2021

Mediation: Embedded Assumptions of Whiteness?

Sharon Press
Mitchell Hamline School of Law, sharon.press@mitchellhamline.edu

Ellen E. Deason
The Ohio State University

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Abstract

This article attempts to uncover some of the systemic ways in which white supremacy is expressed in the practice of mediation in the United States with the goal of inspiring additional conversations and deeper attention to these issues by scholars and practitioners in the field of dispute resolution. Our methodology is to apply the themes in Layla F. Saad's book, Me and White Supremacy: Combat Racism, Change the World, and Become a Good Ancestor (2020). We use the lenses of tone policing, color-blindness, racial stereotyping, anti-blackness, white silence, and white supremacy to reflect on the following aspects of mediation: communication norms, expression of anger, emphasis on the future, the development of narratives, mediator bias, mediator neutrality, embedded assumptions about conflict, who serves as mediators, and the role of self-determination. The article concludes with some suggestions for potential ways to address the issues raised.

Keywords

Disciplines

Dispute Resolution and Arbitration | Law and Race

MEDIATION:
EMBEDDED ASSUMPTIONS OF WHITENESS?

Sharon Press* & Ellen E. Deason**

We will have to repent in this generation not merely for the hateful words and actions of the bad people but for the appalling silence of the good people.

<p align="right">Dr. Martin Luther King, Jr.</p>

I. INTRODUCTION

This Article began with the murder of George Floyd by an officer of the Minneapolis Police Department on May 25, 2020, after a convenience store employee reported that Floyd used a counterfeit $20 bill to purchase cigarettes.[1] Seventeen minutes after the police arrived, Floyd was unconscious, pinned beneath them.[2] The events were recorded by bystanders and the public was confronted with visual evidence of what has been happening to Black, Indigenous, and People of Color (BIPOC)[3]—especially Black men—for centuries. It was dramatic testimony that law enforcement is based on a system that is the product of systemic racism and embedded notions of white supremacy.

We were horrified by what we saw, as were so many others. It is fair to ask why the reaction from whites like us—that we needed to do something—took so long when George Floyd was not the first person of color, nor the last, to be shockingly mistreated. We do not fully know the answer, or perhaps we are not able to con-

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* Professor of Law and Director, Dispute Resolution Institute, Mitchell Hamline School of Law.

** Joanne Wharton Murphy / Classes of 1965 & 1973 Professor in Law Emerita, The Ohio State University Moritz College of Law.

[1] Evan Hill et. al, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html.

[2] *Id.*

[3] "BIPOC" is a term commonly used in academia that expands on the phrase "people of color" to "account for the erasure of black people with darker skin and Native American people." One additional goal of the term is to emphasize that people of color are not a monolithic group and avoid conflating the experiences of different groups. *See* Sandra E. Garcia, *Where did BIPOC Come From?*, N.Y. TIMES (June 17, 2020), https://www.nytimes.com/article/what-is-bipoc.html. We use the term BIPOC to refer to the overall group of people of color generally, while not meaning to imply that the constituent groups have identical views or experiences.

front it. But the result was that each of us felt driven to try to understand our part in this culture and to begin to confront white supremacy in our personal and professional spheres. We both leapt at the opportunity to join a small group of dispute resolution colleagues to read and discuss our responses to Layla F. Saad's book, *Me and White Supremacy*.[4] Beginning in July, ten of us met on a weekly basis to begin working to understand white supremacy and all of the ways that it is embedded in our society.[5]

This piece grows out of that examination. Specifically, as mediators and teachers of mediation, we felt compelled to take a closer look at how mediation is taught and practiced in the United States and try to uncover the ways in which white supremacy has crept in or been "baked" into the practice. We are intentionally writing this as a set of reflections because we are not the first people to raise many of these issues about mediation and, importantly, neither of us is a critical race scholar. We don't propose answers,[6] but rather accept the common adage that the first step is recognizing the issue. We also are persuaded by Robin DiAngelo's point that awareness of the problem is especially important in the context of race: "[r]ushing ahead to solutions—especially when we have barely begun to think critically about the problem—bypasses the necessary personal work and reflection and distances us from understanding our own complicity."[7] So we will use this forum to raise questions that we hope will lead to more conversations and deeper attention to these issues by scholars and practitioners in the field of dispute resolution.

We would also like to acknowledge the *Cardozo Journal of Conflict Resolution* editors for being open to including this piece as part of the Symposium Issue on Presumptive Mediation in the Courts. Sharon participated in the Symposium as a presenter on the Florida State Court ADR Program for which she served as di-

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[4] Layla F. Saad, Me and White Supremacy: Combat Racism, Change the World, and Become a Good Ancestor (2020). The book is organized into four weeks of information and prompts for reflection covering such topics as: You and White Privilege; You and White Fragility; You and Tone Policing; You and White Silence; You and White Superiority; and You and White Exceptionalism.

[5] At the start of our journey, we agreed as a group that we would maintain the confidentiality of our conversations but could share what we had learned from each other without attribution. Thus, while not disclosing the names of those we worked with, we wish to express our gratitude to each of them for their insights. We learned so much from them.

[6] We do, however, remind readers of some suggestions made by others. *See infra* Part VII.

[7] Robin DiAngelo, *Foreword* in Saad, *supra* note 4, at xi-xii.

rector during its formative years, until 2009.[8] We believe it is important to underscore the connection between our topic and the Symposium. When an institution endorses the use of a process such as mediation, it has an obligation to ensure that the process is free from embedded racism. This is especially true when that institution is a court, and the court is incorporating mediation as a part of the justice system. Our examination leads us to believe that there is work to be done to deliver on the promise of racial justice. Given that the Symposium focused on court-connected mediation, we will use institutionalized mediation as our frame of reference, but it is important to note that we believe that the critique reaches beyond the context of court-connected or presumptive mediation to mediation in all its contexts.

In this Article we will apply the themes articulated by Saad to the following aspects of mediation: communication norms[9] and the role of anger[10]; the role of narration and narratives;[11] the role of the past in mediation;[12] mediator bias;[13] the neutrality of the mediator;[14] embedded assumptions about conflict;[15] who currently serves as mediators;[16] and the role of self-determination.[17] We will look at these attributes of mediation through the lenses of tone policing,[18] color-blindness,[19] racial stereotyping,[20] anti-blackness,[21] white silence,[22] and white supremacy.[23]

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[8] She has written previously on the Florida State Court ADR Program. *See, e.g.*, Sharon Press, *Mediator Ethical Breaches, Implications for Public Policy*, 6 Y.B. Arb. & Mediation 107 (2014); *Mortgage Foreclosure Mediation in Florida – Implementation Challenges for an Institutionalized Program*, 11 Nev. L. Rev. 306 (2011); *Institutionalization of Mediation in Florida: At the Crossroads*, 1 Penn St. L. Rev. 43 (2003); *Institutionalization: Savior or Saboteur of Mediation?*, 24 Fla. St. L. Rev. 903 (1997); *Building and Maintaining a Statewide Mediation Program: A View from the Field*, 81 Ky. L.J. 4 (1992–93).

[9] *See infra* Section III.A.

[10] *See infra* Section III.B.

[11] *See infra* Section IV.A.

[12] *See id.* Section IV.A.

[13] *See infra* Section IV.B.

[14] *See infra* Section IV.C.

[15] *See infra* Section IV.D.

[16] *See infra* Section V.

[17] *See infra* Section VI.

[18] *See infra* Section III.

[19] *See infra* Section IV.

[20] *See infra* Section IV.B.

[21] *See id.* Section IV.B.

[22] *See infra* Section IV.C.

[23] *See infra* Section V.

