actually suggests his own platinum rule, a rule that proposes to 'Do unto others as they themselves would have done unto them' to replace the "golden rule" (1979, p. 422).

resolution both in international and domestic conflicts across countries and regions. Race relations is also not immune. Racism, ethnic prejudice and xenophobia also tend to occur due to unwillingness of individuals and groups to engage in reflexive dialogue.

Secondly, intercultural dialogue is likely to enhance skill and intercultural competence, however, without some level of skill and competence are also among the minimum requirements in the conduct of intercultural dialogue. Both at the level of facilitation and participation in the process of dialogue, communication skills and intercultural competence are essential ingredients in developing understanding through dialogue. Both willingness and capacity to learn are vital; a concerted effort to listen to and understand others and the acknowledgement of difference are both vital in fostering positive awareness regarding other cultures and groups (Byram 2009). Equipped with these tools as ingredients, intercultural dialogue can become a potent instrument that can be deployed to counter racism. However, these ingredients (that is, communication skills and intercultural competencies) may not readily be accessible to individuals and groups harbouring racist attitudes and stereotypes. Therefore, the effectiveness of intercultural dialogue as an anti–racism tool, depends on its integration with other strategies that focus on education, cultural awareness campaigns, training and so on.

Thirdly, one of the inclusive features of intercultural dialogue is its adherence to allowing for difference. At the same time, such dialogue, at least as outlined in the Council of Europe's White Paper tends to aim at achieving social cohesion, a concept that 'is often being redefined to equate with homogeneity and assimilation' (Vasta 2010). It is unclear how participants engaging in intercultural dialogue are expected to balance their own difference and cultural identity while tapping into the homogenising focus of emerging discourse on social cohesion. This is particularly tricky in the case of interfaith dialogue, where absolutes are involved and participants hold dear what distinguishes them from each other.

Policymakers and scholars understand that this is challenging, if not an intractable terrain (Abu-Nimer 2012; Huang 1995). Yet, provided intercultural dialogue aims at achieving the accommodation of difference, without too much focus on an assimilatory version of social cohesion, its utility in addressing diversity is conceivable.

Conclusion

In this chapter, I explored the intersectionality between racism and intergroup prejudice as psychosocial problems in pluralistic societies and the utility of intercultural dialogue as an anti–racism instrument. Globalisation has enabled the evolution of an unprecedented assemblage of culturally diverse communities across countries. Historically, nations and regional powers have attempted to address this phenomenon through a cocktail of multicultural policies designed to accommodate the rights of minorities within the mainstream socioeconomic and political landscape. However, the pressures of immigration and diversity on social cohesion amid recurrent intergroup conflict, race riots, racism, extremism and xenophobia have led some policymakers and scholars to conclude that multiculturalism has failed to deliver. The search for alternative approaches to address the issues associated with cultural diversity has therefore received growing interest among scholars and practitioners. For example, the Council of Europe's 2008 White Paper envisages that intercultural dialogue can better achieve what multiculturalism failed, namely, the creation of understanding among people with diverse ethnic, racial, religious and/or cultural backgrounds.

This chapter discussed the intergroup contact hypothesis as a theoretical framework within which intercultural dialogue can be operationalised. Intercultural dialogue as a form of intergroup contact can lead to positive outcomes when the underlying contact is positive. Participants should interact in a consensual, collaborative and mutually respectful exchange of views in order to learn from each other and to effect positive change that can advance

understanding. When intercultural dialogue is prosecuted with the acknowledgement of difference and equality, it can be useful as an anti–racism strategy. By enhancing reflexivity, it gives individuals and groups the opportunity to critically examine their fears, assumptions and preconceptions about each other.

If the conceptual and practical limitations can be properly addressed, intercultural dialogue can be effectively utilised in addressing a range of social problems including social exclusion and marginalisation, racism, intercultural conflict, extremism and xenophobia. Dialogue involves equal participation and reflexive interaction that can enhance collaboration and understanding in intercultural communication. However, this shouldn't imply that intercultural dialogue should replace multiculturalism as a policy framework. Instead it should be integrated with the tenets of critical multiculturalism, addressing the range of institutional and structural inequalities in pluralistic societies. I, therefore, conclude by underscoring the fact that the power relations in these societies shouldn't be ignored by solely focusing on dialogic interaction.

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Report from the **Special Adviser on Equal Justice** in the New York State Courts

October 1, 2020

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EXECUTIVE SUMMARY

October 1, 2020

Dear Chief Judge DiFiore:

On June 9, 2020, Your Honor appointed me to conduct a review of racial bias in the New York State court system. I salute your willingness to call for this review on this topic, at this time. You asked that I deliver this report and recommendations by today, October 1, 2020.

To conduct this review, I was ably assisted by a number of my colleagues at the law firm of Paul, Weiss, Rifkind, Wharton & Garrison, LLP.[1] We also enlisted the advice and input of Professor Harold Goldstein, an industrial psychologist at Baruch College, The City University of New York, and his team at Siena Consulting. Professor Goldstein and I, and our respective firms, undertook this assignment pro bono. We received no compensation or reimbursement from the court system for our work on this matter. Finally, throughout this review, I was advised and supported by Justices Troy Webber and Shirley Troutman, co-chairs of the Franklin H. Williams Judicial Commission, and a number of your other colleagues in the New York State judiciary.

Since my appointment four months ago, my team and I conducted 96 interviews involving 289 individuals. We interviewed current or former judges from almost every type of court upstate and downstate. Our team interviewed court clerks, court watchers, court officers, court attorneys and administrative personnel, private civil and criminal practitioners, institutional and public defenders and prosecutors. We engaged numerous bar associations, judicial associations, court employee unions, court reform organizations and affinity groups. Along with the recommendations set forth below, we believe it important to convey to you what we heard from these interviews, and we do so in Section VI of this report (pp. 54–78).

In general, people we spoke with welcomed this review and were anxious to talk with us. Some organizations canvassed their respective memberships and came forward with their own thoughtful written observations and recommendations. To promote candor from interviewees, we promised that their statements would not be attributed to them by name unless we received explicit permission to do so. At my request, OCA created a public

[1] This Paul, Weiss team included counsel Maria H. Keane, associates Amitav Chakraborty, Lissette Duran, Anna Gonzalez, Kimberly Grambo, Danielle Hayes, Vincent Honrubia, Madison Lupino, Agbeko Petty and Jonathan Wall, summer Associates Claire Abbadi (Columbia Law ’21), Sheridan Cunningham (Harvard Law ’21) and Tobias Kuehne (Yale Law ’21) and paralegals Zachary Hoffman and Erin Mah.

email address to enable individuals to submit anonymously to my team and me information about their experiences with racial bias in the court system. In the course of this review, I received numerous unsolicited letters, phone calls, emails and voicemails from individual members of the public and various organizations concerning racial bias in the courts. Our team studied past reports that examined racial bias in the New York State court system. We also received and reviewed OCA's policies and practices on hiring, promotion, workplace conduct and bias training.

Given COVID-19, my opportunity to visit courts and observe in-person proceedings around the state was limited, though I did have the opportunity to personally visit several courts toward the end of this review.

As written, your assignment to me was a nuanced one. In sum, you asked me to review existing polices, practices and organizations within the New York State court system that are intended to address racial bias and recommend any changes or expansion of those policies, practices and organizations. You did not ask me to undertake a comprehensive review of criminal and civil justice throughout the system – encompassing, for example, jury selection, detention, police, bail or sentencing practices, or the substance of judicial decision-making – for evidence of racial bias. In fact, you have asked the Justice Task Force to study the issue of racial disparity in stops, arrests, charging decisions and jury selection. Thus, I have avoided the temptation (and the invitation of some) to wander into that vast forest.

That said, I have three big-picture observations to share:

First, though it has been 16 years since I chaired the Judiciary Committee of the New York City Bar Association, I was reminded over the last four months of the intense pride and dedication that many in and around the New York State court system – from the upstate Village justice to the Kings County Family Court judge – feel for their work. Particularly given the challenges over the last seven months associated with COVID-19, you should take great comfort that many in the court system you lead work hard to get it right and make it better.

Second, there is the bad news. This review would lack credibility if I omitted it. Through Your Honor's Excellence Initiative considerable progress has been made since 2016 to improve promptness, productivity, disposition rates, reduce case backlogs and modernize courtrooms. But, in one form or another, multiple interviewees from all perspectives still complain about an under-resourced, over-burdened New York State court system, the dehumanizing effect it has on litigants, and the disparate impact of all this on people of color. Housing, Family, Civil and Criminal courts of New York City, in

particular, continue to be faced with extremely high volumes of cases, fewer resources to hear those cases and aging facilities. Over and over, we heard about the "dehumanizing" and "demeaning cattle-call culture" in these high-volume courts. At the same time, the overwhelming majority of the civil or criminal litigants in the Housing, Family, Civil and Criminal courts in New York City are people of color. The sad picture that emerges is, in effect, a second-class system of justice for people of color in New York State. This is not new. In 1991, a Minorities Commission appointed by then-Chief Judge Wachtler declared "there are two justice systems at work in the courts of New York State, one for Whites, and a very different one for minorities and the poor."[2]

As intended, the proposed merger plan will also achieve efficiencies and improve things. But, problems so extensive and systemic in nature can only be addressed by a new, wholesale investment in resources, technology, people and infrastructure. Obviously, you do not have the power to make these changes alone. The judiciary cannot print money or tax the people. This is a matter for all three branches of New York State government, as well as the local governments that own and maintain the courthouses. Should this report become public, my hope is that it aids you in obtaining greater legislative and executive support for the judicial branch, at both the state and local level.

Third, I must report that the news in June of the vile, racist Facebook posting by the Brooklyn-based court officer appears to have peeled the lid off long-simmering racial tensions and intolerance within the court officer community, particularly in Kings County. This, too, is not new. In 1991, the Minorities Commission noted racial tensions that existed then within the court officer community. In 2020, a number of court officers of color were outspoken to us in expressing similar grievances, and told us the Facebook post was not an isolated incident. According to court officers of color, the use of racial slurs by white court officers is common and often goes unpunished. These court officers also told us they felt they could not report incidents of bias for fear of being ostracized by their fellow officers and facing adverse career consequences from powerful and entrenched union leaders. We note that at least one union leader has himself posted offensive messages on social media, leading several court officers to brand union leadership as a "safe haven for racist speech and actions."

For this review, I took very seriously (and, from my own experience in public office, agree with) your direction to only recommend changes to the system that "center on operational issues that lie within the power of the court system to implement

[2] REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES, Vol. 1, at 1 (1991) [hereinafter MINORITIES COMMISSION REPORT].

administratively and unilaterally." To that end, my team and I worked hard to put forth the following recommendations that are specific, practical and workable:

A Commitment From the Top. Just as the legislature has mandated for all state personnel on matters of sexual harassment, we recommend that the court system's leadership embrace a "zero tolerance" policy for racial bias, and explain that the duty to uphold this policy extends to all those working within the New York State court system – from judges, to interpreters, to court officers. While we note that OCA's current discrimination policies state that "the Unified Court System prohibits and will not tolerate . . . discrimination or harassment" on the basis of race, we suggest a more robust, publicized policy specifically addressing racial bias is warranted.

Promote Existing Institutions. From our interviews it is apparent that there is a considerable lack of transparency within the court system on matters of race and racial bias. Interviewees across the board were unfamiliar with many of the existing institutions dedicated to addressing issues of racial bias, as well as the nature of their missions. Others suggested such organizations were "running out of steam." We endorse the continued missions of the Williams Commission and OCA's Office of Diversity and Inclusion, for example, but we recommend a reemphasis on promoting, clarifying and strengthening the mandate of these existing organizations.

Expand Bias Training. The Williams Commission recently recommended regular, mandatory training on bias for all judicial and non-judicial personnel across the court system. We agree. Countless interviewees told us that mandatory implicit bias and cultural sensitivity training is long overdue for judicial and non-judicial personnel in the New York State court system. At present, it appears that such training is both inconsistent and insufficient.

Judges are human, too. They are not above the reach of the implicit racial biases that pervade our society, yet equality before the law requires them to be. Multiple judges we spoke with were willing to acknowledge their own implicit biases and recognized the value of training to open minds and challenge stereotypes. As we understand it, new judges receive bias training at a plenary session during summer sessions at the Judicial Institute in White Plains. Beyond that, the Judicial Institute provides a yearly session on implicit bias that may be accessed remotely as a video, but it is not mandatory.

We perceive an equal if not greater need for more robust bias training for non-judicial personnel, particularly the court officer community. Interviewees have relayed innumerable stories of dehumanizing language by court officers towards litigants of color, as well as instances where tensions were directly escalated by courts officers' actions. But,

it appears that the only "mandatory" training that OCA's Human Resources department uniformly provides to non-judicial personnel is delivered as part of the orientation for new employees and covers "discrimination and harassment," but not implicit bias, specifically. As for court officers, we understand there is a form of implicit bias training at the Court Officer Academy, but we are told that the training provided was lacking, and that it did not actually prioritize understanding racial bias.

In all, it appears there is no centralized body charged with developing, administering, tracking and updating training on racial bias and cultural sensitivity for judicial and non-judicial personnel. We recommend that OCA develop and require comprehensive racial bias and cultural sensitivity training for both judicial and non-judicial personnel, informed by experts in these fields. This training must be multidimensional and address the overlap between issues of race, class, gender, sexual orientation, immigration status, trauma and beyond, in order to ensure more relevant and nuanced discussions.

Address Juror Bias. Interviewees expressed to us a number of concerns about juror bias. Jurors are human, too, and bring to the courtroom all the biases and prejudices they are exposed to in our society. To address this:

First, we recommend that OCA create and display a video educating jurors about implicit bias before *voir dire*. We understand that in many, if not all, state courthouses where jurors are summoned and selected for trials, prospective jurors are already shown a general orientation video. We recommend that OCA work with court personnel, outside experts and members of the bar to include within that video orientation a carefully balanced message on implicit bias that can be shown to venire panels of jurors.

Second, we recommend that Your Honor appoint a new or standing committee to investigate and formulate a proposal to create uniform rules to explicitly permit and endorse *voir dire* of jurors on racial bias. Trial attorneys have told us that the practice of permitting *voir dire* on the subject of implicit bias is inconsistent, and that certain judges allow *voir dire* on such questions while others do not.

Third, we recommend that a model jury instruction on implicit bias be developed for both criminal and civil trials. A number of courts around the country have adopted jury charges that explain the concept of implicit bias and remind jurors to be aware of their implicit biases. As we understand it, OCA can utilize standing committees for criminal and civil pattern jury instructions to develop standard language on implicit bias.

Adopt a Social Media Policy. We recommend that OCA develop a policy for judicial and non-judicial personnel that provides clear restrictions on the use of social media – whether in an official or personal capacity – for racially or culturally offensive remarks

that reflect poorly on the court system. Our reading of the law is that such a policy is legally permissible. *See, e.g.*, *Festa* v. *Westchester Medical Ctr. Health Network*, 380 F. Supp. 3d 308, 319–321 (S.D.N.Y. 2019) (finding that public hospital may discipline an employee for an off-hours anti-Semitic Facebook post if it would disrupt the hospital's ability to serve the local community and "cause harm within the ranks"). We note that other court systems around the country have implemented social media policies to ensure that employees' online activity does not undermine public confidence in the operation of the courts and the application of justice. A social media policy may prohibit communications that constitute harassment or racially offensive remarks, but should be drafted in a way that will not prohibit protected activities under the National Labor Relations Act.

Strengthen the Inspector General Process for Bias Complaints. After consulting a retired Inspector General with extensive experience in the U.S. government and other sources, we recommend that OCA adopt the following best practices to improve its complaints and investigations processes:

First, given the number of interviewees – judicial and non-judicial – who were unaware that mechanisms for making bias complaints even existed, we recommend that OCA engage in a robust campaign to educate court system participants about the existence and purpose of these offices and the procedures to lodge a bias complaint.

Second, we recommend that OCA clarify its retaliation policy to better assuage concerns that interviewees across the spectrum cited about filing complaints. While the current policy states that retaliation is prohibited, the definition of retaliation provided in OCA's discrimination booklet is narrow, difficult to understand and only provides a few examples of very formal, narrow work-related actions of retaliation, such as termination or a demotion with a decrease in wage or salary.

Third, we recommend that OCA update its policies and publicly available resources to more clearly explain that complaints may be made anonymously.

Fourth, we recommend that OCA update and clarify its current public guidance about informal complaint mechanisms.

Fifth, we recommend that, following a complaint, OCA routinely follow up with the complainant to apprise him or her of the status of the investigation initiated by the complaint, and, to the extent permitted by law and privacy concerns, apprise the complainant of the outcome of the investigation. We are advised by an experienced retired IG that this simple act goes a long way to promote credibility and confidence in the process.

Sixth, we recommend that OCA designate an ombudsperson within the IG office to advise potential complainants of their options for registering their concerns. We note that several state court systems and federal agencies maintain similar offices to help individuals navigate complaint systems.

Seventh, we recommend that OCA track and annually report the number of racial bias or race discrimination complaints received, investigated and where possible, substantiated.

Review of Rules Changes for Bias. Next, we recommend that one of the existing institutions for addressing bias – the Williams Commission, the IG for Bias Matters or the Office of Diversity and Inclusion – be tasked with the standing responsibility to review legislation, proposed constitutional amendments, regulations and rules changes pertaining to the state judiciary for any potential bias or disparate impact on people of color, and convey any such concerns to the Chief Administrative Judge. This was suggested to us by the National Center for State Courts and there is precedent for it among government agencies.

Continue Progress on Translation and Interpretation Services. We note that in 2017, the New York State Advisory Committee on Language Access issued a "Strategic Plan" for implementing a number of good recommendations to improve translation and implementation services throughout the state, and we are told implementation of these recommendations is underway. We have heard positive feedback about implementation of the Strategic Plan, and we endorse the Plan's recommendations.

Improve Data Collection. We regret to report that the New York State court system's data collection and publication practices have fallen behind those of other states. We therefore recommend that OCA both expand on categories of data already collected and collect additional, more robust and rigorously audited information that will help create a baseline to measure progress on fighting disparate case outcomes, beyond that which is required by the recently enacted Police Statistics and Transparency Act and the recent amendments to the bail reform law.

Improve Diversity and Inclusion within HR Practices. Throughout the course of our investigation, interviewees frequently raised the lack of diversity within the court system's workforce, and their perception that diversity is not a serious consideration for leadership. Specifically, several interviewees asserted that diverse employees are underrepresented in senior leadership positions, particularly within the OCA bureaucracy. To cure this, we recommend a number of HR reforms developed with assistance from an expert in the field, Professor Harold Goldstein. While they are most aptly suited for the

non-judicial workforce, some may also be applicable to the judiciary, to the extent that they are within OCA's power to implement.

Enhance Trust between Court Officers and the Community. According to judges, public defender organizations, bar associations and numerous others, court officer mistreatment of litigants of color, their families, and attorneys of color is a significant barrier to achieving equality in the court system. In addition to the recommendations above that would impact the court officer community, we recommend these changes for court officers specifically: court officers should be required to wear name tags, and, similar to the NYPD Patrol Guide, OCA should publicly post the rules that court officers must follow in carrying out their official duties, including use-of-force guidelines.

Facilitate Navigation of Courthouses. Interviewees recommended a "greeter" in courthouses on a more widespread basis. We agree, and recommend that there be a designated individual within each courthouse whose role is to welcome litigants and answer basic questions about how to navigate the building and adhere to general procedures and practices. Likewise, helpful, clear, signage and written guidance within courthouses is essential to ensuring that litigants are able to navigate the courthouse and understand the proceedings before them.

Ensure Implementation of Change. Finally, experience shows that recommendations matter little if there is no follow-through on the implementation of them; far too often, reports and recommendations such as these are placed on a shelf and gather dust unless there is a commitment to put words into action. We recommend that Your Honor appoint an entity or group to, on an ongoing basis, monitor and report on implementation of the recommendations here that are adopted.

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One final thought: This review comes at a particularly tense moment for race relations in America. Black Americans watch an unrelenting parade of video images of their people's lives snuffed out like animals at the hunt, at the hands of law enforcement in this jurisdiction and beyond. They conclude, with considerable evidence to support it, that in the eyes of law enforcement their lives do not matter as much as those of whites. The very notion of equality under law is today cast in serious doubt.

You are obviously committed to change and the assessment of hard questions, which is why you asked for this review. In my assessment as a lawyer, a student of history, a former public official, and as an African American, this is a moment that demands a strong and

pronounced rededication to equal justice under law by the New York State court system. It is also my experience that credibility will only be earned if the public sees both strong commitments to reform at the front end and a sustained effort to follow through on those commitments, during your tenure as Chief Judge and beyond.

Respectfully submitted,

Jeh Charles Johnson

I. OUR WORK

A. The Mandate

On June 9, 2020, Chief Judge DiFiore appointed Secretary Johnson to conduct "an independent review of the New York State court system's response to issues of institutional racism," and to make "[r]ecommendations [that] center on operational issues that lie within the power of the court system to implement administratively and unilaterally."[3] Chief Judge DiFiore directed that Secretary Johnson deliver this report and recommendations by October 1, 2020.

In specific terms, the Chief Judge's assignment was to:

- Review the policies and statewide practices of the court system that explicitly address issues of racial bias, with recommendations as to the revision and expansion of such practices.
- Review the structure, operations and effectiveness of organizations and programs within the court system designed to address issues of systemic and implicit bias, and to make recommendations for necessary changes to such structure and operations.
- Review bias education and training practices of judges and non-judicial personnel to ensure that such training maximizes the understanding of all court personnel on the challenging issues of racial justice, with recommendations for necessary changes in such practices.
- Review the practices of selection and appointment of judicial and non-judicial officers and employees within the court system, with recommendations to ensure that those practices are consistent with the highest standards of fairness, equity and inclusiveness.
- Review court policies and programs to ensure they are free of racism and other bias, with recommendations for the amendment of such policies and programs.

B. Engagement with Stakeholders

To conduct our work, our team solicited the views of various stakeholders in the New York State court system to gain a comprehensive understanding of the issues concerning racial bias. These stakeholders included current and former judges, non-judicial personnel

[3] Press Release, Hon. Lawrence K. Marks, *Aiming to Advance Equal Justice in the Courts, Chief Judge DiFiore Announces Independent Review of Court System Policies, Practices and Initiatives* (June 9, 2020), https://www.nycourts.gov/LegacyPDFS/press/pdfs/PR20_24.pdf.

with the Office of Court Administration ("OCA"), district attorneys, prosecutors, public defenders, private attorneys, bar associations, judges' associations and representatives from court employee unions.

More specifically, we engaged a broad range of people in and around the New York State court system, including individuals from the following:

- Administration for Children's Services
- Asian American Bar Association of New York
- Asian American Judges Association
- Association of Latino Judges
- Brooklyn Defender Services
- Bronx Defenders
- Caribbean American Lawyers Association
- Center for Court Innovation
- Commission on Judicial Conduct
- District Attorneys of Albany, Bronx, Dutchess, Erie, Kings, Monroe, New York, Suffolk, Queens and Westchester Counties
- Dominican Bar Association
- Dutchess County Public Defender
- Franklin H. Williams Judicial Commission on Minorities
- Fund for Modern Courts
- Guardians Association of the New York State Courts
- Judicial Friends Association, Inc.
- Latino Court Officers Society
- Latino Judges Association
- Legal Aid Bureau of Buffalo
- Legal Aid Society of New York City
- Legal Aid Society of Northeastern New York
- Legal Services Of the Hudson Valley
- Manhattan Legal Services
- Mayor's Office of Criminal Justice
- Measures for Justice
- Metropolitan Black Bar Association
- Mobilization for Justice, Inc.
- Monroe County Public Defender
- National Center for State Courts

- New York City Association of Criminal Court Judges
- New York City Association of Housing Judges
- New York City Bar Association
- New York City Criminal Court Judges Association
- New York City Family Court Judges Association
- New York City Housing Court Judges Association
- New York City Law Department
- New York City Mayor's Office of Criminal Justice
- New York County Clerk
- New York Courts Shomrim Society
- New York State Association of Criminal Defense Attorneys
- New York State Court Clerks Association
- New York State Court Officers Association
- New York State Family Court Judges Association
- New York State Judicial Institute
- Northern Manhattan Improvement Corporation
- OCA Office of Diversity and Inclusion
- OCA Counsel's Office
- OCA Human Resources
- Office of the Appellate Defender
- Office of the Inspector General
- Puerto Rican Bar Association
- South Asian Bar Association
- Tribune Society
- Westchester Magistrates Association

In all, we conducted 96 interviews involving 289 individuals. We interviewed current or former judges from the Court of Appeals, the Appellate Divisions, the trial-level Supreme Courts, County Courts, City Courts and Town and Village Courts. Our team interviewed court clerks, court officers, court attorneys and administrative personnel of OCA. We interviewed prosecutors, private civil and criminal practitioners, public defenders and attorneys acting as assigned counsel.

To promote candor from all interviewees, in this report we do not by name attribute (unless authorized) narratives or quotations to specific individuals interviewed.

C. Materials Received from Interviewees

In addition to our interviews, we received and reviewed over 200 documents, including memoranda and emails supplementing answers given during interviews, pictures and emails documenting instances of discrimination or bias and memoranda and emails referring us to prior studies or models for innovative practices.

D. Public Contacts

At our request, OCA created a public email address to enable individuals to anonymously submit messages and concerns about their experiences with racial bias in the New York State court system. The email inbox was activated on July 8, 2020, and was advertised on OCA's internal listserv the same day. We received 59 emails, 24 of which reported incidents of experienced racial bias and 15 recounted incidents of observed racial bias. Only our team had access to this emails; they are not accessible to OCA. In the course of this review, Secretary Johnson also received a number of unsolicited letters, phone calls, emails and voicemails on the subject of racial bias in the courts.

E. Research

Our team studied past reports on the New York State court system that examined issues of racial bias. These included reports of past and ongoing commissions, as well as external studies and news reports. Most notably, the team reviewed 27 reports from the Williams Commission,[4] and analyzed recommendations the Williams Commission made from 1991 to 2019 to alleviate racial bias and increase diversity in the court system. Beyond the Williams Commission reports, we studied reports by the Vera Institute of Justice,[5] the Court Statistics Project,[6] the Center for Court Innovation[7] and various additional reports that examined issues relevant to the mandate.

Our team received and reviewed OCA's policies and practices on hiring, promotion, workplace conduct and bias training. We engaged and consulted with Professor Harold Goldstein, an industrial psychologist at Baruch College, The City University of New York, and his team at Siena Consulting, in the review of these policies and practices. Professor

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[4] Our team did not review the Williams Commission's reports in 1999 and 2000 as they were not provided to us and do not exist on the Williams Commission website.

[5] Besiki Luka Kutateladze & Nancy R. Andiloro, *Prosecution and Racial Justice in New York County – Technical Report*, VERA INST. OF JUST. (Jan. 31, 2014), https://www.ncjrs.gov/pdffiles1/nij/grants/247227.pdf.

[6] *Collecting Race and Ethnicity Data*, CT. STATISTICS PROJECT (June 24, 2020), http://www.courtstatistics.org/__data/assets/pdf_file/0018/42255/Race_special_topic_final.pdf.

[7] Rachel Swaner et al., *Procedural Justice at the Manhattan Criminal Court: Impact, Limitations, Implications*, CTR. CT. INNOV. (Aug. 2019), https://www.courtinnovation.org/sites/default/files/media/documents/2019-08/pj_manhattan_report.pdf.

Goldstein made a series of recommendations for OCA's recruitment, hiring, training, evaluation and promotion practices, as well as suggestions for accountability measures to assess progress toward fairness and diversity-related goals and objectives. Many of his recommendations have been incorporated into this report.

Using 2020 employment statistics provided by OCA, we also analyzed the diversity of employees of the New York State court system.

Finally, we researched several legal matters, as well as the text and legislative history of New York State Senate bill 7703, which, once signed into law, will require OCA to compile and publicize demographic data in the judiciary. We also studied the recently-passed STAT Act, which requires OCA to compile and publicize demographic data for individuals charged with misdemeanors.

F. Court Visits

Given COVID-19, our opportunity to visit courts and observe in-person proceedings around the state was limited. This would have been of great benefit to this review. However, toward the end of the review, as the courts began to reopen, Secretary Johnson had the opportunity to personally visit several courts, observe proceedings, and meet with judges, attorneys, court clerks and court officers there.

II. THE NEW YORK STATE COURT SYSTEM

The New York State court system is the largest and most complex in the Nation, serving one of the most populated, complex, diverse and dynamic states in the Nation. Adding to the complexity, the court system is structured one way inside New York City and another way outside the City. Few practitioners and observers understand the full complexity of the state's court system and how it got that way.

A. History of the New York State Courts

In 1777, New York adopted the state's first constitution, which marked the beginning of a long history of organizing and re-organizing its judiciary.[8] The courts operating in New York prior to 1777 reflected the model of judicial organization introduced during British colonial rule: the Supreme Court held jurisdiction over disputes under law – akin to jurisdiction of the English King's Bench – while the Court of Chancery enjoyed jurisdiction over equitable disputes.[9] The courts of law and chancery were supplemented by specialized courts, such as those responsible for hearing non-capital felony cases or disputes arising in New York City.[10]

The 1777 Constitution largely continued this system; in 1786 Circuit Courts were introduced.[11] Justices were assigned to particular counties, and traveled within them holding court sessions for civil cases.[12] These courts were supplemented in the decades that followed by a number of additional courts responsible for specialized disputes, such as the Surrogate's Court established in 1787 to handle the administration of estates.[13]

By the time of the Constitutional Convention of 1846, the Circuit Courts had proved ineffective at responding to the needs of the growing and increasingly-centralized population of the state. As a result, New York adopted a consolidated court structure which prevails, in many respects, to this day.[14] The Supreme Court absorbed jurisdiction over the equitable disputes once heard by the abolished Court of Chancery, becoming a court of

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8 N. Y. State Bar Ass'n Committee, THE JUDICIARY ARTICLE OF THE NEW YORK STATE CONSTITUTION 1, 9 (2017) [hereinafter THE JUDICIARY ARTICLE].

9 *Id.*; *see also* COURTS OF NEW YORK STATE, https://history.nycourts.gov/new-york-legal-history/history-new-york-courts/ (last visited July 30, 2020).

10 THE COURT OF GENERAL SESSIONS 1683–1847, https://history.nycourts.gov/court/court-general-sessions/ (last visited July 30, 2020); COURT OF COMMON PLEAS 1686-1895, https://history.nycourts.gov/court/court-common-pleas/ (last visited July 30, 2020).

11 CIRCUIT COURTS 1786–1895, https://history.nycourts.gov/court/circuit-courts-1786-1895/ (last visited July 30, 2020); Marc Bloustein, A SHORT HISTORY OF THE NEW YORK STATE COURT SYSTEM (1987).

12 *Id*.

13 SURROGATE'S COURT, https://history.nycourts.gov/court/surrogates-court/ (last visited July 30, 2020).

14 *See generally* Bloustein, *supra* note 11; *see* SPECIAL COMMISSION ON THE FUTURE OF THE N. Y. STATE COURTS, A COURT SYSTEM FOR THE FUTURE 16 (2007) [hereinafter SPECIAL COMMISSION REPORT 1].

general original jurisdiction.[15] The newly-expanded Supreme Court was divided into eight Judicial Districts, each made up of four justices elected by residents of the district.[16] The Convention also introduced the Court of Appeals: the highest court of the state responsible for hearing appeals from the state's various trial courts.[17] Judges of the Court of Appeals would be elected by a state-wide vote, subject to certain eligibility criteria.[18] The 1894 Constitutional Convention built upon these changes and established an intermediate level of appellate review by creating four Appellate Divisions throughout the state consisting of elected Supreme Court Justices appointed by the Governor to hear appeals.[19]

The current New York State court system is the product of the 1962 Constitutional Convention, which instituted a "unified court system" under Article VI of the New York State Constitution.[20] This unification consisted primarily of consolidating administrative bodies and funding arrangements.[21] The post-1962 court system also constitutionally enshrined the structure of the eleven lower courts of original jurisdiction that still exist today.[22] These courts are: the Supreme Court, the Court of Claims, District Courts, County Courts, Family Courts, Surrogate's Courts, City Courts, a New York City Criminal Court, a New York City Civil Court, and the Town and Village Courts.[23]

In addition, the unification instituted a cap of one Supreme Court justice to fifty thousand residents, but created provisions for the appointment of "acting" Supreme Court justices appointed by the Chief Administrative Judge.[24] This has led to a large number of lower court judges serving as "acting" Supreme Court justices over the second half of the twentieth century and continuing to the present day.[25]

In 1977, the New York electorate, by constitutional amendment, authorized the creation of a unified state court system and the Office of Court Administration, or OCA, to oversee it. With the exception of Town and Village Courts, the budget and financing for the state judiciary was placed under unified state control, though state courthouses themselves remain the property and responsibility of local governments.[26] At the same time, the

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15 THE JUDICIARY ARTICLE, *supra* note 8, at 13.
16 *Id.* at 14.
17 *Id.* at 13.
18 *Id.*
19 *Id.* at 16.
20 N.Y. CONST. art. VI, § 1(a).
21 Bloustein, *supra* note 11; SPECIAL COMMISSION REPORT 1, *supra* note 14, at 17.
22 SPECIAL COMMISSION REPORT 1, *supra* note 14, at 16–17.
23 *Id.*; N.Y. CONST. art. VI, § 1.
24 *Id.* at 23–24.
25 *Id.* at 24.
26 N.Y. CONST. art. VI, § 29; art. VII § 1.

electorate approved creation of a Commission on Judicial Conduct, and the gubernatorial appointment of judges to the Court of Appeals.[27]

B. Today's New York State Court System

Today's New York court system is made up of eleven lower courts and four appellate divisions.[28] The highest court is the New York Court of Appeals.[29] While some of New York's trial courts – such as the Family Court – are distinguished by their subject matter jurisdiction, others have jurisdiction over the same legal issues in different areas within the state.[30] Most notably, the court structure within New York City differs from the rest of the state, as it includes Civil and Criminal courts to resolve legal disputes.[31] By comparison, the judicial system outside New York City employs a combination of City Courts, District Courts and Town and Village Courts that hear cases involving civil claims for $15,000 or less, as well as non-felony criminal prosecutions.[32] The County Courts in the counties outside New York City are responsible for all felony criminal prosecutions.[33]

Present day, New York's courts are divided geographically into 13 Judicial Districts.[34] The First, Second, Tenth, Eleventh, Twelfth, and Thirteenth Judicial Districts encompass New York City and Long Island.[35] The Third and Ninth Districts cover a number of counties directly north of New York City, such as Westchester, Rockland, Ulster and Albany counties.[36] The Fourth District covers the northernmost part of the state, while the Fifth and Sixth Districts encompass the middle of the state.[37] Finally, the Seventh and Eighth Districts cover the western part of the state.[38]

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27 SPECIAL COMMISSION REPORT 1, *supra* note 14, at 53–54.

28 Jay C. Carlisle and Matthew J. Shock, *The Constitutional Convention and Court Merger in New York State*, 38 PACE L. REV. 69, 74 (2017).

29 N.Y. CONST. art. VI, § 3.

30 Carlisle and Shock, *supra* note 28, at 75; *see also* Quintin Johnstone, *New York State Courts: Their Structure, Administration, and Reform Possibilities*, 43 N.Y.L. SCH. L. REV. 915, 916 (1999).

31 NEW YORK CITY COURTS, https://www.nycourts.gov/courts/cts-NYC.shtml (last visited Aug. 18, 2020).

32 SPECIAL COMMISSION REPORT 1, *supra* note 14, at 17–22; THE COURTS OUTSIDE NEW YORK CITY, https://www.nycourts.gov/courts/cts-outside-nyc.shtml (last visited Aug. 18, 2020).

33 *Id.*

34 NEW YORK STATE JUDICIAL DEPARTMENTS AND DISTRICTS, https://www.nycourts.gov/courts/ad4/Court/Dept-Districts.html (last visited Aug. 18, 2020).

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.*

Figure 1[39]

The Court of Appeals. The Court of Appeals is the highest court in the state. As the single ultimate arbiter of New York law, the court can review decisions from the state's appellate courts, rulings by the Commission on Judicial Conduct[40] and direct appeals from the trial courts in certain instances.[41] The court consists of seven judges who serve fourteen-year terms.[42] Court of Appeals judges are appointed by the Governor, and are chosen from a slate of candidates recommended by the Commission on Judicial Nomination.[43]

The Supreme Court. Consistent throughout the state is the Supreme Court and its Appellate Divisions. The Supreme Court is a statewide court of "general original jurisdiction in law and equity," which automatically has jurisdiction over all "classes of actions and proceedings" created by the state legislature.[44] In practice, however, the Supreme Court only hears those cases which do not fall under the jurisdiction of one of the

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39 *Id.*

40 *See Procedures in the New York State Court of Appeals*, NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT http://www.scjc.state.ny.us/General.Information/Gen.Info.Pages/Procedures.html (last visited Aug. 18, 2020).

41 N.Y. CONST. art. VI, § 3. For example, direct appeals can be taken from the trial courts where the constitutional validity of a state or federal statute is at issue. *Id.*

42 *Id.* at § 2.

43 *Id.*; *see also* NEW YORK STATE COMMISSION ON JUDICIAL NOMINATION, http://nysegov.com/cjn/overview.htm (last visited September 5, 2020).

44 N.Y. CONST. art. VI, § 7(a)–(b).

other ten smaller or more specialized trial courts operating within the state.[45] The Supreme Court may also refer disputes to another trial court – except the Court of Claims – when doing so would "promote the administration of justice."[46] As a result, the Supreme Court primarily hears major civil litigation, such as commercial or matrimonial disputes.[47]

The Supreme Court also contains a specialized Commercial Division, in which judges resolve commercial disputes with potential damages of over $500,000.[48] There are four Commercial Divisions in New York City located in the Supreme Court in the Bronx, Manhattan, Brooklyn and Queens. There is also a Commercial Division in Albany, Nassau, Suffolk, Onondaga and Westchester Counties and in the 7th and 8th Judicial Districts.[49]

Supreme Court justices are elected to each of the Judicial Districts by the electorate of that district.[50] There is a maximum of one Supreme Court justice to every fifty thousand residents, and each justice serves a maximum term of fourteen years.[51] These restrictions are not imposed on acting Supreme Court justices, who are appointed by the Chief Administrative Judge.[52] Acting justices have the same powers as elected Supreme Court justices.[53]

Supreme Court, Appellate Division. The Supreme Court also includes an appellate function. There are four appellate Judicial Departments of the Supreme Court across the state, which are served by four corresponding Appellate Divisions. The Appellate Divisions hear criminal and civil appeals from the courts of original jurisdiction within their geographical Department, as well as appeals from the Court of Claims, Surrogate's Court, Family Court and County Courts.[54] The Constitution places a cap of seven justices on the first and second Appellate Divisions, and five justices in the third and fourth Appellate Divisions.[55] Additional judges can be added on a temporary basis for as long as they are necessary for the speedy disposition of the Appellate Division's docket.[56]

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45 *See* THE JUDICIAL SYSTEM, https://www.dos.ny.gov/lg/handbook/html/the_judicial_system.html (last visited July 30, 2020).
46 N.Y. Const. art. VI, § 19(a).
47 SPECIAL COMMISSION REPORT 1, *supra* note 14, at 17.
48 COMMERCIAL DIVISION – N. Y. SUPREME COURT, http://ww2.nycourts.gov/courts/comdiv/history.shtml (last visited July 30, 2020).
49 *Id.*
50 N.Y. CONST. art. VI, § 6(b).
51 *Id.* at §§ 6(c)–(d).
52 *Id.* at § 26.
53 SPECIAL COMMISSION REPORT 1, *supra* note 14, at 23–24.
54 N.Y. CONST. art. VI, § 7(a); SPECIAL COMMISSION REPORT 1, *supra* note 14, at 27.
55 N.Y. CONST. art. VI, § 4(b).
56 *Id.* at § 4(e).

Supreme Court, Appellate Term. Appellate Terms of the Supreme Court are additional courts created at the discretion of each Judicial Department, consisting of between three and five justices.[57] Currently, only the First and Second Departments have Appellate Terms.[58] These Terms hear appeals from the New York City Civil Court, New York City Criminal Court, the City Courts and the District Courts within each Department and appeals from non-felony criminal convictions within the Department.[59] Appeals from civil judgments made by the Appellate Terms are heard by the Appellate Division, and then by the Court of Appeals if the Appellate Division's holding is appealed. The Appellate Terms' criminal decisions are appealable only to the Court of Appeals directly.[60]

The Family Court. There is a Family Court in each county across the state.[61] Family Court judges in counties outside New York City are elected to their positions, while judges in New York City are appointed by the mayor.[62] Judges of the Family Court serve ten-year terms.[63] The Family Court possesses original jurisdiction primarily over disputes involving minors.[64] The Family Court is also empowered to hear certain related disputes referred to it by the Supreme Court, and in such cases is authorized to exercise all the authority normally allocated to the Supreme Court.[65] Appeals from Family Court judgments are heard by the Appellate Division of the Supreme Court, and a litigant may appeal an Appellate Division decision to the Court of Appeals.[66]

The Surrogate's Court. Like the Family Court, the Surrogate's Court is a specialized body with one court in each county. The court has original jurisdiction over wills, trusts and estates and all actions and proceedings related to these areas that are not already within the exclusive jurisdiction of the Supreme Court.[67] In addition, the court can exercise "equity jurisdiction" to hear other cases, unless such an exercise would conflict with the law.[68] Surrogate's Court judges are elected by each county, and serve ten-year terms outside of New York City or fourteen-year terms within New York City.[69]

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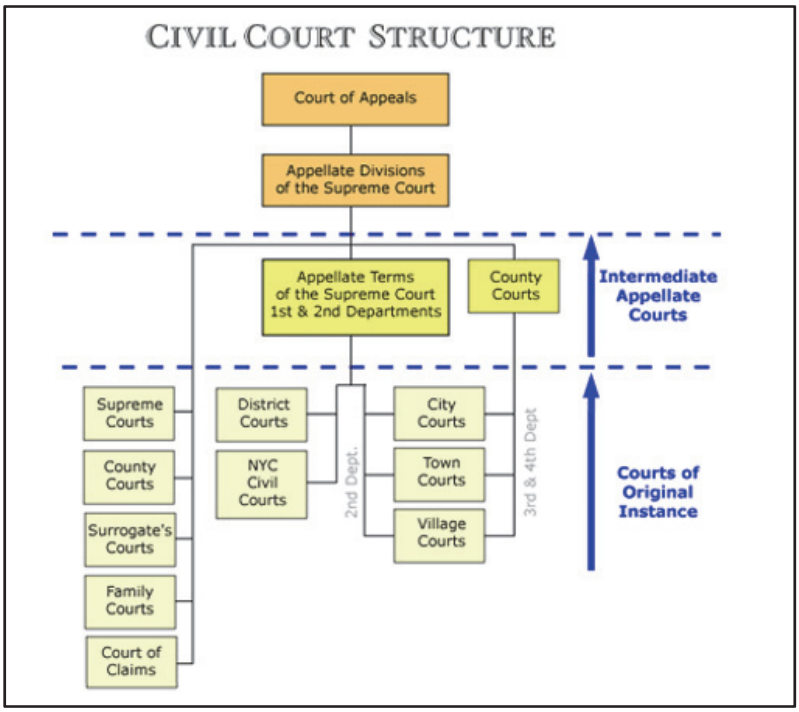
57 *Id.* at § 8(a).
58 THE JUDICIARY ARTICLE, *supra* note 8, at 27.
59 N.Y. CONST. art. VI, § 8(d)–(e); SPECIAL COMMISSION REPORT 1, *supra* note 14, at 27.
60 N.Y. C.P.L. § 460.20(2)(b).
61 N.Y. CONST. art. VI, § 13(a).
62 *Id*.
63 *Id*.
64 *Id.* at § 13(b).
65 *Id.* at § 13(c).
66 Carlisle and Shock, *supra* note 28, at 76, 80.
67 N.Y. CONST. art. VI, § 12(d).
68 *Id.* at § 12(e).
69 *Id.* at §§ 12(b)–(c).

The Court of Claims. The Court of Claims handles litigation in which the state of New York is a party.[70] The Constitution authorizes between six and eight judges to sit on the court for terms of nine years.[71] Judges can only be appointed to the court by the Governor with the advice and consent of the State Senate.[72] Appeals from judgments by the Court of Claims proceed to the Appellate Division, then to the Court of Appeals.[73] A number of Court of Claims judges also serve as acting Supreme Court justices.[74]

In addition to these statewide courts, the court system also contains a number of specialized courts across the state. These include the Integrated Domestic Violence courts and the Problem Solving Courts.[75] Specialized courts exist across the state, but not consistently. For instance, there is a Human Trafficking Intervention Court in Suffolk County, but not in Albany County.[76] Litigants are referred to these courts, if they are available, by the court of original jurisdiction over the case.



70 *Id.* at § 9.
71 *Id.*
72 *Id.*
73 Carlisle and Shock, *supra* note 28, at 80.
74 SPECIAL COMMISSION REPORT 1, *supra* note 14, at 23–24.
75 These Problem Solving Courts identify underlying issues bringing people into court and employ innovative approaches to address those issues, including drug treatment, human trafficking intervention, mental health services, as well as adolescent diversion programs. *See Office of Policy & Planning*, N.Y. UNIFIED CT. SYS., https://ww2.nycourts.gov/admin/opp/index.shtml (last visited July 30, 2020).
76 *Human Trafficking Intervention Courts: Court Locations*, N.Y. UNIFIED CT. SYS., http://ww2.nycourts.gov/courts/problem_solving/htc/courts.shtml (last visited July 30, 2020).

Figure 2[77]

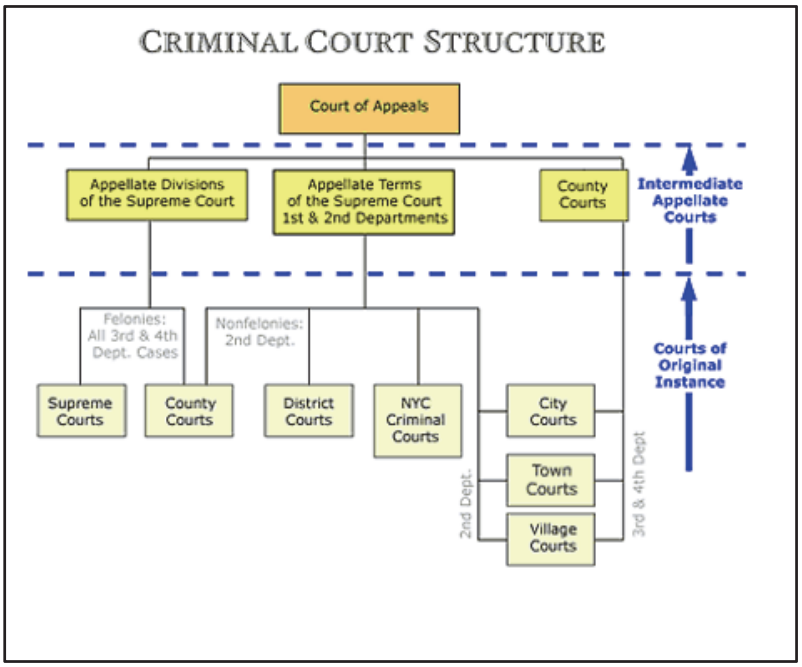


Figure 3[78]

C. Lower Courts Within New York City

Civil Court. The Civil Court of the City of New York has original jurisdiction over civil suits involving damages up to $25,000.[79] The Small Claims Courts and the Housing Courts are part of the Civil Court system, although they are often referred to as separate courts. The Small Claims Court adjudicates claims valued up to $10,000[80] and the Housing Court handles housing or landlord-tenant matters of any value.[81] There is a Housing Court and Smalls Claims Court in each of the city's five boroughs, as well as two additional locations in Harlem and Red Hook.[82] Appeals from Civil Court proceed to the First and Second Appellate Term, then to the Appellate Division, then to the Court of Appeals. All

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77 *Structure of the Courts*, N.Y. UNIFIED CT. SYS., https://www.nycourts.gov/courts/structure.shtml (last visited Sept. 5, 2020).

78 *Id*.

79 *New York City Civil Court: In General*, N.Y. UNIFIED CT. SYS., http://www.courts.state.ny.us/COURTS/nyc/smallclaims/general.shtml (last visited July 30, 2020).

80 *New York City Small Claims Court: In General*, N.Y. UNIFIED CT. SYS., http://www.courts.state.ny.us/COURTS/nyc/smallclaims/general.shtml (last visited July 30, 2020).

81 *New York City Housing Court: In General*, N.Y. UNIFIED CT. SYS., http://www.courts.state.ny.us/COURTS/nyc/housing/general.shtml (last visited July 30, 2020).

82 *New York City Housing Court: Phone Listings & Addresses*, N.Y. UNIFIED CT. SYS., http://www.courts.state.ny.us/COURTS/nyc/housing/addresses.shtml (last visited July 30, 2020); *New York City Small Claims Court: Phone Listings & Addresses*, N.Y. UNIFIED CT. SYS., http://www.courts.state.ny.us/COURTS/nyc/smallclaims/addresses.shtml (last visited July 30, 2020).

Civil Court Judges are elected to office for ten-year terms, with the exception of the judges serving in the Housing Courts.[83] These Housing Court judges are instead appointed by the Chief Administrative Judge from a list compiled by an Advisory Council.[84] Civil Court Judges are eligible to be appointed acting Supreme Court justices.[85]

Criminal Court. The Criminal Court handles misdemeanors and lesser offenses.[86] The Criminal Court is also responsible for arraigning defendants charged with indictable felony offenses.[87] After arraignment, the prosecution of felonies proceeds in the Supreme Court. Appeals from Criminal Court proceed to the First and Second Appellate Term, then directly to the Court of Appeals. Criminal Court judges are appointed to office for ten-year terms by the mayor.[88] As with the Civil Court judges, Criminal Court judges are also eligible to be appointed acting Supreme Court justices.[89]

D. Lower Courts Outside New York City

Outside of New York City, legal disputes akin to those handled by the Civil and Criminal courts are handled by five different trial courts. Jurisdiction over a specific issue largely depends on the county, and differs across the state. There are 57 counties outside of New York City.

In each of these counties, a County Court presides over felony criminal cases.[90] Judges serving on these courts are elected by the county for ten-year terms.[91] The Constitution also authorizes these courts to hear civil suits involving damages of less than $25,000, as well as housing or landlord-tenant disputes.[92] The latter power is rarely exercised, since the legislature typically creates Town, City or Village courts with original jurisdiction over these disputes.[93]

In Nassau County and the western part of Suffolk County, civil suits for monetary damages up to $15,000 and misdemeanor offences are handled by a District Court.[94] These

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83 SPECIAL COMMISSION REPORT 1, *supra* note 14, at 20; N.Y. CONST. art. VI, § 15(a).
84 *Id.*; *New York City Housing Court: Advisory Council*, N.Y. UNIFIED CT. SYS., http://www.courts.state.ny.us/COURTS/nyc/housing/advisory.shtml (last visited Sept. 5, 2020).
85 SPECIAL COMMISSION REPORT 1, *supra* note 14, at 23, 78.
86 Janet DiFiore and Lawrence K. Marks, THE NEW YORK STATE COURTS: AN INTRODUCTORY GUIDE 1 (2016).
87 *Id.*
88 N.Y. CONST. art. VI, § 15(a).
89 SPECIAL COMMISSION REPORT 1, *supra* note 14, at 23, 78.
90 DiFiore and Marks, *supra* note 86, at 2.
91 N.Y. CONST. art. VI, § 10(b).
92 *Id.* at § 11(a).
93 SPEC. COMM'N ON THE FUTURE OF THE N.Y. ST. CTS., JUSTICE MOST LOCAL: THE FUTURE OF TOWN AND VILLAGE COURTS IN NEW YORK STATE 7 (2008) [hereinafter SPECIAL COMMISSION REPORT 2].
94 DiFiore and Marks, *supra* note 86, at 1.

courts also hear arraignments for felony offenses.[95] The actual limitations imposed on a District Court within their jurisdictional bounds is determined by law.[96] A locality outside of New York City can petition to create a District Court by legislative action, but the state legislature can "regulate and discontinue" these courts.[97] At least one judge must serve on each District Court, and these judges are elected by the District's constituents for a term of six years.[98] Nassau and Suffolk Counties are currently the only counties that employ District Courts.[99]

The Constitution also permits the creation of Town, Village and City Courts in all counties outside of New York City.[100] Town, Village and City Courts are often referred to as "Justice Courts."[101] These courts have original jurisdiction up to, but not greater than, the jurisdiction of the District Courts.[102] These courts may be regulated or dissolved by the legislature.[103] Town and Village Courts typically arraign defendants for felonies, and issue judgments on misdemeanor or minor offences, housing or landlord-tenant disputes, and civil suits involving damages up to $3,000.[104] In the Second Department, which has an Appellate Term, judgments by Town, Village and City courts may be appealed to the Appellate Term.[105] In the Third and Fourth Departments, judgments from Town, Village and City courts are appealed to the County Court.[106]

City Courts generally handle civil suits up to $15,000, misdemeanor offenses, and occasionally small claims.