II. WHY EXAMINE MEDIATION AND WHITE SUPREMACY?

Our goal is to raise and explore questions about the ways that white supremacy may be reflected in the structures and practices of mediation. For many whites, the term "white supremacy" conjures up images of the Ku Klux Klan and other white nationalist groups. The dictionary definition is "the belief that the white race is inherently superior to other races and that white people should have control over people of other races"[24] but, particularly in academic circles and increasingly in broader arenas, white supremacy is understood as a much more comprehensive concept. In the context of this Article, white supremacy "does not refer to individual white people and their individual intentions or actions but to an overarching political, economic, and social system of domination."[25]

The problem we want to explore is based on the concept that the "white" way of being is considered to be the normal way of being. It determines what is correct and acceptable. Therefore, any non-white way of being is seen as wrong or inappropriate. This assumption is a crucial foundation for white supremacy:

> White supremacy describes the culture we live in, a culture that positions white people and all that is associated with them (whiteness) as an ideal. This supremacy is more than the idea that whites are superior to people of color; it is the deeper premise that supports this idea—the definition of whites as the norm or standard for human and people of color as a deviation from that norm.[26]

Discussing this concept is challenging. We recognize that the use of the term "white supremacy" is uncomfortable for whites because none of us want to be racist or considered to be racist. Robin DiAngelo has identified this aversion as based in the belief that "only bad people [are] racist."[27] This is one of the unexamined beliefs behind whites' racial responses, which she calls the "pillars of whiteness." Our dismissive reactions are also supported by the ideology of individualism, which allows white people "to exempt themselves from the forces of socialization" and think of ourselves

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24 *White Supremacy*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/white%20supremacy (last visited May 22, 2021).

25 ROBIN DiANGELO, WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM 28 (2018).

26 *Id.* at 33.

27 *Id.* at 3.

as thus not contributing to the problem.[28] And these beliefs are intertwined with the myth that racism consists of "discrete acts committed by individual people, rather than . . . a complex, interconnected system."[29] As a result, while some of our discussion will focus on the effect of individuals' biases and communications in mediation, our primary goal is to examine mediation as a system operating within our larger national economic, political, and social system.

We take this challenge seriously, and we have tried to resist impulses based on our own "white fragility"[30] to minimize the issues or react as if they don't apply to us or to mediation. And we recognize that this discussion may cause you, the reader, to experience discomfort as well. We nonetheless believe it is important to expose potential expressions of white supremacy in mediation in order to encourage examination, reflection, and ultimately, change.

Before we begin our exploration, a few definitions will provide a common starting point:

- *Prejudice* consists of feelings, stereotypes, and generalizations about another person based on their membership in social groups. It is pre-judgment based on little experience with an individual that is projected onto everyone from that group.[31] Everyone has prejudices and we cannot avoid them. They tend to be similar within a group because we "swim in the same cultural waters and absorb the same messages."[32]
- *Discrimination*, in contrast, is action based on prejudice. Some forms of discrimination are clear and recognizable, but when based on a subtle feeling, such as discomfort or self-consciousness, the different treatment can be subtle and hard to recognize.[33]
- *Racism* is more than prejudice. It exists "[w]hen a racial group's collective prejudice is backed by the power of legal authority and institutional control."[34] It is the authority

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[28] *Id.*

[29] *Id.*

[30] "White fragility" is a defensive response when one comes face-to-face with racism and white privilege. Common white responses to this racial stress include "anger, withdrawal, emotional incapacitation, and cognitive dissonance." *Id.* at 101.

[31] DiAngelo, *supra* note 25, at 19.

[32] *Id.*

[33] *Id.* at 20.

[34] *Id.*

and control that transform prejudice into racism. Racism is a "far-reaching system that functions independently from the intentions or self-images of individual actors."[35] In sum, "[r]acism is a structure, not an event."[36]

We would also like to provide some disclaimers about generalizations. First, the term BIPOC includes a variety of "non-white" groups who certainly do not see things the same way. There is a well-known literature describing processes related to mediation in other cultures, including some practices of indigenous peoples in the United States,[37] but a dearth of studies of specific BIPOC groups in Western-style mediation.[38] So, when using the term BIPOC, we do not intend to characterize any particular BIPOC group, but rather to draw a contrast to Western white norms of mediation in general. Moreover, while the answers to problems of racism in mediation are likely different for different peoples of color, the questions that must be considered are the same.

Second, while we have no intention to stereotype, there are points in the discussion where it is useful to raise differences between perceived common features of various communities. Of

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[35] *Id.*

[36] *Id.* (quoting J. Kçhaulani Kauanai, *"A Structure, Not an Event": Settler Colonialism and Enduring Indigeneity*, 5.1 J. CULTURAL STUD. ASS'N (Spring 2016), https://csalateral.org/issue/5-1/forum-alt-humanities-settler-colonialism-enduring-indigeneity-kauanui/.

[37] *See, e.g.*, E. Victoria Shook & Leonard Ke'ala Kwan, *Ho'oponopono: Straightening Family Relationships in Hawaii, in* CONFLICT RESOLUTION: CROSS-CULTURAL PERSPECTIVES, 213–39 (Kevin Avruch, Peter W. Black & Joseph A. Scimecca, eds., 1991); Robert Yazzie, *"Life Comes from It": Navajo Justice Concepts*, 24 N. MEX. L. REV. 175 (1994). In addition, some indigenous traditions in other parts of the world have inspired the development of processes used in the United States. For example, Family Group Conferencing, which is now a widespread restorative justice practice, was introduced in New Zealand in 1989 based on Mâori practices. *See, e.g.*, Andrew Becroft, *Family Group Conferencing: Still New Zealand's Gift to the World?*, Children's Comm'n (Dec. 2017), https://www.occ.org.nz/assets/Uploads/OCC-SOC-Dec-2017-Companion-Piece.pdf. ("The FGC process was prompted and inspired by some aspects of Mâori methods of dispute resolution with a clear goal to improve a system which had failed Mâori . . . . Mâori custom and law is based on the idea of collective rather than individual responsibility. Alleged offending by a child or young person therefore requires a collective response, as it is seen as a collective problem."). *Id.* at B.

[38] There are some notable exceptions. *See, e.g.*, Lorig Charkoudian & Ellen Kabcenell Wayne, *Fairness, Understanding, and Satisfaction: Impact of Mediator and Participant Race and Gender on Participants' Perception of Mediation*, 28 CONFLICT RESOL. Q. 23 (2010); James R. Coben, *Lessons Learned from Family Mediation Training for the Hmong Community in Minnesota*, 40 FAM. CT. REV. 338 (2002); Steven Weller, John A. Martin & John Paul Lederach, *Fostering Culturally Responsive Courts: The Case of Family Dispute Resolution for Latinos*, 39 FAM. CT. REV. 185 (2001); Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 L. & SOC. REV. 767 (1996).

course, no group is homogenous. And there will always be significant differences among individuals within groups based on intersectionality.[39] Again, our comparisons are intended to further awareness of features of mediation that conform to the dominant Western, white way of doing things.

Finally, not all practices and styles of mediation are the same. Just as the context of mediation is different in family, civil, community, small claims, and other disputes, the racist effects of elements of mediation may have different significance in these settings. In addition, mediator style probably matters. For example, we believe that the more directive the mediator, the greater the chance that the mediator's way of doing things will be imposed on the participants. More generally, regardless of context or style, when non-BIPOC mediators default to their own place of comfort, it is likely the "white way" that is the norm despite variations in their stated approaches to mediation. And many mediators who are BIPOC have been trained in the dominant Western styles of mediation. There are some theories of mediation, namely inclusive and transformative approaches, that emphasize self-determination in ways that are designed to lessen the effects of many of the practices we question. We discuss these forms of mediation separately toward the end of this piece.[40] But for most purposes in this Article, we will tend to refer to mediation in general unless our point concerns a particular context or approach to mediation.

III.   Mediation and Tone Policing

One of the dimensions of white supremacy that first made us think of a connection to mediation is "tone policing." Saad defines tone policing as a "tactic used by those who have privilege to silence those who do not by focusing on the tone of what is being said rather than the actual content."[41] Consider these examples from her list of ways in which tone policing is expressed:

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[39] Kimberle Crenshaw is credited with coining the term intersectionality in her 1989 article *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1 U. Chicago Legal F. 139 (1989). An intersectional experience of discrimination cannot be understood as only an additive combination of claims arising from discrete sources of discrimination. For example, the effect of being Black and female is greater than the sum of the effects of racism and sexism. *See id.* at 152–57.

[40] See the discussions of transformative mediation and inclusive mediation *infra* at Section VI.

[41] Saad, *supra* note 4, at 46.

- "If you would just calm down, then maybe I would want to listen to you."
- "You are bringing too much negativity into this space, and you should focus on the positive."[42]

Can you hear the mediator? Here are some echoes of Saad's examples:

- I can understand you better if you don't interrupt and speak so loudly.
- What is past is past and we are not here to assess blame; you need to focus on the future and building a positive outcome.

Mediation is an institutional setting in which control of the process is often exercised by the mediator. Mediators "can control who speaks, allow or disallow interruptions, and encourage and regulate the amount of participation by all parties."[43] We think that tone policing by the mediator shows up in two related dimensions. The first is in terms of the type of communication that mediators at a minimum endorse, and often require. The second is in how many mediators treat anger.

A. *Communication*

The setting of communication norms happens at the beginning of most mediations when the mediator delivers what is commonly referred to as the mediator's opening statement. Training manuals (and trainers) often encourage the mediator to set "ground rules" for the mediation. These ground rules tend to include such items as: treat each other with "common courtesy" and respect; "do not interrupt each other;"[44] "speak calmly" or "no use of inflammatory" language."[45] It should be obvious that how one defines

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[42] *Id.* at 50.

[43] Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 L. & POL'Y 7, 14 (1986).

[44] *See, e.g.*, Appendix 2A, Model Mediator's Opening Statement, U.S. AIR FORCE, https://www.airuniversity.af.edu/Portals/10/AFNC/documents/cnsworksheets/model_mediator_statementcheck.pdf; Robert A. Berlin, *Sample Mediator's Opening Statement*, https://www.mediate.com/articles/berlinB1.cfm (last visited Apr. 20, 2021); *Sample Introductions for Mediators*, U.S. DEP'T VETERANS AFFS., https://www.va.gov/ADR/SampleMed.asp (last visited Apr. 20, 2021).

[45] *See e.g.*, Opening Statement Checklist, CMTY. MEDIATION SERVS. (June 11, 2009), https://static1.squarespace.com/static/52e68c87e4b060b221fa9af5/t/534c49d1e4b072e1d4f197f4/

"courtesy," "inflammatory," and "respectful" communication, and even what one considers to be an interruption, are inherently ambiguous and certainly informed by one's culture and upbringing.[46]

Why is this control harmful? After all, it is merely intended to foster a productive conversation. From a person of color's perspective, when a white person insists that they speak in an approved tone that suits the white person, then the white person is imposing the idea that their standards are superior. Worse, in controlling "how BIPOC are supposed to talk about their lived experiences with racism and existing in the world," the white person is "reinforcing the white supremacist ideology that white knows best."[47]

We also wonder about disparities in enforcement of the ground rules on communication. In the opening statement, ground rules are directed equally to all participants. But are they enforced more often against Black participants in mediation because their interruptions are seen as more "scary" or aggressive? There is no data to support, or refute, this speculation, and it would depend on the narratives about race that the mediator carries into the process. But it would not be inconsistent with unexamined prejudices and implicit biases.[48]

Finally, in an effort to avoid tone policing by others, BIPOC often will preemptively tone police themselves.[49] This might be

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1397508561899/OFEB-SN_CMSOpeningStatement_6-09.pdf; Mediator Opening Statement Checklist, NEW ENG. INTERSTATE WATER POLLUTION CONTROL COMM'N (Jan. 2003), http://neiwpcc.org/wp-content/uploads/2017/11/Mediator-Opening-Statement-Checklist.pdf.

[46] These differences are captured in the Intercultural Conflict Style Inventory (ICS) created by Mitchell R. Hammer. *Resolving Conflict Across Cultural Boundaries*, INTERCULTURAL CONFLICT STYLE INVENTORY, https://icsinventory.com/ (last visited Apr 20, 2021). This assessment of approaches to conflict is based on a different set of criteria than the popular Thomas Kilmann Instrument (TKI). *Thomas-Kilmann Instrument*, KILMANN DIAGNOSTICS, https://kilmanndiagnostics.com/assessments/thomas-kilmann-instrument-one-assessment-person/ (last visited Apr 20, 2021). The TKI relies on the dynamic between assertiveness and cooperativeness creating five modes: avoidance, accommodation, competition, compromise, or collaboration. The ICS is intended to be more culturally responsive. It looks at *what* is communicated (direct or indirect) and *how* things are communicated (with emotional restraint or emotional expressiveness). To illustrate the cultural dimension, "avoidance" in the TKI is meant to represent low concern for both one's own needs and the others' needs and is based on an individualistic cultural view. From a collectivist worldview, avoidance, i.e., maintaining relational harmony, would reflect a high concern for both self-interest and other parties' interests.

[47] SAAD, *supra* note 4, at 50.

[48] *See infra* Section IV(B).

[49] SAAD, *supra* note 4, at 48; Nancy A. Welsh, *Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation*, 70 S.M.U. L. REV. 721, 747 (2017) ("[p]eople 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").

most likely to occur in mediation when BIPOC parties work with a white mediator. Research has indicated an association between an increase during mediation in a party's sense of self-efficacy—the ability to talk and make a difference—and having the race of at least one mediator match the race of the party.[50] Self-censoring could be related to a reduced level of self-efficacy associated with working with a white mediator. In any event, it would likely have the effect of undermining the effectiveness of mediation. If a BIPOC participant avoids a difficult subject because it would elicit an "inappropriate" tone from them, then this topic (obviously an important one) would not factor explicitly into exchanges of views or discussions of the shape of an agreement. It would likely, however, remain in the background where it could act as a barrier to a resolution or result in an incomplete resolution. As Bernard Mayer has explained, effective conflict work requires embracing both logic *and* emotion: "If we don't access our emotions when we are in conflict, we can't engage effectively, make decisions, or move the dispute forward in a constructive way . . . ."[51]

B. *Expressions of Anger*

Controlling the tone of communication is closely linked to controlling expressions of anger; often interruptions and loud exclamations are triggered by anger or other strong emotions. As with interruptions and volume, one's perception of anger may have a racial dimension. Saad makes the point that "[s]o much about tone policing has to do with anti-Blackness and racist stereotypes (often intersected with sexism) . . . . A white person's expression of anger is often seen as righteous, whereas a Black person's anger is seen as aggressive and dangerous."[52] There is a deep-seated societal fear of anger on the part of racial minorities, especially Blacks,[53] and we speculate that Black men are especially likely to be seen as dangerous when they are angry because of common stereotypes

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[50] Lorig Charkoudian, Deborah T. Eisenberg & Jaime L. Walter, *What Works in Alternative Dispute Resolution? The Impact of Third-party Neutral Strategies in Small Claims Cases*, 37 CONFLICT RESOL. Q. 101, 110 (2019). For more on studies on the effect of racial matching in mediation, see *infra* notes 216–233 and accompanying text. We thank Lorig Charkoudian for suggesting the application of this research to self-policing.

[51] BERNARD MAYER, THE CONFLICT PARADOX 169 (2015).

[52] SAAD, *supra* note 4, at 47.