The selection process and terms of the judges overseeing the Town, Village and City courts is determined by the legislature, with the exception that Town judges must be elected for four year terms.[107] In 2008, The Special Commission on the Future of New York State Courts found that a majority of the judges in these courts did not have a law school education.[108]

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95 *Id*.
96 N.Y. CONST. art. VI, § 16(d).
97 *Id.* at §§ 16(a), (i).
98 *Id.* at § 16(h).
99 *District Court: Introduction*, N.Y. UNIFIED CT. SYS., https://www.nycourts.gov/courts/cts-outside-nyc-DISTRICT.shtml (last visited Aug. 18, 2020).
100 N.Y. CONST. art. VI, § 17.
101 SPECIAL COMMISSION REPORT 2, *supra* note 93, at 7.
102 N.Y. CONST. art. VI, § 17(a).
103 *Id.* at § 17(b).
104 SPECIAL COMMISSION REPORT 2, *supra* note 93, at 29.
105 Carlisle and Shock, *supra* note 28, at 83; DiFiore and Marks, *supra* note 86, at 3.
106 DiFiore and Marks, *supra* note 86, at 3.
107 N.Y. CONST. art. VI, § 17(d).
108 SPECIAL COMMISSION REPORT 2, *supra* note 93, at 13.

E. The Proposed Merger Plan

In recent years there have been calls for extensive change to the court system, such as the consolidation of the eleven trial courts into a two- or three-tiered trial court system. In 2019, Chief Judge DiFiore unveiled a court merger proposal that would replace the current structure with a three-tiered trial court system.[109] The merger plan would require an amendment to the state Constitution.[110]

Pursuant to the plan, County Court, Family Court, Surrogate's Court and the Court of Claims would be abolished and incorporated into the Supreme Court system.[111] Former judges on these courts would transition to become Supreme Court Justices.[112] In addition, City Courts, District Courts and New York City's Civil and Criminal Courts would be abolished and incorporated into a new statewide Municipal Court system.[113] Former judges from each of these courts would become judges of newly created Municipal Courts.[114] Town and Village Courts would remain unchanged.[115]

F. Case Volume

The New York State court system is one of the busiest in the Nation, with the state's trial courts handling over 3 million cases each year.[116] There has been a steady decrease in filings in recent years, from 3,510,348 filings in 2015 to 3,009,470 in 2019.[117] In 2019, the Court of Appeals decided 116 cases from a pool of 19,094 dispositions from the Appellate Divisions.[118] At the Supreme Court level, there were 450,409 civil filings and 38,966 criminal filings, which represent a steady decline of filings in recent years.[119] Across the state, the City and District Courts outside of New York City processed 854,056 filings in total. The Surrogate's Court processed 141,237 filings, and the Court of Claims

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109 *See* Press Release, Hon. Lawrence K. Marks, *Chief Judge Proposes Constitutional Reforms to Simplify Outdated Court Structure, Aiming to Enhance Access, Optimize Resources* (Sept. 25, 2019), https://ww2.nycourts.gov/sites/default/files/document/files/2019-09/PR19_22.pdf.

110 *Id.*

111 *See Key Provisions of the Chief Judge's Court Consolidation Proposal*, N.Y. UNIFIED CT. SYS., https://ww2.nycourts.gov/sites/default/files/document/files/2019-09/CourtMergerSummaryandProposal.pdf (last visited Aug. 18, 2020).

112 *Id.*

113 *Id.*

114 *Id.*

115 *Id.*

116 N.Y. ST. UNIFIED CT. SYS., 2019 ANNUAL REPORT 35 (2020).

117 *Id*.

118 *Id.* at 33–34. There were also 2, 807 dispositions in the Appellate Terms. *Id.*

119 *Id.* at 35, 42.

handled 1,801 claims.[120] The Family Court received 578,346 filings in 2019, with 192,799 filings in New York City alone.[121]

New York City handled 278,928 filings in its Criminal Court and 540,583 filings in its Civil Court in 2019.[122] Criminal Court filings in New York have declined in recent years, but Civil Court filings have increased from 528,059 filings in 2015 to 540,583 in 2019.[123] Of the cases filed in the city's Civil Court, 323,971 were civil actions, 193,970 were housing claims, 17,587 filings were small claims, and 5,055 were commercial claims.[124] In addition, the 1,277 Town and Village Courts also process almost 2 million cases each year.[125]

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120 *Id.* at 39–40.
121 *Id.* at 40.
122 *Id.* at 35.
123 *Id.*
124 *Id.* at 41.
125 *Id.* at 43; N.Y. UNIFIED CT. SYS., JUSTICE COURT MANUAL 7 (2015) http://www.nycourts.gov/courts/townandvillage/FinalJusticeCourtManualforUSCsite.pdf.

III. ADDRESSING RACE IN THE COURT SYSTEM

In 1983, a Supreme Court justice in Queens looked out at his courtroom and reportedly said "there's another nigger in the woodpile."[126] In 1994, a Finger Lakes judge was reported to have remarked in open court, "[o]h, it's been a rough day – all those [B]lacks in here," after arraigning three Black defendants arrested in a college disturbance.[127] It would be naïve to think that in such a large court system serving such a large, diverse and dynamic state, these expressions of overt racism are isolated. As documented by two judicial commissions over the last 30 years, explicit and implicit racial bias has existed throughout the New York State court system. The good news is that today's New York State judiciary is more diverse than it was 30 years ago (*see* Section IV, pp. 32–41). The bad news is that the accounts of explicit and implicit racial bias we heard as part of this review were strikingly similar to the testimony from decades ago.

A. The Minorities Commission

In 1988, then-Chief Judge Sol Wachtler announced the formation of the New York State Judicial Commission on Minorities. The Minorities Commission's mandate was, in summary, to ascertain how the public and court participants perceive the treatment of minorities in the courts, to review the diversity of court personnel in non-judicial positions and recommend ways to increase that diversity and to determine whether the elected or appointed process for selecting judges results in greater diversity.[128]

The Minorities Commission's report, released in 1991, was blunt in its findings. The report concluded that "there are two justice systems at work in the courts of New York State, one for Whites, and a very different one for minorities and the poor."[129] The Minorities Commission also concluded that the public perceived the court system to be racially biased,[130] and that courts used primarily by minorities – *i.e.* the Family, Criminal, Civil and Housing courts within New York City – were "grossly deteriorated and inadequate" and referred to as "ghetto courts."[131]

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126 MINORITIES COMMISSION REPORT, *supra* note 2, at 21.
127 William Glaberson, *In Tiny Courts of N.Y., Abuses of Law and Power*, N.Y. TIMES, Sept. 25, 2006.
128 FRANKLIN H. WILLIAMS JUDICIAL COMMISSION ON MINORITIES, EQUAL JUSTICE: A WORK IN PROGRESS, FIVE YEAR REPORT 1991–1996 7 (1997).
129 MINORITIES COMMISSION REPORT, *supra* note 2, at 1.
130 *Id*. at 27.
131 *Id*.

The report also recounted a number of overtly racist comments from judges in open court across the state.[132] Other findings of the Minorities Commission include that:

- nearly half of all attorneys surveyed witnessed discriminatory treatment of minority court users, that court personnel were frequently disrespectful and discourteous to minority court users;[133]
- the quick pace at which judges make weighty decisions in the cases of minority litigants undermines their confidence in the system;[134]
- many of the judges who made bail determinations lacked the cultural sensitivity to make fair determinations appropriate for the realities faced by minority court users;[135]
- for litigants for which English is not a primary language, full access to the court system was significantly impaired due to the insufficient amount of interpreters;[136]
- minority attorneys were treated with less professional respect and courtesy than their white counterparts;[137]
- minority judges were underrepresented in supervisory and administrative positions in the court system[138] and
- minorities were underrepresented within the non-judicial work force and that the EEO office within OCA had been "relegated to second class status."[139]

The Minorities Commission also singled out the court officer community, which one attorney quoted in the report described as "an especially horrible problem,"[140] citing segregated locker rooms for court officers in the Bronx, and graffiti reflecting racial insults in hallways and locker rooms.[141] The Minorities Commission noted an incident where a court officer placed an attorney of color in a chokehold because the court officer assumed the attorney was a defendant who was approaching a judge too closely, though the judge had motioned for the attorney to approach the bench.[142] During public hearings conducted

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132 *Id*. at 21–22 (Judges used phrases like "not having a Chinaman's chance" when speaking to Asian court users. One Housing Court judge remarked to a white landlord that he was "stuck" with a "tarbaby," referring to the Black tenant who was also in court.).
133 *Id*. at 27.
134 *Id*.
135 *Id*. at 43.
136 *Id*. at 52.
137 *Id*. at 92.
138 *Id*. at 100.
139 *Id*. at 116.
140 *Id*. at 111.
141 *Id*. at 114.
142 *Id*. at 88.

by the Minorities Commission, a Black court officer testified that her fellow court officers told her to refer to litigants as "slime," to refer to their children as "baby slime," and not to show litigants "any courtesy whatsoever."[143]

B. The Franklin H. Williams Commission

The Minorities Commission recommended that a further commission be formed to ensure the successful implementation of their recommendations. Therefore, in 1991, Chief Judge Wachtler re-established the Minorities Commission permanently and renamed it the Franklin H. Williams Judicial Commission, in honor of the former Chairman of the Minorities Commission.

In addition to implementing the Minorities Commission's recommendations, the newly-named Williams Commission was tasked with the following mandate:[144]

- *Engagement with Court Leaders:* To attend annual meetings with the Chief Judge and court administrators to discuss issues of concern to the minority legal community.
- *Data Collection & Analysis:* To collect and analyze race data and analyze programs relating to the treatment of people of color in the court system and suggest methods for correcting identified issues. In appropriate instances, successful programs in certain counties could be standardized and/or centralized under the authority of the Commission.
- *Monitoring Racial Bias Complaints:* To collect and monitor complaints of racial bias within the judicial system and forward them to the commission or agency with jurisdiction to discipline, where appropriate. In addition, the Commission could propose remedies to prevent repeat offending.
- *Policy Review:* To review and comment on existing and pending legislation affecting people of color and the state court system and recommend new legislation where necessary.
- *Nationwide Coordination:* To participate in the National Consortium of Commissions and Task Forces on Racial/Ethnic Bias in the Courts, which was spearheaded by Ambassador Williams himself.
- *Programming & Community Engagement:* To interact with local bar associations, law schools and community groups in an effort to develop

[143] *Id*. at 22.
[144] *See id*. at 8–9.

educational and other programs designed to address racial and ethnic bias in the legal profession.

The Williams Commission has been involved with the implementation of several recommendations aimed at furthering its mandate. One initiative generated by the original Minorities Commission's 1991 study included the "establishment of the position of Special Inspector General for Bias Matters (now Managing Inspector for Bias matters) to reinforce the UCS's commitment to a bias-free work environment."[145] The Commission's original 1991 recommendations also led to the creation of the UCS's Workforce Diversity Office, which strives to promote diversity throughout the court system, as well as the reconfiguration of judicial nominating and screening panels to include at least one individual-of-color and one female.[146] Similarly, the Commission's original recommendations led to the creation of a Minority Advisory Committee to the Chief Administrative Judge, which, among other measures, led to the establishment of more inclusive interview panels for non-judicial positions.[147]

Over the years, the Williams Commission has hosted various trainings and professional development programs for court employees and the broader legal community. For example, the Commission developed and annually presents a class for new judges on cultural awareness at the New York State Judicial Institute training session for new judges.[148] Similarly, the Commission has hosted seminars for judges exploring issues affecting minority litigants, defendants, juvenile offenders and minors in foster care.[149] On a handful of instances, and as recently as 2016, the Williams Commission also facilitated implicit bias training for court personnel, including human resource supervisors and managers.[150] In 2019, the Commission organized professional development workshops where employees of color were trained on public speaking and interview and writing skills so that these applicants have the requisite skillset when applying for upper-management roles.[151] Similarly, we understand one of the Commission's more popular programs is their annual seminar entitled "Everything You Need to Know About Becoming a Judge." This

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145 *See* FRANKLIN H. WILLIAMS JUDICIAL COMMISSION ON MINORITIES, ON THE PATH TO EQUAL JUSTICE 1998–2008: MAKING A DIFFERENCE 1, 3 (2008) [hereinafter ON THE PATH TO EQUAL JUSTICE].

146 *Id.*

147 *Id.*

148 *Franklin H. Williams Judicial Commission*, N.Y. STATE UNIFIED CT. SYS., http://ww2.nycourts.gov/ip/ethnic-fairness/index.shtml (last visited Sept. 23, 2020).

149 ON THE PATH TO EQUAL JUSTICE, *supra* note 145, at 7.

150 NEW YORK STATE UNIFIED COURT SYSTEM 2016 ANNUAL REPORT 1, 17 (2017) (noting that training was focused in Eighth Judicial District); *see also* NEW YORK STATE UNIFIED COURT SYSTEM 2013 ANNUAL REPORT 1,2 (2014).

151 NEW YORK STATE UNIFIED COURT SYSTEM 2019 ANNUAL REPORT 1, 21 (2020) (noting that training occurred in Third and Fourth Judicial District).

seminar – targeted toward attorneys-of-color and law students of color – has existed for 10 years, and purports to provide education, resources, mentorship and networking opportunities to these individuals to increase the pipeline of future judges of color.[152] The Williams Commission has also published informational brochures in Spanish and Chinese to help non-English speaking litigants navigate Small Claims Court.[153]

C. Race in the Town and Village Courts

Finally, we believe it is worth noting a comprehensive 2006 *New York Times* report on the Town and Village court system in New York. The *Times* spent a year interviewing prosecutors, defendants, defense attorneys and plaintiffs, reviewing public documents and visiting courts across the state. The *Times* concluded that litigants in these courts "have been subjected to racial . . . bigotry so explicit it seems to come from some other place and time."[154]

Focusing substantially on misconduct by judges, the *Times* noted that over three quarters of Town and Village justices were not attorneys, highlighting that New York requires "more schooling for licensed manicurists and hair stylists" than for Town and Village justices. Some examples of explicit racism located in the disciplinary files of Town and Village justices include a Catskills judge reminiscing in open court that it was once safe for young women to walk in his community "before the [B]lacks and Puerto Ricans moved here." In 2003, when a white complainant referred to a Black defendant in a disorderly conduct case as "that colored man," the Alexandria Bay judge told the defendant that the term was not offensive, explaining that while other words were racist, "colored" was not. The judge went on to say, "you know, I could understand if he would have called you a Negro, or he had called you a nigger. . . . For years we had no colored people here." In 2003, a Westchester County judge asked a Lebanese-American woman with a parking ticket if she was a terrorist. In Le Roy, a town outside of Rochester, a judge "concocted false statements . . . to help immigration officials deport a Hispanic migrant worker in 2003." In a Town and Village court in Malone, the judge told a Latinx defendant "you're not from around here, and that's not the way we do things around here," when the man requested that the plaintiff suing him be forced to come to court and prove his case. The judge did not mention that the plaintiff was his dentist.[155]

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[152] *See, e.g.*, NEW YORK STATE UNIFIED COURT SYSTEM 2016 ANNUAL REPORT at 17.
[153] ON THE PATH TO EQUAL JUSTICE, *supra* note 145, at 3.
[154] Glaberson, *supra* note 127.
[155] *Id.*

IV. DEMOGRAPHICS OF THE JUDICIARY

Both the Minorities and Williams Commissions identified the lack of diversity among judges and non-judicial employees within the court system as a major issue affecting the administration of justice in the state. Many of those we spoke with in 2020 also expressed concerns about the lack of diversity in the court system, particularly among judges. We analyzed past and current demographic data provided by OCA to evaluate the progress that has been made to diversify the judiciary.

It is important to note that there are limitations to the data available. Most notably, the team did not have race data for Town and Village justices. This limitation is not without impact, as the vast majority of court users interacting with the court system outside of New York City do so with Town and Village justices. Anecdotally, several interviewees described the Town and Village justices and courts as overwhelmingly white.

A. Diversity of the Judiciary Over Time

The judiciary in New York State has become more diverse over the past 30 years. However, when compared to the evolving demographics of the state, judges of color continue to be underrepresented on the bench, and the gap between the non-white share of the judiciary and non-white share of the population remains the same. In 1991, there was a 20.5 point gap between the share of the population that was non-white (30.7%)[156] and the percent of non-white judges on the bench (8.2%).[157] In 2020, the gap between the non-white population (44.8%) and judiciary (23.9%) is 20.9 points.[158]

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[156] Population statistics are based on 1990 and 2000 census data, and 2015 and 2018 census estimates of those selecting only one race. *See* U.S. Census Bureau, *Explore Census Data* (Sept. 22, 2020, 12:31 PM), https://data.census.gov/.

[157] FRANKLIN H. WILLIAMS JUDICIAL COMMISSION ON MINORITIES, EQUAL JUSTICE: A WORK IN PROGRESS, FIVE YEAR REPORT 1991–1996 1, 20 (1996).

[158] *See* New York State Unified Court System, DIVERSITY ON THE BENCH BY JUDICIAL DISTRICT/COURT (2020) (rec'd Aug. 28, 2020) (on file with N.Y. Office of Ct. Admin.) [hereinafter DIVERSITY ON THE BENCH]; *see also* New York State Unified Court System, DIVERSITY ON THE BENCH STATEWIDE (2020) (rec'd Aug. 28, 2020) (on file with N.Y. Office of Ct. Admin.).

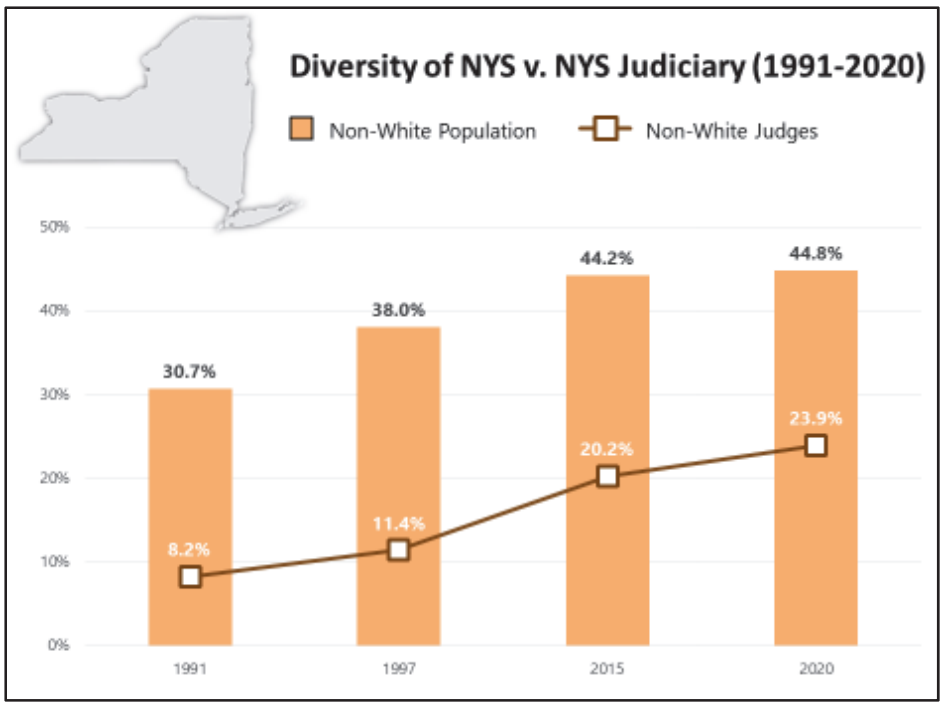


Figure 4

Underrepresentation has persisted across all non-white groups, though the representation of Black judges has steadily improved over the past 30 years. For the Latinx and Asian communities, the gaps between population and judges widened in the late 1990s before more recently narrowing, but they remain larger for both communities than they were in 1991. In 1991, around 15.9% of the population identified as Black compared to 6.3% of judges (a 9.6 point difference); 10.5% of the population was Latinx compared to 1.7% of the judiciary (an 8.8 point gap);[159] and 3.9% of New Yorkers identified as Asian compared to 0.3% of the bench (3.6 points). In 2020, Black people account for 15.7% of the population and 14% of judges (a 1.7 point difference); Latinx people make up 17.7%

[159] Unlike the census, which treats Hispanic as an ethnicity, the data received from OCA treats Hispanic as a race, distinct from other races. When completing demographic forms, an employee indicating that they are both Hispanic and another race would be recorded in OCA data as "Two or More Ethnicities." Since very few employees have selected "Two or More Ethnicities," we assume that the vast majority of persons of Hispanic ethnicity choose either to identify as Hispanic or another race. In order to render population data that are comparable to the OCA data, we were obliged to treat the Hispanic ethnicity in the census data as a category exclusive of other minority races. To this end, we calculated the percent of Hispanics in the census data as all persons selecting "Hispanic or Latino" and subtracted persons also identifying their race in the census as Black or Asian. We acknowledge that this calculation is imperfect and excludes Afro-Latinx and Asian Latinx people from the "Hispanic" category in the OCA data. This decision was not taken lightly or with the intent to erase the existence of Afro-Latinx and Asian Latinx people.

of the population and 7.0% of the judiciary (a 10.7 point difference); and Asian people comprise 8.5% of New Yorkers and only 2.6% of the bench (5.9 points).

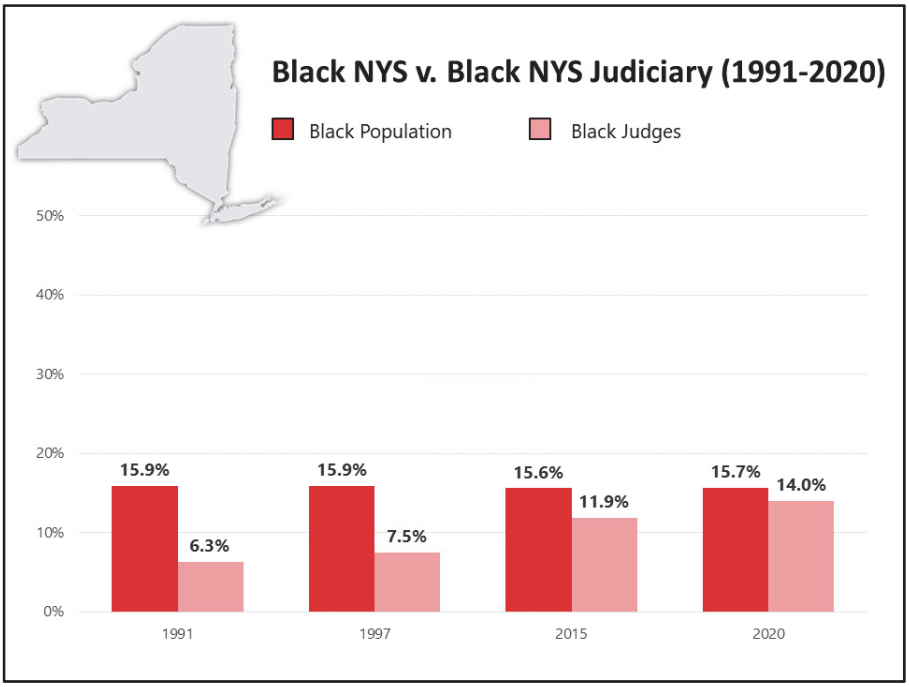
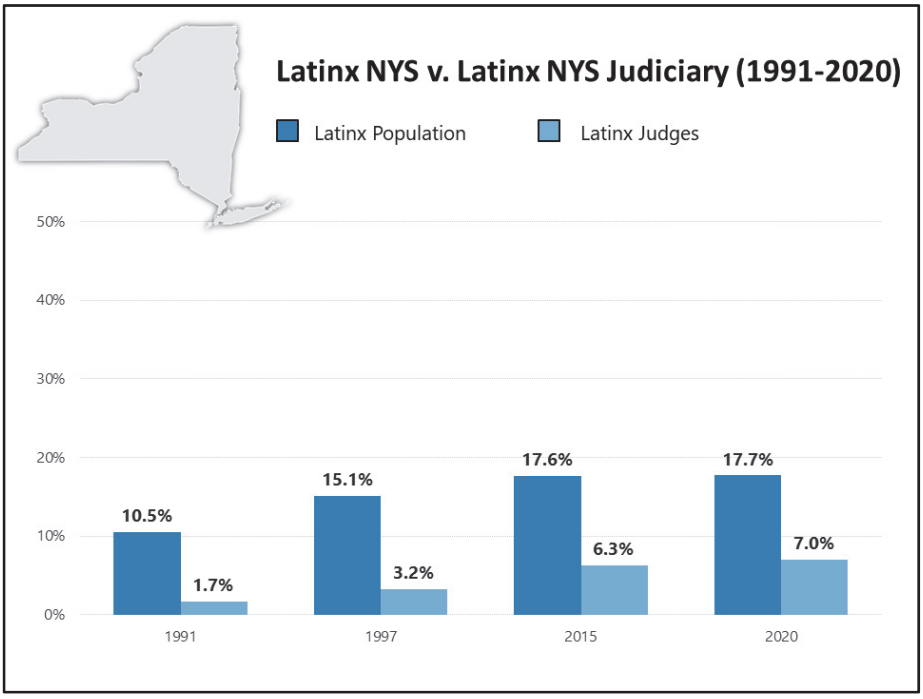


Figure 5



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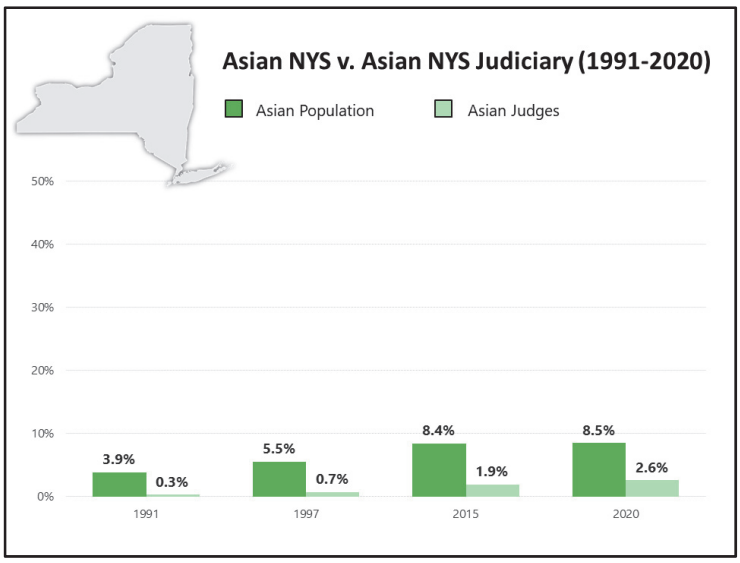


Figure 7

B. Diversity of the 2020 Judiciary Compared to the Populations Served

Today, judges of color are still underrepresented compared to the populations the courts serve. This is true both statewide and in New York City. New York City has a population that is approximately 31.7% white, 24.2% Black, 26.3% Latinx, and 14.1% Asian. However, the judiciary in New York City courts is 58.1% white, 21.5% Black, 12.4% Latinx, and 6.3% Asian (*see* Figures 8 and 9 below).[160]

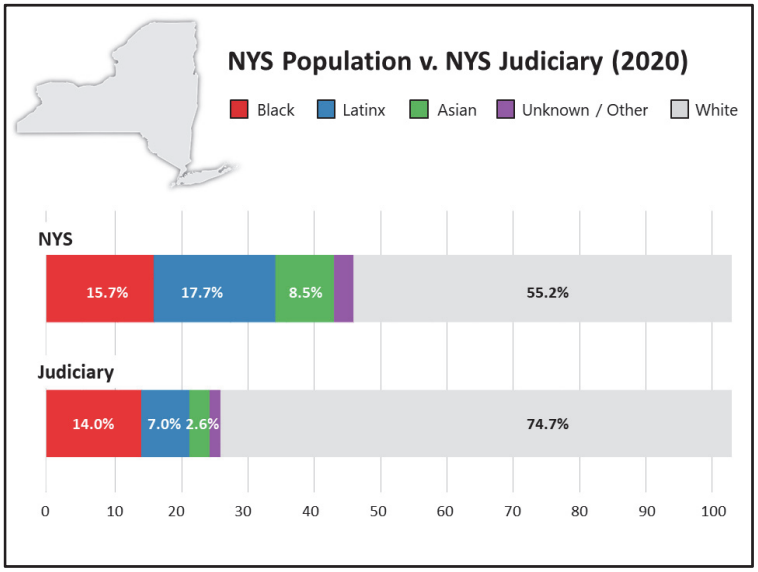


Figure 8

[160] This includes the City, Supreme and Surrogate's courts. *See* DIVERSITY ON THE BENCH, *supra* note 158.

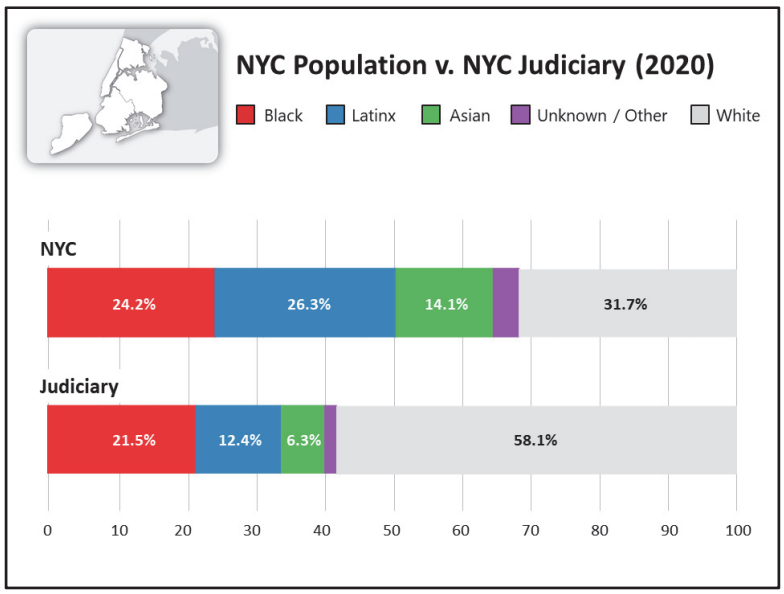


Figure 9

1. New York City Courts

Defendants appearing in the New York City courts face a judiciary that is not representative of the city, let alone of the litigant population. Although we have no statistics from OCA that track the races of litigants in the city, all interviewees involved in the New York City courts, particularly in Criminal Court, Family Court and Housing court, noted that the vast majority of litigants appearing in those courts are Black and Latinx. In New York City Criminal Court, defendants face a judiciary that is 56% white, 13.1% Black, 11.9% Latinx, and 11.9% Asian (*see* Figure 10 below).[161] In other words, a criminal court judiciary that is one-fourth Black and Latinx serves a city that is more than half Black and Latinx, where the Black and Latinx communities are overrepresented among people arrested and appearing in criminal court.

According to interviewees with experience in the New York Family Court system, most litigants appearing in Family Court are parents and families of color. Here, again, all minority populations are underrepresented on the bench, with the Latinx and Asian community – two of the fastest-growing and youngest populations in New York City – the

[161] These figures include both New York City Criminal Court judges and judges temporarily assigned from Civil Court. *See* DIVERSITY ON THE BENCH, *supra* note 158. Note that percentages calculated in the chart differ from those calculated by UCS. These percentages were calculated by dividing the raw number of judges by the total number of judges.

most underrepresented, making up less than half the share of the Family Court bench as they do of the general population (*see* Figure 11 below).[162]

Non-white judges are likewise underrepresented on the Housing Court bench, comprising 44% of the judiciary serving a population that is over 64% people of color (*see* Figure 12 below).

Civil Court has the lowest percentage of white judges (40%) of all City Courts, and the highest percentage of Black judges (31.1%) and Latinx judges (24.4%) (*see* Figure 13 below). Asian judges remain underrepresented compared to the overall Asian population in the city. The slightly more diverse demographics of the Civil Court bench may be partly explained by the fact that Civil Court judges are elected rather than appointed. As discussed in the section below, elections of judges tend to benefit the Black and Latinx populations, whereas the Asian community remains underrepresented among judges chosen by election.

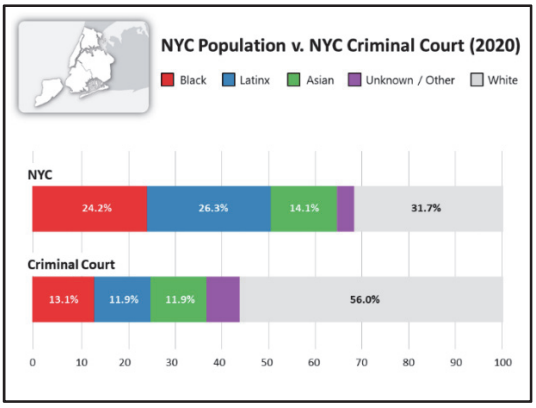
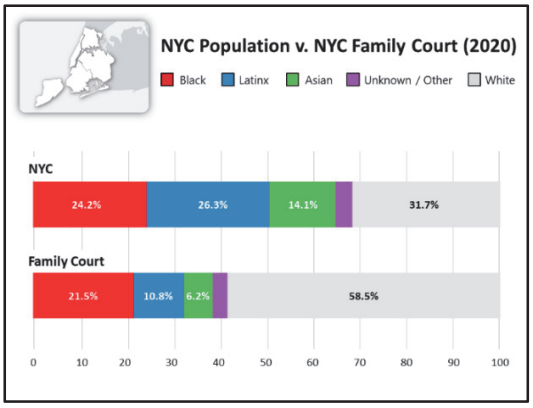


Figure 10



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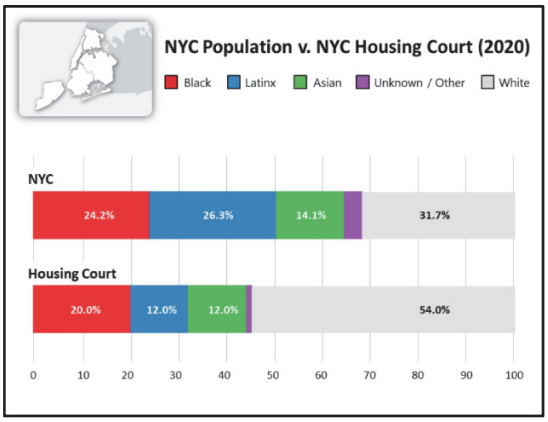

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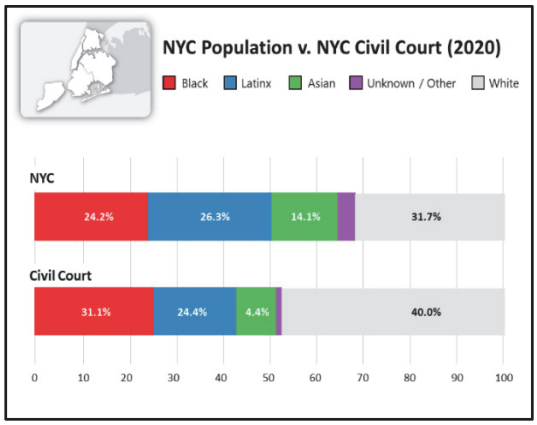


Figure 13

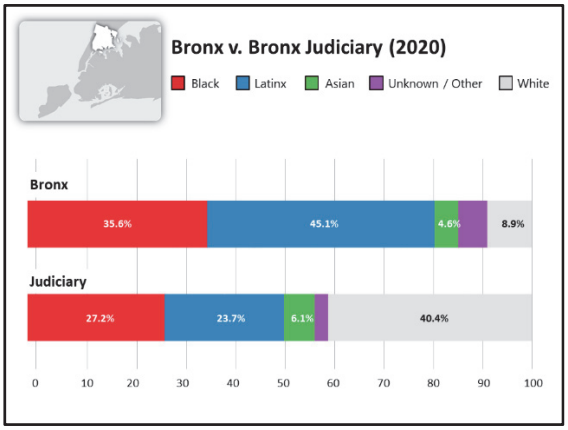
[162] These figures include both NYC Family Court judges and judges temporarily assigned from Civil Court. *See* DIVERSITY ON THE BENCH, *supra* note 158.

2. New York City Judiciary by Borough

People of color are underrepresented on the benches of all boroughs of New York City.[163] In the Bronx, where over 85% of the population is non-white, only 57% of the judiciary are people of color (*see* Figure 14 below).

In Queens, the borough with the next largest proportion of minorities, over 60% of the judiciary is white (*see* Figure 15 below). Latinx and Asian populations are the most underrepresented on the bench there.

Non-white judges are also underrepresented in Brooklyn, where white judges account for over half of the judiciary (56.5%), though white Brooklynites are just over one-third of the population (36.2%) (*see* Figure 16 below). Most striking, Brooklyn has fewer than 5% Asian judges (4.3%), though it is over 10% Asian (11.6%).



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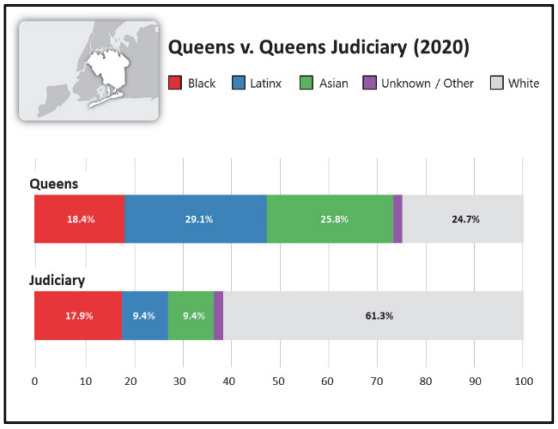

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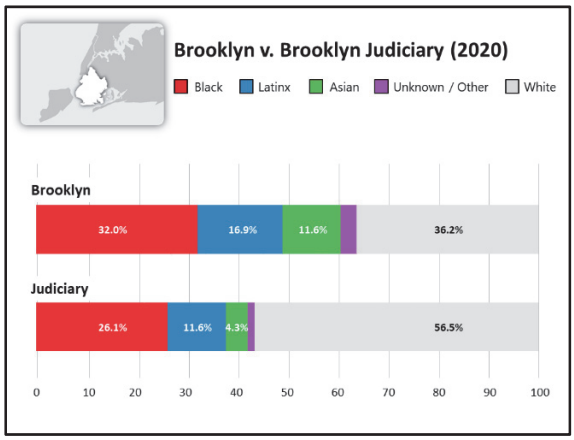

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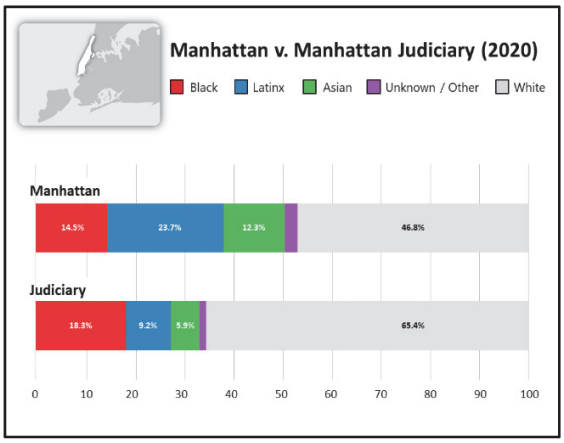

Figure 17

[163] Numbers presented in this section include all judges sitting on City Courts, the Supreme Court and Surrogate's Court in the borough. *See* DIVERSITY ON THE BENCH, *supra* note 158.

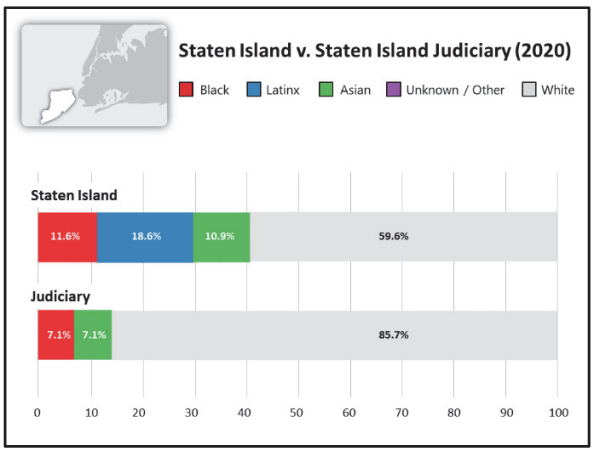

Figure 18

3. Judicial Districts Upstate

It is well known that counties upstate are, on the whole, less diverse than New York City. However, across all Judicial Districts, the upstate judiciary is even less diverse than the population. In the Fourth,[164] Fifth,[165] and Sixth[166] Judicial Districts in the northernmost parts and center of the state, the population is over 80% white (*see* Figures 20–22 below). However, the judiciary is well over 90% white.

In the easternmost parts of the state, the Seventh[167] and Eighth[168] Judicial Districts are more diverse because they contain the cities of Rochester, Buffalo, and Syracuse (*see* Figures 23–24). These districts are around 80% white, but white judges are about 86% and 88%, respectively, of the judiciary.

Even in the Third,[169] Ninth,[170] and Tenth[171] Judicial Districts, the more diverse jurisdictions in the southern part of the state, non-white judges are underrepresented (*see* Figures 19, 25–26). The Third Judicial District is around 10% Black, but less than 5% of its judiciary is Black; the Latinx community accounts for 8.3% of the population, but only 1.6% of the judges, and there are no Asian judges in the Third District. The Ninth Judicial

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164 The Fourth District is comprised of Clinton, Essex, Franklin, Fulton, Hamilton, Montgomery, St. Lawrence, Saratoga, Schenectady, Warren and Washington counties.

165 The Fifth District contains Herkimer, Jefferson, Lewis, Oneida, Onondaga and Oswego counties.

166 The Sixth District includes Broome, Chemung, Chenango, Cortland, Delaware, Madison, Otsego, Schuyler, Tioga and Tompkins counties.

167 The Seventh District includes Cayuga, Livingston, Monroe, Ontario, Seneca, Steuben, Wayne and Yates counties.

168 The Eighth District contains Allegany, Cattaraugus, Erie, Genesee, Niagara, Orleans and Wyoming counties.

169 The Third District includes Albany, Columbia, Greene, Rensselaer, Schoharie, Sullivan and Ulster counties.

170 The Ninth District includes Dutchess, Orange, Putnam, Rockland and Westchester counties.

171 The Tenth District includes Nassau and Suffolk counties.

District is over 40% non-white, but less than 20% of its judges are of color. The Ninth District is over 20% Latinx, but has less than 4% Latinx judges, and there are no Asian judges in this District. The Tenth Judicial District on Long Island is nearly 40% non-white, but over 85% of its judges are white. In the Tenth District, the Latinx and Asian communities are the most underrepresented on the bench.

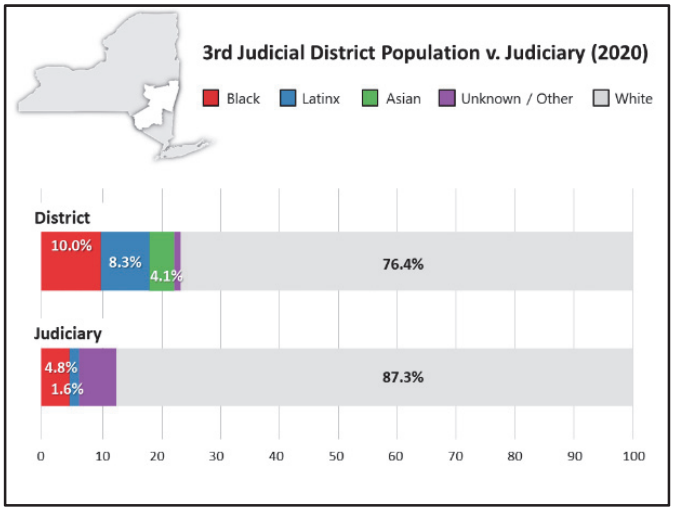
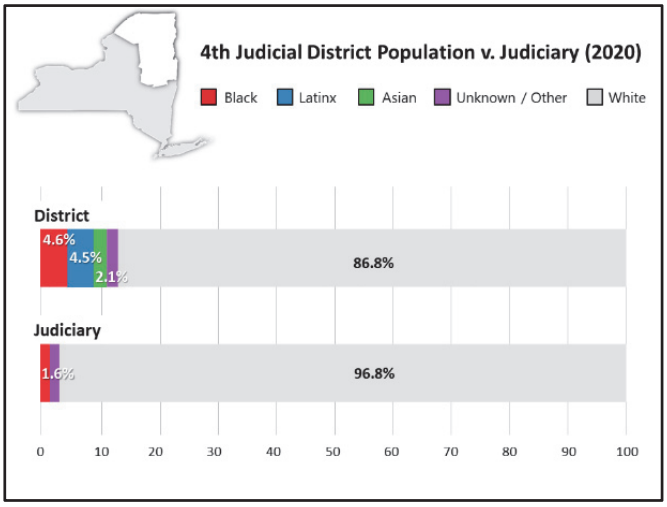


Figure 19



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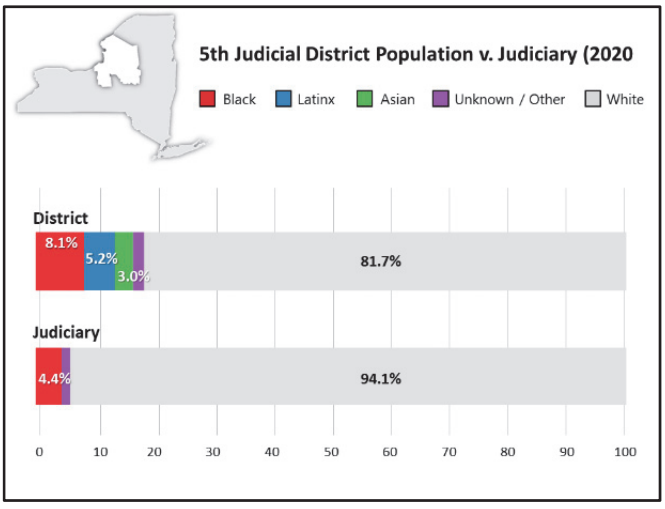

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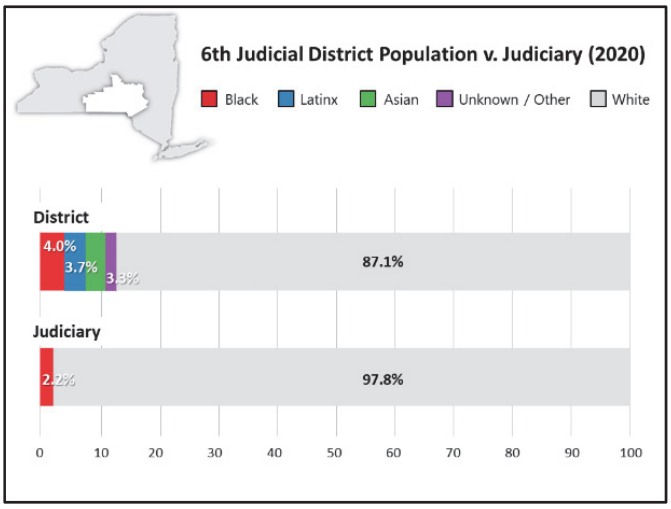

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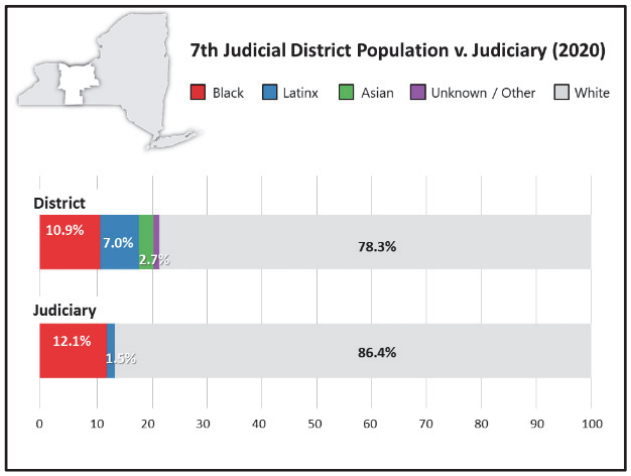

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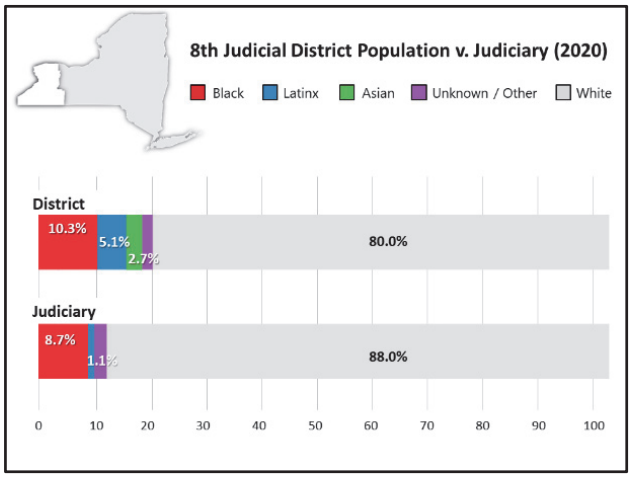

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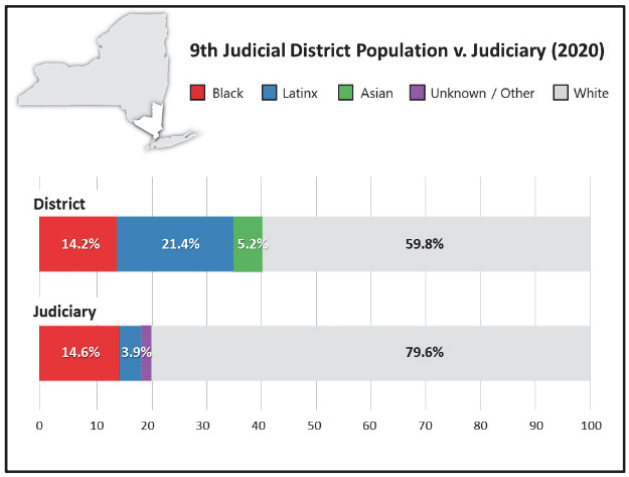

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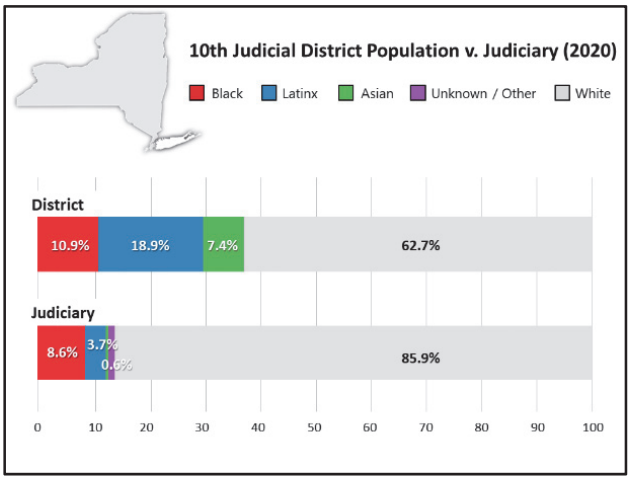

Figure 26

V. POLICIES, PRACTICES, PROGRAMS AND ORGANIZATIONS DESIGNED TO ADDRESS BIAS IN THE NEW YORK STATE COURT SYSTEM

The Chief Judge's mandate called for us to identify and evaluate all existing policies, practices and organizations within the New York State court system that are intended to address racial bias.

We conducted an extensive search within and around the court system for policies and programs addressing racial bias. Notably, it was difficult to find a list or organizational chart explaining the various institutions and resources within the New York State court system intended to address racial bias, and what they do. Information in various booklets, brochures and webpages is confusing, inaccurate and often out of date. Further, a number of interviewees suggested that reality and practice fall short of the stated goals and intentions of these programs. In our interviews, even some of those working within these organizations were unaware of the activities or roles of other organizations, despite their shared mission. Additionally, some policies and programs are less formalized and were difficult to fully evaluate.

We found the following policies, practices, programs and organizations that exist in whole or in part to address issues of racial bias:

A. The Franklin H. Williams Commission

As explained in Section II above, the Williams Commission was established in 1991. It is a standing Commission currently co-chaired by Justices Troy Webber and Shirley Troutman. From our review, it seems plain that the Williams Commission serves as the primary and most visible program throughout the court system for addressing issues of racial bias and the treatment of underrepresented communities.

The Williams Commission was originally charged with implementing the 1991 recommendations of the Minorities Commission. And from its founding in 1991 until 1996, the Williams Commission published detailed analysis, findings and updated recommendations as bolstered by their own studies and initiatives. These annual reports also measured progress on the implementation of the Minorities Commission's 1991 recommendations and highlighted specific areas of attention and needed focus for subsequent years.

Beginning in 1997, the Williams Commission transitioned away from those detailed reports and primarily focused on coordinating conferences, seminars and mentorship programs. The Williams Commission continued – and continues – to publish brief

summaries of their activities in a short section in the New York State Unified Court System's Annual Reports. According to its own website,[172] the Williams Commission's primary functions include:

- Serving as a conduit to people of color within the court system and meeting annually with the Chief Judge and court administrators to discuss issues of concern to court employees and matters pertaining to racial and ethnic fairness in the courts.
- Sponsoring seminars and conferences for judges and court personnel on issues of diversity and race within the courts.
- Holding professional development and leadership workshops for court personnel and providing judicial mentors for attorneys interested in judicial appointments.
- Acting as a liaison to community groups, fraternal organizations within the court, bar associations and judicial appointing authorities.
- Producing and distributing various publications, including a newsletter.
- Hosting a Diversity Awards Program, which honors individuals and organizations working to promote racial and ethnic fairness in the New York State Unified Court System and the broader legal community.
- Presenting a class for new judges on cultural awareness at the New York State Judicial Institute training session for new judges.

B. Managing IG for Bias Matters

OCA's Inspector General is responsible for investigating complaints of disciplinary violations, criminal activities, conflicts of interest and misconduct on the part of non-judicial employees, as well as persons or organizations, working within the court system.[173] There are two specialized units within the IG's Office: the Office of the Managing Inspector General for Bias Matters ("IG for Bias Matters") and the Office of the Managing Inspector General for Fiduciary Appointments.

Established in 1998, the IG for Bias Matters is responsible for investigating allegations of bias based upon race, as well as other protected classes, that affect the workplace of personnel within the court system, "including acts that relate to services provided by court personnel to the public."[174] The IG for Bias Matters receives complaints from both the public and court system employees and investigates the behavior that precipitated the

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[172] *Franklin H. Williams Judicial Commission*, N.Y. STATE UNIFIED CT. SYS., http://ww2.nycourts.gov/ip/ethnic-fairness/index.shtml (last visited Sept. 23, 2020).

[173] *Office of Inspector General*, N.Y. STATE UNIFIED CT. SYS., http://ww2.nycourts.gov/admin/ig/index.shtml (last visited Sept. 23, 2020).

[174] *Id.*

complaint, including studying systemic issues involving the functions of particular court units or systems. Notably, non-judicial employees of the Town and Village Courts are not under the authority of the IG for Bias Matters because they are hired by, and therefore disciplined by, local governance bodies. In addition to its internal-facing functions, the IG for Bias Matters also acts as a liaison with federal, state and local law enforcement and regulatory agencies, such as the Equal Employment and Opportunity Commission and the New York State Commission on Human Rights, on matters that fall within their jurisdiction.

Kay-Ann Porter Campbell currently serves as the IG for Bias Matters. She oversees the office and personally investigates serious allegations of bias, such as allegations against judges or allegations of criminal conduct. Other allegations are handled by designated investigators. Complaints of bias in upstate courts are handled by an investigator located in Albany.

Employees wishing to make a formal complaint may call the IG for Bias Matters or fill out the Claim of Discriminatory Treatment form.[175] The webpage for the Office of Diversity Inclusion (discussed below)[176] contains a link to a Discrimination Claim Policy and Procedure, and statement declaring that it is the court system's policy to ensure equal employment opportunity without regard to race as well as other protected classes.[177] Complainants may also contact the IG for Bias Matters indirectly via the court system's toll-free hotline or through referrals from other offices within the court system, such as the Division of Human Resources and the Chief Clerk's office. Although the Discrimination Claim Policy and Procedure does not state that an employee may file an anonymous complaint, we were told that anonymous claims are accepted and investigated. Litigants may also contact the IG for Bias Matters to file a formal complaint about discrimination or bias they experience from a court employee.

Complaints that are deemed to be serious receive a formal investigation.[178] The investigation involves an interview with the complainant, any witnesses and the individual against whom the claim was filed.[179] The IG for Bias Matters requests that anyone

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[175] Bias Complaint Form, Office of Inspector General, N.Y. STATE UNIFIED CT. SYS., http://ww2.nycourts.gov/sites/default/files/document/files/2018-05/ClaimDiscrimTreatment.pdf (last visited Sept. 23, 2020).

[176] *See Office of Diversity and Inclusion*, N.Y. STATE UNIFIED CT. SYS., http://ww2.nycourts.gov/careers/diversity/index.shtml (last visited Sept. 23, 2020).

[177] *See Discrimination Claim Policy & Procedure*, OFFICE OF CT. ADMIN. (2016), http://ww2.nycourts.gov/sites/default/files/document/files/2018-07/DiscClaimBklet.pdf [hereinafter *OCA Discrimination Claim Policy & Procedure*].

[178] *OCA Discrimination Claim Policy & Procedure*, *supra* note 176, at 13.

[179] *Id.*

contacted during an investigation maintain confidentiality by not disclosing the existence or any details of the complaint. In most cases, however, a complainant's identity and at least some details of their complaint are made known to interviewees and the complainant's supervisor.

After the investigation is complete, the IG for Bias Matters will submit a confidential, final investigative report to the Administrative Judge of the District where the conduct occurred, including whether the complaint was substantiated and, if appropriate, recommended sanctions. Within thirty days of the issuance of the report, the Deputy Chief Administrative Judge will issue a final determination in consultation with the District's Administrative Judge.[180] If the Deputy Chief Administrative Judge agrees that the complaint is substantiated, the matter is supposed to proceed to a hearing, where the subject of the complaint faces disciplinary action. It is our understanding that, in most instances, the subject agrees to settle the matter without a hearing. If the matter is not settled, decisions can be appealed to the Chief Administrative Judge, who will issue a final determination within thirty days of the date of the appeal.[181]

C. OCA's Office of Diversity and Inclusion

The Office of Diversity and Inclusion ("ODI") is responsible for implementing the court system's diversity policies and maintaining diversity within the workforce. ODI – which was called the "Office of Workforce Diversity" prior to this year – has performed various functions over the years, before assuming its current role. Prior to the creation of a separate diversity office around a decade ago, diversity issues were handled by the Office of Equal Employment Opportunity within OCA's Division of Human Resources. One of this office's roles was to investigate complaints of discrimination, a function now handled by OCA's Inspector General Office.

Currently, ODI focuses primarily on recruiting and maintaining diversity within the court system's non-judicial workforce. To this end, ODI is tasked with carrying out the court system's diversity policies, specifically as they relate to recruitment and hiring. Additionally, ODI strives to ensure that diversity and inclusion is a consideration in every decision made throughout the court system, specifically that minority employees feel that their opinions are welcomed and considered.

Although we have found no formal policies mandating ODI's participation, we are told that ODI is involved in the interview and hiring process. According to one OCA

[180] *Id.* at 14.
[181] *Id.*

administrator, interview panels are constituted in each court across the state, consisting of five employees, three from the locale where the court sits and two from outside the locale. ODI's Director, Anthony Walters, sits on several of the interview panels, especially in courts upstate where there is a lack of minority court employees of sufficient seniority to sit on the panels. The panels' recommendations go to the Deputy Chief Administrative Judge and the Chief Administrative Judge for final approval.

We are told also that ODI is involved in outreach initiatives to ensure that OCA is recruiting diverse candidates. There are several fraternal organizations within the court system that provide resources for minority court employees, such as the Tribune Society and the Cervantes Society. We understand that ODI partners with these organizations to provide information about job opportunities to the public. We also understand that ODI sends job announcements to minority organizations, such as bar associations and HBCUs.

Although there is no mention of it on its website, according to ODI staff, the office also created a diversity task force that focuses on promoting minority court employees, especially in courts upstate. The task force consists of court employees at every level including judges. The goal of the task force is to develop trainings, programs and policies that promote diversity, which the employees on the task force can implement in their respective courthouses.

D. Anti-Discrimination Panels

Court employees can informally resolve issues of bias or discrimination by contacting a supervisor or, if the complaint involves a direct supervisor, a higher-level manager.[182] Employees are also able to direct their complaints to the Administrative Office or Administrative Judge of the Judicial District in which the incident or behavior of concern occurred. Upon receiving a complaint, the Administrative Judge can choose to either resolve the matter informally, or refer the matter to the IG for Bias Matters or a member of the District's Anti-Discrimination Panel,[183] though the latter option has been characterized as "largely defunct."

The Anti-Discrimination Panel program[184] was designed to be another informal procedure for employees to resolve complaints of bias and discrimination.[185] Coordinated by ODI, panels were established in each court, and consisted of judicial and non-judicial

[182] *Id.* at 11.
[183] *Id.* at 12.
[184] *See Anti-Discrimination Panel Program*, OFFICE OF DIVERSITY AND INCLUSION, http://ww2.nycourts.gov/CAREERS/diversity/bias-free-environ.shtml (last visited Sept. 23, 2020).
[185] *Id.*

employees trained to receive complaints of discrimination.[186] The panels acted as an intermediary platform to help resolve issues without a formal investigation process.[187] Panel members would listen to employees and offer alternatives for resolutions to the complained-of behavior.[188] Panels would also inform employees of their options for advancing complaints of discrimination, including directing employees to the proper channels to file a formal complaint.[189] If a complaint described a serious issue of misconduct, the panels would report the complaint to the IG for Bias Matters.

E. Disproportionate Minority Representation Committee

In 2005, the New York State Family Court Judge's Association ("NYSFCJA") sponsored its first educational session to discuss what was then referred to as disproportionate minority contact with the child welfare and juvenile justice systems. Thereafter, the NYSFCJA partnered with the Williams Commission to sponsor a day-long program at the Judicial Institute. In 2009, Judge Gayle Roberts, who sits in the Bronx Family Court, requested a series of meetings with Family Court Judges in the other four boroughs with the goal of creating a Disproportionate Minority Representation ("DMR") Committee in each borough focusing on these issues. DMR Committees were eventually formed throughout the state and have sponsored statewide and local conferences, trainings and working groups designed to address systemic issues and issues of bias affecting minority children and their families in the New York State court system. Although the committees are spearheaded by judges, they work in cooperation with outside stakeholders and are focused on bringing awareness to these issues to all court personnel. Interviewees described these trainings as "very high quality."

F. Bias Training for Judges

In the course of our review, we identified a number of bias training programs for judicial personnel in and around the court system. Notably, there does not appear to be a consistent, state-wide approach to bias training. Most bias trainings offered by OCA do not appear to be mandatory. Some Judicial Districts and individual courts have taken the initiative to implement bias trainings, but these efforts appear to be ad hoc or diffuse.

New Judges Seminar. The Judicial Institute provides education and training for New York State judges and justices. Newly elected and appointed judges must attend the Judicial Institute's New Judges Seminar offered in January of each year. The New Judges

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186 *Id.*
187 *Id.*
188 *Id.*
189 *Id.*

Seminar is a weeklong program designed to assist new judges "transition to [their] new role."[190] Subjects covered during this training include what Judicial Institute personnel termed "soft" subjects, such as bias training and introductions to OCA policies and procedures, and "hard" subjects, such as how to run a courtroom, arraignments and other judicial skills.

The 2020 New Judges Seminar provided two opportunities for implicit bias training: a one-hour session entitled "Implicit Bias in the Courtroom" and a two-hour panel session entitled "The Judge's Role as Supervisor and Manager." "Implicit Bias in the Courtroom" was held on the second day of the New Judges Seminar, just before lunch, and was led by Mirna Santiago, an attorney and member of the New York State Bar Association's Committee on Diversity and Inclusion. The course "examine[d] how implicit bias affects the administration of justice." "The Judge's Role as Supervisor and Manager" was a panel session held during the morning of the third day of the New Judges Seminar. Kay-Ann Porter, the Managing Inspector General for Bias Matters, and Carolyn Grimaldi, OCA Director of HR, were among those on the panel.

Our team reviewed the PowerPoint presentation and reference list given to participants as part of the "Implicit Bias in the Courtroom" session. The session appears to have discussed the sources and manifestations of unintended and implicit bias, explained cultural competence, including why it is important and how it is achieved and reviewed and how bias and lack of cultural competence affect the legal profession and the administration of justice. At least one-third of the presentation was dedicated to helping participants develop strategies for interrupting their own implicit biases. The reference list provided sources for further reading on topics covered in the presentation, as well as other relevant topics, such as how implicit bias affects education and employment. Our team did not review any materials for the second session on "The Judge's Role as Supervisor and Manager."

Judicial Summer Seminars. The Judicial Institute also offers "Judicial Summer Seminars" every summer, when judges from across the state may "gather, face-to-face with their colleagues, to share their experiences and wisdom."[191] The Judicial Summer Seminars are a three-day program which includes seminars on legal updates, judicial skills and "broader-based, thought-provoking courses particularly relevant to [judges'] work."[192] Newly elected and appointed judges are required to attend because the second part of the

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[190] Letter from Juanita Bing Newton, Dean, N.Y. Judicial Inst., to judges attending the 2020 N.Y. New Judges Seminar (Jan. 6, 2020) (on file with N.Y. Office of Ct. Admin.).

[191] Letter from Lawrence K. Marks, Chief Administrative Judge, N.Y. Unified Court System, to judges attending the 2019 N.Y. Judicial Summer Seminars (Summer 2019) (on file with N.Y. Office of Ct. Admin.).

[192] *Id*.

New Judges Seminar is held on the afternoon before the start of the Judicial Summer Seminars and the morning of the first day.

In 2019, one of the plenary sessions intended for new judges was entitled "Implicit Bias in the Courtroom." This session, led by David Horowitz, a lecturer at Columbia Law School, was characterized as "[a] description of the ways in which implicit bias affects the administration of justice." Our team reviewed the PowerPoint presentation and session materials given to participants as part of this workshop, which appears to have focused on issues of bias in jury selection, as well as ideas for recognizing and remediating systemic biases affecting both judges and juries. The materials for this workshop seem to reflect a session geared toward court policies and practices, rather than solutions for curing personal biases.

In addition to these dedicated courses on bias, we are advised that Judicial Institute personnel are attempting to incorporate bias training into seminars on a broader range of issues. One recent class on new artificial intelligence technology discussed how such platforms exhibit design biases that disproportionately affect minorities. The seminars have also covered topics such as the social and legal history of the excessive use of force and the effects of trauma on litigants' lives.

The Office of Justice Court Support. Town and Village justices attend twelve hours annually of mandatory training courses administered by the Office of Justice Court Support ("OJCS"). We are told these courses are practical and geared toward what Town and Village justices do on a daily basis. One of the yearly trainings focuses on issues of diversity and inclusion. In 2019, the diversity and inclusion training focused on recognizing implicit bias.

Training in Judicial Districts. In the course of our review, we learned that judges in the Third District have the option of attending a bias training given in their district. The training lasts between 1.5 and 2 hours, and takes place before dinner. Materials for this training are created by a panel of judges in the district, and the training itself is conducted by outside consultants.

New York State CLE Requirements. Both attorneys and judges admitted to the New York State bar are subject to New York State Continuing Legal Education requirements. Members of the bar are required to complete at least one credit hour in the area of diversity, inclusion and elimination of bias every biennial reporting cycle.[193] Diversity, inclusion and elimination of bias courses and programs may include, among other things, "implicit

[193] N.Y. Ct. Rule § 1500.22.

and explicit bias, equal access to justice, serving a diverse population, diversity and inclusion initiatives in the legal profession, and sensitivity to cultural and other differences when interacting with the public, judges, jurors, litigants, attorneys, and court personnel."[194]

G. Training for Non-Judicial Personnel

As with the bias training for judges, there does not appear to be a consistent or coordinated effort to provide bias training to all non-judicial personnel across the state. Some individual Judicial Districts have begun to develop training programs and policies, but these efforts are not centralized and the trainings not uniform.

For Interviewers. Materials received from OCA indicate that employees responsible for interviewing and hiring receive some training on racial bias. A 2017 PowerPoint entitled, "The Interview Process," gives tips on how to conduct interviews and advises interviewers not to ask questions about race and national origin. Another PowerPoint from 2018 entitled, "The Hiring Process: Interview Best Practices: Using the New Structured Interview Forms and the Interview Resource Center" includes tips on how to mitigate various types of biases, including racial bias, when rating interviewees. It also discusses prohibited areas of inquiry, which includes race and color. A third PowerPoint from 2019, entitled "Recruiting a Diverse Workforce," discusses how to reach a diverse applicant pool and also explains rating errors and implicit bias. According to officials from Office of Diversity and Inclusion, this was the training ODI gave on this topic for HR managers in each Judicial District. We also identified several one-page documents listing instructions for interviewers. One list sets out prohibited areas of inquiry during an interview, including "all questions regarding a person's race/color." Another list contains tips on avoiding bias in the interview process, but does not specifically mention racial bias.

For Managers. Materials we received from OCA indicate that bias is discussed in at least some management training. A PowerPoint dated May 16, 2019, entitled, "Ethics Training: Transition to Supervisor," documents a training given by Rosemary Garland-Scott, the Statewide Special Counsel for Ethics. It sets out ethics rules that apply to court system employees. The presentation mentions that "no bias or prejudice" is allowed under the Rules Governing Judicial Conduct and the Conduct of Nonjudicial Court Employees. It also states that court employees "shall not discriminate . . . on the basis of race, color, [or] national origin" and lists "discourag[ing] racist . . . jokes or remarks" under "best

[194] *Id*. at § 1500.2.

practices" for court employees. This presentation does not directly focus on racial discrimination.

We received two versions of a PowerPoint entitled, "Performance Management & Problematic Conduct for HR Professionals" which discusses best practices for performance management. The presenter's notes on slides addressing performance evaluations contain a discussion of bias issues, including the "similarity bias." Other notes reference "subconscious bias" and state that evaluations "should not contain . . . discriminatory language/code words." This presentation does not explicitly discuss implicit bias or racial or ethnic bias. While the notes contain examples of bias, none of those examples are of racial, ethnic or cultural bias.

A third PowerPoint, dated June 11, 2020, entitled, "NYS Unified Court System: Discrimination and Harassment Awareness" contains an overview of the laws and policies prohibiting harassment and discrimination, and discusses racial discrimination and harassment. It also presents a series of scenarios involving different types of discrimination. Only one of the eight scenarios depicts ethnic discrimination (against an Irish employee); none involve racial discrimination. The presentation also includes training on how to report discrimination claims.

General Training. In addition to materials geared toward educating interviewers and managers on issues of bias, we received one PowerPoint entitled, "Implicit Bias" created by the OCA HR Training and Professional Development Office. The target audience for this presentation is unclear. The last slide of the PowerPoint refers trainees to Harvard's Implicit Association Test, and the presenter's notes suggest that the audience was invited to take the test and consider their own biases. No other materials received appear to be bias training given by OCA to a general audience.

Officials from ODI no longer administer anti-discrimination trainings; they believe they were removed because OCA prefers attorneys to conduct those trainings. ODI has recently conducted a training at the Court Officers Academy, and officials expressed that they were "moving in the direction of conducting ongoing trainings" on bias.

H. Training for Personnel in Town and Village Courts

Clerks in Town and Village Courts are municipal employees and not generally subject to the authority of OCA. The Administrative Judge of each Judicial District develops the practices and policies of Town and Village Courts, but does not appear to be involved in training non-judicial employees of Town and Village Courts. We were not able to ascertain whether there are any training programs implemented by OCA, the Judicial Institute or

OJCS for Town and Village Court clerks or any other non-judicial employee. Justices interviewed were unsure what type of training their court clerks receive or who would be responsible for administering this training.

I. Training Efforts of Judicial Districts

Third Judicial District. Officials from the Third District began mandating bias training two years ago.[195] The training was initially required only for judges and managers in the District, but more recently, the training requirement was extended to all courthouse employees in the District, including court officers. An implicit bias training panel, currently comprised of the Chief of the local Legal Aid branch, the Chief Clerk of Albany County, an LGBTQ advocacy group In Our Own Voices, Court Analyst Julio Rivera and the Hon. Richard Rivera, travels to various courthouses within the district to conduct the training. This training has not yet been universally administrated in the District due to interruptions caused by COVID-19. Interviewees shared the PowerPoint for this training, which begins with several interactive exercises, reviews the difference between explicit and implicit bias and discusses the Harvard Implicit Association Test. The training also discusses microaggressions, and provides strategies for "debiasing" and practicing greater cultural competence. The presentation seems to emphasize to trainees that having biases does not necessarily mean they are bad people.

Eighth Judicial District. Officials from the Eight Judicial District have developed and executed bias trainings largely on an ad hoc basis. All new employees, including law clerks and secretaries, are required to attend a one-day training, which includes a segment dedicated to racial and gender bias; the training is not required for judges. There is also a separate training for court officers that focuses on implicit bias training. Managers across the Eight Judicial District attend annual court meetings to discuss future trainings. However, different courts have different policies and practices. Family Court, for example, has its own training, which is offered in six counties, including Niagara County and Erie. The Erie Family DMR Committee provides a two-day training on implicit bias that specifically addresses cultural differences among families appearing in Family Court. The training uses a video entitled "Race the Power of Illusion" as a learning tool to engage a joint dialogue about race. The Erie Family DMR Committee has also hosted an education series on related topics like Racial Anxiety, Cultural Competency, Generational Trauma in Communities of Color and Working with Native American Families. Interviewees observed that counties with greater resources, like Erie County, are able to provide more trainings, but it is more difficult to do training programs in less populous areas with less

[195] Officials interviewed from the Third District believe they were the first district to mandate bias training.

resources. There has been some effort to bring trainings to counties through electronic meetings on Skype.

VI. WHAT WE HEARD

In the course of this review we connected with 289 people in 96 individual and group interviews. We spoke with sitting and retired judges representing almost every type of court in the system, prosecutors, criminal defense attorneys, institutional defenders, private practitioners, affinity groups, judicial associations, bar associations, court watchers, court officers and court clerks. Many interviewees followed with written sets of recommendations. We promised interviewees they would not be quoted by name, which we assess promoted candor. Accordingly, we do not attribute the quotes and assertions in this section by name, except where we were granted express permission to do so. Nor do we repeat every single thing we heard in our interviews. What appears below is representative of what we heard, reflecting a number of consistent observations and concerns. Some of what is recounted below is beyond the scope of this review to address. Nevertheless, we believe it important, as part of this assignment, to give voice to all the concerns expressed below.

A. An Under-Resourced, Over-Burdened Court System

We are obliged to begin with this. We note the Excellence Initiative and the considerable progress that has been made since 2016 to improve productivity, eliminate backlogs and modernize courtrooms. However, in one form or another, the #1 complaint we heard from multiple interviewees from all perspectives was about an under-resourced, over-burdened court system, the dehumanizing effect it has on litigants and the disparate impact all this has on people of color.

The Housing, Family, Civil and Criminal courts of New York City in particular continue to be faced with high volumes of cases, fewer resources to hear those cases, subpar technology and in some instances, crumbling and outdated facilities. Addressing the backlog of cases due to court closures during COVID-19 will no doubt make matters worse. Over and over, we heard about the "dehumanizing" and "demeaning cattle-call culture" in New York City's highest volume courts. At the same time, a disproportionately high percentage of the civil or criminal litigants in the Housing, Family, Civil and Criminal courts in New York City are people of color. The picture painted for us was that of a second-class system of justice for people of color in New York State.

One judge told us that the systemic reluctance to devote resources to these high-volume courts in New York City, which primarily serve indigent people of color, is "the very definition of institutional bias." Some interviewees went so far as to allege that deliberate choices have been made over the years not to address the persistent problems that have an

undeniable racially disproportionate effect. A Family Court judge noted the overlap between the concerns expressed by the Williams Commission in the early 1990s and the complaints repeated today.

The widespread complaints about high-volume courts took several forms:

First, there were the complaints about the facilities themselves. We note that this was not universally a problem. Courthouse visits undertaken as a part of this review revealed renovated facilities that had been further retrofitted to accommodate COVID-19 concerns. However, interviewees stressed that new, well-kept and clean courthouses are not a privilege enjoyed by all litigants equally. For example, multiple, independent groups of interviewees cited the "atrocious" Housing Court facilities in Brooklyn and the Bronx – courts frequented disproportionately by litigants of color. As one lawyer explained, Brooklyn's Housing Court is "the most inadequate facility for anything, let alone court proceedings." Another interviewee said that the courthouse is hardly recognizable as such, given that it is not a courthouse at all – but rather, a repurposed office building.[196] A public defender informed us that while other courthouses are operated by OCA, the office building occupied by the Kings County Housing Court is rented by the city, and the landlord of this building has regularly appeared on the Public Advocate's "Worst Landlords Watch-list." Several interviewees also described long lines to enter the Brooklyn facility, which often wrap around the block. Litigants are forced to stand outside in inclement weather – without shelter – for hours, waiting to enter. Upon entry, litigants were reported being "herded into an over-crowded elevator, over-heated by the crush of human bodies and strollers." A Housing Court judge told us the public bathrooms in Kings County Housing Court are among the worst she has ever seen, and another cited their resemblance to "a run-down public school bathroom, along with the public-school smells, stains and scratched up stalls." Judges cited dark, poorly ventilated and overheated or overcooled hallways and courtrooms affect individuals with respiratory issues, while overcrowding, stress and tense interactions affect individuals with mental health problems.

In the Bronx, we are told some litigants must descend into a non-ADA-compliant basement to have their cases heard, with ceiling tiles hanging on by a thread above their heads. Meanwhile, air conditioning is problematic and unpredictable – with some judges citing that they once measured the temperature in a makeshift courtroom at 62 degrees Fahrenheit.

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[196] The Working Group understands that there are long-term plans to move and update these courthouses, according to a report of the Housing Court Commission. *See Reforming New York City Housing Courts*, *A One-Year Update,* OFFICE CT. ADMIN. 9-10 (Feb. 2019), http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/19_Housing_Court-Report_Update.pdf.

Interviewees acknowledged the 2017 expansion of access to counsel for those in eviction proceedings has dramatically increased the numbers of individuals accessing the New York City's Housing Courts on a daily basis,[197] but noted that Housing Court facilities had previously been and are still insufficient to handle the volume of cases and individuals.

Second, judges acknowledged to us that the high volume of cases in these courts is their "enemy" in addressing bias, specifically. As a Supreme Court justice noted, Housing and Family Court judges have only have one clerk, while in the court's Commercial Division, most judges have three clerks. A group of Family Court judges surveyed cited research showing that implicit bias is more likely to be acted upon when a decision-maker is rushed.[198] They noted that if a judge has time to slow down, unpack the case before them, look at it from multiple angles and "surface their own biases and reactions" to the individuals involved, that judge is more likely to second-guess their own assumptions and biases. In a separate interview, another Family Court judge admitted that proceedings are often too rushed when judges are making decisions about removing a child from his or her family.

Third, interviewees noted that the atmosphere of Family Court is often dominated by concerns about security, with little to no consideration for its effects on litigants. We recognize that armed court officers are indispensable to court security. Nevertheless, interviewees told us that the presence of armed officers in Family Court contributes to the impression that it is yet another institution that "polices and controls" people of color.

Fourth, interviewees noted the length of time litigants must wait for their cases to be heard and adjudicated in high-volume courts. In Civil Courts hearing consumer debt cases, litigants are shuffled into "overstuffed" waiting rooms to wait for hours, only to have a few short minutes before the judge. As one organization noted, "wait times are a problem; the court system does not have what one would call a 'customer service model,' and it has a disproportionate impact on the non-white population in the courts." Interviewees, particularly those who spend much of their time in court, cited the lack of a formalized procedure or set of guidelines for setting court calendars as particularly problematic for litigants of color. Interviewees statewide cited an established practice of scheduling

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[197] *See Implementing New York City's Universal Access to Counsel Program: Lessons from Other Jurisdictions,* NYU FURMAN CTR. 16 (Dec. 2018), https://furmancenter.org/files/UAC_Policy_Brief_12_11-18.pdf.

[198] *See* Kristin Henning, *Race, Paternalism, and the Right to Counsel*, 56 AM. CRIM. L. REV. 649, 652-55 (2017) (citing Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1555 (2004); Vanessa Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 L. AND HUM. BEHAV. 413, 415 (2011)).

litigants who have sufficient resources to retain paid counsel before clients represented by legal aid attorneys or public defenders.

Interviewees said this practice wastes precious time, especially for indigent litigants, who must miss work or spend much needed resources on childcare to wait all day in court for their case to be called. As a group of Housing Court judges explained, when the court cannot complete its calendar for the day, cases are often adjourned out of necessity, meaning that unrepresented litigants must take another day off from work or arrange for childcare. For some litigants in Housing Court, "missing even one day of work can mean that a month's rent cannot get paid in full," putting litigants facing eviction even further behind.

One defender organization reported that their internal data analysis has shown clear racial disparities in case processing time in felony cases in New York City. In the case of Family Court, delays in processing a case can mean potentially permanent damage to children, particularly when those delays impact reunification. As one Family Court Judge noted, in this context, "justice delayed is justice denied."

One lawyer noted that the delays impart a sense of profound unfairness and have a demoralizing effect on clients. Ultimately, the message sent is that the loss of the litigants' time – particularly those who are indigent or people of color – is a casualty within the system's broader disorganization. One lawyer told us that occasionally, litigants in Family Court feel so disheartened by persistent delays that they eventually fail to appear at all.

Fifth, interviewees also cited the lack of uniform access to childcare services, especially in New York's high-volume courthouses. The difficulties that litigants, and particularly litigants of color, face in arranging for childcare in order to attend and fully participate in court proceedings, was a commonly raised theme throughout interviews. A group of Housing Court judges told us that previously, the Housing Court provided childcare services within the courthouse while parents or caretakers attended their cases, but that this practice has been discontinued due to budgetary limitations. Judges stressed that the need for childcare support continues to be an "overwhelming" issue faced by litigants, particularly women, who otherwise must bring their children into the courtroom with them, or miss proceedings altogether. Beyond this, the bare minimum of needs faced by working parents in court are not met – one legal aid attorney mentioned that there are not even changing tables in Family Court bathrooms throughout New York City. While a narrow issue, as she framed it, if litigants are going to be subject to delays and long wait times, they should at least be able to easily use the restroom with their small children while they wait.

Sixth, interviewees noted the importance of adequate signage in courthouses. Aside from practical concerns, they noted that signage is important for the message that it sends to litigants: that the court system is there to serve them, and that they are active participants in it. Yet, one prosecutor noted that the signage is so bad in some courts in his jurisdiction, "airports and local Department of Motor Vehicles offices are more navigable than the courthouse." Interviewees often pointed to the importance of adequate signage for unrepresented litigants and those who are of limited English proficiency – noting that it is unacceptable that these individuals often only accidentally end up at their intended destination within the courthouse, and that once there, they sometimes do not have even a basic grasp of what is taking place. In essence, interviewees felt that other, larger issues aside – like the quality of interpretation services or access to counsel – useful, common-sense, accessible signage is the bare minimum of resources that the system can provide its most vulnerable litigants.

Finally, multiple interviewees noted that in this environment, court officers, attorneys and judges sometimes exhibit a lack of understanding, empathy and compassion towards litigants of color interacting with the court system. One judge mentioned that there is "a culture in the courts that discourages compassionate treatment." One district attorney noted, "you don't see, at all, any care or compassion for the family that is watching their son or daughter being sentenced to 20 years in prison. When there's that emotional outburst, they are ushered out of the courts by security." A number of interviewees mentioned a tendency of certain judges and court officers to "moralize" at litigants of color and disparage them because of their dress or how they speak in court. One defense attorney noted that certain judges yell at or punish clients for being late, without regard to litigants' poverty, childcare needs or ability to take time off from work. A senior member of a leading bar association recalled an incident in which a Family Court judge in New York City yelled at a litigant for saying in court that she did not know who the father of her child was. The judge apparently then inquired, "How is it that you people never know?"

This insensitive behavior extends to attorneys in court as well. One Housing Court judge noted, during her time on the bench, she frequently overheard statements by attorneys that ran the gamut of overt racism, racial bias and racially tinged condescension. She mentioned that this dynamic was especially problematic in the Housing Courts, an environment where the litigants of color are often being evicted and the landlords and attorneys pursuing the evictions are overwhelmingly white. One public defender reported an instance in which he witnessed a court-appointed attorney buy boots on her iPad while her client lost custody of her child in Family Court.

Interviewees also pointed out that personnel across the system have virtually no idea how to interact with indigenous persons, despite that, as interviewees pointed out, "there are so many Native Americans that come into contact with the bar and the courts." One interviewee noted that although "most discrimination exists closer to [Native American reserves]," the farther one moves from those areas, Native Americans are essentially considered "nonexistent."

B. Existing Institutions Addressing Racial Bias are Inadequate, Opaque or Unknown

Part of our assignment from the Chief Judge was to examine existing programs or policies geared towards reducing racial bias.

Significantly, many interviewees simply were not aware that many of these programs and policies existed, or if they did, they were unfamiliar with their scope and function.

The IG for Bias Matters is the prime example of this. This office is charged with investigating complaints of racial, sexual, sexual orientation and gender identity related-discrimination or bias. Many individuals in the system simply did not know that this office existed, or did not understand its role. One national-level state court observer noted that New York State was truly "ahead of its time" in creating such an office, and that few other states have a similar institutionalized role for investigating complaints of racial bias. As such, she was "surprised and disheartened" to learn that it was not widely understood. When prompted, another upper-level OCA employee admitted that she had only recently learned the office existed. One group of judges interviewed even recommended that OCA establish an "Inspector General for Diversity and Bias Related Conduct," though this position already exists. Potentially a reflection of its relatively unknown status, we are told that the IG for Bias Matters typically receives ten or fewer complaints of racial bias meriting an investigation per year.

While one OCA staff member informed us that there are posters advertising complaint procedures for registering a complaint to the Offices of the IG or the IG for Bias Matters in some courthouses, few others acknowledged that they had seen such advertising. In general, interviewees pointed to the lack of well-publicized, anonymous and fair complaint procedures for reporting incidents of bias on the part of judicial and non-judicial personnel. Several judges and former judges noted that the current system does not address "festering" issues with court officer conduct, and another former judge cited "deep concerns" about complaint procedures as a whole.

Even when interviewees were able to name a few of the organizations tasked with addressing racial bias in the court system, many noted that these entities are ineffectual or exist in name only. The characterization "window dressing" was used more than once.

Interviewees noted that the Office of Diversity and Inclusion, or ODI, had recently experienced budget cuts, and its team of eight people involved in discussing diversity issues with courthouses across the state had recently been pared down to only two. One judge noted "if one is serious about interrupting bias, it cannot be done cheaply."

Likewise, an interviewee questioned whether the newly-expanded Office for Justice Initiatives had any "real leverage" to combat racial bias in the courts. For example, we were told that this office's budget request for programs specifically addressing racial bias was denied in 2018, and that subsequent funding received has been "far too little" to develop and administer such a program.

Interviewees were also generally confused about the "largely defunct" Anti-Discrimination Panels, which were originally created to serve as a more informal dispute resolution mechanism for incidents of bias and beyond. The panels were administered by trained judicial and non-judicial intermediaries, and are still advertised in OCA's "Discrimination Claim Policy & Procedure" booklet as a confidential means for personnel to "resolve incidents of discrimination" outside of formal complaint procedures.[199] However, interviewees informed us that these panels are no longer in widespread operation. While one interviewee noted that reinvigorating the program would be beneficial for addressing incidents of bias in a less adversarial fashion than the formalized complaint process, other interviewees who were familiar with the program in practice noted that the panels were difficult to manage and resulted in inconsistent or unwieldy investigations. Ultimately, a member of OCA's staff noted that the most problematic feature of the Anti-Discrimination Panels is that they are neither in use, nor have they been formally disbanded.

One interviewee noted that while the New York Federal-State-Tribal Courts and Indian Nations Justice Forum was once successful in achieving judicial recognition of Tribal Court Orders, and had been having discussions about incorporating Federal Native American Law into the New York bar exam,[200] these efforts have waned in recent years.

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[199] *OCA Discrimination Claim Policy & Procedure*, *supra* note 176, at 11.

[200] We understand that other states have done this, such as Washington State, which now includes Indian law on the state bar exam and stresses the importance of Indian law in Washington State law schools. *See State and Tribal Courts: Strategies for Bridging the Divide*, CTR. FOR CT. INNOV. 19 (2011), https://www.courtinnovation.org/sites/default/files/documents/StateAndTribalCourts.pdf.

Next, a number of interviewees told us – in words or in substance – that the Williams Commission has "run out of steam." This view is shared even by Commission members. One member expressed a hope the Commission will ultimately be empowered through independent initiatives like this one. We recognize the Commission's efforts over decades to address diversity and equal justice in the court system. That said, interviewees told us their belief that the Commission is no longer "as critical of the system" as it once was. This may partially be attributed to the Commission's apparent shift from an investigative and reporting mechanism to more of a community-building organization over the last few years. Many interviewees stressed the Commission's potential to be an "asset" on matters of equal justice, and that the Commission could be more "proactive" and "forceful" in its approach to its original mandate.

Finally, many interviewees told us they do not feel comfortable lodging complaints of racial bias, largely for fear of retaliation from superiors or colleagues. As one judge of color noted, there is "a fear among Black leadership in the system," and that these leaders of color try to "tread lightly" when dealing with claims of racial discrimination. The judge added that this is perhaps because they fear that they will not be supported, or will lose their positions of power if they speak out. Judges expressed fear of raising issues of racial bias, out of concern for blowback from fellow judges. Court attorneys, as at-will employees, fear reporting incidents of bias against the judges they work for.

Meanwhile, attorneys described feeling powerless to raise complaints against judges who engaged in biased behaviors or made racially-charged comments against them or their clients. As repeat players in the system, prosecutors and defense attorneys expressed that despite pervasive problems with problematic judges, their professional duties often require them to keep their feedback to themselves, at the risk of compromising their client's case, their own reputation or that of their organization. One legal aid attorney interviewed noted that many pro bono attorneys of color tend to be young, which creates additional barriers to speaking up against inappropriate behavior.

C. Court Officers

On June 7, 2020, it was reported publicly that a Brooklyn-based court officer had posted on Facebook an illustration of President Barack Obama with a noose around his neck, and Secretary Hillary Clinton being taken to a wooden apparatus to be hanged. The post prompted immediate outrage, and we are told that the officer has been suspended.

It is apparent from our interviews that this episode peeled the lid off raw emotions about and within the court officer community, particularly in Kings County. A number of interviewees were outspoken in expressing those grievances about the court officer

community. Several told us that the post described above is not an isolated incident. Interviewees reported that the court officer who posted the offensive message had been "protected for years," and that her racist views and mistreatment of people of color as a court officer had long been tolerated without adverse consequences. Others alleged that problematic social media posts by court officers have been a widespread issue repeatedly ignored despite complaints long before this recent incident. Interviewees said the court officer's post evidences a broader institutional acceptance of racist behavior.

Still worse, court officers of color told us they felt they could not report incidents of bias, for fear of being ostracized by their fellow officers and facing adverse career consequences from powerful union leaders. Even some judges told us they hesitate to report court officers, citing incidents where court officers have created a hostile environment for judges who they feel have criticized them. One very senior judge confided that she is aware that some judges are afraid of reprimanding or correcting the misbehavior of certain court officers in their courtrooms.

Although interviewees stressed that not all court officers behave in a hostile manner, almost every interview touched on what appears to be a culture of toxicity and unprofessionalism exhibited by court officers towards litigants, litigants' relatives and attorneys of color.

Multiple interviewees told us that a number of court officers engage in disrespectful, condescending and unprofessional behavior directed disproportionately at individuals of color interacting with the judicial system. For example, a Family Court practitioner relayed experiences of court officers yelling at litigants of color, as well as at immigrants for whom English is not a first language. Her experience was echoed by other interviewees, who described court officers as "routinely bullying defendants, displaying short fuses" and perceiving courtroom users as potential threats. Other examples of unprofessional behavior included discussing litigants' marital status and berating litigants about the clothes that they wear. Interviewees mentioned that such behavior is often unprompted, and frequently escalates an already-tense situation given the nature of certain judicial proceedings.

Interviewees also noted that court officers exhibit differential treatment towards certain individuals by applying facially neutral policies differently on the basis of race. For example, interviewees at a legal think tank noted that litigants and attorneys of color consistently receive additional scrutiny and are required to produce their identification when entering the courthouse, while white individuals are waived through. Another example is the prohibition against cell phone use in the courthouse; this rule is often

enforced aggressively against people of color, but not against white individuals. One former prosecutor noted that Black defendants are more often handcuffed when appearing for minor infractions, while their white counterparts are not.

Some interviewees reported instances of explicitly racist conduct or comments by court officers. According to court officers of color, the use of racial slurs by white court officers is common and often goes unpunished. One public defender relayed a story of being in an elevator with her clients, who happened to be Black teenagers, and multiple court officers. In response to comments made by the Black teenagers, one white sergeant replied, "Keep running your mouth. You'll always be a nigger." Multiple court officers of color mentioned white court officers using the n-word. One court officer of color recalled an incident where she overheard a white court officer telling another officer that he would have done better on the requalification exam if it had a "Sean Bell target" – referencing the unarmed Black man who was killed on his wedding day after police officers fired 50 bullets into his car. Another court officer of color recounted an incident in a locker room where a white court officer referred to a Black court officer as "one of the good monkeys." According to interviewees, these incidents were reported, but the court officers involved were not disciplined. One court officer told us that his supervising officer ranted at a Christmas party about how Black people are lucky that they are allowed to be court officers in the first place.

Though court officers are employees of the Unified Court System, according to several interviewees, court officer discipline and promotion is heavily influenced by union leadership, specifically the leadership of the New York State Court Officers Association. Multiple interviewees occupying various positions within the court system also told us it is well-known that court officers cannot be promoted unless it is personally approved by the head of Court Officers Association, who has been president of that union for 46 years. Court officers of color describe the Court Officers Association as "insular," and believe that union leadership has over time become entrenched and insulated itself from any real scrutiny or challenge.

We also note that certain union leaders have themselves posted offensive messages on social media, leading several court officers to complain that union leadership is a "safe haven for racist speech and actions."[201] In one Facebook post, a member of union leadership referred to protestors who sprayed graffiti on a New York State court van as "animals." In that same Facebook post, the union leader's profile picture was the Betsy

[201] Rebecca Rosenberg & Bruce Golding, *Racial Inequality Probe Ordered Into Court Officers Union Leader*, N.Y. POST (June 12, 2020), https://nypost.com/2020/06/12/racial-inequality-probe-ordered-into-court-officers-union-leader/.

Ross flag, which has been widely adopted by white Supremacist groups, including the Ku Klux Klan.[202]

Notably, the overall diversity of the court officer community does not diverge significantly from the population statewide or in New York City (*see* Figures 25 and 26 below), though the statewide or citywide population does not necessarily reflect the demographics of the litigants in particular state courts.

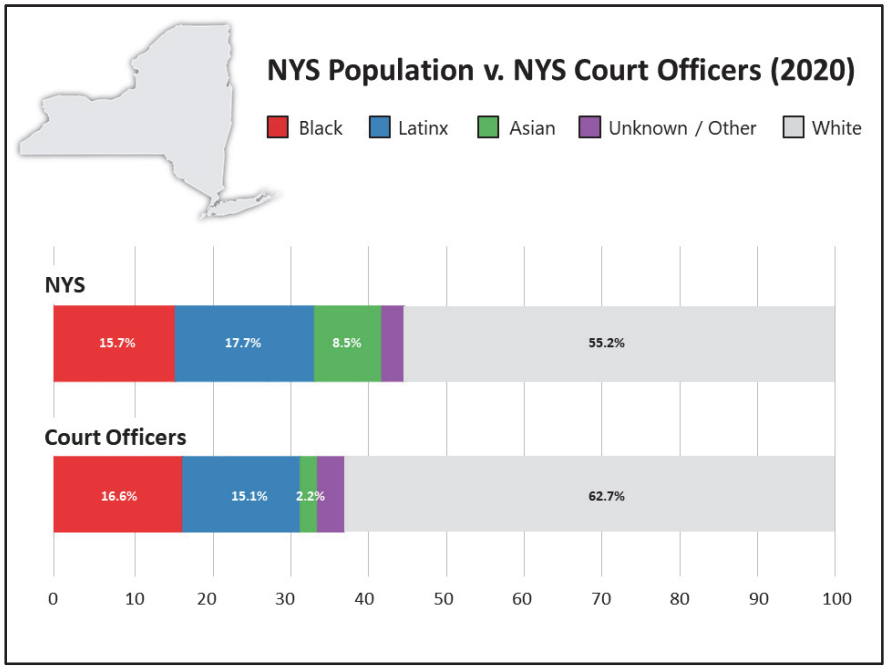

Figure 25

[202] In New York, a KKK group passed out mini Betsy Ross Flags, in addition to the Confederate Flag which they commonly use. In Georgia, some KKK groups required members to use the Betsy Ross Flag in ritualistic meetings. Janice Williams, *Is the Betsy Ross Flag Racist? Meaning, History and Symbolism Behind U.S.A.'s 13-Star Flag*, NEWSWEEK (July 2, 2019), https://www.newsweek.com/betsy-ross-flag-meaning-history-racist-1447174.

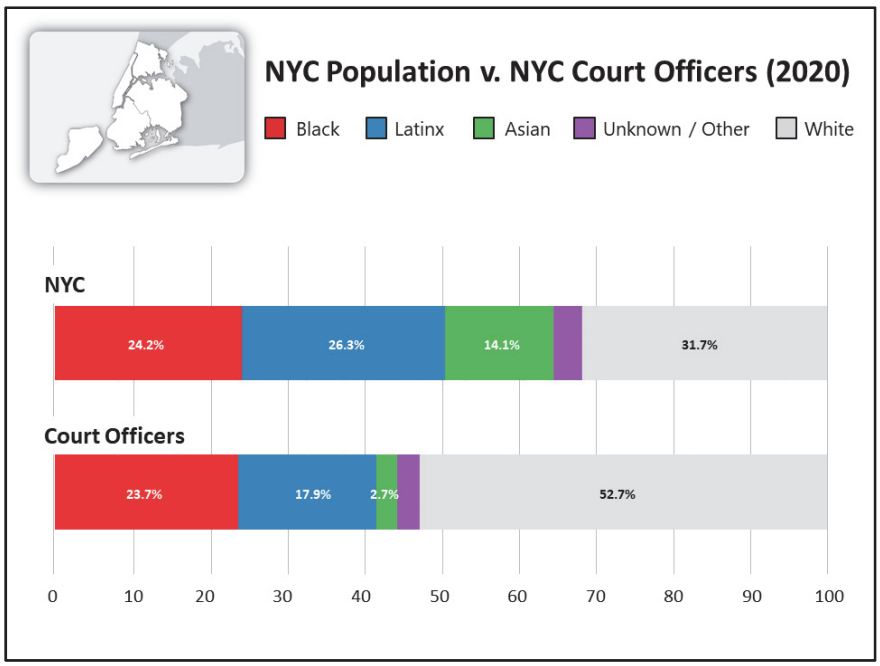

Figure 26

Critically, interviewees emphasized that the diveristy of the court officer community is concentrated at the lower levels, and the data below supports this (*see* Figure 27 below).

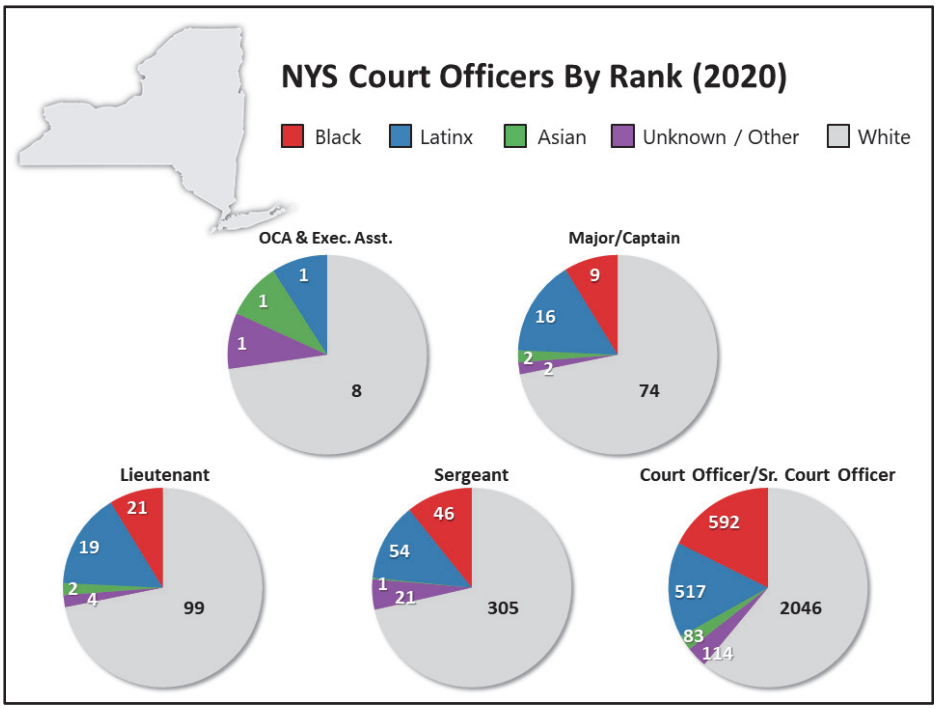

Figure 27

D. Issues Facing Attorneys of Color

In the course of our interviews, we were struck that almost every attorney of color we spoke with – ranging from criminal defense attorneys to the Bronx District Attorney herself – reported incidents in which they were mistaken for someone other than an attorney or otherwise subjected to disparate treatment. A supervising attorney of color currently serving in a public defender's office told us "every Black attorney working in the system has a story" of being treated differently, seemingly on the basis of race. These instances take several forms:

- being mistaken for a criminal defendant;
- being mistaken for an interpreter;
- being mistaken for another attorney of color;
- being asked to show identification to enter the courthouse while white attorneys are not;
- being questioned about sitting in the front row of the courtroom reserved for attorneys and
- comments from judges and court officers on how they carry themselves or are dressed.

Both upstate and downstate practitioners appearing in multiple types of courts have reported such treatment. One African American criminal defense attorney recounted for us the recent experience of appearing in state court upstate to represent a client. His description of the experience sounded as if he were appearing in a courtroom in the deep South in the early 1960s: the reaction from local officials was astonishment and questions such as "why are you here?"

Some attorneys of color also told us that they are "believed less often" when making statements to the judges before whom they appear. This problem is magnified when an attorney of color represents a litigant of color in court; in such an instance, according to the head of a public defender's office, the bias manifests itself as disbelief of both attorney and client and the failure to take them seriously. Another frequent practitioner in Family Court noted that she has repeatedly been referred to as aggressive or overly assertive, while her white male counterparts making similar arguments to represent their clients are not.

So pervasive are such incidents that the head of a legal organization told us that attorneys of color practicing in one county keep a running Google document tracking the

inappropriate comments that they hear from judicial personnel. Two other legal organizations told us they keep running lists of such incidents.

Finally, we heard there is a palpable, cumulative effect such disparate treatment has on attorneys of color and the quality of representation that they can provide: if a client witnesses this treatment, it lessens the confidence the client has in his or her lawyer, and erodes the client's overall confidence in the ability of the judicial system to deliver fair outcomes.

E. Judicial Diversity

Though the data (*see* Section IV above) demonstrates overall progress in this area, many judges we spoke with stated the view that the judiciary is not sufficiently diverse or representative of New York's population, particularly upstate. The data does in fact reflect an increasingly diverse judiciary statewide and New York City-wide (*see* pp. 32–41); we note, however, pockets and particular groups where representation in the judiciary lags behind the population. As one particularly notable example, one interviewee pointed out that there is currently only one Native American jurist on the entire New York State bench. According to the interviewees, the lack of diversity among the judiciary leads to perceptions that justice is not fairly administered.