[53] Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1579 (1991).

about them. There are also strong social taboos against women expressing anger, and these taboos have particular force in the case of Black women.[54] The effect of this fear and these taboos is to delegitimate anger expressed by Blacks.[55]

Fear of anger may represent fear of the unsettling message behind the anger. Consider the following question from Audre Lorde:

> I speak out of direct and particular anger at an academic conference, and a white woman says, "Tell me how you feel but don't say it too harshly or I cannot hear you." But is it my manner that keeps her from hearing, or the threat of a message that her life may change?"[56]

But regardless of racist influences that skew the way whites perceive Black anger, the way mediation treats anger has a racist effect. The argument here is parallel to the one that Trina Grillo made in an important article written in 1991, in which she explored the process dangers for women who were court-ordered to mediation.[57] She posited that while mediation promised to include an opportunity to express emotion,[58] instead, there was a systematic suppression of anger.[59]

Grillo claimed that discouraging anger sends a message that anger is unacceptable, and dangerous. She pointed out the potential harm of this message to a woman in the midst of divorce:

> [She] may for the first time in her life have found a voice for her anger. As her early, undifferentiated, and sometimes inchoate expressions of anger emerge, the anger may seem as overwhelming to her as to persons outside of it. And yet this anger may turn out to be the source of her energy, strength, and growth in the months and years ahead. An injunction from a person in power to suppress that anger because it is not sufficiently modulated may amount to nothing less than an act of violence.[60]

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54 *Id.* at 1575–76.

55 *Id.* at 1579.

56 Audre Lorde, The Uses of Anger: Women Responding to Racism, Keynote Speech at the National Women's Studies Conference (June 1981), https://www.blackpast.org/african-american-history/1981-audre-lorde-uses-anger-women-responding-racism/.

57 Grillo, *supra* note 53.

58 *See, e.g.*, Sharon Press, *Court-Connected Mediation and Minorities: A Report Card*, 39 CAP. U. L. REV. 819, 840 (2011) (asserting that "[m]ediation is uniquely suited to allow for emotion and nonlinear narrative, neither of which a traditional litigation setting supports").

59 Grillo, *supra* note 53, at 1572.

60 *Id.* at 1572–73.

The situation for BIPOC dealing with a dispute tinged with racism is similar. Their experiences with racism are painful. Insisting that they discuss these experiences in mediation without expressing rage or grief is dehumanizing.[61] Some mediators will allow parties to "vent" their anger as a prelude to moving on to discuss settlement. Grillo argues that this does not take anger seriously as a "path to clarity and strength. Anger that is merely vented has lost its potential to teach, heal, and energize; it is ineffective anger, anger that 'maintains rather than challenges' the status quo."[62]

Not all conflicts involving BIPOC are explicitly about racist behavior, but the suppression of emotion, and hence emotional topics, is likely also damaging in other disputes (perhaps even more damaging). For BIPOC, many negative interactions have their roots in racism. Even if there is no racist intention for the behavior underlying a dispute, the effect on a person of color may be felt as racist. Yet tone policing may submerge this aspect of a dispute beneath a veneer of adherence to the mediation ground rules. In Grillo's terms, denying this anger may remove a source of strength and growth for resolving the dispute at issue and for dealing with conflicts going forward.[63]

IV. Mediation and Color-Blindness

Saad defines color-blindness as the idea that one does not "see" color or notice race.[64] Taken literally, the phrase would be an obviously false denial of actual perception. However, many whites use it instead to characterize their attitudes and actions, asserting that they do not treat people differently based on differ-

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[61] Saad, *supra* note 4, at 51.

[62] Grillo, *supra* note 53, at 1575 (quoting Harriett Lerner, The Dance of Anger 10 (1985)). For a rousing piece on the potential of anger as a positive force for change, *see generally* Lorde, *supra* note 56.

[63] There is also another side of the story about expressing anger. Prolonged venting, especially in the presence of the other party, can trigger heightened cortisol levels. This physiological response can lead to greater entrenchment in negative feelings and to distorted perceptions that can interfere with problem-solving and decision-making. Jill S. Tanz & Martha K. McClintock, *The Physiologic Stress Response During Mediation*, 32 Ohio St. J. on Disp. Resol. 29, 60, 66 (2017). Tanz and McClintock further note that there may be a difference between men and women in their response to negative emotions. Women appear to be more likely than men to inhibit emotions such as anger and to engage in problem-solving. *Id.* at 49–51.

[64] Saad, *supra* note 4, at 77.

ences in race.[65] On the surface, that sounds admirable. They aspire to live in a society where, in Dr. Martin Luther King, Jr.'s words, people "will not be judged by the color of their skin, but by the content of their character."[66]

Yet scratch the surface and the reality of the world is that color does matter. Saad describes how, even to a child, color-blindness is not neutral. Failure to recognize racial differences in skin tone creates the impression that being Black is somehow synonymous with "bad" and should be a source of shame. Why else, she queries, would someone deny the difference?[67] And if color does not matter, why do BIPOC continue to experience oppression? There *are* differences that correlate with race: in wealth, rates of incarceration, death from COVID-19, education, infant mortality, and on many other measures.

Color-blindness surely does not *cause* these discrepancies by itself, so what is the harm in aspiring to a better world? The answer is that "[c]olor blindness is a particularly insidious way for people with white privilege to pretend that their privilege is fictitious."[68] Saad identifies three ways in which color-blindness is harmful. First, it is "an act of minimization and erasure."[69] Second, it is an act of gaslighting—an attempt to make BIPOC "believe they are just imagining they are being treated the way they are being treated because of their skin color."[70] And third, it allows whites to avoid looking at their own race. This reenforces the assumption that to be white is to be "raceless" and "normal" and allows whites to refuse to look at themselves as persons with white privilege.[71] In this way, color blindness helps perpetuate the discrepancies associated with race.

We have identified several ways in which we think color-blindness is expressed in mediation practices in ways that can be harmful. They are interrelated (and also related to tone policing and other expressions of white supremacy), but we have divided them

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[65] *See, e.g.*, *id.* at 78 (providing examples). *See generally* Eduardo Bonilla-Silva, Racism without Racists: Color-Blind Racism and the Persistence of Racial Inequality in Contemporary America 1 (3d ed. 2010) ("Most whites assert they 'don't see any color, just people.'").

[66] Saad, *supra* note 4 at 78; Bonilla-Silva, *supra* note 65, at 1; Dr. Martin Luther King, Jr., I Have a Dream speech (Aug. 28, 1963), https://www.npr.org/2010/01/18/122701268/i-have-a-dream-speech-in-its-entirety.

[67] Saad, *supra* note 4, at 77.

[68] *Id.* at 80.

[69] *Id.* at 81.

[70] *Id.* at 82.

[71] *Id.*

into four categories for purposes of analysis. First, we contend that the practice of reframing, the mediator's guidance in developing narratives, and the common admonition to take a forward-looking perspective can foster blindness to BIPOC's life experiences and thus minimize or erase the relevance of those experiences to the resolution of the dispute. Second, a mediator who is color blind is also likely blind to stereotypes and microaggressions—their own and those of participants. Third, color blindness is coupled with white silence through the way that many mediators apply the principle of neutrality. And fourth, Western mediation assumptions are largely blind to the diversity of cultures and wide variety of approaches to conflict in the United States. This blindness is of special concern for court mediation programs that serve diverse populations. All these aspects of color blindness shape the narrative that develops in mediation, and hence the content of the discussion and the outcome.

A.   *Blindness to BIPOCs' Life Experiences*

One implication of color-blindness is a minimization of, or failure to hear and appreciate, the differences in BIPOC experiences from the experiences of those who are white. Saad ties this to the mistaken and harmful belief that if we do not see race, then racism goes away.[72] In *White Fragility*, DiAngelo describes an incident at a workshop where a white participant claimed to not see race, telling DiAngelo's co-presenter (a Black man), "I don't see you as black." His response was, "Then how will you see racism?" He explained that if she were ever going to understand or challenge racism, then she would need to be aware of the differences in their experiences. Denying his color was not helpful to him; it denied his reality.[73] D'Angelo observes that "[t]he pretense that she did not notice his race assumed that he was 'just like her' and in doing so she projected her reality onto him."[74]

We see several common mediation practices and techniques that can make it harder to hear and appreciate other mediation participants' different lived experiences. One is the practice of reframing by the mediator. A second is the way a mediator guides the process by identifying issues, setting an agenda, and asking

[72] *Id.* at 78–79.
[73] DiAngelo, *supra* note 25, at 41–42.
[74] *Id.* at 42.

questions selectively, which develops some narratives more fully than others. And a third aspect is the insistence on a forward-looking orientation. These all have the effect of altering a person's narrative. What a person is able to express is not the same as what they would convey without these interventions from the mediator. When that person is a person of color, this suppression of expression is a form of color-blindness—rejecting the value of their (different) lived experience to the dispute at hand.