The judges we spoke to also noted underrepresentation in certain positions of power (*e.g.*, the position of Presiding Justice) and much-sought-after assignments (*e.g.*, the Commercial Division of New York County). On the other hand, we are told by OCA that in fact nine of the fifteen Administrative Judges who sit in downstate New York (the City plus Long Island and Rockland, Orange, Putnam and Dutchess Counties) are people of color.

After surveying a group of Supervising and Administrative Judges on the topic, a summary of the responses sent to us by the Judicial Friends Association indicated that procedures for judicial part assignments often appear to be entirely discretionary and lack sufficient transparency to even critique them in an informed way.[203] Another group of judges interviewed complained of a seeming lack of transparency around the factors or qualifications that go into judicial promotions.

Finally, we heard mixed views from judges about whether the elected or appointed process better promotes diversity. Some interviewees expressed that people of color have

[203] *Report to the New York State Court's Commission on Equal Justice in the Courts*, JUD. FRIENDS ASS'N. 7-14 (Aug. 31, 2020), https://www.urbancny.com/wp-content/uploads/2020/09/Judicial-Friends-Report-on-Systemic-Racism-in-the-NY-Courts.9.14.20.pdf.

a higher chance of becoming a judge through the electoral process, particularly in diverse communities, where the community is given a voice in its representation. One elected judge upstate recalled for us with pride that he challenged the party's handpicked choice in a primary and ran successfully as a renegade. These same interviewees believe that judicial screening committees participating in the appointment process are themselves not diverse and contain "too many 'Big Law' types."

On the other hand, interviewees who believed the appointive process secured better judicial diversity noted the inherent issues and barriers in the electoral process. These interviewees asserted that, realistically, the electoral process, just as often as the appointive process, depends upon "who you know." One judge of color explained that the political nominating system at judicial conventions causes candidates of color to be bypassed or discouraged by party leadership, particularly in upstate counties, and that interested candidates are often forced to abide by the party's selection for fear of retribution in future elections. To achieve this endorsement, interviewees indicated that candidates must publicly align themselves with the political party, which is often only achieved through substantial donations to the political party's county chairman. One interviewee suggested that unless party politics is eliminated, appointments better serve interests of diversity. (It is no secret that, in fact, there are few competitive judicial elections in downstate New York.)

We analyzed data on elections and appointments of judges sitting in New York City to evaluate which process leads to more judges from minority backgrounds. In New York City, elected judges include those on the Supreme Courts, Surrogate's Courts, and New York City Civil Court. Judges in the New York City Family, Housing, and Criminal courts are appointed. According to data received from OCA, the vast majority of judges outside of New York City are elected. Judges sitting on City Courts outside of New York City may be appointed or elected, but these data were not disaggregated. Thus, we did not analyze relative outcomes of appointments and elections outside of the City.

As reflected below, overall the data shows that elections in New York City appear to yield a more diverse judiciary. Judicial appointments yield a greater percentage of Asian judges, but elections place more Black and Latinx judges on the bench and create a more diverse bench overall. Black jurists account for 16.5% of appointed judges and 27.3% of elected judges. Latinx judges comprise 11.3% of the appointed judiciary and 14.6% the elected judiciary. However, only 4.2% of elected judges identify as Asian, whereas 8.5% of appointed judges do.

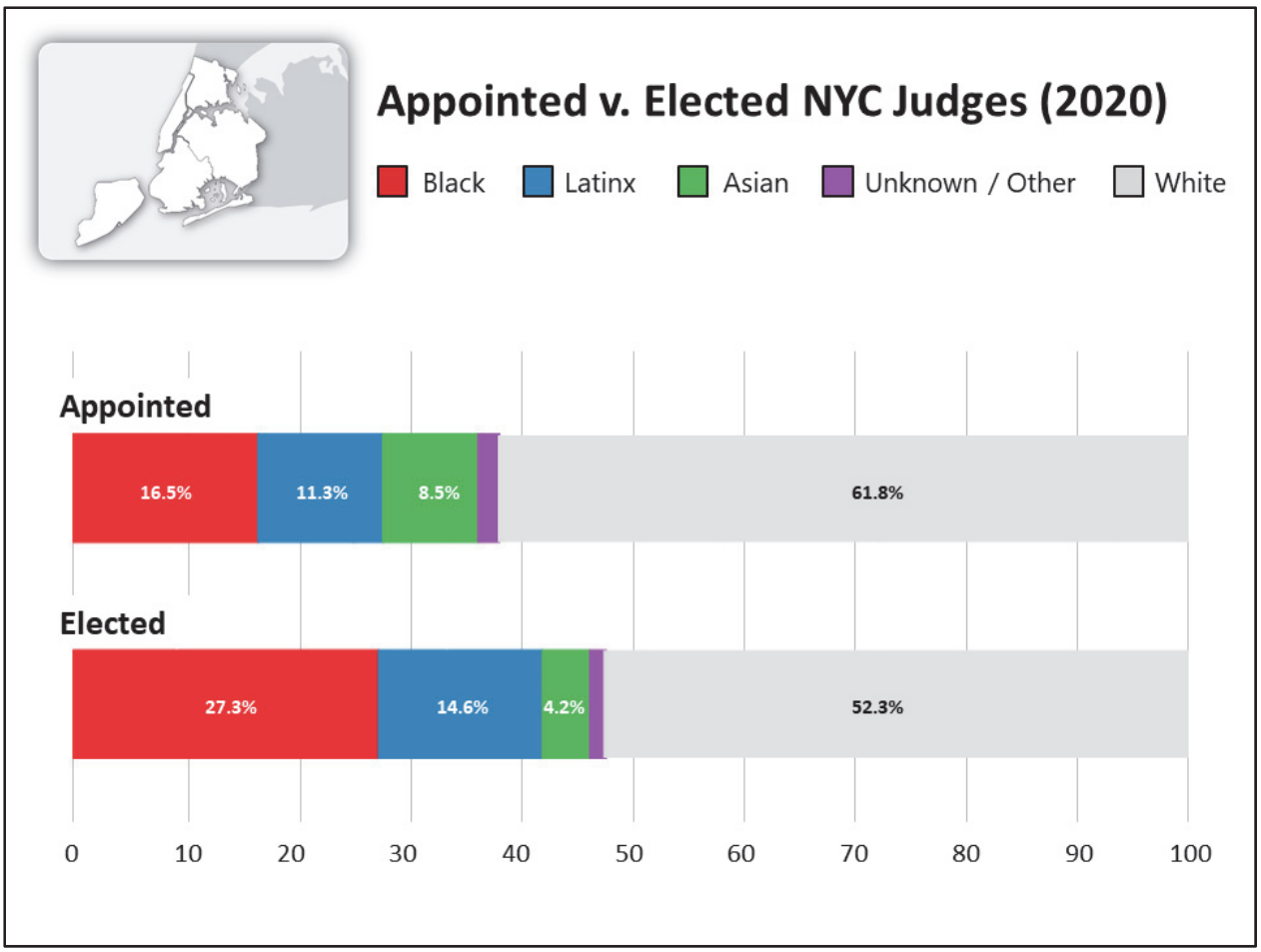

Figure 28

Ultimately, while we take no position on this issue, the appointment versus election question will depend on the circumstances – and the commitment to diversity by those who ultimately have the power to appoint a judge or help a judicial candidate secure a place on a ballot.

Interviewees also provided mixed views regarding whether or not they believed the Chief Judge's proposed merger plan would increase judicial diversity.[204] On the one hand, some judges asserted that the plan's implementation would reduce the number of elected judges in growing minority communities. On the other hand, proponents of the merger plan observed several key benefits if it were to be adopted: first, interviewees asserted that the merger plan would necessarily increase the pool for diverse judges to be promoted to

[204] *See* Press Release, Hon. Lawrence K. Marks, *Chief Judge Proposes Constitutional Reforms to Simplify Outdated Court Structure, Aiming to Enhance Access, Optimize Resources* (Sept. 25, 2019), https://ww2.nycourts.gov/sites/default/files/document/files/2019-09/PR19_22.pdf.

the Appellate Division, as many courts would be merged into the Supreme Court. Second, interviewees highlighted that many of the courts that would be merged into the Supreme Court – including Family Court, for example – would see reduced workloads as cases would be more evenly distributed across more judges. Interviewees opined that this improvement in resource allocation would improve the overall quality of justice administered in these courts. We take no position on this issue, as we do not believe we are equipped to offer an informed opinion.

F. Diversity Within the UCS Bureaucracy

Interviewees frequently highlighted a dearth of diversity, particularly in promotion opportunities, throughout the bureaucracy of the Unified Court System. This encompassed the leadership of OCA. Interviewees from within the court system, including a number of sitting judges, cited a perception of lack of diversity within OCA leadership – put more than once as "a lack of diversity on the 11th floor" of OCA's offices at 25 Beaver Street in Manhattan. (Here perception may not have caught up with reality because we are told that five of the twelve officials in the OCA's executive office are people of color.)

Throughout the bureaucracy employees of color we spoke with perceive unfair barriers in hiring and promotion. Interviewees noted that this perception is a problem in and of itself, in that it has a chilling effect on diverse applicants' willingness to even seek employment or promotion within the system.

Judges commented that it appeared task forces, committees and commissions tended to include a recurring cast of non-diverse individuals.

Numerous interviewees from across the spectrum perceive that nepotism permeates hiring and promotional decisions, even though most jobs within the court system are civil service positions requiring civil service exams. Perceived nepotism in the court officer community in particular was identified by interviewees. According to a judge interviewed, given the number of intergenerational families in the ranks of clerical staff and court officers, nepotism results in an non-diverse employment population in certain courts. Interviewees noted that this problem – which extends across both competitive and non-competitive positions – leads to "bad morale" among employees and leads to the perception that people of color face unfair barriers in advancing in their careers.

Some interviewees highlighted a perceived lack of attention and accountability among OCA leadership in ensuring a diverse workforce. For example, one interviewee explained that while Administrative Judges formerly maintained statistics on racial and ethnic hiring and regularly met to review these statistics, this practice halted because, as the interviewee

explained, the Administrative Judges "just got tired" of the practice. Similarly, tracking progress on diversity goals throughout the court system was one of the original undertakings of the Williams Commission, which formerly issued detailed reports comparing workforce demographics to population, updated regularly to reflect population changes. Commission members told us that they currently receive and analyze the data, use it to challenge administrators when they meet with them, but do not publicize the data.

Interviewees complained that applicants of color are often unaware of job openings, opportunities to take civil service exams and opportunities for promotion.

Additionally, interviewees highlighted a lack of uniformity among the Judicial Districts in their outreach efforts and results in making diverse hires. We heard that in one Judicial District robust outreach efforts – including outreach to faith communities and local colleges and advertising through its own publications and in local newspapers – resulted in noticeably more applicants of color. Interviewees highlighted the success of another Judicial District's efforts to communicate available positions and upcoming civil service exams to its employees via email and postings on an easily accessible website. These Judicial Districts cited the importance of community, grassroots efforts in improving diversity hiring numbers as well as the importance of "credible messengers" in advertising employment in the court system. But, a well-known affinity organization stated that Judicial Districts like these are the exception, not the rule. Interviewees acknowledged the inherent difficulties in recruiting diverse candidates – particularly in upstate communities – where the population is not nearly as diverse as New York City.

Next, interviewees complained of the ineffectiveness of "interview panels," and told us that they actually provide barriers to merit-based advancement. We understand that interview panels – responsible for interviewing and recommending candidates to the Deputy Chief Administrative Judge for hiring and promotion – are a part of efforts to ensure a fair and equal hiring and promotion process. Despite this, some interviewees perceived inherent unfairness in the process. For example, one interviewee conveyed the impression that there is often a predetermined candidate, and that interview panels will simply re-constitute themselves until the desired candidate is chosen. One retired Black judge told us he had grown tired of sitting on interview panels simply to "achieve diversity" when the result was preordained. Interviewees complained about a lack of transparency in the process, and that candidates for promotion are often not notified that they are not selected for a position, and are never formally informed why they were not chosen, even when they ask for feedback. Interviewees said this general lack of transparency generates festering perceptions that the process is political, based on favoritism and rigged. Given

the noted inhibiting effects this has on potential applicants of color, these perceptions are nearly as important as the actual outcomes.

With respect to competitive civil service positions, interviewees say that the required civil service exams for these positions provides an extra barrier to employment. Specifically, interviewees relayed that examination dates are not always publicized, and that preparatory materials are often unavailable or difficult to access. Interviewees said that learning about and adequately preparing for these examinations depends on knowing people already in those roles who had previously prepared for the examination – an opportunity that is less available to applicants of color who are underrepresented in these roles.

Finally, interviewees characterized the "reclassification process" – whereby employees apply to be classified to a higher "grade" or different position – lacks transparency and is wrought with subjectivity. One knowledgeable interviewee said many employees are under the impression that supervisors typically show favoritism in these processes.

G. Bias Training

One consistent message we heard was that existing training on racial and cultural bias and sensitivity is inconsistent and insufficient. Multiple judges in particular were willing to acknowledge their own implicit biases and recognized the value of training to open minds and challenge stereotypes. One retired Black judge with decades of experience told us he often had to "check his biases" at the door when evaluating a litigant before him. Several judges interviewed noted that isolation is a challenge for ensuring that judges are engaging with and exploring issues of racial bias and cultural awareness. However, the primary complaint about bias training is that it is not currently mandatory for all judicial and non-judicial personnel across the New York State court system.

As for judicial training efforts, we are aware that all new judges receive bias training at a plenary session during summer sessions at the Judicial Institute in White Plains. Beyond that, the Judicial Institute provides a yearly session on implicit bias, which may be accessed remotely as a video, but is not mandatory. Several veteran judges surveyed noted that even when returning judges attend training at the Judicial Institute in person, many choose not to attend the implicit bias session. Several Supreme Court justices pointed out that these sessions for experienced judges are administered in a way that may even discourage attendance – specifically, the implicit bias session at the Judicial Institute for experienced judges has historically been provided at the end of the second day of the conference, at which point, most judges' "brains are turned off." We understand that last year, implicit bias training was one of twelve mandatory courses that Town and Village justices were

required to take. However, one justice told us that the quality of the bias training is "rudimentary."

On substance, a few judges we interviewed noted that the Judicial Institute's trainings "effective," in that they help judges be conscious of not thinking they have "heard a [litigant's] story before," based on demographics. But, most of the feedback received about judicial training on issues of bias or cultural sensitivity was critical.

With regard to non-judicial staff, as we understand it, the only "mandatory" training that OCA HR uniformly provides is delivered at orientation for new employees and covers "discrimination and harassment," but not implicit bias, specifically. While judges who are not new can opt to receive yearly training on implicit bias through the Judicial Institute, there is no such unified or well-known platform for periodic or recurring training for non-judicial staff.

We are aware that OCA has developed specific implicit bias training materials, but that they have been administered only at the request of specific courts. Individual Judicial Districts surveyed informed us that they require such training for non-judicial staff, but this is of their own initiative, not OCA's. One administrative judge noted the vast differences between Judicial Districts' approaches, and that there is "no centralized body for training" on these subjects. She explained that this is problematic, given that larger counties have more resources for trainings, while smaller and less populous counties cannot afford them. As a result, individuals in some parts of the state may fall through the cracks, while even the best-intentioned local leaders in the system worry about maintaining ongoing funding to provide adequate and current trainings.

We are also told that although court officers now receive a form of implicit bias training at the Court Officer Academy, a senior-level court officer upstate stated that the training provided was lacking, and that it did not actually prioritize understanding implicit bias. Similarly, a judge commented that the bias training at the Court Officer Academy in Brooklyn was no more than a "bare bones outline."

Requests for improvements to both judicial and non-judicial training on implicit bias or cultural competency are not new. Interviewees told us, however, that previous efforts have faced resistance from stakeholders in the system. One judge noted that previous attempts to launch a more widespread training effort for non-judicial personnel were so "vehemently rejected" that the project was canceled. This judge expressed hope that refreshed efforts today would be received more favorably. Another interviewee said that judges can be so averse to discussing topics like "white privilege" that they will reject programming developed by organizations like the Williams Commission, or will refuse to attend non-

mandatory sessions. Several interviewees mentioned that those undergoing training – judges in particular – are often unwilling to acknowledge their own biases, and chafe at the idea of a training titled as such.

H. Juries

Interviewees, principally from the criminal defense bar, expressed concerns regarding juror bias. Interviewees explained that recognition of juror bias and expanded opportunities for counsel to explore biases in jury selection would allow for fairer outcomes for litigants of color.

One interviewee stated that, "[t]he most significant and sustained issue confronting our criminal system . . . is that our judiciary permit jurors with racial bias (overt and implicit) to serve as jurors, notwithstanding challenges during *voir dire*." As a threshold issue, interviewees cited that juror education on implicit bias in decision-making is lacking. Beyond this, while one interviewee noted that some judges – predominantly Black or Latinx judges – allow defense counsel to question prospective jurors on implicit racial bias during *voir dire,* others deny counsel the opportunity to do so altogether. Defense attorneys also expressed that they simply do not have time to explore issues of racial bias during *voir dire* properly. Another interviewee stated that some judges, wanting to keep proceedings moving quickly, will deny the defense attorney the opportunity to ask questions outside of the items on the questionnaire handed out at the start of jury proceedings.

An institutional defender told us that jurors of color tend to distrust the police more or have had negative encounters with law enforcement, and noted that when jurors of color express that distrust, they are automatically struck from the pool. Meanwhile, potential jurors with family members in law enforcement do not receive the same treatment.

Interviewees also raised concerns that some judges uncritically accept the reasons that prosecutors provide when striking jurors for cause, insisting that this practice ultimately results in non-diverse juries. A former judge recalled recommending a court rule that allows for easier challenges to preemptory strikes, but found that this recommendation was met with resistance by district attorneys and judges. A defender association noted that the difficulties in a successful *Batson* challenge stem, in part, from the lack of data on the New York State court system, and juries specifically. They noted that a party will have difficulty demonstrating that a juror was struck intentionally for a race-based reason if no available data on the numbers of minorities in the jury pool could substantiate that *Batson* claim.

Finally, some interviewees noted an underrepresentation of communities of color in jury pools, citing upstate county-wide juror pools that are largely white, and barriers to jury service such as lack of transportation, daycare or the financial means to serve on a jury.

I. Assigned Counsel

On the whole, feedback about the quality of legal representation provided by assigned counsel throughout the state was largely, though not entirely, negative. Family Court judges told us the quality of court-appointed attorneys has increased since the early nineties, and in pockets of the state, interviewees were pleased with the quality of assigned counsel – such as parts of the Third Judicial District, Manhattan and Westchester County.

That said, many interviewees did express disappointment with the quality of assigned counsel, the failures of which one Family Court judge noted generally tend to fall on litigants of color. One prosecutor lamented that 18-B attorneys are "the worst," and that in her experience, they "have no training, are not knowledgeable and most do not own computers." She added that it was "depressing" to think that 18-B attorneys are charged with representing individuals in criminal cases. A district attorney noted that the 18-B panel is "not even a shadow" of its Federal counterpart, the Criminal Justice Act Panel.

Interviewees noted that reimbursement rates for 18-B attorneys have not been increased (which must be done by the state legislature) since 2004, and saw this as largely responsible for the poor quality of representation observed. Moreover, several interviewees pointed to the fact that rates for 18-B compensation are capped at $4,400 per case – the equivalent of 59 hours of work on a felony case, with exceptions only in "extraordinary circumstances." In most instances, interviewees pointed out that the cap tends to incentivize attorneys to take on too many cases.

Interviewees also raised problems with a lack of diversity among 18-B attorneys, citing difficulties recruiting people of color to serve, and noting that there are too few bilingual options for litigants who are assigned counsel.

As a related matter, several interviewees focused on issues relating to when counsel is assigned in certain types of cases, claiming that assignment happens too late in the proceedings in both Family Court and Housing Court cases. Interviewees acknowledged the impact of the 2017 law establishing the right to counsel in eviction cases on tenants in New York City.[205] In the first year the law was implemented, there was a significant

[205] The law provides that "[s]ubject to appropriation, the coordinator [of the Office of Civil Justice] shall establish a program to provide access to legal services" for low-income individuals in eviction cases in Housing Court and "shall ensure that, no later than July 31, 2022 … all income-eligible individuals receive access to full legal

decrease in evictions in the jurisdictions where it had been rolled out. That said, one Housing Court advocate noted that the right to counsel would be even more effective if it attached at the earlier point where a litigant receives an eviction notice, not at the first court appearance, so that a lawyer has the opportunity to speak to his or her client and learn about the case before appearing at the eviction hearing.

Likewise, an organization that studies judicial administration nationally noted that its primary critique relating to assigned counsel in Family Court proceedings is that litigants are not able to secure an attorney early enough in the process.

J. Translation and Interpretation Services

New Yorkers speak over 150 languages and dialects, and over 30% of New Yorkers speaking a language other than English at home.[206] When it comes to translation and interpretation services in court proceedings, Spanish remains the most requested language in the state. However, the number of requests for new language grows each year, particularly for Asian languages, French, Russian, Creole, and West African.

The Office of Language Access, a division of the OCA, is charged with providing translation and interpretation services to New Yorkers. The concerns we heard surrounding access to language services are far from novel. Indeed, the New York State Advisory Committee on Language Access has periodically issued reports analyzing and assessing the court system's languages services and the issues regarding access. In its most recent report, "Ensuring Language Access, A Strategic Plan for the New York State Courts," published in March 2017, the New York State Advisory Committee on Language Access concentrated on the issues surrounding access and quality of language in the court system.

Like the 2017 Report, interviewees noted that access to interpreter services varies significantly across districts.[207] While interviewees acknowledged that the primary reason for this difference in access is lack of resources, many focused their discussions on the inefficiencies related to data collection for language services. Interviewees noted there is a disconnect between the actual supply and demand for interpreters because the current data collection system does not accurately reflect the number of cases requiring interpreters. According to the interpreters interviewed, while an interpreter may translate for twelve cases and assist five court users with filing petitions in one day, the system tracks

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representation no later than their first scheduled appearance in a covered proceeding in [Housing Court], or as soon thereafter as is practicable." N.Y.C. ADMIN. CODE. § 26-1302(a)(2).

206 *Ensuring Language Access: A Strategic Plan for the New York State Courts*, New York State Advisory Committee on Language Access 1, (2017), http://ww2.nycourts.gov/sites/default/files/document/files/2018-06/language-access-report2017.pdf [hereinafter *Language Access Strategic Plan*].

207 *Id*.

daily interpreter use (not individual use) and would therefore record these numerous services as only one appearance. Thus, the data on use of court interpreters is significantly underreported and therefore the budget for language services is often insufficient.

It should be noted that interpreters we interviewed believe there is "systemic and institutional language discrimination" against both court interpreters and the litigants interpreters serve. An interpreter shared that court staff had posted signs and caricatures of interpreters inside of courtrooms and offices. One office had a sign that read, "No Interpreters Allowed." Another sign placed on the only desk outside of a courtroom, read, "Interpreter Sits Here," and was accompanied by an illustration of a Mexican person sleeping (or rather taking a siesta) under a sombrero. In another office, court staff posted on a notice board a caricature of an interpreter as part of "Misfit Island," meant as an offensive reference to the Island of Misfit Toys. Court staff and judges sometimes call interpreters "*interrupters.*"

Several interpreters told us that non-Spanish interpreters do not receive the same career benefits as Spanish interpreters. With some exceptions, unlike Spanish interpreters, who are full-time employees, non-Spanish interpreters work on per diem and are therefore not eligible for labor protections or promotion to court clerk positions. This distinction is no doubt owing to basic demographics, and the much higher demand for full-time Spanish interpreters on the payroll, and the less frequent or predictable need for those who interpret other languages.

Finally, multiple interviewees shared that judges, attorneys and court personnel treat litigants of limited English proficiency poorly. Interviewees said that some judges lack the patience to deal with any confusion or delays arising from mistranslations or the assigning of an interpreter. Interviewees also shared examples of court users being forced by judges to use a language other than their first or preferred language. One interviewee told us that in a Family Court case, a Spanish interpreter was assigned to an Italian-speaking-litigant. When the interpreter told the judge that the litigant spoke Italian, not Spanish, the judge responded, "that's basically the same thing, go on." Interviewees asserted that court staff incorrectly assume that an individual's inability to speak English means that the individual is unintelligent.

K. Town and Village Courts

There are approximately 1,277 Town and Village Courts currently operating across the 57 counties outside of New York City.[208] A number of interviewees discussed these local

[208] NEW YORK STATE UNIFIED COURT SYSTEM 2019 ANNUAL REPORT 17, 43 (2020).

courts. One Town and Village justice noted that, given the number of cases these courts process each year, the justices running these courts do not receive the respect they deserve. A court interpreter working with Town and Village Courts expressed that the courts in her district are "providing good services" and added, "we all know each other. It is a good rapport."

On the other hand, most of the comments about Town and Village Courts were negative. An OCA administrative official told us Town and Village justices disproportionately account for an outsized share of instances of judicial misconduct in the state. Legal practitioners appearing before these courts elaborated on these issues. One interviewee with 20 years of upstate practice in these courts noted that he had witnessed multiple instances of Town and Village justices "lord it over" and threaten litigants with jail time for minor infractions, such as a speeding ticket. Senior leadership at an upstate District Attorney's office observed that Town and Village justices are often "pro-prosecution." An upstate City Court judge remarked, "racism is at its strongest in Town and Village Courts." One interviewee relayed a story of a justice who would tell new employees in the defender's office about a "hanging tree" that the justice had in his backyard. Interviewees also reported a lack of diversity among the ranks of Town and Village justices. However, one district attorney noted that this lack of diversity roughly tracks the demographic breakdown of different parts of the state and that he could not recall a person of color running for justice in his area.

VII. RECOMMENDATIONS

As stated before, many of the criticisms we heard in the course of this review can be traced to a high volume of cases and a shortage of time and resources to deal with them. These are matters that can only be addressed by an expanded investment in resources, technology, people and infrastructure – a matter for all three branches of New York State government and local governments across the state. We also heard a number of very specific and credible recommendations that were beyond the scope of this review, were beyond our capacity to objectively evaluate, or would require legislative or constitutional change. For example, practitioners in Housing Court recommended that the right to appointed counsel attach sooner than at the first court appearance;[209] criminal defense practitioners expressed concern about the diversity of juror pools and recommended that New York adopt a rule similar to that in Washington state to lower the bar for *Batson* challenges in jury selection.[210] In our view, each of these recommendations deserve careful debate and consideration by practitioners and judges who work in these courts on a daily basis.

Chief Judge DiFiore asked for recommendations on "operational issues that lie within the power of the court system to implement administratively and unilaterally, rather than on proposals for legislative practices." We worked hard to meet that mandate, and develop recommendations that are specific, practical and implementable.

Here are those recommendations:

A. A Commitment From the Top

A consistent message we heard in our review, from judges, attorneys, court officers and other non-judicial personnel is that "change needs to come from the top." Interviewees highlighted that public pronouncements and reports on the court system frequently do not articulate a race and equity agenda. For example, neither the Chief Judge's "Excellence Initiative," nor the New York City Family Courts' recently released "vision document," articulate any explicit standards or goals related to race and equity or diversity and

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[209] Specifically, as discussed in Section VI *supra*, advocates suggested that the right to counsel in eviction cases, which was legislatively expanded in 2017, would be even more effective if it attached at the point where a litigant receives an eviction notice, so that a lawyer has the opportunity to speak to his or her client and learn about the case before appearing at the eviction hearing. *See* N.Y.C. Admin. Code. § 26-1302.

[210] As discussed in Section VI *supra,* in 2018, Washington State Courts recently adopted General Rule 37 to eliminate the exclusion of potential jurors based on race or ethnicity. *See generally* Wash. Gen. R. 37. The Rule disallows peremptory strikes when, under the totality of the circumstances, an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge. *Id.* Under Rule 37, an objective observer is aware of "implicit, institutional, and unconscious biases, in addition to purposeful discrimination." Wash. Gen. R. 37(f).

inclusion. As one group of judges also told us, "battling systemic racism needs to be perceived as an ongoing goal for the courts, not a response to a public scandal." As a point of comparison, interviewees frequently cited the "zero tolerance" approach mandated by the legislature for all state personnel when it comes to sexual harassment over the last several years, leading to a "culture shift" and increased reporting of complaints of sexual harassment.

We therefore recommend that OCA leadership embrace a "zero tolerance" policy for racial bias, along with an expression that the duty to uphold this policy extends to all those working within the New York state court system – from judges, interpreters to court officers. While we note that OCA's current discrimination policies state that "The Unified Court System prohibits and will not tolerate . . . discrimination or harassment" on the basis of race, we suggest a more robust, publicized policy specifically addressing racial bias is warranted.[211]

B. Promote Existing Institutions

Interviewees across the board were unfamiliar with the existing institutions tasked with addressing issues of racial justice. For example, and as we noted before, few interviewees understood the scope and responsibilities of the Williams Commission or OCA's Office of Diversity and Inclusion. Several interviewees had not even heard of these organizations, which is a great disservice to their efforts in this area over the years. We endorse the continued missions of the Williams Commission and the Office of Diversity and Inclusion; they simply need more of a platform, further incorporation into broader OCA initiatives, increased consultation and face-time with OCA leadership and more funding in order to carry out their missions.

A judge who is a member of the Caribbean American Lawyers Association stressed to us that when it comes to combating racial bias on an institutional level, the key is "transparency, transparency, transparency." Another judge and member of the Association added that "if you cannot explain how a process works, there is probably something wrong with that process."

From our interviews, however, it is apparent that there is a considerable lack of transparency within the court system when it comes to addressing matters of race and racial bias. We also found that there is scarce accurate, up-to-date information about existing practices publicly available – particularly in the realms of data stewardship practices, hiring and promotion practices, complaint procedures, to name a few.

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[211] *OCA Discrimination Claim Policy & Procedure*, *supra* note 176, "Introduction."

In addition to promoting and incorporating dedicated organizations like the Williams Commission, we recommend that OCA review the scope, precise duties and authorities of any and all organizations addressing racial bias in the court system. We believe these efforts will ultimately help OCA better clarify and delineate the precise roles of these overlapping and complex organizations, facilitate a broader conciliation of where these organizations have ossified or evolved and identify any gaps within these structures. We also recommend that OCA promulgate a guide that can be used as a resource for OCA personnel, litigants and partner organizations.

C. Expand Bias Training

On August 5, 2020, the co-chairs of the Williams Commission wrote to Chief Judge DiFiore to recommend regular, mandatory training on bias for all judicial and non-judicial personnel across the court system. We agree.

Countless interviewees told us that both mandatory implicit bias and cultural sensitivity training are long overdue for judicial and non-judicial personnel in the New York state court system. At present, it appears that such training is both inconsistent and insufficient.

Judges are not above the reach of the implicit racial and cultural biases that pervade our society, yet equality before the law requires them to be. Multiple judges we spoke with were willing to acknowledge their own implicit biases and recognized the value of training to open minds and challenge stereotypes. Enhanced training of judges on the nuances of racial and cultural bias is in our judgment a crucial step towards alleviating racial injustice throughout the court system. A study, recognized by the New Jersey State Bar Association on the implicit bias held by judges and the connection to the disparate outcomes in the criminal justice system, showed that training judges "can reduce and/or mitigate the prospect that implicit bias will affect judicial decision-making and outcomes."[212] Further, as a judicial association told us, there is little to no testing of judges' susceptibility to implicit bias nor any analysis of judges' own decisions, and that therefore "judges are less likely to appreciate and internalize the risks of implicit bias."[213] Yet, as further described in Section VI above, judges are not uniformly required to attend trainings on these topics at present, and often elect not to, when given the choice.

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[212] Sharon Price-Cates, *Implicit Bias New Science in Search of New Legal Strategies Toward Fair and Impartial Criminal Trials*, N.J. LAW, Aug. 2018 65, 66 (citing Jeffrey J. Rachlinski et al., *Does Unconscious Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1196–97 (2009)).

[213] *Report to the New York State Court's Commission on Equal Justice in the Courts*, JUD. FRIENDS ASS'N. 1, 27 (Aug. 31, 2020), https://www.urbancny.com/wp-content/uploads/2020/09/Judicial-Friends-Report-on-Systemic-Racism-in-the-NY-Courts.9.14.20.pdf; *see also* Siri Carpenter, *Buried Prejudice: The Bigot in Your Brain*, SCI. AM. MIND, Apr./May 2008, 1, 32.

We perceive an equal if not greater need for more robust bias racial bias and cultural sensitivity training for non-judicial personnel, particularly the court officer community. As discussed previously, interviewees have relayed innumerable stories of dehumanizing language by court officers towards litigants of color, as well as instances where tensions were directly escalated by courts officers' actions. Because court officers, as a group, interact with all court users – from the moment they enter the courthouse, in the hallways and waiting areas and in the courtroom – court officers should be better trained to deal with the many issues that can arise by these touchpoints. Interviewees suggested that training needs to help court officers understand that they are pivotal players in the administration of justice, and are not simply there to keep order.

In all, it appears there is no centralized body charged with developing, administering, tracking and updating training on implicit bias and cultural sensitivity for judicial and non-judicial personnel. For non-judicial personnel, tailored racial bias and cultural sensitivity training is not widely promulgated by OCA, if at all. Specific trainings for court officers are not adequate. While judicial bias training is slightly more centralized, and is required for new judges, we believe OCA should undertake uniform attendance and ongoing, robust engagement. Interviewees frequently contrasted training efforts on issues of racial and cultural bias to those relating to sexual harassment, suggesting that if OCA can require and track attendance for trainings on the latter, they have the capacity to do the same for the former.

As such, we recommend that OCA develop and require comprehensive racial bias and cultural sensitivity training for both non-judicial and non-judicial employees, informed by experts in these fields to ensure more relevant and nuanced discussions. Such training must acknowledge that issues of racial and cultural bias are intersectional[214] – addressing that discrimination on the basis of race often overlaps with those relating to class, gender, sexual orientation, immigration status, and beyond. In particular, racial bias and cultural sensitivity training must incorporate education on trauma, which many interviewees noted is critical for any personnel – judicial or non-judicial – who interact with litigants regularly. Further, we agree with the Center for Court Innovation that training is most effective when it does "not merely cover abstract ideas but [is] specific to the relevant OCA setting and include[s] concrete examples of behaviors and decisions that the trainee should and should not make, including how to respond when witnessing unacceptable or questionable

[214] The term "intersectional" was coined by celebrated legal scholar Kimberlé Crenshaw over thirty years ago to refer to the compounding discrimination that black women face on account of both their race and their gender, however, in popular discourse today, it encompasses a variety of crosshatched identities, such as those listed above. *See* Merrill Perlman, *The Origin of the Term "Intersectionality,"* COLUM. JOURNALISM REV. (Oct. 23, 2018), https://www.cjr.org/language_corner/intersectionality.php.

behavior by others in a court space." We also agree with CCI's recommendation to us that all trainings be designed "to ensure real accountability for the information having been appropriately conveyed and internalized." Finally, training should be mandatory, tracked by OCA to ensure participation, and conducted regularly for all judges and non-judicial employees.

D. Address Juror Bias

Interviewees expressed to us a number of concerns about juror bias. While there is no single panacea to this problem, we have carefully considered and recommend below certain steps that can be implemented to alleviate issues of racial bias in jury selection and deliberation:

First, create and display a video educating jurors about implicit bias before *voir dire*. We understand that in many, if not all, state courthouses where jurors are summoned and selected for trials, prospective jurors are shown a general orientation video. A range of interviewees, including one district attorney, raised the possibility of including within the orientation video a segment on implicit racial and cultural bias. As noted by the National Center for State Courts, an orientation video that includes a segment on implicit bias would not be unprecedented.[215] For example, the United States District Court for the Western District of Washington introduced an implicit bias video for jurors in 2017.[216] Since then, a number of other courts have either used this video or produced their own implicit bias program.[217] We recommend that OCA review exemplars of such videos, such as the Washington State video, and work with court personnel, outside experts and members of the bar to create OCA's own carefully balanced video on implicit bias that can be shown to venire panels of jurors.

Second, we recommend that the Chief Judge appoint a new or standing committee to investigate and formulate a proposal to create uniform rules to explicitly permit and endorse addressing juror bias during *voir dire*. Trial attorneys have told us that the practice

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[215] *Juror Videos*, NAT. CTR. FOR STATE CTS. – CTR. JURY STUDIES, http://www.ncsc-jurystudies.org/juror-videos (last visited Sept. 24, 2020).

[216] *See* U.S. Dist. Ct., W.D. Wash., *Unconscious Bias*, YOUTUBE (Mar. 31, 2017), https://www.youtube.com/watch?v=XHu-zUet8Tw.

[217] *See, e.g.*, *Unconscious Bias Video for Potential Jurors*, U. S. DIST. CT. N. D. CAL., https://www.cand.uscourts.gov/attorneys/unconscious-bias-video-for-potential-jurors/ (last visited Sept. 24, 2020); Chao Xiong , *Minnesota courts lag federal counterpart in using implicit bias video*, MINN. STAR TRIB. (Sept. 3, 2019), https://www.startribune.com/minnesota-courts-lag-federal-counterpart-in-using-implicit-bias-video/558975162/ (noting that the Washington implicit bias video is a "common part of juror orientation in federal court in Minnesota"); *Memorandum from the Office of the State Court Administrator to Members of the Oregon State Bar*, OFFICE OF THE STATE CT. ADMINISTRATOR (Jul. 8, 2020), https://www.osbar.org/_docs/resources/OSCmessages/Unconscious-Bias-Juror-Video.pdf.

of permitting *voir dire* on the subject of implicit bias is inconsistent, and that certain judges allow *voir dire* on such questions, while others do not. We believe the system would benefit from explicit guidance on this issue, and we recognize that it is beyond the scope of our expertise to prescribe such guidance as a part of this review. As such, we propose that a diverse committee of judges, attorneys, professors and/or subject area experts be consulted in drafting a proposal. It is our understanding the Chief Judge has the authority to then authorize such changes.[218] Ideally, these standards would explicitly permit and endorse *voir dire* on questions of implicit bias.

Third, we recommend pattern jury charges on implicit bias. A number of courts around the country, such as in California and Washington, have adopted jury charges that explain the concept of implicit bias and remind the members of the jury to be aware of their implicit biases.[219] More recently, the New Jersey Supreme Court adopted a proposal to examine, among other issues, the propriety of model jury instructions on impartiality and implicit bias.[220] We recommend that OCA request that a new or standing committee, such as the Committee on Criminal Jury Instructions, develop model jury instructions on implicit bias for both civil and criminal cases.

E. Adopt a Social Media Policy

As discussed previously, the recent highly offensive social media post by a Brooklyn-based court officer came up countless times during our interviews. One interviewee noted that social media posts are a growing source of racial bias complaints among court employees, and others opined that such posts are strongly correlated with racially biased behavior and mistreatment of people of color within the courthouse. OCA currently has no policy explicitly governing employees' personal use of social media.

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[218] The New York State Constitution provides the Chief Judge with supervisory responsibility to "establish standards and administrative policies for general application." *See* N.Y. CONST. art. VI, § 28(c). This authority includes power over the "adoption, amendment, rescission, and implementation of rules and orders regulating practice and procedure in the courts." N.Y. JUD. § 211(b). Once the appointed committee drafts its proposed rule establishing uniform rules on the subject of bias during *voir dire*, the Chief Judge, in consultation with the Chief Administrative Judge and the Administrative Board of OCA could implement such a change. *See id*.

[219] *See, e.g.*, Kris Olson, *New jury instructions take aim at implicit bias*, MASS. LAWYERS WEEKLY (Jun. 20, 2019), https://masslawyersweekly.com/2019/06/20/new-jury-instructions-take-aim-at-implicit-bias/; *Criminal Jury Instructions*, U.S. DIST. CT. W. D. WASH., , https://www.wawd.uscourts.gov/sites/wawd/files/CriminalJuryInstructions-ImplicitBias.pdf; *California Civil Jury Instructions, CACI No. 113*, JUD. COUNCIL CAL. (2020) https://www.courts.ca.gov/partners/documents/Judicial_Council_of_California_Civil_Jury_Instructions.pdf; Illinois Circuit Court Civil Jury Instruction 1.08, ADMIN. OFFICE ILL. CTS. (May 2019) https://courts.illinois.gov/CircuitCourt/CivilJuryInstructions/1.08.pdf.

[220] *See Commitment to Eliminating Barriers to Equal Justice: Immediate Action Items and Ongoing Efforts,* N. J. JUD. (Jul. 16, 2020), https://www.njcourts.gov/public/assets/supremecoutactionplan.pdf.

We recommend that OCA develop a policy for judicial and non-judicial personnel that provides clear guidance and limits on the use of social media – whether in an official or personal capacity – in a manner that has negative implications for the New York state court system. Our reading of the law is that such a policy is legally permissible.

To be sure, public employees have a right under the First Amendment and Article I, Section 8 of the New York State Constitution to freely express themselves in their own personal use of social media, particularly when it comes to matters of public concern. Employees also have a statutory right under the National Labor Relations Act to use social media to organize and address the terms and conditions of their employment.[221] However, courts have held that a public employer may limit and discipline certain public speech that is offensive and reflects poorly on the employer.

In general, state employers cannot "condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick* v. *Meyers*, 461 U.S. 138, 142 (1983). However, employees who speak on subjects related to their official duties receive less First Amendment protection. *See, e.g., Garcetti* v. *Ceballos*, 547 U.S. 410 (2006) (holding that district attorney who wrote a memo recommending dismissal of criminal charges based on a deficient warrant and who later testified on behalf of the defense did not enjoy First Amendment protection because his speech pertained to his official duties). Likewise, employees may be disciplined for off-duty speech that is unrelated to their official duties if there is a government justification "far stronger than mere speculation" that the speech will interfere with efficient delivery of public services. *See, e.g., City of San Diego* v. *Roe*, 543 U.S. 77 (2004) (holding that police department could discipline officer who identified himself as a member of law enforcement when selling videos of himself stripping online because he "took deliberate steps to link his videos and other wares to his police work, all in a way injurious to his employer.")

Federal Courts in the Second Circuit have held that disciplining an employee for off-duty, non-work-related speech does not violate the First Amendment if "(1) the employer's prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech." *Locurto* v. *Giuliani*, 447 F.3d 159, 172-73 (2d Cir. 2006) (citing *Jeffries* v. *Harleston*, 52 F.3d 9, 13 (2d Cir.1995)). In *Locurto*, a police officer and firefighter were fired after participating in a Labor Day "funniest float" parade contest in which their float mocked Black people and the Civil

[221] 29 U.S.C. §§ 151–69.

Rights movement in various ways including recreating the dragging death of James Byrd Jr.[222] More recently, a federal district court applied *Locurto*'s reasoning in the context of social media when ruling on a motion to dismiss in *Festa* v. *Westchester Medical Ctr. Health Network*, 380 F. Supp. 3d 308 (S.D.N.Y. 2019). The plaintiff in that case, a compliance coordinator for a public hospital, logged onto Facebook one evening on her personal computer and commented on a local news channel's page that it was "too bad" a funnel cloud projected to affect the area of a Hasidic community "didn't suck them all away." The court stated that the public hospital could reasonably conclude that the employee's post would disrupt its ability to serve the local community and "cause harm within the ranks" of the hospital "by promoting resentment and mistrust." *Id.* at 319, 321.

We note that other court systems around the country have implemented social media policies to ensure that employees' online activity does not undermine public confidence in the operation of the courts and the application of justice.[223] For example, the Nebraska State Supreme Court prohibits its employees, in their personal capacities, from posting "[s]tatements, comments, or images that disparage any race, religion, gender, sexual orientation, disability, or national origin," as well as "any communication that engages in personal or sexual harassment" or that "would contribute to a hostile work environment" on racial, sexual, or religious grounds.[224] The Colorado Judicial Department more broadly prohibits employees from "making statements which negatively reflect on the professionalism of the courts . . . or which otherwise have an adverse effect on the confidence of the pubic in the integrity, propriety and impartiality of the judicial system."[225]

We recommend that OCA, after consultation with stakeholders, issue a social media policy for its personnel along the same lines. A social media policy may prohibit communications that constitute harassment or racially offensive remarks, but should be

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[222] James Byrd Jr. was a Black man who, months before the parade, had died after being chained to the back of a moving pickup truck by three white men. *See*, Juan A. Lozano, *Texas Town Reflects on Dragging Death Ahead of Execution*, AP NEWS (Apr. 21, 2019), https://apnews.com/b3097455f1ab499695fa2553ed636258.

[223] *See, e.g.,* Directive Concerning Colorado Judicial Department Employee Policies, Chief Justice Directive 08-16, OFFICE CHIEF JUST. 1, 19 (June 28, 2013), https://www.courts.state.co.us/userfiles/file/Administration/HR/Policies/CJD%2008-06%20amended%2007-13.pdf [hereinafter Colorado Judicial Department Social Media Directive]; *Nebraska Non-Codified Supreme Court Rules and Best Practice Guidelines and Standards, Other Personnel-Related Policies: Social Media*, NEB. JUD. BRANCH, https://supremecourt.nebraska.gov/personnel-and-miscellaneous-rules/other-personnel-related-policies/2-use-social-media (last visited Sept. 24, 2020) [hereinafter *Nebraska Judicial Branch Social Media Policy*]

[224] *Nebraska Judicial Branch Social Media Policy, supra* note 224.

[225] Colorado Judicial Department Social Media Directive, *supra* note 224.

drafted in a way that will not prohibit protected activities under the National Labor Relations Act.

F. Strengthen the IG Process for Bias Complaints

Numerous interviewees also expressed concerns and uncertainties about OCA's policies and procedures for handling complaints of racial bias and discrimination. After consulting a retired Inspector General with extensive experience in the U.S. government and other sources, we recommend that OCA adopt the following best practices to improve its complaints and investigations processes.

First, given the number of interviewees – judicial and non-judicial – who were unaware that mechanisms for making bias complaints even existed, we recommend that OCA engage in a robust campaign to educate court system participants about the existence and purpose of these offices and the procedures to lodge a bias complaint. This should include training for all personnel on how to submit a complaint of racial bias and discrimination, and conspicuous signage in courthouses advertising the existence of these offices. As one expert in inspector general policies and procedures suggested, it should be made clear that OCA's IG office, including its Bias Matters Unit, exists not only to identify waste, fraud and abuse, but also to address matters of racial bias.

Second, we recommend that OCA clarify its "no retaliation" policy in order to better assuage concerns that interviewees across the spectrum cited about filing complaints. While the current policies state that retaliation is prohibited, the definition of retaliation provided in OCA's discrimination booklet is narrow, difficult to understand and only provides a few examples of very formal, work-related retaliation, such as termination or a demotion with a decrease wage or in salary.[226] The policy does not indicate that more informal or non-work related forms of retaliation are also prohibited, such as making disparaging comments about the complainant to others, or scrutinizing work or attendance more closely than other employees without justification – which may be considered "retaliation" under federal law.[227] We recommend that, similar to the EEOC's Enforcement Guidance on Retaliation and Related Issues, the revised policy more broadly define retaliation, and provide specific examples of both informal and formal, as well as work related and non-work related forms of retaliation.[228] Similarly, the policy should

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[226] The policy states that "examples of forms of retaliation may include termination of employment, a demotion with a decrease in wage or salary, a significant loss of benefits, or a transfer," that may raise to a violation of "UCS policy [and] state and federal laws." *OCA Discrimination Claim Policy & Procedure*, *supra* note 176 at 16.

[227] *Equal Employment Opportunity Commission Enforcement Guidance on Retaliation and Related Issues*, No. 915.004, OFFICE OF LEGAL COUNSEL (Aug. 25, 2016), https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues#B.

[228] *Id.* (citing *Burlington Northern & Santa Fe Railway Co.* v. *White*, 548 U.S. 53 (2006)).

clearly identify a simple and confidential path to lodging a complaint against one's supervisor, and steps that may be taken to proactively protect complainants who do so from retribution, aside from the availability of an ex-post retaliation claim.

Third, we recommend that OCA update its policies and publicly available resources to more clearly explain that complaints may be made anonymously. As further discussed in Section VI above, while the Managing Inspector General for Bias Matters technically does accept and investigate anonymous complaints received through its complaint form and complaints hotline, over email, and from referrals from other bodies, we understand that OCA does not advertise this fact outside of in-person presentations to stakeholders. Additionally, its complaint form appears to require claimants to authorize the use of their name in investigating claims.[229] We understand that the Commission for Judicial Conduct will receive and investigate anonymous complaints, and will take steps to protect the confidentiality of complainants such as by filing a complaint itself, rather than in the complainants' name.

That said, neither the website for the Managing IG for Bias Matters nor the Commission on Judicial Conduct's website contain any information pointing to one's ability to submit anonymous complaints. Thus, it was unsurprising that interviewees were almost unanimously unaware that complainants can file complaints anonymously. Across the board, interviewees suggested that permitting anonymous complaints is not only a "best practice," but is necessary to building trust and encouraging complaints. OCA's outward guidance should be updated to make the anonymous complaint process abundantly clear, particularly in its written materials and guidance. In order to further facilitate lodging complaints, particularly anonymous ones, the IG's office might also consider enabling a system for the electronic filing of complaints with the IG for Bias Matters, so that complainants do not have to use email in order to submit a complaint virtually.[230]

Fourth, we recommend that OCA update and clarify its current public guidance as to informal complaint mechanisms. The current guidance includes (i) referring the complaint to "anti-discrimination panels," (ii) directing a complaint to one's supervisor and (iii) directing a complaint to the administrative office or administrative judge of the judicial district in which the offending act is alleged to occur.[231] We understand, however, that anti-discrimination panels are now largely defunct and, according to several interviewees, were not a dependable or consistent means of resolving issues when they did operate. As

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[229] *Claim of Discriminatory Treatment Form UCS-18,* N.Y. STATE UNIFIED CT. SYS. OFFICE INSPECTOR GEN. http://ww2.nycourts.gov/sites/default/files/document/files/2018-05/ClaimDiscrimTreatment.pdf (last visited Sept. 22, 2020).

[230] Our understanding is that this is consistent with the practice of the Commission on Judicial Conduct.

[231] *OCA Discrimination Claim Policy & Procedure*, *supra* note 176 at 11-12.

such, we recommend that OCA formally disband the now-defunct panels and update its materials to clearly reflect that this is not an available means of resolving complaints.

Fifth, consistent with confidentiality concerns, we recommend that, following a complaint, OCA follow up and apprise the complainant of the status of the investigation initiated by the complaint, and, to the extent permitted, apprise the complainant of the outcome of the investigation. We are advised by an experienced retired IG that this simple act goes a long way to promote credibility and confidence in the process. Interviewees frequently lamented a lack of transparency in the complaint procedures arising from a dearth of communication from investigating bodies to complainants, leading to perceptions that the complaint system is ineffective. Indeed, OCA's online booklet titled "*Discrimination Claim: Policy & Procedure,*" describing its discrimination policies and procedures, states that the IG's Office will confirm receipt of a claim within two weeks and complete the investigation, in most circumstances, in 45 days.[232] Moreover, while the policies note that complainants will be notified of the final determination of the Deputy Chief Administrative Judge,[233] at least one interviewee familiar with the process expressed that this does not always happen in practice. The policies do not otherwise require the IG to share with the complainant anything about the status of the investigation while it is pending; rather, the onus appears to be on the complainant to seek additional information from the investigator.[234]

To instill confidence in the investigatory process, we recommend that, consistent with its obligations to keep investigations confidential, the IG's office proactively communicate important timelines and procedures with complainants up front, and that they communicate meaningful investigatory updates to complainants with reasonable frequency. We suggest that, should an investigation extend beyond the typical 45-day window, that complainants are affirmatively provided an update every 30 days. Finally, we recommend that complainants be informed when the IG's office has completed its investigation and whether the complaint was substantiated or not. Complainants should also be informed when the Deputy Chief Administrative Judge has come to a decision about whether take personnel action, and where appropriate, of the actions taken.

Sixth, we recommend that OCA designate an ombudsperson within the IG office. Interviewees raised a lack of understanding as to how to discern between the numerous avenues for lodging a complaint. Likewise, our review of the various OCA policies shows that there is little guidance on how to do so. We suggest an ombudsperson to advise

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232 *Id. at 13.*
233 *Id.*
234 *Id.*

potential complainants of their options for registering their concerns. We note that several state court systems and federal agencies maintain similar offices to help individuals navigate various complaints systems.[235] In enabling the ombudsperson, it must be made clear that this individual is not an investigating authority in any capacity; instead, to avoid conflicts with the integrity of the investigating bodies procedures, the ombudsperson should purely be made available to help complainants navigate OCA's mechanisms for lodging complaints.

Seventh, we recommend that OCA track and annually report the number of racial bias or race discrimination complaints received, investigated and where possible, those substantiated. Interviewees told us that without a public accounting of how complaints are resolved, the community's perception is that there are no consequences for incidents of racial bias. Such a report could be sent to the Chief Judge by both the Commission for Judicial Conduct and the IG for Bias Matters, and, to the extent possible, should be made public.

G. Review of Rules Changes for Bias

Next, we recommend that one of the existing institutions for addressing bias – the Williams Commission, the IG for Bias Matters, or the Office of Diversity and Inclusion – be tasked with the standing responsibility to review legislation, proposed constitutional amendments, regulations and rules changes pertaining to the state judiciary for any potential disparate impact or bias on people of color. Any concerns should be conveyed to the Chief Administrative Judge as they arise. This was suggested to us by the National Center for State Courts and there is precedent for it among government agencies. For example, the U.S. Department of Homeland Security's Privacy Office has among its responsibilities the evaluation of all DHS-related legislation and proposed regulations that involve the disclosure of personally identifiable information.[236]

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[235] *See, e.g.*, *Ombudsman for Attorney Discipline*, TEX. JUD. BRANCH, https://www.txcourts.gov/organizations/bar-education/ombudsman-for-attorney-discipline/ (last visited Sept. 22, 2020); Administrative Order No. 05-9 Establishing an Ombudsman Program for the Fourth Judicial Circuit of Illinois (Ill. Ct. App. 2005); *Ombudsman Edward T. Zrubek*, DEP'T DEFENSE OFFICE INSPECTOR GEN., https://www.dodig.mil/Offices/Ombudsman/ (last visited Sept. 8, 2020); *Whistleblower Protection Ombudsman*, U.S. OFFICE INSPECTOR GEN. DEP'T TRANSP., https://www.oig.dot.gov/about-oig/whistleblower-ombudsman#:~:text=The%20Inspector%20General%20has%20designated,their%20specific%20rights%20and%20remedies (last visited Sept. 8, 2020).

[236] *Department of Homeland Security Privacy Office*, U.S. DEP'T HOMELAND SEC., https://www.dhs.gov/topic/privacy#:~:text=The%20Department%20of%20Homeland%20Security,to%20reduce%20the%20privacy%20impact (last visited Sept. 21, 2020).

H. Continue Progress on Translation and Interpretation Services

As noted before, New Yorkers speak over 150 languages and dialects, and over 30% of New Yorkers speaking a language other than English at home.[237] When it comes to translation and interpretation services in court proceedings, Spanish remains the most requested language in the state. However, the number of requests for new languages grows each year.

We note that in 2017 the New York State Advisory Committee on Language Access issued a "Strategic Plan" for implementing a number of strong recommendations to improve translation and interpretation services throughout the state, and we are told implementation of these recommendations is underway.[238] We have heard positive feedback about implementation of the Strategic Plan, and we endorse the Plan's recommendations.

Beyond the 2017 Strategic Plan, as described in Section VI, in the course of this review we heard a number of concerns about the disparate treatment of interpreters. Therefore, problems facing translation and interpretation staff should be fully incorporated into the court system's efforts to improve education of judicial and non-judicial personnel on cultural sensitivity and implicit bias, diversity and inclusion and ensuring accountability for incidents of racial bias.

I. Improve Data Collection and Stewardship Practices

We regret to report that the New York State court system is far from cutting edge when it comes to understanding and combatting racial bias in case outcomes, and that its data collection and publication practices have fallen behind those of other states. Interviewees stressed that data collection and analysis on case outcomes is critically important to identifying the points at which racial disparities exist, and the first step to remedying bias in the court system. However, as a threshold issue, several interviewees pointed out that OCA's current data landscape is incredibly opaque: even in our experience conducting this review, it was exceedingly difficult to ascertain the types of case outcome data that are collected, how they are collected, who they are shared with and where and whether they may be accessed publicly. We spoke with several organizations that have sought to partner with OCA in studying racial disparities through case outcome data, including national leader in this space, Measures for Justice, and the consensus was that the lack of transparency in OCA's data practices has prevented a meaningful accounting of where to

[237] *Language Access Strategic Plan*, *supra* note 207, at 1.
[238] *Id*.

even begin in improving them. As such, in addition to the following narrow recommendations, we first suggest that OCA publish a report or detailed "FAQ" explaining the nature and extent of its current data collection and stewardship practices across UCS.

Data Collection for Criminal Cases. Interviewees informed us that the Police Statistics and Transparency Act (the "STAT Act") signed into law by Governor Cuomo on June 15, 2020, requires OCA to compile and publish data, including the race and ethnicity of the individual charged, for "misdemeanor offenses and violations" – with required monthly updates.[239] Felony data is not included within the ambit of the STAT Act. Additionally, New York State's budget for the 2020-2021 fiscal year included amendments to the bail reform law that was passed in 2019, requiring that OCA, in conjunction with the State Division of Criminal Justice Services ("DCJS"), compile and publish data on pretrial release determinations, which will include the race, ethnicity, and gender of the individual charged.[240] The law requires OCA to publish reports containing the aforementioned data on its website every six months.

While we support these legislative efforts to increase data collection and transparency, we stress that they must be implemented carefully and uniformly, and should be expanded upon to include robust, multivariable data on felonies as well.

First, as Measures for Justice pointed out, unless data collection under the STAT Act or any other legislation is executed with sufficient standards of uniformity and quality control, it will not be useful for meaningful analysis. OCA should transparently disclose its procedures and standards for collecting and auditing data under this type of legislation, and disclose the underlying data publicly, so that independent organizations can, test, corroborate and analyze it as well. One critical component of this recommendation is ensuring accurate data entry. Interviewees have cited widespread problems with accurate data entry in the past, noting that the data collected is often inconsistent or was missing for critical fields. For example, one criminal justice organization that requested data from

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[239] S.B. 1830C, 2019-2020 Legis. Reg. Sess., (N.Y. 2019). Pursuant to the STAT Act, OCA is required to compile and publish data on the race, ethnicity, and sex of the individual charged; whether the individual was subject to a custodial arrest and/or was held prior to arraignment; the disposition of the case; in the case of dismissal, the reasons therefor; and the sentence imposed, including fines and surcharges. *Id*.

[240] S.B. 7506B, 2019-2020 Legis. Sess. (N.Y. 2020). Also collected are the criminal offense; whether the individual was released on recognizance, released with conditions, or remanded; the length of pre-trial detention, if applicable; failure to appear at court dates, if applicable; and pretrial re-arrests, if applicable. *Id*. We also acknowledge that the New York State Justice Task Force, in a February 2019 report, similarly recommended that OCA report data on pretrial release determinations, including detention requests by prosecutors. *Report on Bail Reform*, N.Y. STATE JUST. TASK FORCE (Feb. 2019), http://www.nyjusticetaskforce.com/pdfs/ReportBailReform2019.pdf. Although the bail reform amendments do not require the publication of detention requests by prosecutors, the substance of the Justice Task Force's recommendations are encompassed by the new reporting requirements.

OCA several years ago reported that the bail amount was missing in 82% of the dockets they received and the bail decision was missing in 40% of the dockets. While the recently enacted legislative reporting requirements cited above should ameliorate this problem to a certain degree, placing more emphasis on proper training and resources for clerks will help ensure that data collection is consistent in all the courts within the court system. As such, we also recommend that OCA increase training provided to court clerks and establish data collection rules mandating that all applicable data fields are populated.

Second, we recommend that OCA expand on the publication required by the STAT Act and the bail reform amendments and publish those same categories of data – the race, ethnicity, and sex of the individual charged, whether the individual was subject to custodial arrest and/or was held prior to arraignment, pretrial release determinations, the disposition of the case or reasons for a dismissal and the sentence imposed – for felony offenses. We understand that OCA collects some data, disaggregated by race, on the disposition of felony, violent felony, drug felony, and misdemeanor arrests, and that this data is publicized by DCJS.[241] However, as Measures for Justice noted, "the devil is in the details," and at present, the data currently collected is insufficient in that (1) it only provides the disposition of the arrests and does not include other important data, such as pretrial release determinations, and (2) it only provides aggregate numbers and does not break the data down according to each individual charged. While appropriate for rudimentary analysis, collection of additional measures would allow for a "multivariable" analysis at the individual case level (fully anonymized, of course), which is necessary to allow the data collected to produce meaningful study of disproportionate racial impacts throughout different touchpoints within the criminal justice system.

To illustrate, we understand that while basic measures such as case disposition and the race of the defendant are available, without more nuanced additional factors, such as whether the defendant was represented, avenues for robust analysis are extremely limited. Interviewees identified other aspects or factors within the criminal justice system that they claim are prone to racial bias and disproportionately disadvantage people of color, for example, use of plea agreements, rates of referral to alternative sentencing and diversion programs, and the use of algorithmic bail reform tools. As such, in addition to mandating *uniform* data collection, we also recommend that OCA consider collecting, monitoring and publishing these additional data points – both for felony and misdemeanor cases in New

[241] *Dispositions of Adult Arrests by Race/Ethnicity, County, and Region*, DIV. CRIM. JUST. SERVS., https://www.criminaljustice.ny.gov/crimnet/ojsa/dispositions-adult-arrest-demographics.html (last visited Sept. 22, 2020).

York – to ensure that justice is dispensed in a racially equitable fashion in all parts of the criminal justice system.

In support of these recommendations, we note that multiple other states and cities engage in more widespread data collection and publication efforts than New York's, even considering these legislative advancements. In March of 2018, the state of Florida passed legislation requiring courts and law enforcement agencies across the state to collect about 140 different data points for criminal cases and report it to a central repository, Florida's Department of Law Enforcement, where it will be published online.[242] Some of the data points include pretrial release determinations, the precise terms of plea deals, and sentencing decisions.[243] California launched a data initiative, Open Justice, which publishes criminal justice data per county in an online portal, and includes misdemeanor and felony arrests and disposition of juvenile cases.[244] The City of New Orleans has a Racial Disparity Dashboard, which tracks racial disparities at three points in the criminal justice system: arrests/charges, bail amount and sentencing.[245]

Use of Criminal Outcomes Data. With regards to use of data collected in criminal cases, we recommend that OCA *consider* the recommendation submitted to us by the Judicial Friends Association that data be made available to individual judges on the disposition of their criminal cases, disaggregated by penal law, race, ethnicity, age and sex of defendants.[246] Although Judicial Friends only recommends that criminal judges be given reports on the disposition of their cases, we suggest that the reports include the other data points required by recent legislation and recommend above, including: whether the individual was subject to custodial arrest and/or was held prior to arraignment, pretrial release determinations, use of plea agreements, referral to alternative sentencing and diversion programs and the use of algorithmic bail reform tools. We recognize the many potential limitations and possible misleading indicators inherent in such an analysis, including, for example, the demographics of the venue where a judge sits and the nature of the cases the judge hears. We also recognize that such an analysis, if not performed

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[242] Jason Tashea, *Liberating criminal justice data: How a Florida law provides a blueprint for the nation*, ABAJOURNAL, June 18, 2019, https://www.abajournal.com/web/article/liberating-criminal-justice-data-how-a-florida-law-offers-a-blueprint-for-the-nation.

[243] S.B. 1392, Reg. Sess. (Fla. 2018).

[244] *Data Portal*, OPEN JUSTICE, (Sept. 23, 2020, 10:25 PM), https://openjustice.doj.ca.gov/data.

[245] *Racial Disparity Dashboard*, NEW ORLEANS CITY COUNCIL, https://council.nola.gov/committees/criminal-justice-committee/#racial-disparity-dashboard (last visited Sept. 24, 2020).

[246] *Report to the New York State Court's Commission on Equal Justice in the Courts*, JUD. FRIENDS ASS'N. 1, 30 (Aug. 31, 2020), https://www.urbancny.com/wp-content/uploads/2020/09/Judicial-Friends-Report-on-Systemic-Racism-in-the-NY-Courts.9.14.20.pdf; Jane Wester, *Judges of Color Release Detailed Recommendations to Address Systemic Racism in the New York Courts*, N.Y.L.J. (Sept. 10, 2020), https://www.law.com/newyorklawjournal/2020/09/10/judges-of-color-release-detailed-recommendations-to-address-systemic-racism-in-the-new-york-courts/.

carefully, has the potential to impact judicial objectivity and independence. Finally, we understand that there are various avenues available for judges to receive some of this data. For example, individual judges may run reports on case outcomes using the case management system or contact the Court Research department within OCA to receive aggregate reports on areas of interest. However, we believe that proactively providing all criminal judges with these types of reports, rather than placing the onus on individual judges, will allow for more widespread systemic change.

Data Collection for Non-Criminal Cases. OCA currently has universal case management systems for both the Housing and Family Courts, which collect data on case outcomes. However, this data is neither published nor accessible to stakeholders. We recommend that OCA publish non-identifying or anonymized data it collects on Housing and Family Court outcomes – similar to the manner in which it is required to publish criminal court data under the STAT Act and bail reform amendments. We also recommend that OCA collaborate with key Housing and Family Court stakeholders to develop data points that OCA does not already collect, which are relevant to identifying and reducing any racial bias in these courts.[247] We also recommend that OCA include a data field on initial appearance papers filed with these courts that allows court users to voluntarily self-identify race, ethnicity and gender.

J. Improve Diversity and Inclusion within HR Practices

Throughout the course of our investigation, interviewees frequently raised the lack of diversity within the court system's workforce, and their perception that diversity is not a serious consideration for the system's leadership. Also, as several interviewees noted, and workforce demographic data reveals, diverse employees are particularly underrepresented in senior leadership roles across the OCA workforce. To cure this, we recommend that OCA increase its emphasis on and highlight the importance of its diversity initiatives. The recommendations that follow were developed with assistance from an expert in the field, Professor Harold Goldstein. While they are most aptly suited toward the non-judicial workforce, many may also be applicable to the judiciary, to the extent that they are within OCA's power to implement.

Setting and Achieving Diversity Goals. As discussed above, we observed that institutions to address diversity and inclusion are perceived to be largely ineffective. As such, the Office of Diversity and Inclusion must be fully supported by OCA leadership to

[247] For example, we understand that biographical data, such as race, is not a data point that is typically collected in housing or family court but would be helpful in, for example, determining the types of resources and training needed.

help achieve their goals, including having the appropriate budget to hire personnel and fund diversity and fairness programs. We also recommend that the head of the Office of Diversity and Inclusion establish a new mission statement with a strategic plan for diversity and fairness, communicate it to court system personnel and the public and provide public quarterly mandated reporting to the Chief Administrative Judge on progress against stated diversity metrics and goals. We recognize that this type of demographic data collection and reporting would be partially mandated, at least with regards to judicial race data, as a part of pending legislation, Senate Bill S7703, which we fully support.[248] These metrics should be analyzed on a system-wide, unit-wide and position-wide basis to determine if there are patterns of discrimination in hiring and promotional decisions. Progress on diversity goals should also be connected to organizational reward and penalty systems (*e.g.*, compensation, resource allocation, promotion eligibility) in order to motivate achievement.

Recruiting & Application Process. Recruiting diverse candidates for jobs throughout the court system was an issue routinely identified in interviews – particularly in upstate courts. As described in Section VI above, while some judicial districts cited specific successful initiatives in reaching populations of color, they are not implemented system-wide. For this reason, we recommend that OCA poll judicial districts on what outreach tactics have been successful, and issue "best practices" for raising awareness of career opportunities and identifying sources of diverse talent.[249] As for improving the judicial pipeline for diverse candidates, interviewees repeatedly mentioned that "how to become a judge" programs organized by individual bar associations and affinity groups have been successful in the past. We recommend that OCA embrace these programs as part of its plan to increase judicial diversity.

Interviewees also suggested that OCA needs to focus on making the hiring process more user friendly for diverse candidates, including recognition in procedures and practices that minorities may have less access to technology and less flexibility to travel to hiring and testing centers. We heard that the civil service exams for competitive non-judicial positions are an extra barrier to employment for people of color, in that they are often unaware of job openings and opportunities to take the required civil service exams. To help mitigate these barriers, OCA should examine hiring requirements, including data from civil service exams, which is already tracked and broken down demographically, to determine if job requirements, exam structure or minimum qualifications are

[248] S.B. S7703, 2019-2020 Legis. Sess. (N.Y. 2020).

[249] As an example, individual judicial districts mentioned that they have improved diversity in their ranks by building relationships with local high schools and universities and their diverse clubs, government agencies, local recruiting agencies and local and national diversity associations, through open houses and the creation of internship programs.

disproportionately impacting diverse candidates, and modify them accordingly. OCA should also explore whether test preparation materials can be provided in a different way, to take into consideration cost and ease of access of preparation materials for diverse candidates and the time required to use such preparation materials. OCA might look to the New York Department of Civil Service as an example, which provides free test preparation materials for various similar civil service positions within New York's state government 60 days prior to the date of the examination.[250]

Performance Evaluation. Performance evaluation and appraisal systems have a strong impact on behavior and organizational perceptions of accountability. Therefore, we recommend that OCA consider enhancing its performance evaluation processes by introducing diversity and inclusion elements to its performance reviews of its employees – for example, evaluating whether managers properly handle issues of racial bias and evaluating whether employees engage in racially biased or discriminatory behaviors. Performance appraisal data should be examined to determine if specific individuals show patterns of greater discrimination based on race. If patterns emerge, they should be investigated and appropriate actions should be taken (such as additional training or discipline).

Hiring Decisions & Promotion. We recommend that OCA thoroughly and comprehensively review its hiring and promotion practices to advance diversity throughout its ranks. In furtherance of these goals, OCA should undertake to enhance communication with candidates about the hiring process so they know, for example, where they stand in the process, next steps, and the timeline for hearing back about the position.

Though, as we understand it, the practice is encouraged by a memorandum, we recommend that OCA require diverse interview panels. Steps should be taken to ensure that diverse members of interview panels are truly heard in these decisions, and are not simply included to satisfy a numerical quota. Individuals involved in these decisions should be trained on how to administer and score interviews and calibrate feedback between interviewees fairly. Additionally, the interview process should assess individual applicants' ability to work with diverse individuals and whether they value diversity. Particularly for manager positions, it should evaluate the person's ability to manage diverse individuals.

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[250] According to its website, the New York Department of Civil Service provides various general and position-specific test guides, including general tips for taking exams, exam-specific details on subject matter to be tested, sample questions and answers and explanations. *See Test Guides and Resource Booklets,* N.Y. STATE DEP'T CIV. SERV., https://www.cs.ny.gov/testing/testguides.cfm (last visited Sept. 14, 2020).

Both judicial and non-judicial interviewees of color emphasized their perception that non-judicial employees of color do not share the same career advancement prospects as their colleagues. OCA's promotion policies and procedures have led to a perception that nepotism and bias often drive promotional decisions, leading to unqualified hires and "bad morale" among employees of color. To address these perceptions, we recommend that OCA improve transparency in the promotions process, by including posting all promotions in a manner visible to all viable diverse applicants, ensuring that a diverse slate of candidates is considered for all promotions and, at the very least, by communicating with interviewees when they are not selected. Where possible, decision-makers should undertake to provide feedback to unsuccessful candidates about how they might be able to improve moving forward.

K. Enhance Trust between Court Officers and the Community

According to judges, public defender organizations, bar associations and numerous others, court officer mistreatment of litigants of color, their families, and attorneys of color is a significant barrier to achieving equity in the court system. We heard countless stories of court officers treating litigants and attorneys of color differently than their white counterparts or using dehumanizing language and excessive force. That said, we recognize that court officer conduct is subject to union contracts with OCA, and that OCA likely cannot make sweeping changes unilaterally. On the other hand, we understand that all union contracts are set to expire on March 31, 2021 and must be renegotiated.

In addition to the recommendations above, which would impact the court officer community, we recommend the following for court officers specifically: *first*, court officers should be required to wear name tags. While seemingly simple, being able to identify court officers by name is an important step in fostering an environment of trust and accountability. Officer name tags are common for many law enforcement agencies around the country.[251] *Second*, similar to the NYPD Patrol Guide, OCA should publicly post the rules that court officers must follow in carrying out their official duties, including use-of-force guidelines.[252] Increasing transparency in these ways will help with

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[251] *See, e.g.*, *Directive 6.7*, PHILA. POLICE DEP'T (Mar. 15, 2017), https://www.phillypolice.com/assets/directives/D6.7-UniformsAndEquipment-1.pdf.

[252] *See, e.g.*, *Use of Force Policy, Guidelines and Procedures Handbook*, U.S. CUSTOMS AND BORDER PROTECTION (May 2014), https://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf; *Use of Force Policy*, SANTA MONICA POLICE DEP'T (July 19, 2019), https://santamonicapd.org/uploadedFiles/Police/Policies/Policy%20-%20Use%20of%20Force.pdf; *Use of Force Policy*, PORT WASH. POLICE DEP'T (Jul. 24, 2020), https://portwashingtonpd.ny.gov/wp-content/uploads/2020/08/Use_of_Force_Policy.pdf.

humanizing court officers and understanding the scope of their responsibilities and also holding them accountable where appropriate.

L. Facilitate Navigation of Courthouses

As early as 1991, the Williams Commission called to make the courts more "user friendly."[253] A frequent theme throughout our interviews was that – as a result of hostile interactions with security staff or a lack of informational resources – the critical first touchpoint that litigants of color have with the court system is often a negative, or even traumatizing experience.

Interviewees recommended that, in line with a more "customer service"-oriented approach, OCA consider establishing a "greeter" position in courthouses on a more widespread basis. We agree, and recommend that OCA ensure that there is a designated individual within each courthouse whose role is to welcome litigants and answer basic questions about how to navigate the building and adhere to general procedures and practices.[254] While we do not prescribe that any specific individual within or outside of the existing system fill the greeter role, we urge that whoever takes on this position is adequately trained. Such training should incorporate not only the basic tenets of customer-service, but also, cultural competency, accommodating those with mental illness, trauma or disabilities.

We also reiterate that helpful, clear, written guidance within courthouses is essential to ensuring that litigants are able to navigate the courthouse and understand the proceedings before them. One judge interviewed pointed out that these resources are particularly critical for unrepresented litigants, citing as an example that without adequate signage, litigants may have trouble even finding their way to the designated help center for the unrepresented, if at all. We also emphasize that while online resources and guides for litigants are helpful and to be encouraged, they are not a substitute for such resources within courthouses, given widespread bans on cell phones in courthouses. We also recognize that language needs can vary widely from courthouse to courthouse, and echo calls that this signage be thoughtful and responsive to those local needs.

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253 *See* REPORT ON THE UNIFIED COURT SYSTEM'S IMPLEMENTATION OF THE RECOMMENDATIONS OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES, EQUAL OPP. EMPLOY. OFFICE, Jan. 1995, 1, 12–13.

254 We acknowledge that designated greeter programs are in place in certain courthouses throughout the state, but that they are operated by outside organizations on a volunteer basis. We also note that in certain courthouses, some of the functions that would be carried out by a greeter, such as answering litigant questions or obtaining directions, are often fulfilled by court officers or clerks. *See id.* at 12 (noting that clerks have a role in assisting litigants throughout some courthouses in the state).

M. Ensure Implementation of Change

Finally, experience shows that recommendations matter little if there is no follow through on their implementation; far too often, reports and recommendations such as these are placed on a shelf and gather dust unless there is a commitment to put words into action. We recommend that the Chief Judge assign an entity or committee that includes those independent of the court system, to monitor and report on implementation of those recommendations adopted here on an ongoing basis. Several outside organizations suggested this, and we agree.

One outside organization envisioned the appointment of a third-party independent committee or entity, that would "oversee the implementation of reforms, issue public reports, and provide future recommendations where necessary." Other similar organizations also recommended an outside oversight mechanism for implementation of reforms suggested in this review. We take no position on whether the group or organization tasked with monitoring and ensuring compliance also include some insiders, such as respected senior members of the judiciary. Most important is that *someone* be given this responsibility.

When are private meetings appropriate and how should they be conducted?

The Caucus: Private Meetings That Promote Settlement

Christopher W. Moore

Mediators use a variety of procedures to assist people in conflict in reaching acceptable agreements. While no one technique guarantees settlement, there is a procedure—the caucus—that often is useful in breaking deadlocks. The caucus is a confidential, private meeting held by the mediator with individual parties or a brief private meeting of a negotiation team conducted during bargaining. In the caucus, the parties are physically separated from each other, and communication is intentionally restricted to increase the likelihood of a successful outcome to the negotiation. The caucus is usually of shorter duration than a formal recess in negotiations and is designed to handle specific emotional, procedural, or substantive blocks to negotiation.

Caucuses have been described in a variety of case studies and in the literature on negotiation and mediation. The caucus has been applied to international (Yarrow, 1978; Rubin, 1983; and Young, 1967), labor-management (Kolb, 1985; Maggiolo, 1971; and Zack, 1985), environmental (McCarthy, 1984; and Talbot, 1983), interpersonal (Beer, 1986; and Walton, 1969), and family (Folberg and Taylor, 1984; Haynes, 1981; Moore, 1986; and Saposnek, 1983) disputes. In spite of its widespread application, little has been written on the actual mechanics of the caucus.

C. W. Moore (ed.). *Practical Strategies for the Phases of Mediation.*
Mediation Quarterly, no. 16. San Francisco: Jossey-Bass, Summer 1987.

Why Use a Caucus?

The premise for caucusing is that totally open and uninterrupted communications between parties in dispute are not always productive and that by modifying the communication structure, more areas of agreement can be identified. This premise directly contradicts the assumption that if the parties could only communicate with one another, their conflicts would resolve themselves.

Caucuses are initiated in response to events, external or internal to the negotiations, that block or hinder productive bargaining in joint session. External events may include changes in the legal, economic, or political climate, or actions taken by other parties (lawyers, the press, a party's constituents, custody evaluators, friends) that escalate the conflict or narrow the range of options for settlement. Internal events fall into three categories: (1) problems in interpersonal relationships between parties or within a team, (2) problems in the negotiation process, and (3) problems related to the substantive or content issues under discussion.

Relationship Problems. Relationship problems involve difficulties that arise in negotiations because of strong emotions, misperceptions, and poor communication. Caucuses can be used to respond to each of these problem areas.

Emotional Problems. Either the expression of strong emotions or their lack of expression can block agreement. Expression of strong feelings—anger, hurt, frustration—can on occasion be valuable. The issue is how and where feelings should be expressed.

Venting of feelings in joint session can be educational for both sides. It can demonstrate how strongly a party feels about an issue or how important a concession in a particular area will be. However, face-to-face expression of emotions can also damage relationships so that no agreement can be reached. Mediators must assess how much the party with strong emotions needs to say, how much the other party needs (or can stand) to hear, and then determine the appropriate format for the expression of feelings.

On occasion, it may be more productive to channel the venting of feelings into a caucus where it will not damage the negotiators' relationship than to encourage expression in joint session. Venting in private may provide negotiators with a cathartic release of tension and an opportunity to assess what needs to be said in joint session, and such expression may enable the intervenor to evaluate how best to facilitate an exchange of information about feelings.

When extremely strong emotions are deemed by the mediator to be a major stumbling block to further negotiations, he or she may discourage or prevent the parties from returning to joint session. The mediator may initiate shuttle diplomacy by carrying messages between parties but never

allow them to meet face-to-face until an agreement is reached. This procedure allows the parties to maintain communication but inhibits emotional exchanges that might result in impasse.

Perceptual Problems. The mediator may work with one or both parties in private session to improve their attitudes and perceptions of the other, design procedures to test the accuracy of perceptions, or plan activities that will change negative attitudes. When the mediator discovers information that may reinforce a negative view, the intervenor may occasionally suppress this data or steer the other party away from discovering it by using the caucus to bar information exchanges.

Communications Problems. Such problems are too numerous to catalogue. Mediator strategies regarding communications generally fall into two categories: (1) how to enhance the quality of communications, and (2) how to regulate the quantity of exchanges.

Caucuses are used to increase the quality of communication between parties by changing the form of information exchange. Variations in communications that may be considered in caucus include: direct or indirect communication, oral or written exchanges, varying who communicates (spokespeople, the whole team, or the mediator), and syntax, or how the messages are worded. The mediator may convey information gleaned from the caucus in several ways. He or she may act as a conduit, relaying the information exactly as it was presented; as a surrogate negotiator, presenting the logic or rationale of one negotiator to another; as a reshaper or reframer, recouching the argument of a negotiator into a form that will be better received by another; or as a clarifier, answering questions for another party (Kolb, 1983).

Caucuses are also used to regulate the quantity of communication. It is possible for parties to communicate too much and thus damage the possibility of settlement. Caucuses can be used to limit communication to only productive exchanges and filter out extraneous information or emotions.

Procedural Problems. Procedural reasons to caucus include (1) a lack of clear and well-thought-out negotiating procedure used by one or more parties, (2) the use of an inappropriate procedure, (3) the right procedure used the wrong way, and (4) coordination problems between conflicting procedures.

Negotiators often fumble at the beginning of bargaining because they have an ill-thought-out negotiation plan or the procedure utilized is inappropriate to the situation. Mediators often work with negotiators to educate them about bargaining tasks, procedures, and techniques. This education often must be done in caucus to avoid embarrassing or disempowering a party, inadvertent disclosure of privileged information, or the appearance of partiality or bias on the part of the intervenor.

Coordinating negotiators' approaches to problem solving is perhaps

the greatest procedural problem. Walton and McKersie (1965) note that there are two major approaches to negotiation: distributive bargaining and integrative bargaining.

Distributive bargaining, or positional bargaining, assumes that resources to be divided between the parties are limited, and therefore a win for one negotiator must mean a loss for the other. Positional bargaining is characterized by a sequential presentation of positions, or preferred options, along a continuum that represents greater or lesser gains or losses—wages, time with a child, length of behavior or performance, and so on—to the negotiator making the offer. In this procedure, each negotiator makes incremental concessions until convergence occurs and an acceptable solution is reached (if one is reached at all). Positional bargaining frequently is polarizing and often results in a compromise solution.

Integrative or interest-based bargaining is characterized by an attempt to optimize the satisfaction of as many interests as possible. Interest-based bargaining involves the identification of all or most of the parties' interests and needs and a mutual search for jointly acceptable settlement options.

When negotiators use different bargaining processes, they are often blocked from reaching settlement. Mediators in caucus can aid parties to shift from positional bargaining to interest-based bargaining or to make appropriate compromises if the parties refuse to move from the positional to the interest-based mode.

Substantive Problems. Caucuses may also be needed to handle substantive problems. Examples of this type of problem include (1) too few or too many options on the table, (2) unacceptable alternatives, or (3) alternatives that are insufficiently developed or packaged in an unacceptable manner. Mediators can help parties develop and format substantive proposals that will be accepted.

Negotiators often are reluctant to make proposals in joint session. Reticence may be due to fear of premature commitment to a solution, lack of understanding of each other's needs, or confusion as to what to offer. Work in caucus with other team members or the mediator can assist negotiators in deciding what to offer, when to make a proposal, and how an option can be best presented to the other side. The mediator can often assist the party in proposing an option-generation process rather than a specific proposal that then can be used jointly by all parties to develop an acceptable solution.

When to Call a Caucus

Caucuses may be initiated by either the parties or the mediator at almost any time during negotiations. In calling a caucus, mediators should take care not to hold private meetings prematurely when people are still

capable of working productively in joint session nor too late after unproductive or hostile exchanges have hardened positions.

Timing of caucuses depends on the stage of negotiation development and particular problems encountered by the parties. Caucuses initiated early in negotiations are often used to vent strong feelings, design negotiating procedures, create agendas, identify issues, clarify priorities, organize a disorganized team, design opening statements, or enable the mediator to build rapport with a party.

Caucuses in the middle of a negotiation tend to focus on preventing parties from prematurely committing to a position unacceptable to another party, identifying parties' interests, generating settlement options, or testing bargaining ranges.

Caucuses at the end of negotiations are usually designed to develop or assess final proposals, work out a settlement formula, develop an implementation plan to operationalize an agreement, or work through psychological blocks that are delaying final agreement.

There is no right time to call a caucus. The need for the technique is highly dependent on the needs and skills of the individual negotiators and mediator. In some disputes, there may be multiple caucuses held at a variety of stages in the negotiation, while in other conflicts the technique may not be used at all.

How to Call a Caucus

Caucuses may be initiated by either the negotiators or the mediator. Although there are no formal rules or protocols for caucusing, there are procedures that help them run more smoothly.

Location of Caucus. For caucuses to be most effective, they should provide for a genuine separation of the parties. This generally means separate rooms where parties can neither see nor hear each other and where they can feel safe to discuss issues or problems in a frank and candid manner.

Strategic Decisions in Calling Caucuses. Some of the strategic issues faced by mediators who initiate caucuses include (1) education of the parties about the technique, (2) procedures for calling a caucus, (3) overcoming parties' resistance to separate meetings, (4) making the transition to the caucus, (5) determining the sequence of meetings, and (6) determining the duration of the caucus.

Education of the Parties. The mediator should explain at the beginning of the intervention that private meetings may be initiated at some time during the course of negotiations. Parties should be informed that either they or the mediator may initiate such meetings. Parties should be educated about reasons for a caucus so that they are neither surprised by its proposal nor concerned that the intervenor is making deals with the other party at their expense.

The limits to confidentiality in caucus should be spelled out both in the mediator's opening statement and at the time the caucus is initiated. Parties should be informed as to what, if any, information may be revealed by the mediator to the other party or parties in later joint sessions.

Calling the Caucus. If the parties call for a caucus, the mediator generally should honor their request immediately. Parties have a right to discuss issues either with the mediator or within a team before proceeding.

Mediators can request a caucus and do not have to directly obtain the parties' approval, but the mediator should give a reason for the request.

Overcoming Resistance to the Caucus. Occasionally, one or more parties may resist caucusing. If the intevenor sees the caucus as the only way to achieve movement, he or she should work to overcome resistance by explaining the reasons for the private meeting and then allowing the disputants to decide if they will meet privately. If a caucus is not imperative for the general health of the negotiations, the mediator should accept the decision of the disputants not to caucus.

Transition to Caucus. Parties may initiate caucuses by formally calling for a time to meet privately or by asking for informal breaks. Mediators can use the same procedures. For example, a mediator might say "At this time I think it may be helpful for you each to think in private about some of the proposals that have been presented. I would like to talk separately for a few minutes with each of you and then we'll get back together."

Sequence of Meetings. Mediators use several rules of thumb to determine who to meet with first. In early caucuses where priority may make little difference, the mediator often meets with the initiator of the dispute or caucus or may leave the sequence of meetings up to the parties. Caucuses held later in negotiations may follow the rule suggested by Maggiolo (1971, p. 53): "If neither side has indicated any flexibility in their bargaining position, the first caucus should be held with the party appearing most inflexible. In such situations, some movement is necessary if negotiations are to proceed along fruitful lines." The converse of this sequencing may be appropriate if the mediator wants to determine the limits of the more flexible bargain, the intransigent party needs a break, a particular party is extremely upset and needs time with the intervenor, or a party is exhibiting distance from or hostility toward the mediator and rapport needs to be rebuilt.

Duration of the Caucus. There are no general rules on how long to caucus. Some mediators suggest that private meetings should be held for as long as necessary to accomplish a desired purpose, while others utilize brief time-specific meetings. A common practice is to caucus no more than one-half hour or to schedule separate meeting times so that the other party is not kept waiting. In interpersonal negotiations, there is less tolerance for long breaks, since there is no team with whom to meet while the mediators are with the other party.

Regardless of how long a caucus takes with one party, the mediator should always caucus with both parties prior to reconvening joint sessions. Meeting with both parties demonstrates impartial behavior, maintains rapport and trust, and may also provide a time to communicate information or offers, assess whether positive bargaining range has developed, or test for agreement.

Procedures to Use in a Caucus

Generally, caucuses are initiated to prepare parties for a return to the joint session. The amount of work done in caucus may be as little as a few minutes, with the parties returning to the table to jointly work out the rest of their settlement; or the caucus may be where most of the work takes place, with the mediator shuttling messages between the parties. Once the procedural, substantive, or psychological barriers to settlement have been handled in private, the mediator will usually encourage the parties to resume face-to-face dialogue.

Starting the Caucus. Once the mediator initiates the caucus, he or she should take (1) steps to join psychologically with the party and build rapport, trust, and confidence in the mediator and the process, and (2) actions to assist the party in overcoming the specific barriers to settlement. The first activity, that of joining with the party or creating a psychological contract, can be accomplished by identifying with the party's situation or emotions. Statements such as "I can see why it has been so tough to negotiate" or "Looks like it's been pretty hard on you in the session" may indicate to the parties an interest in and empathy for how they are feeling. Often, reflective listening to a party's emotions at this stage of the caucus may build rapport.

Once rapport has been established, the mediator can shift to more task-oriented behavior. If the intervenor does not know what is causing the impasse, he or she may ask the parties to describe how they see the situation or to identify what barriers exist. If the mediator knows what is causing the impasse, a focused and directive intervention may be initiated.

Psychological Barriers to Settlement. Strong feelings often inhibit a negotiator's ability to bargain. Caucuses can be used to respond to intense emotions by suppressing or encouraging the expression of feelings.

Suppression is pursued when the negotiators do not see any productive outcome from venting feelings or the mediator believes that airing emotions will escalate conflict, create psychological resistance to agreement, or encourage parties toward physical violence. Means of suppressing emotions include formal breaks where parties are left alone to deal with their feelings, a statement by the mediator that focusing on feelings will not be helpful, or a redirection of the parties to substantive or procedural concerns.

At other times, venting, or the expression of feelings may be conducive and even necessary for reaching settlement. Release and exploration of feelings may result in a physiological relief from tension and the attainment of insight necessary for parties to understand each other. If negotiators or the mediator believe that an open discussion of feelings in caucus may lead to movement in joint session, an opportunity for emotional expression should be provided. Several guidelines may be helpful in conducting such a venting session.

1. Encourage the party to focus on his or her feelings, not those of the other side.
2. Help the party distinguish between outcomes that are solely the result of acting on feelings versus outcomes based on a rational and logical assessment of the problem.
3. Allow enough time for the party to "work through" feelings by talking, laughing, crying, yelling, and so on so that he or she does not carry undischarged emotions back into the session.
4. Ask the party to look for positive behaviors that contradict his or her negative feelings toward the opponent. These behaviors may provide hope in negotiations.
5. Work with the party to devise ways to express in joint session how strongly he or she feels but in a manner that does not harm the negotiation relationship. Education of an opponent about the intensity of feelings is important, but it must be done in a creative and nondestructive way.

If misperceptions are a problem, the intervenor may first ask the party to clarify his or her perceptions. The mediator then may request the party to identify behaviors or communications that both reinforce and contradict these perceptions. Hopefully, the exploration of contradictions will create some tension in the party between the dual messages that have been received. The mediator can enhance this tension by asking the party questions such as "Can you think of another, more positive, way that action might have been intended?"

Direct confrontation of misperceptions should be reserved as a last-ditch strategy, since this will often create resistance to the new idea or the appearance of a coalition between the mediator and the other party. If the intervenor feels a confrontation is appropriate, an indirect, or soft, approach is preferable. For example, the mediator might say, "Well, it seems to me that X's statement could be interpreted in several ways" and proceed to elaborate two or more possible explanations. This approach creates tension between the party's view and that of the mediator who, hopefully, is respected. This tension is often enough to cause a party to reevaluate and form new attitudes toward the other party.

Impasses due to communication may be caused by the form of the communication (direct versus indirect, written versus oral), the person who delivers a message, the lack of clarity, or the syntax used to deliver

information. The mediator may use the caucus to enhance the transmission and receptivity of a message. The mediator may decide to use indirect communication between the parties rather than direct face-to-face communication. The intervenor may also ask a party to refrain from a written offer or position and instead to discuss options verbally and in a more open and flexible manner. Conversely, the mediator may assist a party to draft a written proposal to make an offer more believable, tangible, or explicit. Finally the mediator may help parties change the wording or syntax of a message to make it more acceptable.

Parties often either intentionally or inadvertently engage in negative behavior that is repetitive and hinders agreement. Destructive patterns of interaction often must be broken for parties to move forward toward settlement. The mediator can best identify and discuss behavior patterns with a party in the safe environment of the caucus, where a low-level challenge of behavior will not lead to a loss of face.

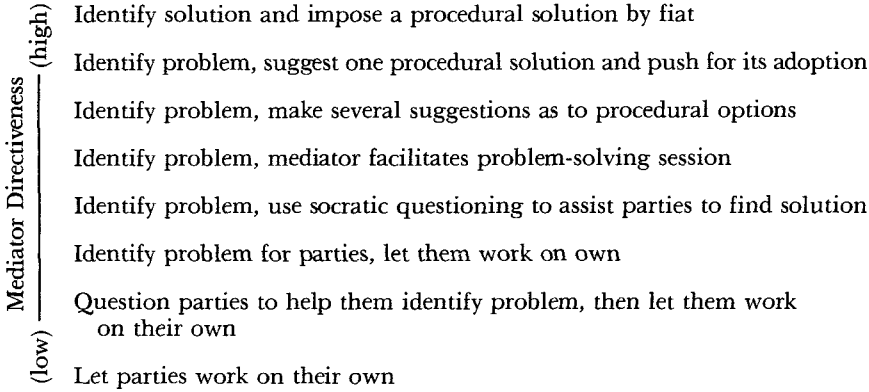
Procedural Barriers to Settlement. Joint sessions often fail because parties are unable to develop or utilize an effective bargaining procedure. A caucus provides time for parties to devise new negotiation processes.

Mediators procedurally intervene at various levels. The degree of mediator directiveness in the negotiation process can be seen in Figure 1.

Techniques for breaking procedural deadlocks are too numerous to list. Some of the most common ones and a description of how each might be used are described below.

Reframing Issues. How issues or interests are presented influences the parties' abilities to negotiate about them. Mediators can redefine or reframe how an issue or interest is described to remove egocentric definitions that inhibit settlement, enlarge the parties' understanding of underlying concerns, or widen or narrow the scope of the problem to be handled.

Figure 1. Level of Mediator Directiveness in the Caucus



Shifting from an Emphasis on Positions to a Focus on Interests. Procedural deadlocks are also caused by the utilization of positional bargaining. This process, it will be recalled, is characterized by a party's adherence to positions or preferred solutions that meet his or her needs or interests but not necessarily those of other disputants.

Mediators and negotiators often use a caucus to move parties away from unacceptable positions and to help them develop proposals that will satisfy the interests of both sides. Mediators can begin the shift toward interest-based bargaining by discussing with a party what interests or needs are met by positions. The party is then asked to speculate about the needs of other disputants. The mediator then reframes the problem as a search for a solution that meets joint needs. The mediator may repeat the process with other parties as a means of coordinating activities.

Substantive Barriers to Settlement. Substantive disagreements are perhaps the most frequent cause of an impasse. The reasons for parties' inability to concur on substance may be the result of inaccurate data, too little or too much information, an inability to generate options, the presence of unacceptable proposals, too many options, inappropriate linkage of issues, unacceptable trade-offs, an unrealistic appraisal of the viability of alternative means of settling the dispute outside of negotiation, and so forth.

Often, a mediator will start work on substantive impasses by asking the party with whom the caucus is being held to describe the substantive issues and barriers to settlement. By starting with the way that the party sees the situation, the mediator can promote rapport and build the belief that the party's needs are first and foremost in the mediator's mind.

It is crucial that the parties have a common understanding of the relevant data and similar methods of assessing this information. Misinformation, missing data, overly complex information, or diverse assessment procedures may cause unnecessary delays in reaching agreements.

Even if all necessary data is available and assessed in a similar way, the parties may still be reluctant to put forth any proposal. This may be because the disputants do not know how to generate options. They also may fear rejection, be afraid of giving away more information than is necessary for an agreement, feel that timing is wrong, or be using delay as a tactic to get more concessions from the other negotiator.

If a party does not know how to generate a proposal, the mediator may, through discussion, brainstorming, questioning, or procedural suggestions, assist the negotiator to develop a proposal. On the other hand, if the mediator determines that the party is reluctant to make a proposal because of fear of rejection or concern for giving away information, the intervenor may explore the fear or offer to test the proposal in caucus with the other side while claiming the option as the mediator's own idea.

If the party has a proposal, but the timing of the offer is a problem, the mediator may discuss with the party standards or indicators for the

timing of the offer or identify conditions or behaviors required from the other party that will induce movement. Frequently the mediator may have to work with both parties to develop a sequence of proposals in which each party makes an offer or concession in exchange for reciprocal benefits.

If a mediator discovers that one party is holding out for concessions or using delay as a tactic, he may assess potential risks or benefits of intransigence with that party. Although a strategy of delay, a last-minute offer, or a proposal at the eleventh hour may work in some disputes, such proposals run the risk of being rejected because of psychological barriers created by the tactic or because there is too little time to evaluate or consider them.

If the substantive impasse is caused by the parties locking into mutually exclusive positions, the mediator may use several responses to loosen them up. The intervenor may refocus a party off of positions and onto the interests of both parties. The mediator may also look for principles, criteria, and standards independent of the disputing parties that might guide them in devising an acceptable solution. Criteria or principles might include an equitable exchange in dollars or goods, an agreement that is implementable, a settlement in which the parties have the resources to comply, or an agreement that will hold over time.

If a focus on interests, criteria, or standards fails to move an intransigent party, the mediator may discuss with the disputant the benefits and costs of maintaining a hard line. Frequently, parties take a hard line in negotiations without ever considering what their costs or options will be if negotiations fail. Negotiated settlements are highly dependent on the unavailability or unpredictability of alternative methods of settlement, such as court or administrative hearings. The recalcitrant disputant may need to reassess his or her position in light of other alternatives (Lax and Sebenius, 1985).

In some disputes, the issue may not be how to choose between two mutually exclusive options but how to select a solution from too many options or from several bad alternatives. In this case, the mediator can revert to the previously mentioned procedure of exploring principles, criteria, or standards. Once criteria are identified, it often is easier to eliminate extraneous options and focus on the best ones. If it appears that the ultimate solution will have to be an arbitrary division of a resource, the intervenor can propose a mechanical means of reaching settlement, such as splitting the difference or using some random-choice procedures.

Preparing the Parties for Reentry to the Joint Session

Preparing for return to the joint session involves working with the parties on substantive, procedural, and psychological issues. Psychological preparation may involve coaching a party to make or receive a psychological offer. Psychological offers include expressing emotions, acknowledg-

ing another's feelings, apologizing, or granting small concessions that create a positive emotional climate for problem solving.

In preparing a party to make psychological offers, mediators should make suggestions about how a party can deliver a message so that it will be best received. If necessary, the mediator may want the party to rehearse the offer and try out several different ways of presenting it.

Preparing the other party to receive a psychological offer may be just as important as preparing the offerer. Some mediators do this by explaining in caucus how the other side feels and by letting the party know that a psychological offer or concession may be forthcoming. Other mediators test the receiving party's receptivity by presenting a hypothetical offer.

Substantive preparation for reentry may also be necessary. After meeting separately with the parties, the mediator may find them in one of several situations. Gulliver (1979) points out that they may have

- Reached total agreement on an item without realizing it
- Identified agreements in principle without working out the details
- Identified a positive bargaining range and possible acceptable settlements (even though gains and losses are still possible depending on how the offers are made)
- Acknowledged overlapping bottom lines, where each party is willing to give much more than the other party requires for a settlement
- Identified a negative settlement range in which no mutually acceptable solutions exist.

The first two conditions are the easiest to address. The mediator can request a return to joint session, ask the appropriate party to make an offer or state a principle, and be fairly sure that the parties will agree. The other situations are more problematic.

In the third and fourth situations, the mediator may ask the parties to return to joint session and identify principles, criteria, or objective standards by which an agreement might be identified. This approach enables parties to develop a rationale for selecting a particular solution within a range of settlement options and prevents them from giving away more than is required for an agreement. Or the mediator may encourage the parties to make positional statements that put them both into the positive settlement range but which do not require them to disclose their bottom lines. An offer-counteroffer strategy then can be used to move the parties toward agreement.

In the event that a caucus results in a stalemate the mediator may try several approaches. He or she may ask for a package deal that combines an unacceptable element of an offer with other more favorable components. If this approach fails, the mediator may announce in private that a

stalemate exists and may outline the costs and benefits to a party of holding onto his or her position versus moving to a new one. If work in caucus is to no avail, the mediator may return to joint session to inform both parties of the impasse, specify the risks of their intransigence, encourage them to be less obstinate, or propose mediator withdrawal if there is no movement. These extremely directive interventions may, on occasion, result in a reassessment of unrealistic positions and consequent movement.

Many of the above psychological and substantive preparations for reentry into joint session are procedurally oriented. Several other procedural considerations for the mediator include setting the stage for new offers, deciding who should make the first offer, priming the parties to make proposals, and presenting mediator-originated offers.

Setting the stage means creating a tone that promotes settlement and establishing the form and sequence of offers. The mediator sets the tone by statements such as "I have met with both of you and each has worked hard in seeking a solution to consider your needs and those of the other."

A rule of thumb in determining the sequence of who talks first is to identify who must make the first offer in order to enable the other party to reciprocate. In some cases the sequencing does not matter while in others, the order of offers may make the difference between settlement, stalemate, or unfair concession making.

On rare occasions, the mediator may want to bring the parties back to joint session and announce that a settlement has been reached. Mediators do this only when the parties' emotional entanglements are likely to lead to further escalation in joint session, when the offer needs to be separated from the offerer, or when a party wishes to save face by not making the offer directly to the other party.

Ethical Considerations

Caucusing is a common mediator practice. The technique, however, does raise ethical questions that intervenors and parties should be aware of. The concerns fall into five areas:

1. Does discussion of privileged information in private undermine trust between the intervenor and the parties?
2. Should there be limits on the confidentiality of information revealed in caucus, and should the mediator maintain confidentiality when information revealed may be important for a fair, equitable, or safe settlement?
3. Is it possible that a mediator will inadvertently reveal information that a party considers to be confidential?
4. Does caucusing promote coalition formation between the mediator and one side and thus compromise the intervenor's impartiality?

5. Does caucusing give the mediator an extreme amount of power over the terms of settlement, eliminate the checks and balances on fairness that result from face-to-face dialogue, and increase the potential for mediator manipulation of the parties and the outcome?

In response to the first question, many mediators have concluded that the reverse is true. The fact that the mediator can discuss issues of concern with a party and hold them in confidence tends to promote more trust than if the intervenor was to state an intention to reveal all information to the other party. In fact, it may be that the faith a party develops in the mediator as a confidant is crucial to increasing mediator influence.

The second question is more complicated. Some codes of ethical behavior for mediators (such as Colorado's Code of Professional Conduct, the Association of Family and Conciliation Court's Model Standards of Practice, and the Society of Professionals in Dispute Resolution's Code of Professional Responsibility) have responded by placing limits on confidentiality where bargaining in bad faith or eminent physical harm is present, but the Code of Professional Conduct for Labor Mediators is adamant that confidentiality should not be breached under any circumstances. Most codes explicitly require practitioners to inform parties about the limits of confidentiality prior to the beginning of mediation. The confidentiality debate within the profession is not over.

Critics of the caucus often argue that a mediator's inadvertent sharing of confidential information (the third issue) is impossible to prevent and that caucusing should not be employed. Although this argument has some truth, the experience of hundreds of mediators indicates that confidentiality can be maintained, with only a few accidental revelations.

The potential for mediator-party coalition formation in caucus (the fourth question) is another frequent argument against caucusing. However, a feeling of understanding may be important to gaining a party's cooperation. A party is more likely to work with a mediator if he or she believes the intervenor to be friendly, sincere, empathetic, and concerned about his or her interests. Clearly, if a mediator oversteps the boundary of impartial behavior and allies him- or herself with a particular party, the mediator will cease to be an effective neutral. The caucus, however, does not inherently create this type of negative coalition.

The fifth concern of critics is perhaps the most powerful argument about the risk of private meetings: the potential for mediator manipulation of the parties or the settlement. Private meetings and controlled communications can give the mediator considerable power over the settlement. If the intervenor has more informaton about the parties' sources of power, acceptable settlement ranges, psychological states, and so forth, and controls all communication between them, there is an increased potential for the mediator to shape or actually dictate the terms of settlement. In dis-

putes where the mediator may have repeated involvement with the parties, such as in the labor sector, there are structural checks on mediator manipulativeness. If a party finds out that a mediator formulated a settlement unfavorable to his interests, the intervenor will never again be asked to serve. In cases where mediation is a one-time occurrence, no such structural checks and balances exist. In these cases, the intervenor should be guided by the professional codes of practice that stress the ownership and forging of the agreement by the parties. The mediator's role is to avoid making a decision for the parties and to procedurally empower them to settle the issues themselves.