The role of narration and narratives is very important in mediation. At its core, mediation allows participants to tell their story in their own words. This provides the opportunity for "voice" that is an essential element of a sense of procedural justice, and that can support self-determination when the stories reflect the perceptions of the participants.[75]

While this all sounds good in the abstract, the problem is that to encourage settlement, mediators reconstruct the language, and along with it the experience, of the parties. This represents a form of control by the mediator over the substantive aspects of the interaction.[76] It increases the prospect of resolution through the "construction of an account that both parties will accept."[77] Mediators regulate this account as it develops by "interpretation and reinterpretation of disputants' statements, determinations of relevance and irrelevance of statements, and styles of discourse."[78] The process has been characterized as the "rephrasing" of a dispute.[79]

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[75] *See* Welsh, *supra* note 49, at 735 ("If a person truly has and takes advantage of the opportunity for voice—i.e., if she truly says what she wants and needs to say she has engaged in an act of procedural self-determination."); *see also* Roselle L. Wissler, *Representation in Mediation: What We Know from Empirical Research*, 37 FORDHAM URB. L.J. 419, 448 n.136, 450 (2010) (reporting on research showing a strong association between a participant's perception of their opportunity for voice and their perception of procedural fairness).

[76] *See* CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 327 (2d ed. 1996) (acknowledging that mediators are "directly involved in influencing disputants toward settlement" and describing ways that mediators exert pressure and persuasion); Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J. L. & POL'Y 71, 99 (2010) ("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."); James R. Coben, *Mediation's Dirty Little Secret: Straight Talk About Mediator Manipulation and Deception*, 2 J. ALT. DISP. RESOL. EMP. 4, 4 (Winter 2000) (asserting that mediators "routinely and unabashedly engage in manipulation and deception to foster settlements, albeit under the rationale of fostering self-determination").

[77] Silbey & Merry, *supra* note 43, at 15. Silbey and Merry observed mediators exerting control over content in four stages: broadening the dispute, selecting issues, concretizing issues, and postponing issues. *See id.* at 15–18.

[78] *Id.* at 15.

[79] Lynn Mather & Barbara Yngvesson, *Language, Audience, and the Transformation of Dispute*, 15 L. & SOC. REV. 775, 778 (1980).

In fact, mediators literally rephrase what parties say. They are taught to use active listening to reflect back what a participant says when they tell their story at the start of the mediation process. This serves to confirm that the mediator understands correctly, to demonstrate to the participant that they have been heard, and to help the other participants hear what is said. As a mediator reflects back a party's statements, a common approach is to "reframe," to neutralize the language used by the party. Although mediators are also taught to acknowledge emotion, reframing often has the effect of stripping all the emotion out of the story. In a sense, the mediator is projecting a new reality onto the participant. For BIPOC, this may feel as if their story is being taken from them and recast using the white gaze.

The creation of a new narrative continues throughout the mediation process. Generally (transformative mediation aside), mediators will define issues and set an agenda for the conversation. They then guide the participants' discussion via questioning and sometimes even by suggesting possible options. The more directive the mediation, the more the narrative is shaped by the mediator. This observation is not limited to evaluative styles. A mediator using a facilitative style can also mold the narrative, although it may occur in ways that may not be as apparent to the participants.[80] This molding takes place when a facilitative mediator's guidance goes beyond routine agenda management or orchestration of the encounter and becomes instead "selective facilitation."[81] That happens when a mediator focuses more on exploring one option or options than others. It has the effect of promoting outcomes that are favored by the mediator, not necessarily through evaluative statements or overt endorsements, but by "differentially creating opportunities to talk through the favored option."[82] Thus, even when a mediator does not suggest the options that s/he thinks are most appropriate, the mediator's views of the parties' options affect the outcome. As Josh Stulberg has explained:

> Most of all, the mediator should be guided in pressing the parties by *his* sense of what is attainable. He should painstakingly listen and search for where the parties have indicated the realm of agreement lies at a given point in time with the facts as then

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[80] Coben, *supra* note 76, at 4, 7.

[81] This term was coined by David Greatbach and Robert Dingwall in their article *Selective Facilitation: Some Preliminary Observations on a Strategy used by Divorce Mediators*, 23 L. & Soc'y Rev. 613 (1989).

[82] *Id.* at 636.

available. He may then shape the discussions and concessions to coincide with these contours that the parties have suggested.[83]

Through the mediator's emphasis, some narratives become privileged, and they tend to be the ones that resonate with the mediator.[84] Since mediators are disproportionately white, the narratives that resonate are likely those that are understandable in the white experience. Thus, white participants' narratives may be privileged at the expense of BIPOCs' narratives.

In addition, mediators often engage in what many call "reality testing" or, perhaps more accurately, "assumption testing" with the parties. Often this is an attempt to get the parties to realistically assess their alternative(s) to reaching a settlement. But it can also take the form of questioning a participant's inferences by stressing the underlying facts and asking if the participant's conclusion from those facts is the only possible interpretation. Consider how it might feel to a person of color if they had asserted that a particular action represented racism, only to have it questioned in this way (perhaps by someone with no experience of racism).

Finally, mediators restrict the narrative that a participant may express by emphasizing a forward-looking focus. Among the touted benefits of mediation is that participants need not agree on the facts; nor will a decision-maker determine what "actually" happened. Rather than focusing on the past, the mediator will assist the participants in figuring out how they want to approach the future. The goal is to avoid getting stuck in an argument about blame that cannot be resolved in mediation. As Jay Folberg and Alison Taylor once summarized this approach: "In mediation the past history of the participants is only important in relation to the present or as a basis for predicting future needs, intentions, abilities, and reactions to decisions."[85]

But this forward-looking emphasis has costs. In curtailing the expression of anger and blame, it short-circuits the "naming, blaming, claiming" sequence through which a dispute develops from a perception of injury (naming), into a grievance (blaming), and ulti-

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[83] Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 Vt. L. Rev. 85, 106 (1981) (emphasis added).

[84] Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 L. & Soc. Inquiry 35, 54–56 (1991) (describing how mediators "participate politically" by asking questions and making summaries that bring focus to one story line or adopt one party's version of the character of the counter party). Due to the structure of mediation, the privileged story also tends to be the one expressed first. *Id.* at 56–59.

[85] Jay Folberg & Alison Taylor, Mediation 14 (1984).

mately becomes a demand (claiming).[86] Without the key step of blaming, the process cannot be completed. In other words, one cannot effectively look forward and formulate demands and proposals without first looking back. Trina Grillo posits that the effects of stifling blame fall most heavily on "those who are already at a disadvantage in society."[87]

Grillo worried that some persons will be discouraged from asserting their rights or unable to articulate their harm.[88] But even without those deleterious effects, limiting the ability of mediation participants to discuss the past and "rehash" what happened and how they feel about it forces a profound alteration of their narratives. It can send a message to BIPOC that their lived experience of the events is not germane to the resolution of the conflict. And the effect is surely heightened when it is accompanied by tone policing, which similarly serves to shut down the expression of emotion and has a silencing effect. Yet without a discussion of a BIPOC's lived experience, a mediation will be left in a color-blind state where the participants cannot understand, and thus cannot respond, to the full dimension of the dispute.

B. *Blindness Through Racist Stereotypes*

Another consequence of color-blindness is that it enables white persons to avoid reflecting on what it means to be white in American society,[89] which includes an examination of one's stereotypes. Stereotyping is "the application of beliefs about the attributes of a group to judge an individual member of the group."[90]

> [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

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[86] William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .* , 15 L. & Soc'y Rev. 631, 633–36 (1980–81).

[87] Grillo, *supra* note 53, at 1565.