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Destiny Peery

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The Colorblind Ideal in a Race-Conscious Reality: The Case for a New Legal Ideal for Race Relations

Destiny Peery*

I. INTRODUCTION

¶1 "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[1] Chief Justice Roberts's statement in *Seattle Schools*[2] captures the dominant contemporary and historical legal approach to diversity that has existed since Justice Harlan's famous dissent in *Plessy v. Ferguson,*[3] introducing the concept of a colorblind Constitution.[4] Since at least the time of *Plessy* there has been a large group of colorblind proponents that advocates that the law should be colorblind as a means to achieving equality under the law. The legal definitions extracted from debates among legal scholars and captured in judicial opinions highlight the importance, in the minds of many, of ridding the law (and society in general) of racial categories that divide and lead to negative outcomes on the basis of these divisions.

¶2 Like judges and legal scholars, social scientists define colorblindness, doing so similarly, but somewhat more precisely than their legal counterparts. For example, some social scientists define colorblindness has been defined as an "ideology in which all people [are] to be judged as individual human beings[] without regard to race or ethnicity."[5] Another approach "focuses on ignoring cultural group identities or realigning them with an overarching identity."[6] Like the definitions coming from the legal domain, these definitions highlight the importance of de-emphasizing group distinctions in order to achieve a higher good of considering all people as individuals rather than simply members of social categories like race. The assumption underlying a colorblind approach is that as long as people do not "see" categories such as race, they cannot discriminate on the basis of them.

¶3 Not everyone agrees that colorblindness is possible or that it is the ideal approach to diversity. In the legal field, the debate has taken the form of arguments in favor of

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[1] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

[2] *Id.*

[3] 163 U.S. 537 (1896).

[4] *Id.* at 559 (Harlan, J., dissenting) ("Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.").

[5] Carey S. Ryan, Jennifer S. Hunt, Joshua A. Weible, Charles R. Peterson & Juan F. Casas, *Multicultural and Colorblind Ideology, Stereotypes, and Ethnocentrism Among Black and White Americans*, 10 GROUP PROCESSES & INTERGROUP RELS. 617, 618 (2007).

[6] Flannery G. Stevens, Victoria C. Plaut & Jeffrey Sanchez-Burks, *Unlocking the Benefits of Diversity: All-Inclusive Multiculturalism and Positive Organizational Change*, 44 J. APPLIED BEHAV. SCI. 116, 119 (2008).

either colorblindness as articulated by Justices Roberts or Harlan, for example, or in favor of race consciousness. Prominent legal scholars on the side of race consciousness have argued for the law to be race-conscious in light of the reality that people have been and remain race-conscious,[7] as well as the facts of existing racial inequalities.[8]

¶4 In the social sciences, the debate between colorblindness and race consciousness has also occurred, with an emphasis on the efficacy of colorblind and multicultural ideologies or mindsets for reducing prejudice and discrimination and improving intergroup relations.[9] In recent years, psychologists have conducted research on the psychological implications of these approaches in terms of basic psychological processes like person perception and attitudes toward social groups.

¶5 In an effort to bridge the gap between the theoretical discussion in the legal field and the empirical discussion in psychology, this Comment will review the arguments made on both sides of the legal debate, as well as the empirical evidence that suggests something about the true efficacy of colorblind versus race-conscious (or multicultural) approaches to dealing with diversity.

¶6 This Comment argues: (1) colorblindness is, under most circumstances, undesirable given its recently discovered negative outcomes, particularly for the very groups or individuals it is meant to protect; (2) true colorblindness is unrealistic given the psychological salience of race; and (3) race consciousness in the law is necessary to ensure equal treatment of racial groups in regulated domains such as housing, education, and employment.

¶7 Part II of this Comment reviews the legal debate around colorblindness and race consciousness, with an analysis of where it has been and where it currently stands. Part III reviews the psychological literature examining how we cognitively construct and use categories, with an emphasis on the salience and inevitability of racial categorization. Categories are the basis for making racial distinctions, and thus, understanding how categories operate psychologically is an important foundation for understanding the debate about colorblindness. In addition, the psychology of categories is helpful to understanding why the negative effects of colorblindness described in Part IV might occur despite the good intentions of those wishing to adopt a colorblind perspective.

¶8 Part IV reviews the psychological literature examining the efficacy of colorblind versus multicultural approaches in various realms of interracial or intergroup contact, including stereotyping, expression of prejudice, and interracial interactions. The relative advantages and disadvantages of colorblindness and multiculturalism will be explored through an examination of the empirical evidence testing these approaches.

¶9 Finally, Part V analyzes the current legal debate around colorblindness versus race consciousness in light of recent psychological research. Part V will conclude by arguing that since true colorblindness is unrealistic and undesirable in important ways, the law

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[7] *See, e.g.*, Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

[8] Black America Reports, *Report Sees "Sobering Statistics" on Racial Inequality*, CNN.COM, Mar. 25, 2009 [hereinafter *Sobering Statistics*], http://www.cnn.com/2009/US/03/25/black.america.report/index.html (citing statistics showing that blacks are two times as likely to be unemployed, three times as likely to live in poverty, and more than six times as likely to be imprisoned compared to whites.).

[9] *See, e.g.*, Destiny Peery & Jennifer A. Richeson, *Broadening Horizons: Considerations for Creating a More Complete Science of Diversity*, 21 PSYCH. INQUIRY 146 (2010); Victoria C. Plaut, *Diversity Science: Why and How Difference Makes a Difference*, 21 PSYCH. INQUIRY 77 (2010).

should be race-conscious in order to move society closer to achieving the racial equality so desired by proponents of colorblindness and race-consciousness alike.

II. THE LAW AND COLORBLINDNESS

A. Historical Case Law and Colorblindness

¶10 The anti-discrimination principle likely led to colorblindness in the law[10] by representing a "moral principle [in the law] that prohibits discrimination."[11] Proponents of this principle argue that it was born out of the Equal Protection Clause of the Fourteenth Amendment[12] and later enshrined in the Civil Rights Act of 1964.[13] The anti-discrimination principle was once considered very much in line with the concept of colorblindness, and in fact, it was argued by some that the anti-discrimination principle necessitated a colorblind approach. The most famous example of this comes from Justice Harlan's dissent in *Plessy v. Ferguson.*[14] In stating, "Our constitution is color-blind, and neither knows nor tolerates classes among citizens,"[15] Harlan argued that the anti-discrimination principle required the Constitution and law generally to be colorblind.[16] Because the anti-discrimination principle requires the law to avoid discriminating against individuals on the basis of group or category membership when it comes to affording individuals rights and privileges guaranteed by the law, it also recommends equal treatment (in other words, color or other category blindness) when it comes to affording treatment.

¶11 Just as Justice Harlan's dissent in *Plessy* articulated the relationship between the Equal Protection Clause of the Fourteenth Amendment and the anti-discrimination principle,[17] Section 1983 of the Civil Rights Act of 1871,[18] which followed three years after the Fourteenth Amendment, also contained language aimed at putting in place a colorblind, anti-discrimination principle.[19] Section 1983, despite relying on race-neutral language like the Fourteenth Amendment,[20] has been used mostly to enforce the anti-discrimination principle by providing a basis for claims against alleged perpetrators of discrimination, particularly racial discrimination. Thus, both the Fourteenth Amendment and Section 1983 were policies that, when applied, considered race despite their technically race-neutral construction. In addition, cases leading up to the civil rights era challenging discriminatory practices in housing, education, employment, and other

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[10] *See* ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992) (containing a full discussion of the history of the colorblind ideal in U.S. constitutional history, including its link to the anti-discrimination principle).
[11] John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 FORDHAM L. REV. 423, 428 (2002).
[12] U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to *any person* . . . equal protection of the laws.") (emphasis added).
[13] Hasnas, *supra* note 11, at 428; *see also* KULL, *supra* note 10.
[14] 163 U.S. 537, 552–64 (1896).
[15] *Id.* at 559.
[16] *Id.*
[17] *Id.*
[18] Civil Rights Act of 1871, 17 Stat. 13 (1871).
[19] The language of this section prohibits private parties, including individuals, from depriving other persons of rights, privileges and immunities secured by the Constitution and laws. *Id.*
[20] Both refer only to "persons," which has been construed to protect racial groups, for example, but does not require such a construal given the race-neutral construction.

domains of social life relied on the previously established link between the anti-discrimination principle and colorblindness to argue that colorblindness was required in order to remedy an explicit denial of rights in those areas.

¶12 *Brown v. Board of Education* powerfully articulated the relationship between colorblindness and the anti-discrimination principle.[21] The Court's holding in *Brown* relied strongly on the idea that the way to avoid perpetuating existing racial inequalities and racial segregation was to stop separating people on the basis of race, as doing so was inherently discriminatory.[22] Chief Justice Warren, writing for the Court in *Brown*, further advocated colorblind thinking about the Fourteenth Amendment when he wrote, "The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.'"[23] The civil rights movement and the legislation that accompanied it, namely the Civil Rights Act of 1964,[24] began to erode the relationship between the existing anti-discrimination principle and colorblindness. Up to that point, key legal decisions closely linked the ideals of anti-discrimination and colorblindness.[25] The civil rights movement began to explicitly differentiate between the two on the basis that colorblindness was insufficient to uphold equal protection under the law and to guarantee equal rights and privileges.[26] Instead, civil rights advocates argued that law and policy must take race into account in order to ensure that the implementation of legally-required colorblindness (in other words, anti-discrimination, equal rights and privileges) occurred as required by law.[27]

¶13 The conflict between the values of freedom and egalitarianism without the consideration of racial distinctions on the one hand and the reality of a historical legacy of racial bias and persistent maintenance of racial bias during this time, on the other hand, created the "new American dilemma of race."[28] This "new" dilemma, the conflict between egalitarianism and the realities of racial inequality, also created a conflict between the need to avoid seeing race to appear egalitarian and the need to see race in order to remedy inequality.[29]

B. Contemporary Case Law and Colorblindness

¶14 Contemporary considerations of the tension between egalitarianism and existing racial inequality do not resolve the tension between the anti-discrimination principle and the colorblind ideal that still exists. Three cases in particular represent the current state of the colorblind ideal in case law and the continued relevance of the conflict of ideals and

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[21] 347 U.S. 483 (1954).
[22] *Id.* at 495 ("Separate educational facilities are inherently unequal.").
[23] *Id.* at 489 (*quoting* U.S. CONST. amend. XIV); *see also id.* at 490 ("In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations on the Negro race.").
[24] Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964).
[25] *See, e.g.*, KULL, *supra* note 10.
[26] *Id.* at 183.
[27] *Id.*
[28] James M. Jones, *Psychological Knowledge and the New American Dilemma of Race*, 54 J. SOC. ISSUES 641, 643, 645 (1998).
[29] *Id.*

realities identified by the new American dilemma of race. *Seattle Schools*,[30] *Grutter v. Bollinger*,[31] and *Ricci v. DeStefano*[32] all set out colorblindness as the only acceptable path to achieving racial equality despite the continued debate about colorblind versus race-conscious approaches to diversity.

¶15 The plaintiffs in *Seattle Schools*[33] challenged a program designed to integrate the public school system. Public school officials in Seattle used white and non-white classifications as factors in school assignments. In order to help balance and integrate the most popular schools, the challenged school assignment system gave some students preference for assignment to the most popular schools on the basis of their race (in other words, if a child's race or ethnicity was underrepresented, he or she was more likely to be assigned to the school than a white student).[34] Parents of children denied admission to their preferred school filed suit, claiming that the plan implemented by the district violated the guarantee of equal protection under the Fourteenth Amendment.[35]

¶16 The Supreme Court struck down the district's system for integrating its schools.[36] The crux of the Court's opinion hinges on Chief Justice Roberts's underlying theory that the way to rid society of discrimination is to stop discriminating (in other words, distinguishing in any sense) on the basis of race.[37] Justice Roberts's approach is a colorblind one. He argues that distinctions on the basis of race are inherently bad when present in a society striving for equality.[38] Roberts views race as a forbidden classification because he believes that racial categories prevent people from thinking of others as individuals rather than simply members of their racial groups.[39]

¶17 Furthermore, the majority opines that allowing the Seattle School District to consider race would interfere with the "ultimate goal" of eliminating the use of race and other "irrelevant" social categories in government decision-making.[40] Justice Thomas relies heavily on Justice Harlan's colorblind analysis in *Plessy*[41] to support the court's holding, arguing that (1) the Constitution is colorblind, and that (2) any form of racial preference or classification on the basis of race, even if meant to increase racial diversity, violates the principle of Constitutional colorblindness.[42]

¶18 The *Seattle Schools* opinion cited to *Grutter v. Bollinger*,[43] a case involving a suit by an applicant denied admission to the University of Michigan's law school. That institution's admissions policy required officials to evaluate applicants in light of test scores and GPAs, as well as "soft" variables that contribute to the student body's diversity, broadly defined.[44] In this case, the Supreme Court upheld the university's

[30] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).
[31] 539 U.S. 306 (2003).
[32] 129 S. Ct. 2658 (2009).
[33] 551 U.S. 701 (2007).
[34] *Id.* at 710.
[35] *Id.* at 710–11.
[36] *Id.* at 711.
[37] *Id.* at 748.
[38] *Id.* at 746.
[39] *Id.*
[40] *Id.* at 730.
[41] Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
[42] *Parents Involved in Cmty. Schs.*, 551 U.S. at 748–81 (Thomas, J., concurring).
[43] 539 U.S. 306 (2003).
[44] *Id.* at 315.

admission policies because the law school had taken a holistic approach by using a race "plus" system of consideration[45] that emphasized diversity in consideration of candidates without any particular requirements for numbers or makeup of the diverse student body desired.[46]

¶19 The majority and minority in *Grutter v. Bollinger* articulate reservations about upholding the University of Michigan Law School's admission policy, and those qualms evince their belief in a colorblind ideal.[47] The majority suggested that while race-consciousness is necessary now, as race-neutral policies become sufficient to provide for a representative and diverse student body, race-conscious policies should be immediately terminated.[48] Justice O'Connor wrote that "we expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[49] In *Grutter v. Bollinger*, the Court reveals its optimism that racial discrimination, the wrong which affirmative action was meant to address, is becoming less prevalent.

¶20 The dissenting and concurring opinions in *Grutter* echo the reservations of the majority, although more strongly. For example, the dissenting opinions refer to the practices of Michigan's law school as "discrimination."[50] Relying on the colorblind principle first identified by Justice Harlan in *Plessy*, Justices Thomas and Scalia argue that allowing such discrimination on the basis of race weakens the colorblind ideal underlying both the Declaration of Independence[51] and the Equal Protection Clause[52] as put forth by Justice Harlan.[53]

¶21 Despite the majority allowing, for the time being, the University of Michigan to consider race in the midst of an amorphous and vague admissions policy, the majority and minority opinions converge on the idea that Michigan's policy violated the ideal principle of colorblindness.[54] All of the decisions argue that American society should strive towards achieving the colorblind ideal that would deem this type of policy unnecessary sooner rather than later.[55]

¶22 The most recent case at the Supreme Court level addressing colorblindness and the anti-discrimination principle is *Ricci v. DeStefano*.[56] In *Ricci*, white firefighters from New Haven, Connecticut, sued their employer, the New Haven Fire Department, for discrimination under Title VII of the Civil Rights Act of 1964.[57] The Fire Department decided to throw out a promotion exam because it discriminated against black and Hispanic firefighters. The white firefighters claimed that decision constituted discrimination against those white firefighters who did not receive a promotion after the Department threw out the exam.[58] The white firefighters argued that the Fire Department

[45] *Id.* at 336, 341.
[46] *Id.* at 335–36.
[47] *Id.* at 338.
[48] *Id.* at 342–43.
[49] *Id.* at 343.
[50] *See, e.g.*, *id.* at 387–95 (Kennedy, J., dissenting).
[51] THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) ("[A]ll men are created equal.").
[52] *See* source cited *supra* note 12.
[53] *Grutter*, 539 U.S. at 378 (Thomas & Scalia, JJ., dissenting in part).
[54] *Id.* at 306.
[55] *Id.*
[56] 129 S. Ct. 2658 (2009).
[57] 42 U.S.C. § 2000e (1964).
[58] *Ricci*, 129 S. Ct. 2658.

intentionally discriminated against them on the basis of their race.[59] Specifically, the white firefighters asserted that but for their race, the exam would not have been thrown out and they would not have been denied promotions.[60] The Fire Department, for its part, stated that it threw out the exam to avoid a Title VII discrimination claim by the black firefighters under a theory of disparate impact.[61]

¶23 Justice Kennedy, delivering the Court's opinion, opined that the fire department's actions were impermissible, unless it could show "a strong basis"[62] that a disparate impact claim was possible and thus needed to be avoided.[63] Kennedy's opinion pitted disparate treatment claims against disparate impact claims,[64] suggesting that employers must be aware of racial disparities in employment outcomes (for example, promotions and hiring), but employers cannot address those disparities unless it is relatively certain that they will be held liable for them.[65] The Court explicitly said, "the City was not entitled to disregard the tests based solely on the racial disparity in the results."[66]

¶24 The decision in *Ricci* represents a reemergence of the strong relationship between the colorblind ideal and the anti-discrimination principle observed prior to the civil rights era. This shift back toward a strong association between these two principles endangers contemporary approaches to the anti-discrimination principle as it challenges the ability to use race in order to remedy racial inequalities.[67] Furthermore, the majority in *Ricci* created a new standard ("strong basis")[68] for addressing racial disparities in the workplace, but not without creating fear of possible legal liability from either action or inaction. By pushing a colorblind approach, the new standard confuses those making a good faith effort to avoid discrimination by prohibiting them from preventing discrimination against one group out of fear of discriminating against another.

C. Contemporary Legal Scholars and Colorblindness

¶25 Despite contemporary case law's advocacy for the colorblind ideal, legal scholars continue to debate whether colorblindness or race-consciousness best addresses racial inequalities. The primary argument of those who advocate for race-consciousness is the same one that was prominent during the civil rights movement. Namely, they argue that race-consciousness is necessary to achieve equal treatment (in other words, colorblindness in practice) in key areas of ongoing inequality. However, legal scholars in favor of the colorblind ideal argue that it is race-consciousness itself that leads to continued racial inequalities.

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[59] *Id.*
[60] *Id.*
[61] *Id*. at 2664.
[62] *Id.* at 2662.
[63] *Id*.
[64] Disparate treatment claims are brought on the basis of explicit unequal treatment between different groups, whereas disparate impact claims are brought on the basis of differential outcomes between different groups resulting from a facially-neutral policy or procedure. *See* Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e (1964); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
[65] *Ricci*, 129 S. Ct. at 2662.
[66] *Id.*
[67] *Id.*
[68] *Id*. at 2662.

¶26 One argument made for race-consciousness, as suggested above, is that race-conscious law is necessary to monitor our commitment to colorblindness with respect to equal access to resources like housing, education, and employment.[69] This argument asserts that legal mechanisms can only prevent discrimination on the basis of race in these regulated domains and address institutionalized inequalities resulting from historical discrimination if it is possible to monitor race and hold liable those who discriminate on the basis of race.[70] For example, Professors Alexander Aleinikoff and Cheryl Harris argue that instituting a colorblind approach permits American society to ignore or excuse the existing racial inequality in part because monitoring would be disallowed in a colorblind system.[71] In other words, if the law prohibits classification on the basis of race, which presumably could prohibit recording any information about race (for example, census counts of racial group membership), it would be impossible to prevent ongoing and future discrimination even in those domains where race predicts disparate outcomes because no action would be possible without some monitoring for ongoing discrimination.

¶27 Another argument for race-consciousness is that it avoids the problem of denial of discrimination. In other words, it prevents complete denial of the history and legacy of discrimination and its effects on those minority groups who have long suffered from its detrimental effects. For example, Professor John Duncan argues that it is the denial of this legacy that, in part, makes a colorblind approach so unappealing to minority groups, as it represents a denial of an identity that is influenced by a history of discrimination.[72]

¶28 Finally, those in favor of race-consciousness argue that colorblindness is a strategy by which the majority can protect and maintain its status by maintaining the discriminatory status quo in its favor.[73] Majority group members may be motivated, in part, to advocate for a colorblind approach because it allows them to avoid acknowledging or remedying inequalities while maintaining their relative advantages. For example, Professor Reva Siegel argues that colorblindness allows individuals, particularly those in the majority, to rationalize the status quo, even one with observable inequalities.[74]

D. Where Does the Law Stand?

¶29 While legal academics continue to debate amongst themselves about the virtues of the colorblind ideal, the Supreme Court has moved firmly in the direction of advocating for a resurgence of the colorblind ideal as the only means to truly eradicating racial discrimination and disparities.[75] The Supreme Court may be motivated both by the desire to enforce the anti-discrimination principle and by a desire to view the admittedly great

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[69] *See, e.g.*, Cheryl I. Harris, *Whitewashing Race: Scapegoating Culture*, 94 CAL L. REV. 907 (2006); T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991).
[70] *See, e.g.*, sources cited *supra* note 69.
[71] *Id.*
[72] John C. Duncan, Jr., *The American "Legal" Dilemma: Colorblind I/Colorblind II—The Rules Have Changed Again: A Semantic Permutation*, 7 VA. J. SOC. POL'Y & L. 315 (2000).
[73] *See, e.g.*, Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77 (2000).
[74] *Id.*
[75] Ricci v. DeStefano, 129 S. Ct. 2658 (2009); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Grutter v. Bollinger, 539 U.S. 306 (2003).

strides already made toward racial equality as sufficient to begin dismantling the very system of law that made those strides possible. The Court even goes so far as to claim that American society's progress towards racial equality is on track now to achieve further equality without intervention by the courts in the form of race-conscious law and policy.

¶30 Unfortunately, the Court has not fully considered whether colorblindness actually leads to the racial equality it is intended to produce and support. A review of the empirical social psychological literature suggests that the story of colorblindness is more complicated than that presented by the optimistic, and possibly overly idealistic, judges who favor this approach.

III. THE PSYCHOLOGY OF CATEGORIES: HOW AND WHY WE SEE RACE IN THE FIRST PLACE

¶31 To put it simply, people are not colorblind. Basic cognitive and social psychological research demonstrates that people use many types of social categories, including race, and the use of categories is adaptive and functional when dealing with the complex, social world in which we all live.[76] In other words, it is necessary for people to use relatively simple categories to aid efficient navigation of life's complexities.

¶32 In his research focused on understanding the creation and hierarchies of categories generally, Professor Gregory Jones has studied the distinction between basic and non-basic categories, and found that basic categories, in particular, aid in making cognitive processing easier.[77] Basic categories are those that are sufficiently inclusive (in other words, they do not include or exclude too many potential category members) and those that have multiple common attributes that make sorting people (or objects) into those categories possible by comparing the number of shared attributes between the group and the potential category member.[78] In addition, basic social categories, like race and gender, are often automatically activated upon encountering social targets (in other words, other people) and allow for easier processing of the social world.[79]

¶33 This research suggests that categories are not inherently bad as has been argued by Supreme Court Justices like Roberts and Thomas. Rather, this research suggests that categories are a necessary part of human cognitive processing of the world around them. It is certainly the case, as suggested by Chief Justice Roberts,[80] that people cannot discriminate against people belonging to different groups if there is no recognition of different groups, but it is not the recognition of groups in and of itself that leads to discrimination. For example, positive outcomes for intergroup contact have been observed where approaches to diversity that recognize and appreciate differences are utilized. This research suggests that even when the groups interacting are historically socially-stratified, such as racial groups, it is not inherently problematic to notice or even

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[76] *See, e.g.*, C. Neil Macrae & Galen V. Bodenhausen, *Social Cognition: Thinking Categorically About Others*, 51 ANN. REV. PSYCHOL. 93 (2000).
[77] Gregory V. Jones, *Identifying Basic Categories*, 94 PSYCHOL. BULL. 423, 423 (1983).
[78] James E. Corter & Mark A. Gluck, *Explaining Basic Categories: Feature Predictability and Information*, 111 PSYCHOL. BULL. 291, 301 (1992).
[79] C. Neil Macrae & Galen V. Bodenhausen, *Social Cognition: Categorical Person Perception*, 92 BRITISH J. PSYCHOL. 239 (2001).
[80] *Parents Involved in Cmty. Schs.*, 551 U.S. at 748 ("The way to stop discrimination on the basis of race is to stop discrimination on the basis of race.").

use race as information in social interactions.[81] In addition, children (even babies) have been shown to notice and sort people into categories on the basis of skin color long before they are aware of the stigma that may be attached to particular group memberships.[82]

¶34 In addition to using categories adaptively to navigate our social worlds, it is likely nearly impossible to avoid noticing basic social categories like race and gender, regardless of whether it is adaptive or not. That is, even if a social category is not relevant for a particular interaction, the categories are still processed by social perceivers. Further, visible social categories such as race and gender are particularly likely to be noticed quickly and automatically,[83] and this makes such recognition relatively immune to disruption even with the good intentions that may accompany a colorblind approach.[84] Research at the neurological level shows that race is cognitively processed the fastest of all categories—even more quickly than gender—occurring in mere fractions of a second.[85] Again, it is important to remember that this basic process, particularly when it occurs automatically and quickly, is not the underlying issue, as suggested by proponents of colorblindness. Rather, racial categorization serves as a starting point that may lead to prejudice and discrimination, but this path to prejudice and discrimination is not automatic.

¶35 In addition to the psychological realities of racial salience, race is just as salient a social and cultural phenomenon. Much of U.S. history is characterized by stratification on the basis of race and conflicts over racial and ethnic identity, group status, and access to resources. Thus, race continues to predict key social outcomes in areas such as housing, education and employment where government intervention has long sought to remedy this stratification.[86] Some groups tend to fare better than others, and the maintenance of racial inequalities leads to the continued salience of race. As a result, minority group members continue to feel the often negative impact of their racial backgrounds on their identities, life experiences, and outcomes, while majority group members continue to receive privileges on the basis of theirs.[87]

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[81] *See, e.g.,* Evan P. Apfelbaum, Samuel R. Sommers & Michael I. Norton, *Seeing Race and Seeming Racist? Evaluating Colorblindness in Social Interaction*, 95 J. PERSONALITY & SOC. PSYCHOL. 918 (2008).

[82] *See, e.g.,* D. J. Kelly, P. C. Quinn, A. M. Slater, K. Lee, L. Ge & O. Pascalis, *The Other-Race Effect Develops During Infancy: Evidence of Perceptual Narrowing*, 18 PSYCHOL. SCI. 1084 (2007); MARGUERITE A. WRIGHT, I'M CHOCOLATE, YOU'RE VANILLA: RAISING HEALTHY BLACK AND BIRACIAL CHILDREN IN A RACE-CONSCIOUS WORLD (1998).

[83] Tiffany A. Ito & Geoffrey R. Urland, *Race and Gender on the Brain: Electrocortical Measures of Attention to the Race and Gender of Multiply Categorizable Individuals*, 85 J. PERSONALITY & SOC. PSYCHOL. 616 (2003).

[84] *See, e.g., id.* (demonstrating that it takes mere milliseconds for the brain to register the category memberships of social targets along dimensions of race, which are unlikely to be disrupted by motivational intentions).

[85] *Id.*

[86] *Sobering Statistics*, *supra* note 8.

[87] *See, e.g.,* Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM, July/August1989, http://www.libary.wisc.edu/EDVRC/docs/public/pdfs/LIReading/InvisibleKnapsack.pdf.

IV. THE PSYCHOLOGY OF COLORBLINDNESS

¶36 For several decades, social institutions, such as the educational system and legal and political domains, have been interested in learning to build tolerance across group lines and eradicate prejudice and discrimination directed at minority groups.[88] While the interest is often construed broadly in terms of how to deal with diversity of any kind, in the United States, concerns about diversity are rooted in a history of racial strife characterized by institutionalized inequalities that have only been erased at blatant levels in the last couple decades. Many years at this point have been dedicated to the development and testing of diversity programming aimed at fostering positive intergroup relations and decreasing intergroup bias.[89] Only recently has the field of psychology taken up the task of considering the psychological implications of these diversity measures. Within the last ten to fifteen years, psychologists have become interested in examining the psychological effects that different approaches to diversity have on subsequent intergroup contact.[90]

¶37 The two major approaches to dealing with diversity have been colorblindness and multiculturalism, as discussed throughout this Comment. The research comparing these two approaches has largely considered how much each approach reduces expressions of prejudice and stereotyping, given that this is a primary aim of diversity ideology generally.[91] More recent research, however, has considered the distinction between explicit and implicit forms of bias,[92] as well as the effects these ideologies have on actual interracial interactions from the perspective of participants (both majority and minority group members).[93] A review of this literature will highlight the differences between colorblindness and multiculturalism not only in terms of the tenets of the two approaches, but also in terms of their collective effects on intergroup contact. This review should inform the debate about colorblindness and race-consciousness in the law by supplementing the intuitions of legal scholars with empirical data showing the actual efficacy of these two approaches in eradicating racial inequality and improving race relations.

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[88] *See, e.g.*, J. W. Schofield, *The Colorblind Perspective in School: Causes and Consequences*, *in* MULTICULTURAL EDUCATION: ISSUES AND PERSPECTIVES (J. A. Banks & C. A. McGee Banks eds., 2007); D. W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CAL. L. REV. 1139 (2008); J. M. Jones, *Psychological Knowledge and the New America Dilemma of Race*, 54 J. SOCIAL ISSUES 641 (1998).

[89] *See, e.g.*, STEVEN BREWSTER, MOLLY BUCKLEY, PHILLIP COX & LOUISE GRIEP, PLAN: NET LIMITED, DIVERSITY EDUCATION RESEARCH PROJECT: LITERATURE REVIEW (2002), http://culture.alberta.ca/humanrights/publications/docs/LiteratureReview.pdf.

[90] *See* studies cited *infra* Part IV.A.

[91] *See, e.g.*, Christopher Wolsko, Bernadette Park, Charles M. Judd & Bernd Wittenbrink, *Framing Interethnic Ideology: Effects of Multicultural and Color-Blind Perspectives on Judgments of Groups and Individuals*, 78 J. PERS. & SOC. PSYCHOL. 635 (2000), *available at* http://faculty.chicagobooth.edu/bernd.wittenbrink/research/pdf/wpjw00.pdf.

[92] Implicit bias refers to bias resulting from automatic cognitive processes and often occurs outside of awareness. Explicit bias refers to bias that is conscious and explicitly stated by the holder of that bias. *See, e.g.*, Jennifer A. Richeson & Richard J. Nussbaum, *The Impact of Multiculturalism Versus Color-Blindness on Racial Bias*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 417 (2004).

[93] *See, e.g.*, Michael I. Norton, Samuel R. Sommers, Evan P. Apfelbaum, Natassia Pura & Dan Ariely, *Colorblindness and Interracial Interaction: Playing the Political Correctness Game*, 17 PSYCHOL. SCI. 949 (2006).

A. The Ease and Efficacy of Colorblind Versus Multicultural (Race-Conscious) Approaches to Diversity

¶38 Many laypersons and courts consider colorblindness a comparatively easy strategy to adopt because it purportedly only requires that one not "see" race.[94] In addition, one can simply claim to not see race and then not mention race, and the illusion of colorblindness is created. The introductory quote by Justice Roberts is illustrative. Roberts suggests that the best way to avoid negative intergroup divisions is to avoid intergroup divisions in the first place.[95]

¶39 On the other hand, multicultural approaches require greater effort. They require acknowledging both similarities and differences, while simultaneously avoiding the negative effects that may stem from noticing differences between groups.[96] While colorblindness is an intuitively easier strategy for many people to conceptualize and utilize at a superficial level,[97] it is in fact far more difficult to put into practice than people tend to realize. People are not, after all, colorblind and wishing that were the case does not make it so.[98] With this premise in mind, research has investigated just how colorblind people actually are when encountering intergroup contact situations.

¶40 Professor Christopher Wolsko and his colleagues conducted one of the first psychological experiments comparing colorblind and multicultural ideologies and their effects on subsequent judgments of same race and other race groups and individuals.[99] They first randomly assigned participants in the study to a colorblind or multicultural mindset, which was induced by having them read a short article advocating for either a colorblind approach that favors seeing all people as individuals or a multicultural approach that favors acknowledging and appreciating racial group differences. They then wrote five points in favor of adopting a colorblind versus multicultural approach depending on the condition they were assigned to.[100] Wolsko found that those in both colorblind and multicultural conditions showed less ingroup favoritism[101] in the form of less positive ratings for the participant's own group compared to a control group that did not adopt either a colorblind or multicultural mindset.[102] There were differences between those in the colorblind and multicultural conditions though, as the colorblind group expressed lower levels of stereotypicality[103] of blacks. Simply put, those in the colorblind condition associated blacks less strongly with typical black stereotypes,

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[94] *Id.* at 649 (explaining that colorblindness is a means to demonstrating that one is not a racist by adopting that perspective that "If I do not notice race, then I cannot be racist").

[95] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discrimination on the basis of race.").

[96] Wolsko et al., *supra* note 91 (demonstrating that multiculturalism can have the ironic effect of increasing stereotyping).

[97] Colorblindness only requires that people avoid noticing and mentioning race as opposed to noticing and appreciating the similarities and differences between racial groups, as is required by multiculturalism.

[98] In fact, people automatically see and sort others into social categories, particularly race but also gender and age groups, within milliseconds. *See* Ito & Urland, *supra* note 83.

[99] Wolsko et al., *supra* note 91.

[100] *Id.* at 638.

[101] Marilyn B. Brewer, *Ingroup Bias in the Minimal Intergroup Situation: A Cognitive—Motivational Analysis*, 86 PSYCHOL. BULLETIN 207 (1979) (defining in-group favoritism as "attitudinal and perceptual biases in favor of members of one's own group over members of other groups").

[102] Wolsko et al., *supra* note 91, at 639 tbl.2.

[103] Stereotypicality is the tendency to perceive individuals as prototypical of a general stereotype.

whereas those in the multicultural group expressed higher levels of stereotypicality of blacks on both positive and negative stereotypes.[104] That is, those participants in the multicultural condition perceived black targets to be more prototypical of a stereotypical black person (for example, less intelligent and more athletic) than those participants in the colorblind condition.

¶41 In two additional studies, Wolsko and his colleagues found additional effects such that those in a colorblind mindset thought that the goals of blacks and whites were more similar than those in the multicultural mindset.[105] Those in a colorblind mindset ignored racial category membership when forming impressions of target people, whereas those in the multicultural mindset did not ignore this information.[106] It might seem fair to conclude that the individuals in the colorblind mindset were performing better with regard to the task of appearing tolerant and not letting race influence their judgments, but additional findings from this same research suggest that the use of racial category information by those in the multicultural condition made them more accurate in their judgments, in part because race was at times useful information, rather than simply evidence of bias.[107]

¶42 Researchers conducted another study using children's performance in a "guess-who" game that requires the use of visual characteristics to narrow down a pool of potential matches to one.[108] The game was set up as either race-neutral or race-relevant, such that in one version (the race-neutral version), the race of the people in the pool was not helpful in differentiating between individuals, and in the other version (the race-relevant version), it was useful.[109] The study compared the performance of younger and older children to demonstrate that the older children, being more likely to have internalized the colorblind norms of society, would perform worse in the race-relevant version of the game because they would be reluctant to use relevant race information during the game. In fact, Professor Evan Apfelbaum and his colleagues did find that older students took longer to play the game (i.e., they had to ask more questions to arrive at the correct target) than younger students, thereby performing worse when racial information was relevant.[110] Taken together, the research of Professors Wolsko and Apfelbaum suggests that accuracy and performance in a social task or interaction may be impaired by a colorblind approach that inhibits the use of race even when it is relevant information in a social interaction.

¶43 Research continues to tease apart the relative advantages and disadvantages of colorblindness and multiculturalism for interracial interactions. For example, Professor Apfelbaum and his colleagues have argued that people use colorblindness strategically to avoid talking about race when they think it may make them appear racist, such as in interracial interactions.[111] In three studies, they examined the efficacy of this "strategic

[104] Wolsko et al., *supra* note 91, at 639 tbl.1.
[105] *Id.* at 644 tbl.4.
[106] *Id.* at 647 tbl.6.
[107] *Id.* at 643, 648.
[108] Evan P. Apfelbaum, Kristin Pauker, Nalini Ambady, Samuel R. Sommers & Michal I. Norton, *Learning (Not) to Talk About Race: When Older Children Underperform in Social Categorization*, 44 DEVELOPMENTAL PSYCHOL. 1513 (2008).
[109] *Id.* at 1514 fig.1.
[110] *Id.* at 1515 fig.2.
[111] Apfelbaum et al., *supra* note 81.

colorblindness"[112] for fostering racial tolerance. In their first study, white participants who were most concerned about appearing prejudiced were also the most likely to adopt a colorblind approach, yet this had the ironic effect of making these same individuals appear less friendly to the black interaction partners they completed a "guess-who" game similar to the one described above with,[113] increasing the chance that their black interaction partners might think their unfriendly behavior was due to bias.[114]

¶44 A second study found that adopting a colorblind approach and avoiding the topic of race required cognitive resources. When using this strategy in an interracial interaction, it depleted the individuals of valuable cognitive resources necessary for exhibiting positive nonverbal behaviors.[115] This made them less able to monitor their actual behaviors to ensure a friendly interaction.[116] Whites who were most likely to adopt a colorblind approach also believed that those who exhibit colorblindness are less prejudiced than those who acknowledge race for any reason, as demonstrated in a third study.[117] Unfortunately, this stood in sharp contrast to the perceptions of the black interaction partners of these individuals. While those who presented themselves as colorblind believed they appeared the most non-prejudiced (compared to those who acknowledged race), their interaction partners interpreted their attitude as evidence of racial bias rather than evidence of non-bias.[118]

¶45 In a final study, a qualifying condition of the backlash effect (in other words, the effect that those who thought they were the most non-biased were perceived as the most biased) was found.[119] In situations where race was relatively less relevant or completely irrelevant to the interaction, colorblindness corresponded to perceptions of less bias. That is, when race was irrelevant, individuals taking a colorblind approach in the interaction were perceived as the least biased, in accordance with their views of themselves as non-biased. This finding highlights that colorblindness is not entirely bad and can be effective under particular conditions.[120] As was the case in this study, when it did not make sense to bring up the topic of race during the interaction, those who avoided doing so (by adopting a colorblind approach) were perceived as less biased.[121] Unfortunately, given the salience of race, there are many times when race is, in fact, relevant. Ignoring the relevance of race at those times, then, is clearly detrimental.

¶46 The ironic effects of colorblindness in interracial interactions have also been demonstrated by Professor Jennifer Richeson and her colleagues. They, too, have demonstrated that the desire to appear unprejudiced, which presumably includes appearing colorblind for many people, ironically negatively impacts interracial

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[112] *Id.* at 918.
[113] *Id.* at 922.
[114] *Id.* at 926.
[115] *Id.* at 924.
[116] *Id.* at 925.
[117] *Id.* at 927 fig.3.
[118] *Id.*
[119] *Id.*
[120] *Id.* at 929 fig.4. Professor Correll and his colleagues also suggest that whether a situation is characterized by high or low conflict may also make colorblindness a more or less efficacious strategy for dealing with intergroup relations in these circumstances. Joshua Correll, Bernadette Park & J. Allegra Smith, *Colorblind and Multicultural Prejudice Reduction Strategies in High-Conflict Situation*, 11 GROUP PROCESSES & INTERGROUP RELS. 471 (2008).
[121] Apfelbaum et al., *supra* note 81, at 928.

interactions by leading to more negative reactions from other race interaction partners, as well as increased perceptions of bias for the white participants who are the most motivated to appear non-prejudiced.[122] In a set of studies pitting a multicultural approach against a colorblind approach, those who adopted a colorblind approach to interracial interactions also exhibited higher levels of racial bias on both explicit (self-reported, deliberative responses) and implicit (automatic responses) measures of prejudice.[123] These results are directly counter to the goals of colorblindness espoused by many who adopt the approach as a means to decrease bias.

¶47 Professor Jacquie Vorauer and her colleagues have examined the relationship between multicultural and colorblind approaches and their effects on interracial contact from the perspective of both interaction partners as well.[124] In two studies, Professor Vorauer showed that a multicultural approach, which she argues caused people in interactions to focus more on their interaction partners, led to more positive interracial interactions than a colorblind approach, which led people to be self-focused in order to monitor their thoughts and behavior in the interaction.[125] Thus, again, research suggests that colorblindness in an interracial interaction is cognitively taxing and possibly prevents positive interracial interactions from occurring.

¶48 However, Professors Nicole Shelton and Jennifer Richeson demonstrated a possible ironic effect in favor of colorblindness when they demonstrated that high-bias whites interacting with black partners were better liked than low-bias whites.[126] They argue that this appears to occur because high-bias whites try harder to overcome their bias in interactions with people of other races (with strategies including behaving in a colorblind manner) in order to avoid appearing prejudiced. Low-bias whites, however, may make less of an effort because they believe it is apparent to their black interaction partner that they are low in bias.[127] Taken together, these studies suggest that colorblindness may be an effective strategy for some under certain conditions, but they largely highlight that a colorblind approach can be problematic in the very situations it is supposed to be most useful for.

¶49 Psychologists, in light of the research discussed above, have also been interested in the underlying variables leading to the often negative effects of colorblindness. One such variable underlying the negative effects observed in interracial interactions may be a within-person divergence between what an individual explicitly communicates about their racial bias and the implicit bias operating outside of one's conscious control. Colorblindness may lead one to express less bias explicitly but may actually exacerbate bias implicitly. A study of bias at these two levels (explicit and implicit) found that individuals in a colorblind mindset in a high-intergroup conflict situation (in other words, a situation involving intergroup competition for scarce resources) expressed less bias

[122] *See* Sophie Trawalter, Jennifer A. Richeson & J. Nicole Shelton, *Predicting Behavior During Interracial Interactions: A Stress and Coping Approach*, 13 PERS. & SOC. PSYCHOL. REV. 243 (2009); J. Nicole Shelton, Jennifer A. Richeson, Jessica Salvatore & Sophie Trawalter, *Ironic Effects of Racial Bias During Interracial Interactions*, 16 PSYCHOL. SCI. 397 (2005); Richeson & Nussbaum, *supra* note 92.
[123] Richeson & Nussbaum, *supra* note 92.
[124] Jacquie D. Vorauer, Annette Gagnon & Stacey J. Sasaki, *Salient Intergroup Ideology and Intergroup Interaction*, 20 PSYCHOL. SCI. 838 (2009).
[125] *Id.*
[126] Shelton et al., *supra* note 122.
[127] *Id*. at 5.

explicitly (as measured by questions gauging explicit self-reported feelings toward another group), but exhibited greater bias at an implicit level (as measured by a task that captures automatic responses).[128] Implicit bias, regardless of explicit, self-reported bias, can affect subsequent behaviors and judgments in negative ways, producing displays of prejudice and leading to discrimination much in the way it is assumed that explicit prejudice does.[129]

¶50 In addition, they found that the same colorblind participants who expressed less explicit bias during the high-conflict situation experienced a rebound effect such that twenty minutes later they expressed greater explicit bias than their baseline.[130] For those participants in a multicultural mindset, their level of bias of both kinds (explicit, self-report and automatic, implicit associations) increased in the high-conflict situation and decreased slightly twenty minutes after considering the situation, demonstrating a correspondence between the two levels of bias, as well as an absence of the ironic effect that led colorblind individuals to express greater bias after the fact.[131]

¶51 As some of the research discussed above has suggested, it is important to consider the effect that various approaches to diversity have on those they are meant to protect and benefit. The interracial interaction studies discussed above suggest that the perceptions of whites and blacks in interracial interactions can diverge significantly. Whites often leave interactions feeling good about their ability to behave in a non-biased way and the positivity of their other race partner's perceptions of them, whereas blacks participating in the same interactions see many of the same behaviors as evidence of racial bias and find their other race partners unfriendly.

B. Preferences for Diversity Ideology

¶52 There are other ways in which reactions to colorblindness and multiculturalism diverge. For example, majority and minority groups tend to differ in terms of their overall preferences for one approach or the other. Presumably this is because of different motivations for adopting a particular approach and different life experiences that lead one to value different aspects of the two approaches.[132] In addition, majority and minority group status, as well as preferences for colorblindness versus multiculturalism, may also lead to differences in perceptions of issues around race and equality, which creates problems when working toward resolving the racial inequalities that still exist.[133]

¶53 Using a sample of participants in a diversity workshop (a situation with a likely selection effect such that those in the diversity workshop were already more likely to care about diversity issues and possibly were likely to exhibit less intergroup bias), Professor

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[128] *Id.* at 487.

[129] *See, e.g.*, Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006).

[130] Correll et al., *supra* note 120, at 487; *see also* C. Neil Macrae, Galen V. Bodenhausen, A. B. Milne & J. Jetten, *Out of Mind but Back in Sight: Stereotypes on the Rebound*, 67 J. PERSONALITY & SOC. PSYCHOL. 808 (1994) (demonstrating that suppressing stereotypes or biased thoughts that come to mind leads them to re-emerge stronger than before they were suppressed, leading to even more bias).

[131] Correll et al., *supra* note 120, at 487.

[132] *See, e.g.*, Ryan et al., *supra* note 5; Andrew R. Todd & Adam Galinsky, The Intimate Connection Between Self-Regulatory and Ideological Approaches to Managing Diversity (Nov. 9, 2009) (unpublished manuscript) (on file with author).

[133] Todd & Galinsky, *supra* note 132.

Carey Ryan and her colleagues investigated relative preferences for colorblind versus multicultural approaches between white majority group members and black minority group members.[134] In the first study, Professor Ryan found that white participants were more likely to endorse a colorblind ideology than black participants, and that black participants were more likely to endorse a multicultural ideology than a colorblind ideology.[135] Further, they found that whereas whites who endorsed a colorblind ideology perceived more similarities between blacks and whites, blacks who endorsed a multicultural ideology showed a similar effect, suggesting that the different approaches produce similar results for different groups of people.[136]

¶54 In a second study, black participants thought that a multicultural approach would lead to more positive interactions, whereas white participants thought that a colorblind approach would lead to more positive intergroup interactions.[137] Professor Ryan argues that colorblindness is preferred by majority groups because it is easy and justifies the status quo,[138] making it unnecessary to deal with the continuing presence of racial prejudice and inequality.[139] This same argument has been made by proponents of race-consciousness in the law.[140]

¶55 Similar group preferences for colorblindness and multiculturalism exist in the business context. Professor Flannery Stevens and her colleagues argue that minority group members prefer workplaces and diversity ideologies in the workplace that are multicultural, allowing them to utilize and express the different perspectives that may result from their experience as members of non-majority social groups.[141] Furthermore, researchers have also demonstrated that the psychological engagement of minority group members in the workplace is greater in a setting where dominant group members prefer multiculturalism to colorblindness.[142] On the other hand, majority group members dislike multicultural approaches, at least those that seem to exclude majority group culture, because they feel overlooked as unimportant contributors to diversity.[143] Instead, as suggested by the research above, whites prefer a colorblind approach that de-emphasizes social group membership.[144]

C. Perpetuating Prejudice

¶56 If colorblindness can be seen as a means to avoid addressing issues of race, then it is also informative as to whether adopting a colorblind or multicultural mindset is likely to affect one's perceptions of discrimination and bias. While it has been argued that the use of racial categories must be avoided in order to avoid discriminating on the basis of

[134] Ryan et al., *supra* note 5.
[135] *Id.* at 623 tbl.2.
[136] *Id.* at 624 fig.1.
[137] *Id.* at 631.
[138] *Id.* at 632.
[139] *Id.* at 619.
[140] *See, e.g.*, Siegel, *supra* note 73.
[141] Stevens et al., *supra* note 6.
[142] Victoria C. Plaut, Kecia M. Thomas & Matt J. Goren, *Is Multiculturalism or Color Blindness Better for Minorities?*, 20 PSYCHOL. SCI. 444, 445 (2009).
[143] Stevens et al., *supra* note 6, at 121.
[144] *Id.* at 120.

race, it is also possible that avoiding racial categories could perpetuate continuing prejudice and discrimination.

¶57 Colorblindness has been shown to lead children to recount situations involving racial bias in ways that downplay the relevance or seriousness of race and racial bias, even in situations where its relevance is blatant.[145] In their study, they put children in either a colorblind or multicultural (or "value-diversity")[146] mindset by exposing them to messages advocating for one approach or the other.[147] They then exposed them to interactions between students involving no-bias, ambiguous bias, or blatant bias. In the blatant bias situation, the children learned that a white child engaged in an unprovoked physical assault of a black child based on the stereotype that blacks are aggressive. Of those in the multicultural mindset, 77 percent of them perceived bias in the blatant bias scenario, whereas only 50 percent of those in the colorblind mindset did.[148]

¶58 In addition, when students were asked to explain what happened in these scenarios, those in a colorblind mindset were less likely to mention race or to describe the incident as serious enough to warrant teacher intervention, suggesting a downplaying (intentional or not) of the blatant racial bias aspect contained in the scenario.[149]

¶59 Professors Andrew Todd and Adam Galinsky conducted related research with adults investigating the effect that colorblind versus multicultural ideologies have on perceptions of racial progress and prevalence of ongoing discrimination.[150] In this research, Professor Todd demonstrated that white study participants who took the perspective of a Latino person during the course of the experiment, thus adopting a perspective that made racial differences more salient (including differences in likelihood of experiencing prejudice and discrimination), increased the white participants' perceptions of racial inequality and increased their support for social policies directed at redressing historical and contemporary racial biases.[151] Further, in another study, Professor Todd found that white study participants who were primed with a multicultural approach to diversity compared to a colorblind approach were also more likely to report greater perceptions of racial inequality and support for social policies directed at redressing historical and contemporary racial inequalities, such as affirmative action.[152]

D. When Colorblindness is Beneficial

¶60 As alluded to above, it is unfair to say that adopting a colorblind approach is completely ineffective as a strategy for dealing with diversity issues. For example, where race is irrelevant, taking a colorblind approach and avoiding mention of race has positive effects for both parties in the interaction.[153] In addition, in high conflict situations (those involving high levels of potential intergroup conflict or competition), it may be beneficial

[145] Evan P. Apfelbaum, Kristin Pauker, Samuel R. Sommers & Nalini Ambady, *In Blind Pursuit of Racial Equality?*, 21 PSYCHOL. SCI. 1587 (2010).
[146] *Id.* at 1588.
[147] *Id.*
[148] *Id.* at 1589–90.
[149] *Id.* at 1590.
[150] Todd & Galinsky, *supra* note 132.
[151] *Id.* at 16–17.
[152] *Id.* at 18.
[153] Apfelbaum et al., *supra* note 81.

to take a colorblind approach because it leads to decreased expressions of explicit bias in the midst of the high conflict intergroup situation, which may serve to smooth over the situation in the moment.[154]

¶61 In general, however, research suggests that under many circumstances colorblindness is detrimental to everyone involved. For majority group members or others adopting this approach, it can lead to increased likelihood of being seen as biased in interracial interactions,[155] as well as decreases in efficiency, performance,[156] and awareness of social realities of inequality.[157] For minority groups, the effects are equally negative, as individuals in these groups may face unfriendly interactions with people perceived to be biased against them,[158] denial of social realities of inequality that affect their lives,[159] denial of social identities that are important to them[160] and their well-being,[161] and even increased experiences of bias.[162]

¶62 Given this, the best approach to dealing with diversity in society as a whole and the domain of law specifically is unlikely to be colorblindness. True colorblindness does not exist and it may not even be desirable if it were to exist.[163]

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[154] *See* Correll et al., *supra* note 120, at 488.

[155] *See, e.g.*, Apfelbaum et al., *supra* note 81 (showing that those who failed to mention race when race was relevant, thus adopting a colorblind approach, were also more likely to exhibit unfriendly nonverbal behaviors that were noticed and perceived negatively by their interaction partners); Richeson & Nussbaum, *supra* note 92.

[156] *See, e.g.*, Apfelbaum et al., *supra* note 108, at 1515–16 (showing that children who played a matching game where race was a useful identifying characteristic but failed to use race took significantly longer to play the game than those who mentioned race); Apfelbaum et al., *supra* note 81 (showing that adults who completed a photo identification task where race was a useful identifying characteristic but failed to use race suffered cognitive depletion after completing the task, and this depletion subsequently impaired their ability to interact positively with an other race partner).

[157] *See, e.g.*, Apfelbaum et al., *supra* note 145 (showing that children describe incidents of blatant racial bias in ways that decrease the likelihood of teacher intervention and downplay the severity when in a colorblind mindset compared to a mindset that values diversity); Stevens, *supra* note 6, at 120 (explaining that a colorblind perspective can lead to a tendency to ignore evidence of discrimination in the form of differential outcomes for majority versus minority group); Todd & Galinsky, *supra* note 132 (showing that people report perceiving that discrimination is less of problem and that progress toward racial equality has been greater when in a colorblind mindset compared to those in a multicultural mindset).

[158] *See, e.g.*, Vorauer et al., *supra* note 124 (showing that Aboriginal people interacting with whites with a colorblind approach regarded the interactions more negatively than those interacting with whites with a multicultural approach); Apfelbaum et al., *supra* note 81 (showing that black people interacting with whites with a colorblind approach perceived their interaction partners as less friendly and regarded them and the interaction more negatively).

[159] *See, e.g.*, Todd & Galinsky, *supra* note 132 (describing the downplaying of social inequality by majority group members adopting a colorblind approach).

[160] *See, e.g.*, Robert M. Sellers, Cleopatra H. Caldwell, Karen H. Schmeelk-Cone & Marc A. Zimmerman, *Racial Identity, Racial Discrimination, Perceived Stress, and Psychological Distress among African American Young Adults*, 43 J. HEALTH & SOC. BEHAV. 302 (2003) (demonstrating that the centrality of racial identity for minorities is both a stressor and buffer against stress).

[161] *Id.*

[162] *See, e.g.*, Richeson & Nussbaum, *supra* note 92.

[163] *See* Jones, *supra* note 28, at 658.

V. CAN THE PURSUIT OF RACIAL EQUALITY BE COLORBLIND?

¶63 Can the pursuit of racial equality, under the law and in society more generally, be racially blind? Assuming the best intentions for those committed to the colorblind ideal, the evidence indicates that colorblindness is neither entirely possible in its most simplistic form, nor is it desirable for achieving the goals underlying any approach to diversity: eliminating bias and improving intergroup relations.

A. Benefits to the Majority Group

¶64 First and foremost, the psychological evidence reviewed above demonstrates the many negative consequences of a colorblind ideology for both majority and minority group members. In general, any benefit derived from a colorblind ideology tends to favor the majority group, which fails to serve the very goals of any diversity ideology. The fact that this approach favors the majority group in a number of important ways is even offered as a reason why majority groups tend to favor such an approach to dealing with diversity, undermining the egalitarian goals of diversity approaches.

¶65 Many legal and psychological scholars alike agree that the primary benefit of a colorblind approach to racial diversity is experienced by whites. While minority groups disfavor a colorblind approach because it denies their non-majority identities, majority group members prefer such a strategy because it affords them the opportunity to avoid dealing with racial issues.[164] In addition, majority group members may also prefer colorblindness because it serves as a means to maintain the status quo by obstructing efforts to monitor existing inequalities that work largely in their favor as the majority.[165] Empirical evidence from psychological research demonstrates majority group preferences for colorblindness compared to minority group members. For example, even among individuals voluntarily participating in a diversity workshop (thus presumably predisposed toward less bias and more interest in positive intergroup relations), whites favored a colorblind approach more than blacks did, while blacks favored a multicultural approach.[166] These groups disagreed on which approach would lead to more positive intergroup interaction, with each group favoring their own preference as the best means to achieve racial harmony.[167]

¶66 The theory behind the preferences of majority and minority groups demonstrated in these empirical studies are echoed in the discussions of legal scholars. That is, majority group members prefer the colorblind approach because, for example, they are motivated to maintain their own higher social status, they are motivated to avoid the threat of being faced with the realities of racial disparities resulting from racial distinctions, and they are afraid that even mentioning race could lead others to believe they are racist.[168]

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[164] *See* Duncan, Jr., *supra* note 72.
[165] Siegel, *supra* note 73.
[166] Ryan, *supra* note 5.
[167] *Id.*
[168] The belief that mentioning race in any circumstance could lead to accusations (implicitly or explicitly) of prejudice seem to underlie the findings in Apfelbaum et al., *supra* note 81 and Apfelbaum et al., *supra* note 111, with both studies demonstrating the willingness to avoid even a mention of race despite the usefulness of that information for the task at hand.

B. Negative Consequences for Interracial Contact

¶67 Empirical evidence suggests that adopting a colorblind approach in interracial interactions, the very interactions where colorblind proponents believe it is most beneficial, can actually lead to negative outcomes. For example, those that adopted a colorblind approach in an interaction involving a task where race was relevant, although neutral, also exhibited less friendly non-verbal behaviors toward their partners.[169] These negative non-verbal behaviors led their other race interaction partners to perceive them as less friendly.[170] In addition, individuals who were most committed to appearing non-prejudiced were also more likely to be disliked by their interaction partners.[171] In fact, these interactions sometimes resulted in prejudiced individuals being more liked by their other race interaction partners than those who were less prejudiced.[172] Ironically, those who were most set on demonstrating their lack of prejudice by adopting a colorblind approach, interacted in a more negative way with their other race partners compared to those who were not concerned with their level of prejudice (regardless of level) because their heightened concerns about how they appeared led them to be less comfortable in the interaction.[173] At the same time, these white participants were not aware of the ironic effect that their adherence to colorblindness had on their black interaction partner's perceptions. Instead, these white participants often believed that these interactions had gone smoothly, that their black partners had liked them, and that they had appeared non-prejudiced.[174] Thus, not only did the interactions sour from the perspective of the people who the "colorblind" whites sought to impress but these white participants did not know they in fact offended their black interaction partners.

C. Awareness of the Reality of Inequality

¶68 Empirical evidence supports the theory of legal scholars that colorblindness obscures racial inequalities. A colorblind mindset may lead individuals to perceive less racial inequality and show less support for social policies directed at remedying social inequalities.[175] In addition, the default mindset of many majority group members is colorblindness, suggesting that they tend to see less racial inequality and show less support for social policies directed at addressing it than other groups, particularly minority groups for whom existing racial inequality is a more salient concern.[176]

D. Race Consciousness is Required

¶69 Despite the great strides toward racial equality, we are by no means living in a post-racial society. Racial inequality persists throughout American society,[177] either as a

[169] Apfelbaum et al., *supra* note 81.
[170] *Id*. at 633.
[171] *See* Richeson & Nussbaum, *supra* note 92.
[172] *See id.*
[173] Apfelbaum et al., *supra* note 81; Richeson & Nussbaum, *supra* note 92.
[174] Richeson & Nussbaum, *supra* note 92.
[175] Todd & Galinsky, *supra* note 132.
[176] *Id*.
[177] *Sobering Statistics*, *supra* note 8 (noting that blacks are twice as likely to be unemployed, three times as likely to live in poverty, and more than six times as likely to be imprisoned).

result of historical legacy and institutional perpetuation or as a result of continued contemporary racial biases that result in experiences of prejudice and discrimination in the everyday lives of racial minorities. In addition, recent social psychological research helps reveal the ways in which racial biases, regardless of intentionality, may impact society generally and the legal domain in particular. For example, Professor Jennifer Eberhardt and her colleagues showed, using real-world data from death penalty cases, that defendants with more afrocentric (more stereotypically black) features were more likely to get the death penalty.[178] In addition to demonstrating the continued importance of race, this research serves as a reminder that the data necessary to discover this biased pattern would not be possible if there was an effort to be colorblind, as a colorblind approach could preclude collection of data about racial group membership for any reason. Thus, in a truly colorblind world, no one could argue that racial sentencing disparities exist, for example, because race would no longer be recognized as a valid category that bias could derive from.

E. Conclusion

¶70 Despite recent court cases, such as *Ricci v. DeStefano,*[179] which have sought a return to the anti-discrimination principle as interpreted in the nineteenth century, a commitment to anti-discrimination requires a commitment to race-consciousness, not colorblindness. The courts and society at large should give up the dream of the colorblind ideal as the approach best able to address the realities of race relations in the United States. The colorblind ideal now serves simply to distract society from achieving true equality, which results not from avoiding seeing differences, but from appreciating those differences in a way that does not disadvantage one group relative to another. As long as racial inequalities exist, adherence to the anti-discrimination principle requires monitoring of the relative social status of different racial groups in order to track progress toward equality, as well as to avoid reverting back to old patterns.

¶71 Despite the emphasis on the comparison between colorblindness and multiculturalism as strategies for contending with a diverse society, giving up on colorblindness does not necessarily require adopting a multicultural approach. Rather, the law should remain race-conscious, because, as this Comment demonstrates, race-consciousness reflects the reality of the social world. In arguing for race-consciousness, it is not necessary to argue for changes in procedure that recognize different cultural practices, as might be required by a true multicultural approach. Rather, the emphasis should be on maintaining an awareness of the realities of race in a legal system and society that faces pervasive stratification on the basis of race every day.[180]

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[178] Jennifer L. Eberhardt, Paul G. Davies, Valerie J. Purdie-Vaughns & Sheri L. Johnson, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383 (2004).

[179] 129 S. Ct. 2658 (2009).

[180] This would require using a "behavioral realist" approach to law as advocated by Jerry Kang and Kristin Lane. This approach requires consideration of what scientific research suggests about the realities of human behavior and decision-making, how these finding relate to latent theories of human behavior represented in law, and asks that discrepancies between these two be addressed. Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 490 (2010).

¶72 The continued attack on anti-discrimination law and affirmative action is likely to keep the debate about colorblindness versus race-consciousness alive. Hopefully, lawyers and judges will look to empirical realities to ground arguments for race-consciousness. In addition, if the voices for race-consciousness can speak loudly and persuasively, it may be enough to push back the erosion that has long been underway of an anti-discrimination principle that recognizes the continuing reality of inequality and provides the means to continue to address this reality.

The Media, A Polarized America & ADR Tools to Enhance Understanding of Perspectives

Ginsey Varghese Kramarczyk*

I. INTRODUCTION

In today's political climate, the U.S. media reports to a disillusioned and polarized American audience and is driven largely by news outlets capitalizing on "conflict" to determine "newsworthiness." [1] With the additional preeminence of social media and algorithms promoting self-reinforcing media, each person's news appetite is limited by confirmation bias.[2]

The media's influence and ability to enhance the public's understanding of varying perspectives is important to promote civil discourse with "the other side."[3] The media has the unique "power to identify, name, and shape issues," and serves as the "gatekeeper" that decides what is "news" and *how* it will be spun.[4] The media mediates information to the public, and its role should thus be considered and guarded purposefully.[5]

"Media," as used in this paper, refers to "news media" or the "press" that delivers news to the public and practices journalism via various mediums–television, radio, magazines, and newspaper, both print and online.[6] More

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[1] *Political Polarization in the American Public*, PEW RESEARCH CENTER (June 12, 2014), http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/ [hereinafter Pew, *Polarization in America*]; Carol Pauli, *News Media as Mediators*, 8 CARDOZO J. CONFLICT RESOL. 717, 717 (2007).

[2] *See* Maeve Duggan & Aaron Smith, *The Political Environment on Social Media*, PEW RESEARCH CENTER (Oct. 25, 2016), http://www.pewinternet.org/2016/10/25/the-political-environment-on-social-media/.

[3] *15.7 Media Influence on Laws and Government,* M LIBRARIES, http://open.lib.umn.edu/mediaandculture/chapter/15-7-media-influence-on-laws-and-government/ (last visited Sept. 29, 2018); *see also* DIANA C. MUTZ, HEARING THE OTHER SIDE: DELIBERATE VERSUS PARTICIPATORY DEMOCRACY 125 (2006) (discussing the consequences of interaction between people who have different political views).

[4] Lorie M. Graham, *A Right to Media?*, 41 COLUM. HUM. RTS. L. REV. 429, 429 (2010); *see also* Pamela J. Shoemaker, *News and Newsworthiness: A Commentary*, 31 EUR. J. COMM. RES. 105, 109 (2006).

[5] BILL KOVACH & TOM ROSENSTIEL, THE ELEMENTS OF JOURNALISM: WHAT NEWSPEOPLE SHOULD KNOW AND THE PUBLIC SHOULD EXPECT 166 (Three Rivers Press ed., 2d ed. 2007).

[6] "Media," "Journalist," and "Press" will be used interchangeably throughout the article. STEPHANIE CRAFT & CHARLES N. DAVIS, PRINCIPLES OF AMERICAN JOURNALISM: AN INTRODUCTION 11 (Erica Wetter ed., 2013).

specifically, "news media" refers to "organizations in the business of gathering and disseminating news, and to reporters, editors, and others who are professional news gatherers and disseminators, primarily at the national level differentiat[ing] the news function from the entertainment function."[7]

This article will survey: (1) the intended role of the media in a democracy; (2) the current polarized political climate in the United States; (3) the challenges facing the twenty-first century with the growth of technology, cable news, and online platforms; (4) the media's role in perpetuating conflict; and (5) propose that media professionals use Alternative Dispute Resolution (ADR) tools and processes to increase the public's understanding of differing perspectives in our conflict-laden political discourse.

A. *Potential Objections*

The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech, or of the press."[8] Proposing a regulatory framework for the media or limiting any form of speech is not in the scope of this article. This article will survey the intended role and responsibilities of the media, analyze current contextual challenges, and provide ADR insights to empower news media professionals who are cognizant of their responsibility to facilitate a public forum to better serve the citizenry in today's polarized political climate.

Movements in the media toward using ADR techniques, such as "peace journalism" and "civic journalism," have faced resistance due to conflicts of interest for reporters.[9] Journalists are expected to maintain a sense of detachment and neutrality to ensure "factual reporting" and ADR "problem-solving" approaches do not pose the risks of agenda pushing.[10] As such, this article will not suggest that "problem-solving" techniques should take priority over "factual reporting."

Predominant today, divisive "reporting" is fueled by interests in higher ratings and financial pressures, likely incentivizing journalistic impropriety.[11] The press was created to serve as "responsible members of the community with a full stake in public life and thus 'concerned' with whether genuine citizen deliberation occurs when needed, and whether communities come to

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[7] CRAFT & DAVIS, *supra* note 6, at 92.

[8] U.S. CONST. amend. I.

[9] Carol Pauli, *Transforming News: How Mediation Principles Can Depolarize Public Talk*, 15 PEPP. DISP. RESOL. L.J. 85, 100 (2015).

[10] *See generally* EUROPEAN CENTRE FOR CONFLICT PREVENTION, THE POWER OF THE MEDIA: A HANDBOOK FOR PEACEBUILDERS (2003); Annabel McGoldrick & Jake Lynch, *Peace Journalism: What Is It, How to Do It?*, REPORTING THE WORLD (2000), https://www.transcend.org/tri/downloads/McGoldrick_Lynch_Peace-Journalism.pdf.

[11] Jürgen Krönig, *A Crisis in the Fourth Estate,* THE GUARDIAN (Aug. 16, 2004), https://www.theguardian.com/media/2004/aug/16/mondaymediasection.politicsandthemedia (concluding that the media are driven by commercial and market pressures).

grips with their problems."[12] This article submits that journalists should have an inherent interest in sound reporting and the psychology of conflict and communications. This entails understanding how "packaging" and "messaging" ultimately impact the audience,[13] but nevertheless the article does not propose regulating journalistic freedom in any manner. ADR techniques would only serve to supplement newspersons' toolkits as they inform and educate the public on relevant issues, while providing for the differing perspectives of fellow citizens.[14]

II. MEDIA IN PUBLIC LIFE

A. *Media as the Fourth Branch of Government*

Many scholars regard the media as the "fourth branch" of government, fulfilling a necessary "check" function in a democracy over the standard three branches of government: legislative, executive, and judicial.[15] The First Amendment captures this fundamental ideal by providing for the "freedom of press" as distinct from the freedom of speech.[16] The founders explicitly created *a free press* to prevent tyrannical rule.[17] The press would serve as a protector against "abuse of official power" and "an educator of the people" by informing the people about government action and policies, as well as possible repercussions and options.[18] A free press, by design, would serve as a conduit between governmental institutions and the public: requiring accountability in government actions.[19]

NY Times Co. v. U.S. states this proposition clearly: "The Founding Fathers gave the free press the protection it must have to fulfill its essential

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[12] Tanni Haas & Linda Steiner, *Public Journalism as a Journalism of Publics*, 2 SAGE JOURNALS 123, 132 (2001), http://journals.sagepub.com/doi/pdf/10.1177/146488490100200202.

[13] Peter du Toit, *Conflict Sensitive Reporting: A Toolbox For Journalists*, RHODES UNIVERSITY 43–44 (Mar. 2012), https://www.internews.org/sites/default/files/resources/ConflictSensitiveReporting-Peter_du_Toit_2012-03.pdf (providing guidance on how journalists can use the psychology of conflict and communication in reporting).

[14] *See* Rukhsana Aslam, *The Role of Media in Conflict: Integrating Peace Journalism in the Journalism Curriculum*, 8 (Nov. 4, 2014) (unpublished Ph.D. thesis, Auckland University of Technology) http://aut.researchgateway.ac.nz/bitstream/handle/10292/7908/AslamR.pdf?sequence=3 (arguing for the implementation of conflict analysis, resolution, and development in journalistic education).

[15] This article holds the premise that media is the unofficial fourth branch of government. Rachel Luberda, *The Fourth Branch of Government: Evaluating the Media's Role in Overseeing the Independent Judiciary*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 507, 508 (2008); William T. Coleman, Jr., *A Free Press: The Need to Ensure an Unfettered Check on Democratic Government Between Elections,* 59 TUL. REV. 243, 243–44 (1984).

[16] Coleman, *supra* note 15, at 243.

[17] *Id.* at 243–44.

[18] *Id.* at 247, 252.

[19] *Id.* at 244, 252.

role in our democracy. The press was to serve the governed, not the governors."[20] Justice Stewart highlights in a dissenting opinion that because "[e]nlightened choice by an informed citizenry is the basic ideal upon which an open society is premised . . . , the [independent] press . . . is a precondition of government."[21] In a democracy where government is to be by the consent of the governed, the media is *how* the public learns about the government.[22] Therefore, the media's role cannot be overlooked, downplayed, or misunderstood. The media controls the news it reports to the public and directly influences public opinion: holding a crucial, tremendous power in facilitating public life.[23]

B. *Media's Responsibility to the Citizenry*

Media and the field of journalism have evolved over the years with the prevalence of Facebook, personal blogs, and Google, alongside major changes in culture, politics, and technology.[24] Part III of the article will discuss the challenges of twenty-first century technology and social media influences. Despite the recent evolution, the objectives of news media remain unaffected: "[T]o provide people with the information they need to be free and self-governing . . . amplifying the conversation of people themselves."[25] The media maintains a responsibility to provide independent, reliable, and comprehensive information for citizens to formulate opinions and to properly engage in the democratic process.

However, the difficulty is that journalism *needs* to make money in order to survive, and conflict sells.[26] Kovach, a prominent voice in journalism, outlines the ten principles of journalism for news people amidst the changing environment:

1) Journalism's first obligation is to truth. 2) Its first loyalty is to citizens. 3) Its essence is a discipline of verification. 4) Its practitioners must maintain

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[20] *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971).

[21] *See* Christa Corrine McLintock, *The Destruction of Media Diversity, or: How the FCC Learned to Stop Regulating and Love Corporate Dominated Media*, 22 J. MARSHALL J. COMPUTER & INFO. L. 569, 571 n.21 (2004) (quoting Branzburg v. Hayes, 408 U.S. 665, 727 (1972)) (Stewart, J. dissenting).

[22] RICHARD DAVIS, THE PRESS AND AMERICAN POLITICS (Beth Mejia ed., Prentice Hall 3rd ed. 2001); *see* KOVACH & ROSENSTIEL, *supra* note 5, at 11 (noting how journalism evolved to create democracy in countries like Poland and Czech Republic—"journalism was for citizenship. Journalism was for democracy.").

[23] KOVACH & ROSENSTIEL, *supra* note 5, at 11–12 ("The principles and purpose of journalism are defined by something more basic: the function news plays in the lives of people."); Diana C. Mutz & Paul S. Martin, *Facilitating Communication Across Lines of Political Difference: The Role of Mass Media*, 95 AM. POL. SCI. REV. 97, 109–10 (2001); *see* William L. Rivers, *The Media as Shadow Government,* in IMPACT OF MASS MEDIA: CURRENT ISSUES 279, 282 (1985) (emphasizing that the media sets the agenda for public discussion by controlling access to what the public reads).

[24] KOVACH & ROSENSTIEL, *supra* note 5, at ix.

[25] *Id.* at 3, 5–6, 11–12.

[26] Corporate, financial, and rating pressures will be discussed in Part IV.

independence from those they cover. 5) It must serve as an independent monitor of power. 6) It must provide a forum for public criticism and compromise. 7) It must strive to make the significant interesting and relevant. 8) It must keep the news comprehensive and in proportion. 9) Its practitioners have an obligation to exercise their personal conscience. 10) Citizens, too, have rights and responsibilities when it comes to the news.[27]

The importance of such tenants cannot be understated considering the unique challenges of the political climate today. Kovach warned that independent news could be overrun by rumors and self-interested commercialism posing as news.[28] He added, "[i]f that occurs, we lose the press as an independent institution, free to monitor the other powerful forces and institutions in society."[29] This is the situation in America today. The public is steadily losing trust in the press as independent and unbiased, with the prevalence of rhetoric about "fake news" and general cynicism dominating political discourse.[30]

III. POLARIZATION IN THE UNITED STATES

Polarization occurs when the judgment of individuals in a group regarding an issue becomes more extreme after discussing that issue with others in the group.[31] While there is markedly increased hostility in the U.S. political environment, there is disagreement amongst researchers as to whether there is a "polarization of ideologies" in the United States.[32] One group of researchers reason that Americans have become more extreme in their policy beliefs, leading to a strong "ideological polarization," while another group of researchers contend that most Americans' views have remained mostly stable over time.[33] Despite mixed findings regarding

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[27] KOVACH & ROSENSTIEL, *supra* note 5, at 5–6.

[28] *Id.* at 6.

[29] *Id.* at 6.

[30] 57% of people in the US believe the media does a poor job of reporting on politics fairly. Amy Mitchell, Katie Simmons, Katherine Eva Matsa & Laura Silver, Pew Research Center, *Publics Globally Wanted Unbiased News Coverage But Are Divided Whether Their News Media Delivers* (Jan. 2018); Michael Barthel & Amy Mitchell, Pew Research Center, *Americans' Attitudes About the News Media Deeply Divided Along Partisan Lines* (May 2017); Art Swift, *Americans' Trust in Mass Media Sinks to New Low*, GALLUP NEWS (Sept. 14, 2016), http://news.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx; Pauli, *News Media As Mediators*, *supra* note 1, at 717.

[31] DOUGLAS KENRICK, STEVEN L. NEUBERG & ROBERT B. CIALDINI, SOCIAL PSYCHOLOGY: GOALS IN INTERACTIONS 392 (6th ed. 2015).

[32] Matthew Gentzkow, *Polarization in 2016*, STAN. U. 1, 2 (2016), https://web.stanford.edu/~gentzkow/research/PolarizationIn2016.pdf.

[33] *See generally* M. P. Fiorina & S. A. Abrams, *Polarization in the American Public*, 11 ANN. REV. OF POL. SCI, 563, 563–88 (2008); Alan I. Abramowitz & Kyle L. Saunders, *Is Polarization a Myth?*, 70(2) J. OF POL, 542, 542–55 (2008); Edward L. Glaeser, & Bryce A. Ward, *Myths and Realities of American Political Geography*, 20 J. OF ECON. PERSP., 119, 119–44 (2006).

ideological polarization, researchers agree that Americans are experiencing "affective polarization."[34]

"Affective polarization" can be defined as the tendency of people to view "in-group" members positively while viewing "out-group" members negatively.[35] It is the inclination of people to assess the opposing partisans negatively and co-partisans positively.[36] As a result, Americans feel distant from members of the opposite party and even dislike those on the other side of the political spectrum.[37] In the current political climate, many Americans who identify with a particular party hold extreme biases against the opposing party members for simply identifying as a "Democrat" or "Republican," even if associated policies or ideologies are not, in reality, extreme.

This type of behavior, while not suggestive of ideological polarization, highlights that many voters have become polarized by "the mere act of identifying with a political party . . . [triggering] negative evaluations of the opposition, [with] exposure to prolonged media-based campaigns only reinforc[ing] these predispositions."[38] Seyle and Newman, both prominent social psychologists, speculate that the majority of America remains ideologically moderate, but the "red" versus "blue" emphasis drowns moderate voices and divides voters into two opposing camps represented by the loudest extremists on both sides.[39] These distortions, according to experts in social psychology, "increase group conflict, decrease intergroup contact, and contribute to many problems in social interaction across groups."[40]

The public sphere is becoming increasingly polarized. A recent 2017 Pew survey revealed that on the eve of Trump's inauguration, 86% of Americans believed that the United States was more politically divided than in the past.[41] Only 46% of Americans held such conviction when Barack Obama became President of the United States in 2009.[42] This statistic reflects that 40% of the American public has recognized this shift within the past eight years.[43]

A 2014 Pew study on polarization in America revealed that politically active Americans, 27% of Democrats and 36% of Republicans, increasingly saw their opponents as "so misguided that they threaten the nation's

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[34] Shanto Iyengar & Sean J. Westwood, *Fear and Loathing Across Party Lines: New Evidence on Group Polarization*, 59(3) AM. J. OF POL. SCI., 690, 690–707 (2015).

[35] *Id.* at 691.

[36] *Id.* at 691.

[37] *Id.* at 691.

[38] Shanto Iyengar, Gaurav Sood & Yphtach Lelkes, *Affect, Not Ideology: A Social Identity Perspective on Polarization,* 76(3) PUB. OPINION Q. 405, 407 (2012).

[39] D.C. Seyle & M.L. Newman, *A House Divided? The Psychology of Red and Blue America*, 61(6) AM. PSYCHOLOGIST 571–80 (2006).

[40] *Id.* at 574.

[41] Pew Research Center, *On Eve of Inauguration, Americans Expect Nation's Deep Political Divisions to Persist* (Jan. 2017), http://www.people-press.org/2017/01/19/on-eve-of-inauguration-americans-expect-nations-deep-political-divisions-to-persist/ [hereinafter Pew, *On the Eve of Inauguration*].

[42] *Id.*

[43] *Id.*

wellbeing."[44] Nearly half of politically active Americans, deemed as "active" because of voting patterns and attention to political news, regarded the other side as a danger to the nation.[45] It flows naturally that more than one-fifth of the respondents in the same survey indicated they would be displeased if one of their children married someone of the opposite party.[46] Compared to 1960, where very few people (5%) indicated this sentiment, the affective polarization, or rather "personalization," of politics is apparent.[47] Polarization appears to be getting worse under Trump's presidency.

Two key shifts have occurred within each party: (1) people's connection with their party is deeper and (2) consistency of people's views has increased.[48] The first shift is apparent in the numbers, but the shocking change is that politics have become incredibly personal.[49] Party affiliation has evolved to be a part of our self-concept in profound ways.[50] This connection of party and "self" extends to how individuals judge politics and new information.[51] People do not view the other party as made up of competent individuals who espouse a different viewpoint or hold a different value system.[52] Instead, the other side is perceived as selfish and stupid, with intolerable views or, at the very least, precarious motives.[53] The other side is seen as a threat to the nation.[54]

The negative sentiment is captured perfectly in party favorability ratings presented in an October 2017 Pew report.[55] It reflects that "about eight-in-ten Democrats and Democratic-leaning independents (81%) have an unfavorable opinion of the Republican party."[56] This includes 44% holding a "very unfavorable view" of the Republicans.[57] The data is the same amongst Republicans: 81% view Democrats unfavorably, with 45% holding a "very unfavorable view."[58] Twenty years ago, a little over half of Democrats (57%) viewed the Republican party unfavorably and only 16% very unfavorably,

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[44] Pew, *Polarization in America*, *supra* note 1, at 8, 11; Pauli, *Transforming News: How Mediation Principles Can Depolarize Public Talk*, *supra* note 9; Gentzkow, *supra* note 29, at 15.

[45] Pew, *Polarization in America*, *supra* note 1, at 8, 11; Gentzkow, *supra* note 29, at 15.

[46] Pew, *Polarization in America*, *supra* note 1, at 12.

[47] *Id.* at 12.

[48] *Id.* at 11; Gentzkow, *supra* note 32, at 17.

[49] *See* Gentzkow, *supra* note 32, at 1.

[50] Alexander George Theodoridis, *The Hyper-Polarization of America*, SCI. AM. (Nov. 7, 2016), https://blogs.scientificamerican.com/guest-blog/the-hyper-polarization-of-america.

[51] Theodoridis, *supra* note 50.

[52] Gentzkow, *supra* note 32, at 17.

[53] Gentzkow, *supra* note 32, at 17; *see* Pew Research Center, *The Partisan Divide on Political Values Grows Even Wider* (Oct. 2017) [hereinafter Pew, *Divide on Political Values Grows Wider*].

[54] Pew, *Polarization in America*, *supra* note 1, at 8, 11; Theodoridis, *supra* note 50.

[55] *See* Pew, *Divide on Political Values Grows Wider*, *supra* note 53, at 65–66.

[56] *Id.* at 66.

[57] *Id.*

[58] *Id.*

while 68% of Republicans viewed the Democratic Party negatively and only 17% very unfavorably.[59] Today, negative opinions are commonplace and more strongly felt than in the past.

On the second point, Americans divide more easily into two separate camps of Republican and Democratic views.[60] This considers independents, who actually outnumber both Republicans and Democrats today, because independents ideologically lean to one party or another.[61] Americans might not be extreme in their overall ideology, but they hold extreme positions on specific issues.[62] In the past, it was more common to find a conservative democratic or liberal Republican.[63] Today, there are fewer people who hold such hybrid views—liberal on some issues and conservative in other areas.[64] Apparently, an individual's choice of presidential candidate increasingly represents how the person regards a spectrum of issues: gun control, abortion, welfare, taxes, racial issues, Islam, the environment, and so on.[65]

According to the ten indices that Pew Research Center have measured via the same questions since 1994, the average partisan gap has increased from fifteen percentage points to thirty-six percentage points on each issue.[66] Never before has the disparity been this large. For example, in 2011, "twice as many Democrats as Republicans said the government should do more for the needy (54% vs. 25%). Today, nearly three times as many Democrats as Republicans" hold this view (71% vs. 24%).[67] The widening partisan gap exists on other issues like gun control and racial discrimination as well.[68] It should be noted, however, as a result of greater acceptance of homosexuality and more favorable views on immigrants (as less of a burden on the country at least), the center has shifted in a liberal direction overall.[69]

Evidence indicates that polarization is a growing concern in America today.[70] There is disagreement about how far apart Americans are on the issues, but the divide is undeniably more personal.[71] People no longer politely disagree because they believe the other side must be stopped.[72] The news

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[59] *Id.*

[60] Gentzkow, *supra* note 32, at 17; Pew, *Divide on Political Values Grows Wider*, *supra* note 53, at 11–12.

[61] Pew Research Center, *Partisanship and Political Animosity in 2016*, 6 (June 2016) [hereinafter, Pew, *Political Animosity*].

[62] Gentzkow, *supra* note 32, at 17.

[63] *Id.* at 17.

[64] *Id.*

[65] Pew, *Divide on Political Values Grows Wider*, *supra* note 53, at 3, 7–12.

[66] *Id.* at 3, 12.

[67] *Id.* at 2.

[68] *Id.* at 2.

[69] *Id.* at 11.

[70] Gentzkow, *supra* note 32, at 20.

[71] *Id.*

[72] *Id.*; Pew, *Political Animosity*, *supra* note 61, at 6.

media, especially the growth of partisan cable news and confirmation bias perpetuated by technology and online platforms, likely played a role in this outcome, as discussed in the next section. [73]

IV. CHALLENGES OF THE TWENTY-FIRST CENTURY

A. *Rise of Technology & Social Media*

The way Americans consume the news has changed with the rise of technology and social media platforms. Nearly all adults in America (99%) own at least one electronic device (including a television).[74] According to a Pew study in 2015, 68% of U.S. adults own a smartphone, 73% own laptops or desktop computers, and 45% own tablets (up from 4% in 2010).[75] The American Psychological Association estimated even higher numbers in 2016, with 86% computer ownership, 74% smartphone ownership, and 55% tablet ownership.[76] Among young adults between the ages of eighteen and twenty-nine in both surveys, ownership of smartphones with internet access reached almost 90% of the population.[77]

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[73] Gentzkow, *supra* note 32, at 20.

[74] Am. Psychological Ass'n, *Stress in America: Coping with Change, Stress in American Survey,* 1 (2017), https://www.apa.org/news/press/releases/stress/2017/technology-social-media.pdf.

[75] Pew Research Center, *Technology Device Ownership* 3 (Oct. 2015).

[76] Am. Psychological Ass'n, *supra* note 74, at 1.

[77] Pew, *Technology Device Ownership*, supra note 75, at 3; Am. Psychological Ass'n, *supra* note 74, at 1.

The number of American adults on social media increased to 65% in 2015, compared to 7% in 2005.[78] Among young adults, social media is approaching market saturation with over 90% young adult social media users reported in 2015.[79] Facebook and Instagram today celebrate over 2 billion combined monthly users.[80] Compared to figures in the last decade, these are substantial increases in electronic device ownership and social media adoption, both of which lead to an increase in news media exposure.[81]

B. *Trends in Technology Usage*

On a typical day, 44% of Americans report constantly checking their social media.[82] An American adult generally looks at their phone once every twelve minutes, or eighty times a day,[83] and, collectively, Americans check their phones over eighty billion times a day.[84] A mobile consumer survey conducted by Deloitte found that "reading the news" was ranked as the "most regularly used daily activity" in smartphone additional uses.[85]

The modern audience consumes news on a screen. Television remains dominant with 57% of Americans relying on television-based news and 38% relying on online news via websites, apps, social media or all three.[86] On the other hand, the portion of American adults who have *ever* accessed news on a mobile device increased from 54% in 2013, to 72% in 2016, to 85% in 2017.[87] While a majority of Americans, especially the older demographics of ages fifty to sixty four (72%) and over the age of sixty-five (85%), chiefly depend on and prefer television, the impact of online platforms cannot be discounted because adults under age forty-nine (94%) increasingly rely on news via their mobile devices and online platforms.[88] Older adults are transitioning to smartphones as well, with about two-thirds of older Americans (67%), ages

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[78] Andrew Perrin, *Social Media Usage: 2005–2015*, PEW RESEARCH CENTER, (Oct. 8, 2015), http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/.

[79] *Id.* at 4–5.

[80] Am. Psychological Ass'n, *supra* note 74, at 1.

[81] Perrin, *supra* note 78; Pew, *Technology Device Ownership*, *supra* note 75, at 3; *see* Lisa Eadicicco, *Americans Check Their Phones 8 Billion Times a Day*, TIME (Dec. 15, 2015) http://time.com/4147614/smartphone-usage-us-2015.

[82] Am. Psychological Ass'n, *supra* note 74, at 4.

[83] SWNS, *Americans Check Their Phones 80 Times a Day: Study,* NY POST (Nov. 8, 2017, 4:08 PM), https://nypost.com/2017/11/08/americans-check-their-phones-80-times-a-day-study.

[84] Eadicicco, *supra* note 81.

[85] *Global Mobile Consumer Survey: US Edition*, DELOITTE, https://www2.deloitte.com/us/en/pages/technology-media-and-telecommunications/articles/global-mobile-consumer-survey-us-edition.html; *See* Eadicicco, *supra* note 81.

[86] Amy Mitchell, Jeffrey Gottfried, Michael Barthel & Elisa Shearer, *Modern News Consumer*, PEW RESEARCH CENTER (July 7, 2016), http://www.journalism.org/2016/07/07/pathways-to-news/.

[87] *Id.* at 5; Kristine Lu, *Growth in mobile news use driven by older adults,* PEW RESEARCH CENTER (Jun. 12, 2017), http://www.pewresearch.org/fact-tank/2017/06/12/growth-in-mobile-news-use-driven-by-older-adults.

[88] Mitchell et al., *supra* note 86, at 5 (finding that 50% of 18–29 year olds and 49% of 30–49 year olds turn to online platforms for news).

sixty-five and over using a mobile device for news – this represents an increase of 24% since 2016 alone.[89] The growth in the usage of devices—TV, computer, mobile phones, and tablets—to consume the news, raises concerns about the impact on the American public. Does the news media play a role in the polarization and personalization of politics in America today? If so, what can be done?

C. *Fragmented Media & Echo Chambers*

Four decades ago, most Americans watched daily news from one of three newscasts in a standard and homogeneous "point-counterpoint" style.[90] However, today's news media is highly fragmented with 24-hour cable news, newspapers, bloggers, online platforms, talk-radio, and other outlets simultaneously competing for the public's attention.[91] With a plethora of news outlets and platforms at the public's fingertips via their devices, the news media must compete to stay relevant.

People generally feel strongly about their positions or policy preferences and seek out information consistent with their paradigms.[92] Kovach warned that "the ability of almost anybody to produce and disseminate text, video, and audio . . . [increases] user demand to personalize the content they consume from other sources."[93] This type of selective exposure produces the "echo chamber" effect where news reinforces one's beliefs and attitudes; this creates what psychologists call "confirmation bias" — the tendency of people to embrace information that supports one's beliefs and attitudes and rejects contradictory messages.[94]

To demonstrate, if a person believes people who live on the coasts are liberal, confirmation bias means that a person gravitates towards evidence that the belief held is true. Therefore, when that person encounters one individual who leans liberal who lives on the coast, the person is likely to believe the data is correct because it reinforces an existing belief. However, if the person encounters a conservative who lives on the coast, the individual easily dismisses the information as a fluke. Confirmation bias occurs when a person encounters information that supports an existing belief, and that person subconsciously place greater importance on that "evidence."[95] The bias

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[89] Lu, *supra* note 87 (noting that those between the ages of 50–64, 79% now use mobile for news).

[90] Shanto Iyengar & Kyu S. Hahn, *Red Media, Blue Media: Evidence of Ideological Selectivity in Media Use*, 50 J. COMM. 19, 20 (2009).

[91] *Id.* at 20.

[92] *Id.* at 20.

[93] KOVACH & ROSENSTIEL, *supra* note 5, at xi.

[94] Iyengar & Hahn, *supra* note 91, at 34; Elizabeth Kolbert, *Why Facts Don't Change our Minds,* NEW YORKER (Feb. 27, 2017), https://www.newyorker.com/magazine/2017/02/27/why-facts-dont-change-our-minds.

[95] *See* Kolbert, *supra* note 94.

explains why anti-vaccine narratives persist across the internet even though the link to autism has been repeatedly debunked.[96]

According to researchers, "[o]nce formed, . . . impressions are remarkably perseverant."[97] In a famous Stanford experiment, students were given two studies about capital punishment — one supporting its ability to deter crime while the other claimed it had no effect on crime.[98] Half of the selected participants supported capital punishment while the other half opposed it.[99] Despite the reality that both studies were fictitious, at the end of the experiment, each set of students found the data supporting their viewpoint to be compelling and deemed the opposing study unconvincing.[100] The experiment demonstrates the staying power of a belief that an individual holds. In a separate experiment, it was *revealed* to participants that information originally given was fabricated, but individuals failed to make appropriate revisions in their beliefs.[101] Researchers are fascinated by the confounding nature of confirmation bias in repeated experiments and how even a proven false impression can persist.[102]

In another experiment, people were asked to rate their understanding of how everyday items like toilets and zippers function.[103] Often, their rating of their true understanding reduced drastically after they were asked to write step-by-step explanations.[104] This phenomenon is labeled the "illusion of explanatory depth," where people believe that they know more than they do *and* if other individuals agree, their belief grows.[105]

How toilets flush is trivial compared to political questions that impact a community; yet, confirmation bias and the illusion of explanatory depth are at play. To illustrate, in a survey considering U.S. military intervention in a particular foreign country, the respondents who were least likely able to identify the country in question were most likely to favor military intervention.[106] This is particularly alarming.

To understand the "political brain," a neuroimaging study was conducted of a group of strong Republicans and strong Democrats.[107] In the study,

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[96] David Grimes, *Echo Chambers Are Dangerous,* GUARDIAN (Dec. 4, 2017), https://www.theguardian.com/science/blog/2017/dec/04/echo-chambers-are-dangerous-we-must-try-to-break-free-of-our-online-bubbles; Luke E. Taylor, Amy L. Swerdfeger & Guy D. Eslick, *Vaccines are not Associated with Autism,* VACCINE 3623 (2014).

[97] Kolbert, *supra* note 94.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *See id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] Michael Shermer, *The Political Brain,* SCI. AM. (July 1, 2006), https://www.scientificamerican.com/article/the-political-brain/?print=true.

subjects were critical of the opposing presidential candidate while repeatedly letting their own candidate off the hook.[108] This is how confirmation bias works. Most disturbing was that the MRI revealed that the dorsolateral prefrontal cortex, the part of the brain associated with *reasoning*, was inactive.[109] But the orbital frontal cortex, the part of the brain associated with processing emotions, and other parts of the brain associated with conflict resolution and moral accountability, the anterior cingulate and posterior cingulate respectively, were stimulated.[110] Once participants arrived at a conclusion with which they were emotionally comfortable, the ventral striatum, the reward and pleasure center, was found to be active.[111] Basically, people experience a rush of dopamine when processing information that supports their beliefs.[112]

The study emphasized two learnings: (1) partisans "twirl the cognitive kaleidoscope" to obtain the conclusions *they want*, and (2) brain circuits trigger rewards for these selective behaviors.[113] Many individuals' opinions frequently are baseless, and generally, "strong feelings about issues do not emerge from deep understanding" as these studies have shown.[114] Moreover, when people with baseless opinions agree, they reinforce one another while readily dismissing any contradictory evidence.[115] Subsequently, these groups feel empowered in their resistance or for "stick[ing] to [their] guns."[116] Ultimately, groups become oblivious to their tribalism, creating an "echo chamber" of confirmation bias. The key concern is whether the rise of partisan news and online algorithms perpetuate this "echo chamber" effect, and thereby bear responsibility for the growing polarization.

D. *Partisan News & Online Algorithms*

In our modern world, cable news is more partisan, online algorithms personalize information to cater to individual tastes, and people aggregate into communities of interest both socially and geographically.[117] People choose

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[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] Kolbert, *supra* note 94.

[113] Shermer, *supra* note 107.

[114] Kolbert, *supra* note 94.

[115] *See id.*

[116] *See id.*; Shermer, *supra* note 107 (noting that the MRI study hypothesized that skepticism may be the antidote for the confirmation bias).

[117] *See* Kolbert, *supra* note 94; Levi Boxell, Matthew Gentzkow & Jesse Shapiro, *Is Media Driving Americans Apart?*, N.Y. TIMES (Dec. 6, 2017), https://www.nytimes.com/2017/12/06/opinion/is-media-driving-americans-apart.html; Am. Press. Inst., *Partisanship and News Behavior* (July 13, 2017), https://www.americanpressinstitute.org/publications/reports/survey-research/partisanship-news-behavior.

what to read or watch based on their own brand of politics, and as a result, the "media becomes background noise . . . [and] the journalism of affirmation [becomes] more appealing."[118]

As mentioned earlier, television is the medium by which a majority of Americans (57%) consume the news.[119] The American Press Institute (API) reported that cable news is the most popular news source among Americans, while broadcast news is a close second.[120] API's study found that Republicans are more likely to tune into Fox News and Democrats are more likely to rely on CNN and MSNBC.[121] A study of "large-scale data [pinpoints] cable television news as a major contributor to polarization."[122] This analysis is consistent with the growth in interparty hostility and the rise in polarization in groups like the elderly, who have "limited internet use but high rates of television viewing."[123]

On average, 57% of people in the U.S. believe the media does a poor job of reporting on politics fairly.[124] The debate between left and right-wing media bias spans several decades.[125] However, there is no agreement on what qualifies as media bias.[126] In fact, when two people with different viewpoints review identical content, even their perceptions of the "bias" differ.[127] On rudimentary review, the parties speak different languages, as seen in televised news rhetoric —Democrats' lingo routinely incorporates "undocumented workers" and the "estate tax" while Republicans use "illegal aliens" and "the death tax."[128]

Some researchers contend most news media outlets are centrist, and perhaps only slightly slanted, but provide a balanced mix of views—although some talk show radios and websites offer more extreme news and opinion.[129] Markus Prior, from Princeton University, argues that the culprit of increased partisan voting is not Fox News, but rather ESPN, HBO and other cable channels that lure the moderate voter away from the news.[130] Matthew Gentzkow, an economist and professor at Stanford University, agrees stating that the rise of television provided a medium to share political information, but it also offered Americans new ways to distract themselves in their free

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[118] KOVACH & ROSENSTIEL, *supra* note 5, at 48–49.

[119] Mitchell, *supra* note 86, at 5; Boxell, *supra* note 117.

[120] Am. Press. Inst., *supra* note 117.

[121] *Id.*; Bharat N. Anand, *The U.S. Media's Problems Are Much Bigger than Fake News and Filter Bubbles*, HARV. BUS. REV. (Jan. 5, 2017).

[122] Boxell, *supra* note 117.

[123] *Id.*

[124] Mitchell, *supra* note 30, at 5; *see* Markus Prior, *Media and Political Polarization*, 16 ANN. REV. POL. SCI. 100, 101–27 (2013).

[125] Anand, *supra* note 121; *see* Am. Press. Inst., *supra* note 117.

[126] Anand, *supra* note 121.

[127] *Id.*

[128] *See* Boxell, *supra* note 117.

[129] Prior, *supra* note 124, at 103–04.

[130] *Id.* at 107.

time, crowding out the median's political engagement.[131] This suggests that the choice between "partisan or centrist" news may not be at issue if moderates avoid the news all together.[132] More study is needed on the moderate voter. For other individuals, selective exposure to news is simply a cognitive response to resist information that is inconsistent with their own views.[133]

Politically active voters, in particular, are less likely to be moved by counter-messaging because they collect a litany of information to contradict and neutralize disagreeable messaging.[134] Markus Prior agrees there is evidence that some individuals will gravitate toward like-minded news when given a choice between news reports, but other criteria will often supersede such partisan uniformity.[135] Researchers like Gerber, Karlan, Bergan, and others nevertheless maintain that media sources influence the public by the slant of a report, and more so, by the *choice* of news stories covered in a broadcast.[136]

Online platforms and social media also create division by their personalization of newsfeeds and search results. Among millennials, 61% claimed Facebook is a common source for political news.[137] Facebook, with almost half of U.S. adults getting their news from individual newsfeeds, is complicit in creating "filter bubbles" that personalize content using algorithms to accommodate individual subscribers' preferences.[138] Facebook's algorithm calculates one's preferences by analyzing a person's liked videos, recent conversations, frequent contacts, and content reviewed in order to provide more of the same content.[139]

This became apparent after the 2016 presidential election, when individual newsfeeds highlighted these personalized filters.[140] Identified Democrats *only* saw mourning of the presidential race while identified Republicans saw *only* celebration of the Trump victory despite having varied

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[131] Matthew Gentzkow, *Television and Voter Turnout*, Q. J. ECON. 931, 970 (2006).

[132] Prior, *supra* note 124, at 120.

[133] *Id.*

[134] *Id.* at 108.

[135] *Id.* at 110.

[136] Alan S. Gerber, Dean Karlan & Daniel Bergan, *Does Media Matter?*, 1 AM. ECON. J. 35 (2009).

[137] Amy Mitchell, Jeffrey Gottfired & Katerina Eva Matsa, Pew Research Center, *Facebook Top Source for Political News Among Millenials*, PEW RESEARCH CENTER (June 1, 2015), www.journalism.org/2015/06/01/facebook-top-source-for-political-news-among-millennials/.

[138] Duggan & Smith, *supra* note 2; KOVACH & ROSENSTIEL, *supra* note 5, at 160; Sally Adee, *How Can Facebook and its Users Burst the 'Filter Bubble'?*, NEW SCIENTIST (Nov. 18, 2016), https://www.newscientist.com/article/2113246-how-can-facebook-and-its-users-burst-the-filter-bubble/.

[139] Selena Larson, *Facebook Shows You What You Want to See Post-Election,* CNNTECH (Nov. 9, 2016), http://money.cnn.com/2016/11/09/technology/filter-bubbles-facebook-election/index.html.

[140] *Id.*

friend groups.[141] While this concept and its impact raises questions on Facebook's civic responsibility, it is not the subject of this article.[142] This overt steering prevents individuals from evaluating various news sources and differing opinions objectively.[143] Personalized filters can also induce poor decisions based on faulty understanding.[144]

Moreover, aggregators of news clips and interviews from other sites have arisen as major "news source" players, including U.S. Uncut, Occupy Democrats, Addicting Info, Make America Great, and The Other 98%.[145] "Occupy Democrats, a far-left page popular with supporters of [] Democratic presidential candidate Bernie Sanders, has 3.8 million likes on its Facebook page. MSNBC . . . a mere 1.6 million."[146] This Facebook phenomenon underlines the missing dialogue between the opposing parties because of "echo chambers" and filter bubbles.[147]

The same data collection and configuration occurs with Netflix, Pandora, Google, and other social media platforms.[148] A thumbs-up on a site indicates one's preference and that data is captured by the algorithm.[149] If a person searches for almost anything on Google, the data is fed into an algorithm and begins to predict what an individual would like or would not like online.[150] This data collection directly impacts the news a person consumes because algorithms begin to predict what a person prefers, making conflicting and disagreeable voices disappear.[151]

Eli Pariser, the author of *The Filter Bubble: What the Internet is Hiding from You*, contends that many people are unaware of the voices that are missing.[152] Tailored recommendations categorically divide people into groups and limit their options and exposure.[153] Personalization of online news

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[141] *Id.*

[142] Facebook is treated as a platform where news media is distributed by individuals or organizations. Michael Barthel, Elisa Shearer, Jeffery Gottfried & Amy Mitchell, *The Evolving Role of News on Twitter and Facebook*, PEW RESEARCH CENTER (July 14, 2015), http://www.journalism.org/2015/07/14/the-evolving-role-of-news-on-twitter-and-facebook/. This article does not treat Facebook as news media, and discussion on the issue is outside of the article's scope.

[143] Shermer, *supra* note 107, at 3.

[144] *Id.* at 3.

[145] Scott Bixby, *'The End of Trump': How Facebook Deepens Millennials' Confirmation Bias*, THE GUARDIAN (Oct. 1, 2016), https://www.theguardian.com/us-news/2016/oct/01/millennials-facebook-politics-bias-social-media.

[146] *Id.*

[147] *See* Natasha Singer, *The Trouble with the Echo Chamber Online*, N.Y. TIMES (May 28, 2011), http://www.nytimes.com/2011/05/29/technology/29stream.html.

[148] Twitter is different because posts are unfiltered, but individuals must sign up for a range of feeds to expand their exposure. Singer, *supra* note 147.

[149] Singer, *supra* note 147.

[150] *Id.*

[151] *See id.*

[152] *Id.*

[153] *Id.*

steers people to affirming content because the algorithms screen out news reports that individuals are likely to disagree with and creates a comfortable bubble of like-minded information.[154] The impact could be detrimental for a democracy because if people only receive affirming narratives, there is a lack of deliberation and understanding of varied interests in the public forum.[155]

On the other hand, some researchers argue that online filter bubbles are a myth because people do not receive their news from only one source.[156] In fact, individuals with particularly extreme views are more likely to consume a variety of news sources, including sites with conflicting ideology.[157] Pew Research reports that almost half of those who learned about the 2016 presidential election used five or more sources to gather their information.[158]

Like most issues, the polarization of America cannot be linked to any one change, but the convergence of many factors simultaneously.[159] This section discussed significant changes in the last decade, including the growth of devices, digital media, twenty-four-hour cable news, social media, online filter bubbles, and party tribalism. While not in the scope of this article, the lived experiences of Americans should not be disregarded—people are impacted by their self-sorting communities and socio-economic realities in a recovering economy. However, arguably, the most severe result of the many changes is that the digital world has undermined the business model that supports quality journalism.[160] The news media is struggling to stay relevant, which raises questions about the never-ending conflict narrative and the commercialization of the news as will be discussed in the next section.

V. MEDIA'S ROLE IN PERPETUATING CONFLICT

A. *Sensationalism & Commercialization of News*

When the public is more polarized, "news with an edge" garners market success.[161] At a White House press briefing about a successful economic plan with Ukraine during the Clinton presidency, one reporter expressed the ideology of mainstream journalism plainly: "Look, we have a rule here. 'No

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[154] *Id.*; Gentzkow, *supra* note 32, at 18; Boxell, *supra* note 117.