[88] *Id.*; *see also* Anne E. Ralph, *Narrative-Erasing Procedure*, 18 Nev. L.J. 573, 619 (2018) ("Narrative-erasing procedure hampers the ability of litigants from marginalized groups to develop narratives that would increase empathy from the judge or jury, create cross-cultural communication, and ultimately result in greater understanding.").

[89] Saad, *supra* note 4, at 82.

[90] Izumi, *supra* note 76, at 89 (quoting Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Stereotyping and Prejudice, in* The Psychology of Prejudice: The Ontario Symposium 55, 58 (Mark P. Zanna & James M. Olson eds., (1994)).

can grow up in a society without having learned the stereotypes assigned to the major ethnic groups.[91]

Both mediators and mediation participants enter the process with stereotypes. This section discusses mediators' stereotypes. The following section discusses the limitations of the principles of impartiality and neutrality to counter mediator stereotypes and how—through these principles—mediation encourages a blind reaction to participants' expressions of stereotypes and cultural myths.

No one has written more thoroughly and perceptively about racial stereotypes and implicit bias in the context of mediation than Carol Izumi.[92] We will not try to replicate her analysis or even to summarize it comprehensively but want merely to highlight some of her points that are most salient for our topic. While our focus is primarily on mediation practices and structural aspects of mediation, we agree with Izumi that action is also necessary at the individual level: "reducing mediator bias should be one strategy in the larger reformation."[93]

Implicit bias is the "automatic association of stereotypes and attitudes with social groups."[94] Implicit stereotypes that result from repeated exposure to cultural stereotypes are automatically triggered (activated) merely by encountering a member of a social group.[95] Some use the term "unconscious bias." It is the automatic association of a person with the stereotype that is unconscious.

Research teaches us that our implicit cognition varies, sometimes widely, from our explicit thinking. We carry a "discernable, pervasive, and strong favoritism" for our own group, as well as for favored groups. And our implicit biases influence our behavior.[96] Based on the Implicit Association Test (IAT),[97] most Americans—

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[91] HOWARD J. EHRLICH, THE SOCIAL PSYCHOLOGY OF PREJUDICE 35 (1973).

[92] Izumi, *supra* note 76; Carol Izumi, *Implicit Bias and Prejudice in Mediation*, 70 S.M.U. L. REV. 681 (2017); *see also* Elayne E. Greenberg, *Fitting the Forum to the Pernicious Fuss: A Dispute System Design to Address Implicit Bias and 'Isms in the Workplace*, 17 CARDOZO J. CONFLICT RESOL. 75 (2015).

[93] Izumi, *supra* note 92, at 682; *see also id*. ("Without robust mediator self-monitoring . . . programmatic changes will not be as effective."); Izumi, *supra* note 76, at 155 ("nondiscrimination in mediation is attainable only with more deliberate, informed, and self-conscious practices by mediators").

[94] Izumi, *supra* note 92, at 685.

[95] *Id.*

[96] Izumi, *supra* note 76, at 88 (citing Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 431–38 (2007)).

[97] *See Project Implicit*, HARV. UNIV., https://implicit.harvard.edu/implicit/iatdetails.html (last visited Mar. 23, 2021).

about 75%—display a "strong and automatic positive evaluation of white Americans and a relatively negative evaluation of African Americans."[98] Not only may our automatic associations be strongly at odds with our espoused beliefs, but our implicit biases often predict discriminatory behavior better than our explicit attitudes.[99] This means that "[d]espite our best intentions and explicit beliefs, implicit biases can produce behavior that diverges from our endorsed principles. So, a mediator may espouse egalitarian beliefs, but her implicit biases produce discriminatory responses toward the parties."[100]

Stereotypes abound. Here are a few common examples:

- "Black women are framed as irrationally angry and therefore aggressive, and therefore bringing unnecessary drama to their workplace . . .";[101]
- Black men are portrayed as "unintelligent and sexually aggressive toward white women";[102]
- Asian Americans are the "model minority." But being regarded as "industrious [and] unassuming" carries a potential dark side of being seen as "cut-throat, inscrutable, and sneaky," as well as being better at math than communication and lacking in leadership skills;[103]
- Asian Americans are subject to the "perpetual foreigner syndrome" and are regarded as disloyal;[104]
- "Indigenous people are primitive";[105]
- "Arabs are terrorists";[106]
- "Latinx people are drug dealers."[107]

Mediators who believe they are color-blind, and, therefore, that they treat everyone equally, are blind to recognizing that they

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[98] Izumi, *supra* note 92, at 686; *see also* Shankar Vedantam, *See No Bias*, WASH. POST MAG., Jan. 23, 2005, at 12, 15.

[99] Izumi, *supra* note 92, at 687.

[100] *Id.* at 686.

[101] Anne Branigin, *Serena Williams Fans Are Upset with This ESPN Analyst's 'Racially Coded' Commentary. It Isn't the First Time*, LILY (Feb. 18, 2021), https://www.thelily.com/serena-williams-fans-are-upset-with-this-espn-analysts-racially-coded-commentary-it-isnt-the-first-time/ (quoting Professor Treva Lindsey).

[102] SAAD, *supra* note 4, at 94.

[103] Izumi, *supra* note 76, at 111, 112.

[104] *Id.* at 114–16.

[105] SAAD, *supra* note 4, at 111.

[106] *Id.*

[107] *Id.*

hold stereotypes. And they are certainly blind, as are all of us, to the automatic activation of their stereotypes as implicit biases and to the influence these stereotypes have on their behavior. When the stereotypes in these examples, or ones like them, are activated as implicit biases in a mediator, they will affect how the mediator hears and interprets a participant's account—as well as what the mediator believes.[108]

In constructing the narrative of a mediation (as described in the prior section), implicit biases will influence which narratives resonate with a mediator and which proposals the mediator sees as most likely to produce an agreement. As Isabelle Gunning has observed, as the parties' narratives compete for legitimacy in a mediation, the narratives are understood—by the mediator and the parties—in relation to pre-existing stories and cultural myths. "Disadvantaged group members will have more negative cultural myths uniquely related to them, i.e. stereotypes, that undermine the ability of their narratives to compete effectively."[109]

C. *Blindness Coupled with White Silence*

While tone policing is a mechanism by which white people silence BIPOC,[110] white silence describes the way that many white people stay silent about racism.[111] Saad asserts that this silence may be born of discomfort with the topic, but it serves to defend the status quo of white supremacy; it is a way "of holding onto one's white privilege through inaction."[112] One of Saad's examples, which we think sometimes applies to mediation, is "[s]taying silent by not holding those around you accountable for their racist behavior."[113] This silence flows from one of the foundational concepts of mediation—namely, mediator impartiality/neutrality.[114]

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[108] *See, e.g.*, Izumi, *supra* note 76, at 118 (postulating that mediators in an example with Asian American homeowners may have experienced "activation of the stereotype that Asians are untrustworthy" and so "may have unconsciously viewed the homeowners as less credible or as giving a less reliable account of the . . . situation").

[109] Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. Disp. Resol. 55, 68 (1995); *see also id.* at 76–79 (describing negative cultural myths that surfaced during mediations and their effect on the process).

[110] *See supra* Part III.

[111] Saad, *supra* note 4, at 53.

[112] *Id.* at 54.

[113] *Id.* at 56.

[114] The Maryland Standards of Conduct for Mediators includes participant self-determination and confidentiality of the process as the other two foundational principles. *See* Md. Standards

Impartiality is defined in the Model Standards of Conduct for Mediators as, "freedom from favoritism, bias, or prejudice."[115] Closely tied to mediator impartiality is the concept of mediator neutrality.[116] Descriptions of precisely what the terms mean and how the principles are interrelated abound.[117] There is certainly confusion in general parlance, and Cobb and Rivkin found that even mediators frequently define neutrality as synonymous with impartiality.[118] For our purposes, we wish to emphasize two separate aspects of these concepts, however labelled. The first is that a mediator should not be biased for or against any *party* to the mediation.[119] The second is that a mediator should be indifferent to the

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of Conduct for Mediators, Applications & Definitions B(6) (Md. Judiciary 2020), https://mdcourts.gov/sites/default/files/import/macro/pdfs/mdstandardsofconductformediators.pdf.