[155] Singer, *supra* note 147.

[156] Matthew Gentzkow & Jesse Shapiro, *Ideological Segregation Online and Offline*, 126 Q. J. ECON. 1799 (2011).

[157] *Id.* at 1802.

[158] Jeffrey Gottfried, Michael Barthel, Elisa Shearer & Amy Mitchell, *The 2016 Presidential Campaign–A News Event That's Hard to Miss*, PEW RESEARCH CENTER (Feb. 4, 2016).

[159] Anand, *supra* note 121.

[160] Gentzkow, *supra* note 32, at 18.

[161] Iyengar & Hahn, *supra* note 94, at 19.

conflict, no story.'"[162] The media does not set out to be sensationalist, but its business model over the last few decades has anchored itself there.[163]

Since the 1990s, about six to eight media giants have controlled 90% of what we read, watch, or listen to.[164] This handful of corporations include Vivendi/Universal, AOL/Time Warner (CNN), The Walt Disney Co. (ABC), News Corporation (FOX), Viacom (CBS), General Electric (NBC), and Bertelsmann.[165] Traditional news outlets honored their civic responsibility to report on facts and provided important analysis by spending the money on field journalists to provide direct coverage on the ground.[166] Today, news channels bring in local experts and pundits to yell at each other on live broadcast because it attracts more viewers and advertisers, promoting sensational news over substantial news.[167] To the disappointment of committed journalists, sensationalist reporting and "entertainment" talk-shows or opinion news have proven to be highly popular according to the ratings.[168]

Big media conglomerates view large audiences as commodities for sale to advertisers.[169] The traditional model of news has been overrun by ad-revenue-driven news media and most Americans are prey to addicting sensationalist news or political disengagement.[170] Media professionals argue that *conflict captivates* the public,[171] just like when drivers slow down to observe a traffic accident even though it causes more unwanted traffic.[172] This style of conflict reporting indicates that people's news knowledge consists of episodic and fragmented accounts of dramatic moments,[173] which produces the "illusion of explanatory depth" discussed earlier in the article.[174] Instead of unwanted traffic, people suffer from a faulty understanding of surrounding causes and consequences on complex policy issues.[175]

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[162] J. FALLOWS, BREAKING THE NEWS: HOW THE MEDIA UNDERMINE AMERICAN DEMOCRACY 164 (Pantheon 1996).

[163] Anand, *supra* note 121.

[164] Ashley Lutz, *These 6 Corporations Control 90% of the Media in America,* BUS. INSIDER (Jan. 14, 2012), http://www.businessinsider.com/these-6-corporations-control-90-of-the-media-in-america-2012-6.

[165] Alan B. Albarran & Terry Moellinger, *The Top Six Communication Industry Firms: Structure, Performance, and Strategy*, in MEDIA FIRMS: STRUCTURES, OPERATIONS, & PERFORMANCE, 102, 102–03 (2002).

[166] *See* Jacob W. Roberts, *The Tragedy of Media Sensationalism in America,* SOUTHERN CAL. INT'L REV. (May 20, 2014), http://scir.org/2014/05/the-tragedy-of-media-sensationalism-in-america.

[167] *Id.*

[168] *See id.*

[169] Phil Barker, *Large-Scale Communication*, BEYOND INTRACTABILITY (Mar. 2005), https://www.beyond intractability.org/essay/large-scale-communication.

[170] *See id.*; Prior, *supra* note 124, at 107.

[171] It is what people want.

[172] Barker, *supra* note 169.

[173] *Id.*

[174] Kolbert, *supra* note 94.

[175] *See* Barker, *supra* note 169.

Ratings also determine the messages that are amplified.[176] The chase for ratings creates an argument culture of "debate shows" and blockbuster stories, and the needed element of a public forum to address the important concerns facing the nation continues to be missing.[177] The news media thrives on conflict precisely because conflict attracts viewers, listeners, and readers to the media; the more intense the conflict, the greater the audience; the greater the audience, the higher the ratings, and high ratings represent enormous financial success for media companies and their advertisers.[178] Moreover, the rise of digital technologies and news aggregators is turning everyone into a media company, which fosters more extreme competition to gain followers.[179]

This extreme commercialism proliferates dangerous politics.[180] To illustrate, CNN and other stations obsessively covered Flight 370 because of Americans' addiction to conflict-style reporting.[181] In the meantime, serious global and domestic issues were poorly reported, including the Russia-China oil trade deal that threatened American's petrodollars in the Ukraine crisis.[182] As Kovach stressed, a journalist's *first* loyalty must be to the citizens because poor coverage by journalists produces an unformed citizenry.[183]

B. *Democracy in Danger*

With growing polarization and mistrust, problems begin to seem unsolvable and compromise is not presented as a legitimate option.[184] The commercial media's profit motives must be decoupled from the news because it harms America's fundamental democracy.[185] The policy intervention and structural overhaul needed, like creating safeguards for responsible and informative media, is not within the scope of the article. Sensationalist and personalized news only perpetuate polarization in America.[186] The polarized debate online and on television screens disenfranchises people from authentic public discussion, and cynicism corrodes the quality of civil discourse in the country, threatening the foundation of democratic institutions.[187]

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[176] Jennifer Akin, *Mass Media*, BEYOND INTRACTABILITY (Mar. 2005), http://www.beyondintract ability.org/essay/mass-communication.

[177] *See generally* KOVACH & ROSENSTIEL, *supra* note 5.

[178] Akin, *supra* note 176.

[179] Anand, *supra* note 121; *see also* Bixby, *supra* note 146.

[180] Victor Pickard, *The Problem with Our Media Is Extreme Commercialism*, THE NATION (Jan. 30, 2017), https://www.thenation.com/article/the-problem-with-our-media-is-extreme-commercialism.

[181] Roberts, *supra* note 166.

[182] *Id.*

[183] *See* KOVACH & ROSENSTIEL, *supra* note 5, at 5.

[184] *Id.* at 174–75.

[185] Pickard, *supra* note 180.

[186] *See* Anand, *supra* note 121.

[187] Robert Berdahl, Speech Delivered to American Society of Newspaper Editors Credibility Think Tank (Oct. 15, 2004).

Sensationalism in news media prevents the public from being knowledgeable participants in policy conversations, and a democracy depends on informed citizens that deliberate and determine the best policy solutions.[188] While electoral politics naturally creates conflict with embedded "winners" and "losers" of a political race, public life and government do not have to be conflict-ridden.[189] Legislation may entail "maneuvers and showdowns but the most important steps often come when people find areas where they can agree."[190] Progress can be made.

As the fourth branch of government, media professionals have an opportunity to mediate progress by carefully choosing *what* they report and *how* they perform and conduct their reporting duties. America needs honest, factual stories, and reporters who can give us the news in a responsible and trustworthy manner. ADR techniques used by mediators, in the next section, provide an understanding about the psychology of conflicts and recommendations to manage conflict to foster an understanding of perspectives in our polarized climate. In the words of Seth Godin:

Giving the people what they want isn't nearly as powerful as teaching people what they need. There's always a shortcut available, a way to be a little more ironic, cheaper, more instantly understandable. There's the chance to play into our desire to be entertained and distracted regardless of the cost. Most of all, there's the temptation to encourage people to be selfish, afraid, and angry. Or you can dig in, take your time, and invest in a process that helps people see what they truly need. When we change our culture in this direction, we're doing work that's worth sharing. But it's slow-going. If it were easy, it would have happened already. It's easy to start a riot, difficult to create a story that keeps people from rioting. Don't say, 'I wish people wanted this.' Sure, it's great if the market already wants what you make. Instead, imagine what would happen if you could teach them why they should.[191]

VI. RECOMMENDATIONS ON MEDIA'S USE OF ADR TO ENHANCE UNDERSTANDING

A. *Media as Mediators*

Today, political dialogue is full of emotion instead of respectful debate, sensationalism instead of honest reporting. The media can use its power to increase polarization and extremism by marginalizing certain groups and only

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[188] David F. Ransohoff & Richard M. Ransohoff, *Sensationalism in the Media: When Scientists and Journalists May Be Complicit Collaborators,* 4 EFFECTIVE CLINICAL PRAC. 185, 185 (2001).

[189] FALLOWS, *supra* note 163, at 163.

[190] *Id.* at 163.

[191] *Cartographer of Meaning in a Digital Age*, ON BEING (Jan. 5, 2017), https://onbeing.org/programs/maria-popova-cartographer-of-meaning-in-a-digital-age-jan2017/ (quoting Seth Godin, *Give the People What They Want*, SETH'S BLOG (Feb. 4, 2015), https://seths.blog/2015/02/give-the-people-what-they-want/).

quoting extreme members and positions.[192] Or the media can be a catalyst for a change.

With polarization in America at its zenith, media professionals have a unique opportunity to use their role as news people, daresay as mediators,[193] to create knowledgeable participants in policy conversations with an understanding of diverse perspectives. As the fourth branch of government, the media's role is to check on the abuses of power and be an educator of the people.[194]

To educate a polarized public, journalists and news reporters should develop skills to be better mediators and adapt to the challenges facing the twenty-first century. Principles of sound mediation mirror principles of sound journalism.[195] A mediator facilitating dispute resolution between parties and a journalist in the public eye uncovering the truth are alike in many ways and different in other ways.[196] Meditation is an intense process "where parties, counsel, and the mediator often spend hours locked in conference rooms attempting to hash out the details of a proposed settlement."[197] In this process, the mediator becomes aware of private details of each party's position.[198] Similarly, in the process of news gathering, a journalist becomes aware of the detailed accounts of each side and must determine how to frame the information into the news the public consumes.[199]

Like a mediator, journalists listen to both, if not multiple, sides of a conflict while maintaining detachment and neutrality.[200] Like a journalist, a mediator brings parties together, gains information, and provides realistic evaluation while refereeing the process.[201] On the other hand, mediation is different from journalism in that mediations are held in private with the parties' consensus to work towards a settlement, whereas a media professional's work is generally in the public purview with the goal of uncovering truth (although confidential interviews or informant conversations may be in private) with no such agreement.[202] Perhaps, movement towards a resolution and "truth-finding" for the news are sometimes incompatible objectives; nevertheless, meditation techniques can help uncover citizens'

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[192] Melissa Baumann & Hannes Siebert, *The Media as Mediator*, NIDR FORUM 28, 28 (Winter 1993).

[193] The media unavoidably, necessarily mediates conflicts. Baumann & Siebert, *supra* 192, at 28.

[194] Coleman, *supra* note 15, at 247, 252.

[195] Baumann & Siebert, *supra* note 192, at 28.

[196] Pauli, *News Media as Mediators*, *supra* note 1, at 719.

[197] LEAH M. QUADRINO, COMPLEX US MEDIATION: KEY ISSUES AND CONSIDERATIONS, Practical Law Practice Note 1-575-6667 (2014).

[198] *Id.*

[199] *See* Shoemaker *supra* note 4, at 109.

[200] Pauli, *News Media as Mediators*, *supra* note 1, at 719.

[201] *Id.* at 720.

[202] *Id.* at 721–22; KOVACH & ROSENSTIEL, *supra* note 5, at 5–6, 167.

underlying interests to facilitate accurate and honest reporting and develop understanding for all parties involved.[203]

Techniques of ADR professionals who facilitate high-conflict mediations and negotiations can equip journalists in the impossible task of presenting the truth and educating a polarized public. There are a litany of training manuals, articles, and books on the principles of ADR and on the art of negotiation and mediation. This article will focus on only three areas: (1) a mediator's presence and growing self-awareness, (2) understanding conflict and cognitive biases, and (3) managing an impasse.

B. *A Mediator's Presence & Growing Self-Awareness*

"Real experts ... are intellectually honest and brutally self-critical with themselves. They examine their mistakes squarely, deconstruct them, and relentlessly search for the impeccable."
– Peter Adler [204]

As many experienced mediators will agree, mediation is more than a "bag of tricks" or techniques.[205] The interplay of one's psychological, intellectual, and spiritual qualities has a direct impact on mediation, and by extension, the effectiveness of news reporting.[206] As mediators Daniel Bowling and David Hoffman assert, "this impact may be one of the most potent sources of the effectiveness of mediation."[207]

Career growth for a mediator (or newsperson) is a process of evolution. At the start, the mediator's goal is to study and practice techniques; next, the mediator tries to gain a deeper understanding of how mediation (or the news) works; lastly, the mediator strives to deepen an "awareness of how his or her personal qualities—for better or worse—influence the mediation [or news reporting] process."[208] A "mediator presence," as experienced by the parties, communicates a message.[209] Similarly, news personalities exert personal influence by their mere presence in disputes, such as in a dispute between party pundits or representatives.[210] When media professionals are at peace with themselves and the world, they subtly carry that peace into the room,

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[203] *See generally* Pauli, *Transforming News*, *supra* note 9.

[204] Peter Adler, Chapter 2 in Daniel Bowling & David Hoffman, *Bringing Peace into the Room: The Personal Qualities of the Mediator* (2003), http://www.eyeofthestormleadership.com/pg16.cfm.

[205] LAURENCE J. BOULLE, MICHAEL T COLATRELLA JR., & ANTHONY P. PICCHIONI, MEDIATION: SKILLS AND TECHNIQUES 11 (2008).

[206] *See* DWIGHT GOLANN & JAY FOLBERG, MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL 98 (Wolters Kluwer eds., 3d ed. 2016) (quoting Daniel Bowling & David Hoffman's article *Bringing Peace into the Room*).

[207] *Id.* at 99.

[208] *Id.*

[209] *Id.* at 99–100.

[210] *Id.* at 100.

interview, or live broadcast and can orient parties in a positive direction.[211] Self-awareness is key.[212]

What does this mean for a media professional reporting the news? Principally, it requires considering and managing personal biases—the lenses through which one sees the world—because bias impacts objectivity in news narratives and impairs the ability to understand the parties' perspectives.[213] Second, it demands a strong emotional intelligence, or EQ, because knowing one's emotions and managing them, as well as recognizing strong emotions and managing relationships with others, is inseparable from balanced reporting.[214]

Strong emotions can sometimes lead to ill-advised conclusions that are counterproductive or even harmful, such as (1) a distorted view, (2) validation of only supporting evidence, or (3) negative reactions to suggestions or evaluations from the other side.[215] A media professional's personal reactions to an issue and ability to manage the responses of others in a news context unequivocally sends a message to the journalist's audience. This is the core of the "mediator's presence" or "newsperson's presence."

Bowling and Hoffman explain that "[u]ntil we develop emotional self-awareness, we will project our own unrecognized emotions onto others."[216] Knowing oneself is to understand one's impulses in a heated debate or disagreeable interview: whether to control the process, react against the people, or rescue the underdog.[217] It is to be aware of identity: views of self, values, culture, and attitude.[218] It is to know if one holds strong convictions against an idea, experience or people, and guard against an unwarranted response.[219]

Lastly, self-reflection, before, during, and after the process of news reporting will be critical in the effort to curb the individual biases that taint objectivity and balance.[220] Consistently evaluating one's "practice" in gathering and reporting the news will develop greater EQ competency.[221]

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[211] *Id.* at 98, 100.

[212] *See* CRAIG E. RUNDE & TIM A. FLANAGAN, BECOMING A CONFLICT COMPETENT LEADER 4 (2007).

[213] *See* GOLANN & FOLBERG, *supra* note 206, at 99–100.

[214] *See* Louise Phipps Senft, *The Interrelationship of Ethics, Emotional Intelligence and Self Awareness*, ACRESOLUTION (Spring 2004), https://www.baltimoremediation.com/articles/ACR_Ethics.pdf.

[215] *See* Yona Shamir, UNESCO-IHP, *Alternative Dispute Resolution Approaches and their Application in Water Management: A Focus on Negotiation, Mediation, and Consensus Building*, http://www.un.org/waterforlifedecade/water_cooperation_2013/pdf/adr_background_paper.

[216] *See* GOLANN & FOLBERG, *supra* note 206, at 99.

[217] *See* Mieke Brandon, *Refection and Self Awareness*, Address at 11th National Mediation Conference in Sydney 1 (2012).

[218] *See id.* at 1.

[219] *See id.* at 4.

[220] *See id.* at 1.

[221] *See id.* at 5.

News professionals also need competency on the conflict and cognitive biases that are at play with themselves, pundits, interviewees, and the general consumers of the news.

C. *Understanding Conflict & Cognitive Biases*

Conflict is an inescapable part of life. It can be defined as "any situation in which people have incompatible interests, goals, principles, or feelings."[222] A cursory glance at the news will accentuate the landmines of conflict entrenched in our political discourse. Unintentionally, people fall prey to the "drama triangle" of victim, villain, and hero.[223] People in a conflict see the other side as the villain and erect walls of judgment that prevent parties from moving past their "positioning" to consider the possibility of a resolution.[224] This understanding of conflict supports the level of discontent and personalization of politics, including the mutually perceived incompatibility, between the Democrats and the Republicans in America today.[225]

Another way to conceptualize conflict is in three dimensions: behavioral, emotional, and cognitive.[226] The behavioral element refers to the concrete elements surrounding a conflict, such as the Dakota Access Pipeline and Standing Rock Sioux tribe.[227] The emotional element refers to the feelings associated with the incident(s) at any stage of the process, such as a legitimate fear that grows into anger or resentment.[228] And lastly, the cognitive dimension involves how people contemplate, understand, and interpret the issues.[229] Different parties have differing interpretations, and as a reporter it is important to understand and share these varying interpretations and the drivers behind them.[230]

Cognitive biases are "universal human tendencies to process information in ways that often lead to erroneous judgments of others."[231] These judgments arise from incorrect assumptions concerning motivations when ignorant of a person's true intentions.[232] Cognitive biases generally serve as instigators of

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[222] RUNDE & FLANAGAN, *supra* note 212, at 4.

[223] GARY HARPER, THE JOY OF CONFLICT: TRANSFORMING VICTIMS, VILLAINS AND HEROES IN THE WORKPLACE AND AT HOME 8 (2004).

[224] *See id.* at 8.

[225] *See generally* Pew, *Polarization in America*, *supra* note 1; Pew, *Divide on Political Values Grows Wider*, *supra* note 53; Pew, *On the Eve of Inauguration*, *supra* note 41.

[226] Leonard L. Riskin, *Eleven Big Ideas About Conflict: A Superficial Guide for the Thoughtful Journalist*, J. DISP. RESOL. 157, 159 (2007), http://scholarship.law.ufl.edu/facultypub/456.

[227] *See id.* at 159.

[228] *See id.* at 159.

[229] *See id.* at 159.

[230] *See id.* at 159.

[231] VICTORIA PYNOCHON & JOE KRAYNAK, SUCCESS AS A MEDIATOR FOR DUMMIES 151 (2012).

[232] *Id.*

disputes and often cause negotiations to fall apart.[233] Thus, a newsperson should be cognizant of cognitive biases that cause people in the same situation to view the situation vastly differently. Common cognitive biases include: selective perception, confirmation bias, attribution bias, anchoring, and reactive devaluation.[234]

1. *Selective Perception*

Selective perception underpins why people view the same event differently.[235] When people process new information, they automatically view it from a particular lens and judge the situation from that frame.[236] Data that is inconsistent with the frame is likely to be disregarded.[237] It is the root of why people in arguments can instinctively tune into concepts that support their viewpoint and point out weakness in the other side, but miss weaknesses in their own argument.[238] Understanding selective perception can prompt a reporter to account for bias by asking probing questions to their interviewees.[239]

2. *Confirmation Bias*

Confirmation bias, as discussed earlier, is similar to selective perception.[240] It is the tendency to weigh supporting evidence more heavily and discredit conflicting evidence.[241] Confirmation bias is perpetuated by advocacy or "positioning."[242] For example, positioning occurs when a political party representative takes a "position" while speaking to a reporter or live audience, and the representative focuses on building her case rather than evaluating it fairly because of her commitment to her argument's superiority.[243]

3. *Anchoring*

Anchoring occurs when people form value estimations or benchmarks based on their individual experiences and understanding.[244] Once the initial

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[233] *Id.*

[234] *See* GOLANN & FOLBERG, *supra* note 206, at 55–60.

[235] *Id.* at 57.

[236] *Id.*

[237] *Id.*

[238] *Id.*

[239] *Id.* at 57.

[240] *Id.*

[241] *Id.*

[242] *Id.*

[243] *See id.*

[244] *Id.* at 58.

benchmark is made, it is difficult to readjust; people are "anchored" by the baseline, even if the comparison or starting point was unsubstantiated.[245] In news coverage, anchoring is evident when political parties are "posturing." For example, Republicans assert that Obamacare was a failure that ruined healthcare and the economy, while Democrats argue it saves lives and helps those who cannot afford insurance.[246] Whether there is a legitimate basis for the numbers or the "positioning," the parties are stuck or "anchored" in their initial positioning.

4. *Attribution Bias*

Attribution bias is the tendency to assume the worst about the opposition.[247] Any action or conduct by the other side is judged in the worst possible light—intentional malfeasance—whereas any ambiguous conduct by one's own side is mere mistake or unintentional conduct.[248] In the political arena, this is apparent. The Democratic Party will scourge the Republican Party for being anti-women's rights but at the same time not praise strong women leaders who identify as Republicans.[249] Similarly, the Republican Party will condemn the Democratic Party over their government "handouts" or "abortions" but often promote wheat subsidies for many of the same philosophical reasons the Democrats push welfare programs.[250]

5. *Reactive Devaluation*

Lastly, reactive devaluation is another level of attribution bias.[251] Any offer or suggestion made by the opposing side is viewed automatically as insufficient or ill-intentioned.[252] Even if, from a neutral perspective, a decent compromise or proposal is offered, reactive devaluation is the tendency to assume the other side does not have one's best interests at heart; therefore, there must be an underlying trap or hidden agenda.[253] News people, like mediators, have a unique role and opportunity to evaluate the merits of

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[245] *Id.*

[246] *See e.g.,* Erika Franklin Fowler et al., *Media Messages and Perceptions of the Affordable Care Act During the Early Phase of Implementation*, J. HEALTH POL. POL'Y L. 167, 170 (2017).

[247] GOLANN & FOLBERG, *supra* note 206, at 60.

[248] *Id.*

[249] *See, e.g.,* S.E. Cupp, *No, Not All Women are Democrats*, N.Y. TIMES (June 16, 2018), https://www.nytimes.com/2018/06/16/opinion/sunday/no-not-all-women-are-democrats.html.

[250] *See, e.g.,* Erika Eichelberger, *The Four Most Hypocritical Provisions in the GOP Farm Bill*, MOTHER JONES (Nov. 7, 2013), https://www.motherjones.com/food/2013/11/republican-farm-bill-food-stamps-subsidy-hypocrisy/.

[251] *See* GOLANN & FOLBERG, *supra* note 206, at 60–61.

[252] *See id.*

[253] *See id.*

proposals or ideas in the abstract, and being unattached from party affiliation allows them to critically examine a matter and avoid reactive devaluation.[254]

D. *Managing an Impasse*

Awareness of cognitive biases is one aspect, but mediators also have techniques to manage an impasse that arises, which can be useful to the media in news reporting. Key techniques are as follows: emphatic listening, reframing, and reality testing.[255]

1. *Empathetic Listening*

"The most basic of human needs is the need to understand and be understood. The best way to understand people is to listen to them."[256] Mediators and journalists alike actively seek to learn people's stories.[257] By creating the space to be fully heard, a mediator and a journalist can redirect confrontational energy to foster collaboration and openness.[258] Empathy is the ability to project oneself into the other person's shoes to understand their emotions and feelings.[259] Empathetic listening uses verbal and nonverbal cues such as saying, "I see" or nodding to reassure the speaker that the speaker can share without fear of criticism, judgment, or interruption.[260] Active listening requires stopping one's inner conversation or urgings to prepare a response, and truly listening to the other person.[261]

An extension of the technique would be reflective listening—where the listener summarizes back what he or she heard to demonstrate understanding.[262] It is important to note, empathy does not equal sympathy.[263] Empathy does not mean that one agrees with the speaker; it simply means that the listener indicates that he or she has heard and understood the speaker.[264] Entertainment news today unfortunately uses mostly confrontational conversations playing a "game of ping-pong marked by a series of 'yes, but' as the person immediately rebuts the other's points."[265] While perhaps

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[254] *See id.* at 160–61.

[255] *Id.* at 123–32.

[256] Dr. Ralph Nichols, INT'L LISTENING ASS'N, https://www.listen.org (last visited Feb. 12, 2018).

[257] HARPER, *supra* note 223, at 93.

[258] *See id.*

[259] GOLANN & FOLBERG, *supra* note 206, at 125.

[260] *Id.* at 125–26.

[261] *See* HARPER, *supra* note 223, at 93.

[262] GOLANN & FOLBERG, *supra* note 206, at 126.

[263] *Id.* at 126.

[264] *Id.* at 126.

[265] *See* HARPER, *supra* note 223, at 95.

entertaining, this style can be damaging and fails to create an understanding of perspectives.[266]

On the other hand, shows like *Messy Truth* with Van Jones or *On Being* with Krista Tippet demonstrate unique, non-partisan styles of reporting aimed at building understanding through conversations with real citizens.[267] Each reporter has their own style, but their attention to listening goes a long way in building understanding.[268]

2. *Reframing*

Mediators manage conversations by reframing, in other words restating or paraphrasing, disagreement using nonjudgmental language.[269] Reframing can also be defined as using different words, concepts, or emphases to appropriate for the context.[270] Journalists aim to gather information to report to the public, not understate disagreement.[271] However, this does not mean reframing is useless. Especially when parties are in a joint conversation with the journalist, the journalist may find that using the reframing technique to rephrase statements of one side's "position" in terms of "interests" can be powerful:[272] for example, framing "immigrants" as people seeking a better life or escaping poverty, or "gun-lovers" as individuals wanting the right to keep their family safe or continue a hard-earned way of life without interference. Reframing can help the journalist and the participants uncover deeper interests and foster understanding even if they do not agree.[273] It may even create space for a journalist to probe one's side about their understanding of the other side's positions, and even potentially create workable solutions.[274]

3. *Reality Testing*

Reality testing is used by mediators to guide parties to uncover gaps in their understanding of a situation.[275] In serving as an agent of reality, the mediator (and the journalist) can pose critical questions and help parties

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[266] GOLANN & FOLBERG, *supra* note 206, at 126.

[267] *See* Van Jones, *Beyond the Messy Truth*, http://www.vanjones.net/beyond_the_messy_truth (Jan. 28, 2018); Krista Tippet, *On Being, Civil Conversations Project*, http://www.civilconversationsproject.org (Feb. 8, 2018).

[268] GOLANN & FOLBERG, *supra* note 206, at 126 (noting that good listening helps bring understanding between parties).

[269] Pauli, *News Media as Mediators, supra* note 1, at 725–26.

[270] *See* BOULLE, *supra* note 206, at 128.

[271] Pauli, *News Media as Mediators, supra* note 1, at 725–26.

[272] *Id.* at 725–26.

[273] *See* GOLANN & FOLBERG, *supra* note 206, at 130–31.

[274] *See* Pauli, *News Media as Mediators, supra* note 1, at 726 (arguing against conflict oriented frames because collaborative spaces foster better understanding and actual resolution of issues).

[275] *See* BOULLE, *supra* note 206, at 233.

conduct evaluations of the issue.[276] In helping a party see the merits of an issue objectively, the party can move towards a more realistic view of the circumstances as opposed to having a view that is completely distorted by cognitive biases.[277] The newsperson, using reality testing, can ask a party to respond to the opponent's claims, illustrating the strengths and weaknesses in the party's own position.[278] In a broadcast or written piece, this critical engagement would be illuminating to the public consuming the news. However, it is important to note that this technique is more interventionist and commonly conducted in private caucusing in mediation to avoid creating vulnerability and defensiveness in the party who is being challenged.[279] As a reporter, critical evaluation jointly with a party can foster understanding, but there is also risk the silent audience may not also join the ride; but at the very least, the journalist has fulfilled her role in enhancing the public understanding of viewpoints.

VII. CONCLUSION

The intended role of the media, as the unofficial fourth branch of the government, is to arm the public with the information they need to be free and self-governing.[280] Unfortunately, the rise of technology, confirmation bias, and mistrust of the media has led to an increasingly polarized America. The growing personalization of politics and misunderstandings demands that the media bolster their toolkit with ADR insights and methods in order to promote understanding. This article provides a few techniques that may prove useful. Every news media professional must grasp that "public discourse lies at the heart of and actually predates formal American journalism."[281] We need more understanding across the aisle today and the Media's adoption of ADR techniques may be the best first step towards a better informed, more understanding public.

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[276] *See id.* at 234.

[277] *See id.*

[278] *See id.* at 233.

[279] *Id.* at 235.

[280] *The 4th Estate as the 4th Branch,* TEACHING HISTORY, https://teachinghistory.org/history-content/ask-a-historian/23821 (last visited Sep. 27, 2018).

[281] KOVACH & ROSENSTIEL, *supra* note 5, 170.

Three Levels for Anti-Racism Training:

Diversity Awareness, Cultural Competence, Anti-racism = Justice

Diversity = Awareness

- Develop a sensitivity and understanding of another ethnic group
- Celebrates variety of cultures and gain knowledge of that culture
- Acknowledges and respect each other's differences
- Positive response – however it will never effectively address racism

Cultural Competence

- Celebrates Diversity
- Depth tends to be historical perspective to so we can all just get along today
- Emphasis is on effectively operating in different cultural contexts
- Relate and communicate across cultural lines
- Managing diversity for overall productivity and often using the dominant bias to do so
- Doesn't look at power, privilege or access

Anti-Racism= Social Justice / Racial Justice

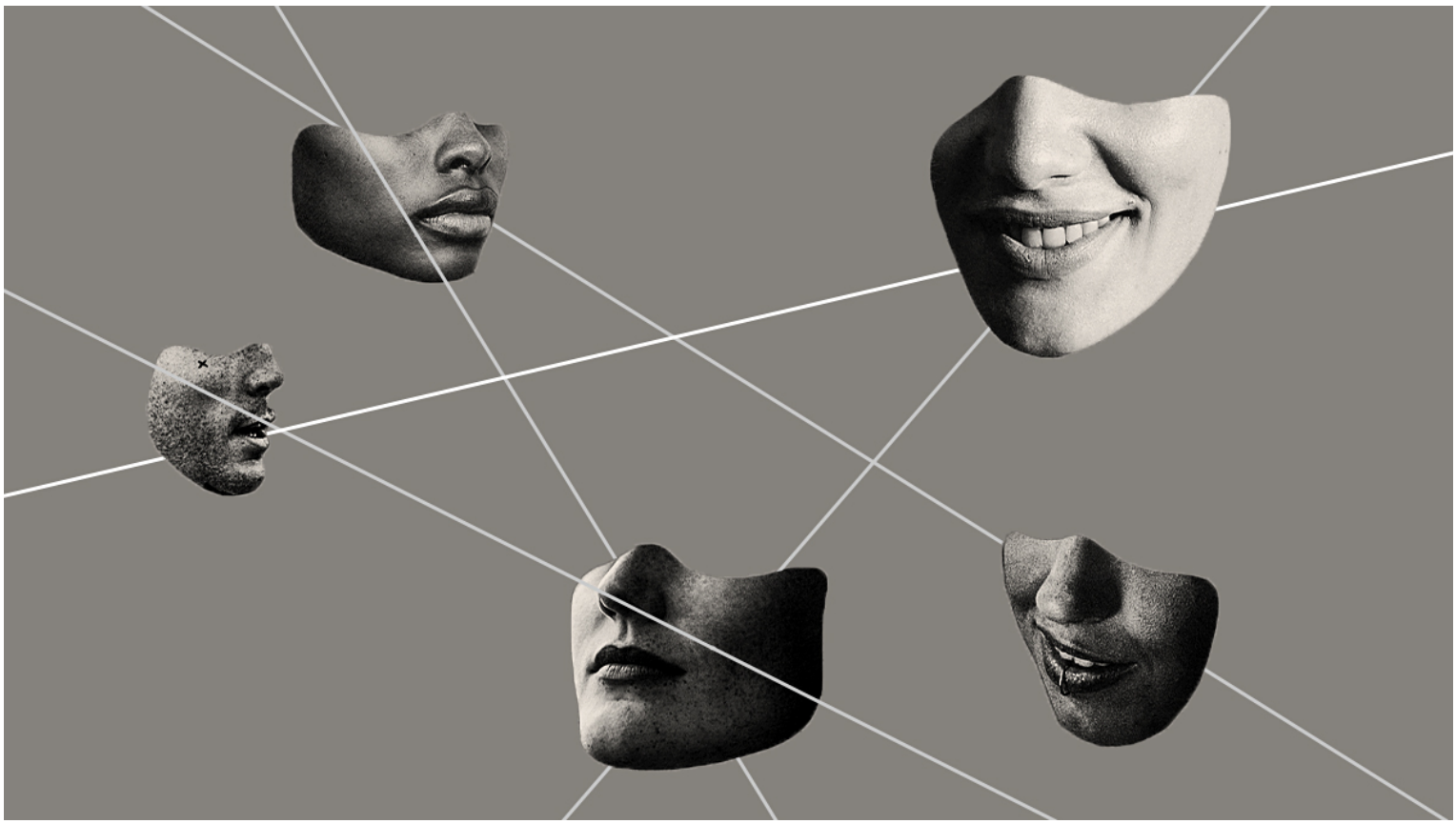
- Looks at the large, societal perspective regarding issues of oppression and social change
- Sights are set on changing the systems and structures that perpetuate inequality and inequity in our society
- Addresses issues of power and privilege along the lines of social identities
- People at this level realize that racism is a problem and are committed to working towards it end
- Need to address both how racism effects People of Color as well as how racial injustice benefits White People
- How practices, policies and procedures do not serve People of Color and over- serve White People

RACE

When and How to Respond to Microaggressions

by Ella F. Washington , Alison Hall Birch and Laura Morgan Roberts

July 03, 2020



HBR Staff/KKGAS/Stocksy

In U.S. workplaces — and around the world — people are finally engaging in real conversations about race, justice, diversity, equality, and inclusion. That's a good thing, hopefully paving the way for meaningful anti-racist action from both individuals and organizations. But those discussions will in all likelihood be very uncomfortable — not just for white employees and leaders who might be confronting their privilege for the first time but also for people of color, especially Black Americans, who know that candid talks with colleagues will mean they either face or need to call out "microaggressions."

These are incidents in which someone accidentally (or purposely) makes an offensive statement or asks an insensitive question. Microagressions are defined as verbal, behavioral, and environmental indignities that communicate hostile, derogatory, or negative racial slights and insults to the target person or group. For Black people, they are ubiquitous across daily work and life. Here are a few seemingly innocuous statements that, in the context of racist assumptions and stereotypes, can be quite damaging.

- "When I see you, I don't see color." (signaling that the person doesn't acknowledge your Blackness or won't hold it against you)
- "We are all one race: the human race." (signaling that your experience as a Black person is no different from the experience of people of other races)
- "You are so articulate." (signaling that Black people are not usually capable of competent intellectual conversation)
- "I see your hair is big today! Are you planning to wear it like that to the client meeting?" (signaling that natural Black hairstyles are not professional)
- "Everyone can succeed in society if they work hard enough." (signaling that disparate outcomes for Black people result from laziness)

As suggested by the name, microaggressions seem small; but compounded over time, they can have a deleterious impact on an employee's experience, physical health, and psychological well-being. In fact, research suggests that subtle forms of interpersonal discrimination like microaggressions are *at least as harmful* as more-overt expressions of discrimination.

Microaggressions reinforce white privilege and undermine a culture of inclusion. The best solution is, of course, increasing awareness of microaggressions, insisting that non-Black employees stop committing them, and calling out those who do. But in the absence of those changes — and understanding that complete prevention is probably impossible — how should Black employees and managers respond to the microaggressions they face, within and outside of current discussions around race in the workplace?

There are three main ways to react:

Let it go. For a long time, the most common default response was choosing not to address offensive comments in the workplace. Because they are pervasive yet subtle, they can be emotionally draining to confront. Yet silence places an emotional tax on Black employees, who are left wondering what happened and why, questioning their right to feel offended, and reinforcing beliefs that they are not safe from identity devaluation at work.

Respond immediately. This approach allows the transgression to be called out and its impact explained while the details of the incident are fresh in the minds of everyone involved. Immediacy is an important component of correcting bad behavior. But this approach can be risky. The perpetrator might get defensive, leaving the target feeling like they somehow "lost control," did not show up as their best self, and will be labeled an overly sensitive whiner, a trouble-maker, or the stereotypical angry Black person.

Respond later. A more tempered response is to address the perpetrator privately at a later point to explain why the microaggression was offensive. Here, the risk lies in the time lag. A follow-up conversation requires helping the person who committed the microaggression to first recall it and then to appreciate its impact. The Black employee bringing it up might be deemed petty — like someone who has been harboring resentment or holding on to "little things" while the other party, having "meant no harm," has moved on. Such accusations are a form of racial gaslighting, which can be very damaging.

We recommend the following framework for determining which course is best for you in any given situation and then, if you decide to respond, ensuring an effective dialogue.

Discern. Determine how much of an investment you want to make in addressing the microaggression. Do not feel pressured to respond to every incident; rather, feel empowered to do so when you decide you should. Consider:

- *The importance of the issue and the relationship*. If either is or both are important to you, avoidance is the wrong approach. Express yourself in a way that honors your care for the other party, and assert yourself in a way that acknowledges your concern about the issue.

- *Your feelings.* Microaggressions can make you doubt the legitimacy of your reactions. Allow yourself to feel what you feel, whether it's anger, disappointment, frustration, aggravation, confusion, embarrassment, exhaustion, or something else. Any emotion is legitimate and should factor into your decision about whether, how, and when to respond. With more-active negative emotions such as anger, it's often best to address the incident later. If you're confused, an immediate response might be preferable. If you're simply exhausted from the weight of working while Black, maybe it is best to let it go — meaning best for you, not for the perpetrator.
- *How you want to be perceived now and in the future.* There are consequences to speaking up and to remaining silent. Only you can determine which holds more weight for you in any specific situation.

Disarm. If you choose to confront a microaggression, be prepared to disarm the person who committed it. One reason we avoid conversations about race is that they make people defensive. Perpetrators of microaggressions typically fear being perceived — or worse, revealed — as racist. Explain that the conversation might get uncomfortable for them but that what they just said or did was uncomfortable for you. Invite them to sit alongside you in the awkwardness of their words or deeds while you get to the root of their behavior together.

Defy. Challenge the perpetrator to clarify their statement or action. Use a probing question, such as "*How do you mean that?*" This gives people a chance to check themselves as they unpack what happened. And it gives you an opportunity to better gauge the perpetrator's intent. One of the greatest privileges is the freedom not to notice you have privilege; so microaggressions are often inadvertently offensive. Acknowledge that you accept their intentions to be as they stated but reframe the conversation around the impact of the microaggression. Explain how you initially interpreted it and why. If they continue to assert that they "*didn't mean it like that*," remind them that you appreciate their willingness to clarify their intent and hope they appreciate your willingness to clarify their impact.

Decide. You control what this incident will mean for your life and your work — what you will take from the interaction and what you will allow it to take from you. Black people, as well as those with various other marginalized and intersectional identities, are already subject to biased expectations and evaluations in the workplace. Life is sufficiently taxing without allowing microaggressions to bring you down. Let protecting your joy be your greatest and most persistent act of resistance.

A note of advice for non-Black allies old and new: The work of allyship is difficult. You will make mistakes as you learn — and you will always be learning. For anyone accused of committing a microaggression or counseling someone who has been accused, here are a few notes on how to respond:

- Remember that intent does not supersede impact.
- Seek to understand the experiences of your Black peers, bosses, and employees without making them responsible for your edification.
- Believe your Black colleagues when they choose to share their insights; don't get defensive or play devil's advocate.
- Get comfortable rethinking much of what you thought to be true about the world and your workplace and accept that you have likely been complicit in producing inequity.

Although more organizations are encouraging candid discussions on race in the workplace, we cannot ignore the historical backlash that Black employees have endured for speaking up. Cultural change takes time and intention. So while we encourage timely and strategic dialogue about microaggressions, it is ultimately up to each individual to respond in the way that is most authentic to who they are and how they want to be perceived.

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White Privilege: Unpacking the Invisible Knapsack
Peggy McIntosh

"I was taught to see racism only in individual acts of meanness, not in invisible systems conferring dominance on my group"

Through work to bring materials from women's studies into the rest of the curriculum, I have often noticed men's unwillingness to grant that they are overprivileged, even though they may grant that women are disadvantaged. They may say they will work to women's statues, in the society, the university, or the curriculum, but they can't or won't support the idea of lessening men's. Denials that amount to taboos surround the subject of advantages that men gain from women's disadvantages. These denials protect male privilege from being fully acknowledged, lessened, or ended.

Thinking through unacknowledged male privilege as a phenomenon, I realized that, since hierarchies in our society are interlocking, there are most likely a phenomenon, I realized that, since hierarchies in our society are interlocking, there was most likely a phenomenon of while privilege that was similarly denied and protected. As a white person, I realized I had been taught about racism as something that puts others at a disadvantage, but had been taught not to see one of its corollary aspects, white privilege, which puts me at an advantage.

I think whites are carefully taught not to recognize white privilege, as males are taught not to recognize male privilege. So I have begun in an untutored way to ask what it is like to have white privilege. I have come to see white privilege as an invisible package of unearned assets that I can count on cashing in each day, but about which I was "meant" to remain oblivious. White privilege is like an invisible weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools , and blank checks.

Describing white privilege makes one newly accountable. As we in women's studies work to reveal male privilege and ask men to give up some of their power, so one who writes about having white privilege must ask, "having described it, what will I do to lessen or end it?"

After I realized the extent to which men work from a base of unacknowledged privilege, I understood that much of their oppressiveness was unconscious. Then I remembered the frequent charges from women of color that white women whom they encounter are oppressive. I began to understand why we are just seen as oppressive, even when we don't see ourselves that way. I began to count the ways in which I enjoy unearned skin privilege and have been conditioned into oblivion about its existence.

My schooling gave me no training in seeing myself as an oppressor, as an unfairly advantaged person, or as a participant in a damaged culture. I was taught to see myself as an individual whose moral state depended on her individual moral will. My schooling followed the pattern my colleague Elizabeth Minnich has pointed out: whites are taught to think of their lives as morally neutral, normative, and average, and also ideal, so that when we work to benefit others, this is seen as work that will allow "them" to be more like "us."

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Daily effects of white privilege

I decided to try to work on myself at least by identifying some of the daily effects of white privilege in my life. I have chosen those conditions that I think in my case attach somewhat more to skin-color privilege than to class, religion, ethnic status, or geographic location, though of course all these other factors are intricately intertwined. As far as I can tell, my African American coworkers, friends, and acquaintances with whom I come into daily or frequent contact in this particular time, place and time of work cannot count on most of these conditions.

1. I can if I wish arrange to be in the company of people of my race most of the time.

2. I can avoid spending time with people whom I was trained to mistrust and who have learned to mistrust my kind or me.

3. If I should need to move, I can be pretty sure of renting or purchasing housing in an area which I can afford and in which I would want to live.

4. I can be pretty sure that my neighbors in such a location will be neutral or pleasant to me.

5. I can go shopping alone most of the time, pretty well assured that I will not be followed or harassed.

6. I can turn on the television or open to the front page of the paper and see people of my race widely represented.

7. When I am told about our national heritage or about "civilization," I am shown that people of my color made it what it is.

8. I can be sure that my children will be given curricular materials that testify to the existence of their race.

9. If I want to, I can be pretty sure of finding a publisher for this piece on white privilege.

10. I can be pretty sure of having my voice heard in a group in which I am the only member of my race.

11. I can be casual about whether or not to listen to another person's voice in a group in which s/he is the only member of his/her race.

12. I can go into a music shop and count on finding the music of my race represented, into a supermarket and find the staple foods which fit with my cultural traditions, into a hairdresser's shop and find someone who can cut my hair.

13. Whether I use checks, credit cards or cash, I can count on my skin color not to work against the appearance of financial reliability.

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14. I can arrange to protect my children most of the time from people who might not like them.

15. I do not have to educate my children to be aware of systemic racism for their own daily physical protection.

16. I can be pretty sure that my children's teachers and employers will tolerate them if they fit school and workplace norms; my chief worries about them do not concern others' attitudes toward their race.

17. I can talk with my mouth full and not have people put this down to my color.

18. I can swear, or dress in second hand clothes, or not answer letters, without having people attribute these choices to the bad morals, the poverty or the illiteracy of my race.

19. I can speak in public to a powerful male group without putting my race on trial.

20. I can do well in a challenging situation without being called a credit to my race.

21. I am never asked to speak for all the people of my racial group.

22. I can remain oblivious of the language and customs of persons of color who constitute the world's majority without feeling in my culture any penalty for such oblivion.

23. I can criticize our government and talk about how much I fear its policies and behavior without being seen as a cultural outsider.

24. I can be pretty sure that if I ask to talk to the "person in charge", I will be facing a person of my race.

25. If a traffic cop pulls me over or if the IRS audits my tax return, I can be sure I haven't been singled out because of my race.

26. I can easily buy posters, post-cards, picture books, greeting cards, dolls, toys and children's magazines featuring people of my race.

27. I can go home from most meetings of organizations I belong to feeling somewhat tied in, rather than isolated, out-of-place, outnumbered, unheard, held at a distance or feared.

28. I can be pretty sure that an argument with a colleague of another race is more likely to jeopardize her/his chances for advancement than to jeopardize mine.

29. I can be pretty sure that if I argue for the promotion of a person of another race, or a program centering on race, this is not likely to cost me heavily within my present setting, even if my colleagues disagree with me.

30. If I declare there is a racial issue at hand, or there isn't a racial issue at hand, my race will lend me more credibility for either position than a person of color will have.

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31. I can choose to ignore developments in minority writing and minority activist programs, or disparage them, or learn from them, but in any case, I can find ways to be more or less protected from negative consequences of any of these choices.

32. My culture gives me little fear about ignoring the perspectives and powers of people of other races.

33. I am not made acutely aware that my shape, bearing or body odor will be taken as a reflection on my race.

34. I can worry about racism without being seen as self-interested or self-seeking.

35. I can take a job with an affirmative action employer without having my co-workers on the job suspect that I got it because of my race.

36. If my day, week or year is going badly, I need not ask of each negative episode or situation whether it had racial overtones.

37. I can be pretty sure of finding people who would be willing to talk with me and advise me about my next steps, professionally.

38. I can think over many options, social, political, imaginative or professional, without asking whether a person of my race would be accepted or allowed to do what I want to do.

39. I can be late to a meeting without having the lateness reflect on my race.

40. I can choose public accommodation without fearing that people of my race cannot get in or will be mistreated in the places I have chosen.

41. I can be sure that if I need legal or medical help, my race will not work against me.

42. I can arrange my activities so that I will never have to experience feelings of rejection owing to my race.

43. If I have low credibility as a leader I can be sure that my race is not the problem.

44. I can easily find academic courses and institutions which give attention only to people of my race.

45. I can expect figurative language and imagery in all of the arts to testify to experiences of my race.

46. I can chose blemish cover or bandages in "flesh" color and have them more or less match my skin.

47. I can travel alone or with my spouse without expecting embarrassment or hostility in those who deal with us.

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48. I have no difficulty finding neighborhoods where people approve of our household.

49. My children are given texts and classes which implicitly support our kind of family unit and do not turn them against my choice of domestic partnership.

50. I will feel welcomed and "normal" in the usual walks of public life, institutional and social.

Elusive and fugitive

I repeatedly forgot each of the realizations on this list until I wrote it down. For me white privilege has turned out to be an elusive and fugitive subject. The pressure to avoid it is great, for in facing it I must give up the myth of meritocracy. If these things are true, this is not such a free country; one's life is not what one makes it; many doors open for certain people through no virtues of their own.

In unpacking this invisible knapsack of white privilege, I have listed conditions of daily experience that I once took for granted. Nor did I think of any of these perquisites as bad for the holder. I now think that we need a more finely differentiated taxonomy of privilege, for some of these varieties are only what one would want for everyone in a just society, and others give license to be ignorant, oblivious, arrogant, and destructive.

I see a pattern running through the matrix of white privilege, a patter of assumptions that were passed on to me as a white person. There was one main piece of cultural turf; it was my own turn, and I was among those who could control the turf. My skin color was an asset for any move I was educated to want to make. I could think of myself as belonging in major ways and of making social systems work for me. I could freely disparage, fear, neglect, or be oblivious to anything outside of the dominant cultural forms. Being of the main culture, I could also criticize it fairly freely.

In proportion as my racial group was being made confident, comfortable, and oblivious, other groups were likely being made unconfident, uncomfortable, and alienated. Whiteness protected me from many kinds of hostility, distress, and violence, which I was being subtly trained to visit, in turn, upon people of color.

For this reason, the word "privilege" now seems to me misleading. We usually think of privilege as being a favored state, whether earned or conferred by birth or luck. Yet some of the conditions I have described here work systematically to over empower certain groups. Such privilege simply confers dominance because of one's race or sex.

Earned strength, unearned power

I want, then, to distinguish between earned strength and unearned power conferred privilege can look like strength when it is in fact permission to escape or to dominate. But not all of the privileges on my list are inevitably damaging. Some, like the expectation that neighbors will be decent to you, or that your race will not count against you in court, should be the norm in a just society. Others, like the privilege to ignore less powerful people, distort the humanity of the holders as well as the ignored groups.

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We might at least start by distinguishing between positive advantages, which we can work to spread, and negative types of advantage, which unless rejected will always reinforce our present hierarchies. For example, the feeling that one belongs within the human circle, as Native Americans say, should not be seen as privilege for a few. Ideally it is an unearned entitlement. At present, since only a few have it, it is an unearned advantage for them. This paper results from a process of coming to see that some of the power that I originally say as attendant on being a human being in the United States consisted in unearned advantage and conferred dominance.

I have met very few men who truly distressed about systemic, unearned male advantage and conferred dominance. And so one question for me and others like me is whether we will be like them, or whether we will get truly distressed, even outraged, about unearned race advantage and conferred dominance, and, if so, what we will do to lessen them. In any case, we need to do more work in identifying how they actually affect our daily lives. Many, perhaps most, of our white students in the United States think that racism doesn't affect them because they are not people of color; they do not see "whiteness" as a racial identity. In addition, since race and sex are not the only advantaging systems at work, we need similarly to examine the daily experience of having age advantage, or ethnic advantage, or physical ability, or advantage related to nationality, religion, or sexual orientation.

Difficulties and angers surrounding the task of finding parallels are many. Since racism, sexism, and heterosexism are not the same, the advantages associated with them should not be seen as the same. In addition, it is hard to disentangle aspects of unearned advantage that rest more on social class, economic class, race, religion, sex, and ethnic identity that on other factors. Still, all of the oppressions are interlocking, as the members of the Combahee River Collective pointed out in their "Black Feminist Statement" of 1977.

One factor seems clear about all of the interlocking oppressions. They take both active forms, which we can see, and embedded forms, which as a member of the dominant groups one is taught not to see. In my class and place, I did not see myself as a racist because I was taught to recognize racism only in individual acts of meanness by members of my group, never in invisible systems conferring unsought racial dominance on my group from birth.

Disapproving of the system won't be enough to change them. I was taught to think that racism could end if white individuals changed their attitude. But a "white" skin in the United States opens many doors for whites whether or not we approve of the way dominance has been conferred on us. Individual acts can palliate but cannot end, these problems.

To redesign social systems we need first to acknowledge their colossal unseen dimensions. The silences and denials surrounding privilege are the key political surrounding privilege are the key political tool here. They keep the thinking about equality or equity incomplete, protecting unearned advantage and conferred dominance by making these subject taboo. Most talk by whites about equal opportunity seems to me now to be about equal opportunity to try to get into a position of dominance while denying that systems of dominance exist.

It seems to me that obliviousness about white advantage, like obliviousness about male advantage, is kept strongly inculturated in the United States so as to maintain the myth of meritocracy, the myth that

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democratic choice is equally available to all. Keeping most people unaware that freedom of confident action is there for just a small number of people props up those in power and serves to keep power in the hands of the same groups that have most of it already.

Although systemic change takes many decades, there are pressing questions for me and, I imagine, for some others like me if we raise our daily consciousness on the perquisites of being light-skinned. What will we do with such knowledge? As we know from watching men, it is an open question whether we will choose to use unearned advantage, and whether we will use any of our arbitrarily awarded power to try to reconstruct power systems on a broader base.

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