[115] Model Standards of Conduct for Mediators std. II(A) (Am. Arbitration Ass'n, Am. Bar Ass'n, & Ass'n for Conflict Resol. 2005). While the Uniform Mediation Act stops short of legislating mediator impartiality, it does require a mediator, before accepting a mediation, to "make an inquiry . . . to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator . . . ." Unif. Mediation Act § 9(a)(1) (Unif. L. Comm'n 2003).

[116] *See* Stulberg, *supra* note 83, at 86 (positing that a mediator's commitment to neutrality is the critical element which permits mediation to be an effective, principled dispute settlement procedure).

[117] For example, Sharon Press and Bobbi McAdoo consider that neutrality generally refers to mediators not having a stake in the outcome; while impartiality has to do with personal biases and mediators' commitment not to let personal opinions affect how the mediation is conducted. Sharon Press & Bobbi McAdoo, *Neutrality in 2020: A Reply to 1981 Stulberg, in* Discussions in Dispute Resolution: The Foundational Articles 141 (Art Hinshaw, Andrea Schneider & Sarah Cole, eds.) (2021). Susan Nauss Exon states that neutrality is, "a mediator's ability to be objective while facilitating communication among negotiating parties," while impartiality is "freedom from favoritism and bias in word, action and appearance." Susan Nauss Exon, *The Effects that Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation*, 42 U.S.F. L. Rev. 577, 580–81 (2008). Carol Izumi identifies four elements of what is commonly thought of as neutrality: no conflict of interest; procedural equality; outcome-neutrality; and lack of bias, prejudice, or favoritism toward any party. Izumi, *supra* note 92, at 684. Leah Wing describes two aspects of mediator neutrality. The first is, "the condition making it possible for parties to raise any topic that concerns them, negotiate with other(s), and come to a resolution of their own accord." The second aspect relates to how the mediator is positioned in relation to the mediation participants and the content of their discussions. This concept is known as "equidistant" or "symmetry." Leah Wing, *Whither Neutrality?: Mediation in the Twenty-First Century, in* Recentering: Culture and Knowledge in Conflict Resolution Practice 93, 94 (Mary Adams Trujillo et al. eds., 2008).

[118] Cobb & Rivkin, *supra* note 84, at 42; *see also* Alison Taylor, *Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence, and Transformative Process*, 14 Mediation Q. 215, 217 (1997) (noting confusion due to lack of a shared vocabulary).

[119] Douglas Frenkel and James Stark refer to this principle as impartiality and state that it means, "that the mediator does not favor any one party in a mediation over any other party. . . . Impartiality thus means a freedom from bias toward any participant." Douglas N. Frenkel & James H. Stark, The Practice of Mediation: A Video-Integrated Text 88 (3d ed. 2018).

outcome of the process.[120] It reflects the principle that the mediator's job is to assist the parties in coming to an agreement that is acceptable to them, not necessarily one favored by the mediator.[121]

Neutrality has been described as, "the antidote against bias."[122] Yet serious critiques have been raised as to whether it is possible for a mediator to be truly impartial or neutral;[123] and mediators have reported feeling like a failure because of their inability to live up to the expectation of neutrality by keeping their reactions to parties at bay.[124] Furthermore, as discussed above, there is a disconnect between mediators' aspirations of neutrality/ impartiality and common practices, which frequently involve influencing parties to obtain a settlement.[125] This influence does not show an indifference to the outcome. Moreover, purging bias requires that "mediators be conscious of their assumptions, biases, and judgments about the participants."[126] But because of the operation of implicit bias, this level of consciousness is unattainable and illusory.[127] This means that the principles of impartiality and neutrality are ineffective as an antidote to racial bias on the part of the mediator, both in terms of attitudes toward the parties and toward the outcome.

What about bias on the part of a participant? Participants are just as likely as mediators to be blind to their implicit biases and to display them in mediation, perhaps even more so because they are not constrained by the ideal of impartiality/neutrality as is the mediator. These biases may be expressed overtly or more subtly in the form of cultural myths that shape the mediation narrative. Gunning observes that "[t]he classic and apparently neutral language that mediators are admonished to use . . . can unintention-

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[120] This principle is frequently labelled neutrality. *See, e.g.*, *id.*

[121] Even this separation is artificial, for outcome neutrality requires refraining from promoting either party's interests. Izumi, *supra* note 76, at 82.

[122] Cobb & Rivkin, *supra* note 84, at 35.

[123] *See, e.g.*, MAYER, *supra* note 51, at 83; Hilary Astor, *Rethinking Neutrality: A Theory to Inform Practice-Part I & Part II*, 11 AUSTRALIAN DISP. RESOL. J. 73, 79–80 (2000); Cobb & Rifkin, *supra* note 84, at 36–37; Izumi, *supra* note 92, at 684; Scott R. Peppet, *Contractarian Economics and Mediation Ethics: The Case for Customizing Neutrality Through Contingent Fee Mediation*, 82 TEX. L. REV. 227, 253–54 (2003).

[124] Linda Mulcahy, *The Possibilities and Desirability of Mediator Neutrality—Towards an Ethic of Partiality?*, 10 SOC. & LEGAL STUD. 505, 516–17 (2001).

[125] *See supra* notes 76–84 and accompanying text.

[126] Izumi*, supra* note 92, at 684.

[127] *Id.* at 685.

ally contribute to the repetition of whatever is the primary narrative and its interpretive framework."[128]

The principle that a mediator should not favor or disfavor any party to a mediation is often interpreted as a command to treat them evenhandedly or to remain equidistant. That injunction is inconsistent with intervening in the face of expressions of racism.[129] As a result, the principles of neutrality and impartiality may contribute to a racist effect for a BIPOC participant by silencing a mediator who sees a racist dynamic. Here, these principles are not merely impotent to reduce bias (as in the case of a mediator); their association with silence may help perpetuate it.

We see the question as whether mediation's commitment to remaining impartial and neutral works to preserve the status quo at the expense of BIPOC. As Leah Wing has asked, "[w]hen differing experiences of violence and of access to power, decision-making, and respect impact the lives of the participants, who is better served when power inequities are attended to by symmetry and neutrality?"[130]

Outcome neutrality is similarly fraught. This principle has generated significant debate, not only about the degree to which it is achievable, but also about the degree to which it is desirable.[131] But the standard advice for a mediator who thinks that an agreement is unfair is to withdraw from the mediation.[132] That could be interpreted as an extreme form of white silence that elevates the value of neutrality above the values of fairness and justice.

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[128] Gunning, *supra* note 109, at 79.

[129] Cobb and Rivkin state the dilemma as "The paradox of neutrality is that from within the existing rhetoric of 'impartiality' and 'equidistance,' neutrality implies detachment; yet in practice it requires the mediators' proactive (and political) involvement." Cobb & Rivkin, *supra* note 84, at 48.

[130] Wing, *supra* note 117, at 669.

[131] *See, e.g.*, Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 46–47 (1981) (asserting that environmental mediators should have a responsibility to ensure that agreements are as fair and stable as possible); 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) (noting the obligation of family mediators to protect the best interests of the children); Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703, 745 (1997) (advocating a "norm-advocating" role for mediators when important societal interests are not represented by the parties, such as in environmental disputes and certain bioethical dispute). *But see* Stulberg, *supra* note 83, at 86 ("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.").

[132] *See* MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 115, stds. II(C), VI(C).

We want to be clear that we are not advocating jettisoning the principles of impartiality and neutrality for mediation. Rather, our goal is to raise questions that we think flow from an awareness of how implicit bias and white silence can affect the process and its reception by BIPOC. Is mediation an appropriate place for anti-racism work? Perhaps the constraints of neutrality mean it is not. Is there any way to effectively incorporate a goal to avoid the perpetuation of white supremacy into the process? Is mediator white silence actually appropriate as a way to avoid putting a white mediator in the role of white savior?[133] Would abstaining from tone policing, from neutering anger through reframing, and from squelching discussion of the past be a sufficient aid to BIPOC self-determination?

D.   *Blindness to the Limitations of Western Cultural Assumptions about Negotiation/Mediation*

Finally, one must acknowledge that the commitment to impartiality and neutrality are based on Western (white) ideology. As Wing explains:

> These values are imbedded in a Western ideology of positivism that assumes it is possible for the observer to be separate from the observed; that one can conduct an intervention (whether it be as a scientist leading an experiment or as a judge, jury, or mediator engaged in a proceeding) without having one's own experiences or values permeate the process. This outlook does not take into account that valuing distance between a conflict intervener and disputing parties is a cultural belief; it does not consider the impact the intervener has on the course of a mediation as he guides the process by asking certain questions and not others.[134]

Other Western (again, white) assumptions are also incorporated into mediation through our way of viewing negotiation. There is a tendency to think of mediation as, "negotiation in the

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[133] Saad describes white saviorism as, "the belief that people with white privilege, who see themselves as superior in capability and intelligence, have an obligation to 'save' BIPOC from their supposed inferiority and helplessness." SAAD, *supra* note 4, at 245. White saviorism also typically involves white centering. "People with white privilege believe that . . . they have what it takes to rescue BIPOC from the very nuanced and complex issues they are faced with." *Id.*

[134] Wing, *supra* note 117, at 59; *see also* Gunning, *supra* note 109, at 83–85 (discussing how the American "non-interventionist" model of mediation conducted by a stranger is based in culture).

presence of a neutral third person,"[135] whose role is to assist the parties in developing a settlement.[136] Michelle LeBaron and Mario Patera have identified the following assumptions underlying the current approach to training in interest-based negotiation:

- Explicit communication and direct confrontation;
- Individualist perspectives on agency and autonomy;
- Competitive assumptions that people will act to maximize individual gains, and can be assisted to extend this behaviour to maximizing joint gains if their own interests are not compromised;
- Action-orientation at the expense of a focus on "being" or inaction;
- Analytic problem-solving;
- Sequential orientation to time;
- Universalist ideas about the international applicability of "interest-based" negotiation;
- Agreement as a central measure of success.[137]

The problem is that this conception of conflict, and of ways to resolve it, is not universal.[138] Culture affects both how individuals experience conflict and how they approach it. It creates "the mental and emotional structures through which people understand their actions and those of others in the conflict."[139] The characteristics LeBaron and Patera identify are "representative of dominant U.S. American culture and other groups influenced by Western thought."[140] The framing of mediation as "negotiation with assistance" embeds the Western, rational, linear approach to negotiation and conflict in the mediation process. Certainly, these white

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[135] DWIGHT GOLANN & JAY FOLBERG, MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL 95 (2006); *see also Mediation*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/about/agencies/dab/adr-services/mediation/index.html#:~:text=mediation%20is%20a%20form%20of,than%20the%20traditional%2C%20adversarial%20approach (last visited Apr. 19, 2021) ("Mediation is a form of assisted negotiation.").

[136] *See, e.g.*, MINN. R. 114.02(7) (1992) (defining mediation as a "forum in which a neutral third party facilitates communication between parties to promote settlement").

[137] Michelle LeBaron & Mario Patera, *Reflective Practice in the New Millennium, in* RETHINKING NEGOTIATION TEACHING: INNOVATIONS FOR CONTEXT AND CULTURE 45, 48 (C. Honeyman, J. Coben & Giuseppe De Palo eds., DRI Press 2008).

[138] Sally Merry, *Disputing Without Culture*, 100 HARV. L. REV. 2057, 2063 (1987) ("Disputing . . . is cultural behavior. . . .").

[139] Charkoudian & Wayne, *supra* note 38, at 31.

[140] LeBaron & Patera, *supra* note 137, at 48.

assumptions about conflict manifest themselves in mediation as generally practiced in court-connected programs.

There are two culture-related challenges for court-connected mediation programs. One is the challenge of tailoring mediation to maximize its effectiveness for disputes among members of a minority group. The other is the challenge of mediating between members of groups with different conflict cultures. We will attempt to highlight briefly some of the literature on the association between race/ethnicity and culture of conflict that is relevant to these challenges for mediation programs in the United States.

An early comparison between Black and white approaches to disputes emphasized differences between them. Thomas Kochman found that the "black mode [of engaging in public debate]—that of black community people—is high-keyed: animated, interpersonal, and confrontational. The white mode—that of the middle class—is relatively low-keyed: dispassionate, impersonal, and non-challenging."[141] Another study supported this picture of preference for direct confrontation among Blacks with a finding that African Americans tend to avoid conflicts less than Latinx and Asian Americans and that they are less likely to use outside third parties to assist in finding a resolution. This finding is consistent with observations that Latinx and Asian American cultures tend to be more collectivist on the scale of individualistic–collectivist orientation.[142] These generalizations must, however, be tempered with the understanding that many factors other than race and ethnic identity affect an individual's conflict style.[143] This means that that there are limitations to the conclusions one can draw about approaches to conflict based on their race and ethnicity.

In an article that sheds light on the dominant U.S. approach to conflict by way of contrast, Joel Lee provides an analysis of Asian mediators' challenges in applying a Western approach to mediation (with its emphasis on individual autonomy and interests) to an Asian orientation (which includes a sensitivity to social harmony

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[141] Charkoudian & Wayne, *supra* note 38, at 31 (quoting THOMAS KOCHMAN, BLACK AND WHITE STYLES IN CONFLICT 18 (1981)).

[142] Stella Ting-Toomey et al., *Ethnic/cultural Identity Salience and Conflict Styles in Four US Ethnic Groups*, 24 INT'L J. INTERCULTURAL RELATIONS 47, 74–75 (2000). As described *supra* note 46, avoiding conflict reflects different values in individualistic and collectivist cultures.

[143] For example, self-construal—the nature of an individual's self-image as independent from and interdependent with others—explains conflict styles better than ethnic background for African Americans, Asian Americans, Latinx Americans, and white (European) Americans. *See* Charkoudian & Wayne, *supra* note 38, at 31.

and hierarchy).[144] The challenges include not only adapting techniques and approaches, but also extend to foundations of Western assumptions about mediation, such as who the mediator should be and the values the mediator should bring to the process. In his analysis of cultural frameworks for disputing, Lee identifies the difference between the "interest-based" model assumptions (white, Western European) and the "Singapore Asian" assumptions about conflict as including:[145]

Interest-Based	Singapore Asian
"the primacy of the individual and the individual's expectation of autonomy"	the primacy of social hierarchy and the individual's expectations to fulfill roles in any hierarchical relationship
"the priority of the interests of the individual"	the priority of observing proper conduct
the premium placed on "direct and open communication for constructive conflict management"[146]	the communication and conduct that is geared towards preserving harmony, relationships, and face
the importance for constructive conflict resolution of maintaining a good working relationship	the importance—as a way of life—of maintaining context-dependent relationships

To what extent might these frameworks affect reactions of Asian-Americans in the United States to Western-style mediation? Lee is emphatic that his framework applies to the mix of cultures in Singapore and should not be generalized more broadly as an "Asian Model."[147] Moreover, Asian-Americans in the United States represent many national cultural heritages, with variations due to gender and length of residence, which make generalizing even more questionable.[148] Yet could some of the ideas be appro-

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[144] Joel Lee, *Culture and Its Importance in Mediation*, 16 Pepp. Disp. Resol. L.J. 317 (2016).

[145] *Id.* at 326–29.

[146] This is interesting because the trend for mediations to be conducted primarily or exclusively in separate sessions would appear to be less consistent with the interest-based norm and more consistent with the Singapore Asian norm which values saving face and preserving harmony, achieved by less direct confrontation.

[147] Lee, *supra* note 144, at 328.

[148] Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 Wm. & Mary L. Rev. 1, 26 (1994).

priate to include in concepts of court-connected dispute resolution with specific groups in the United States?

Finally, we are aware of one attempt to outline elements of a court-connected program tailored for a specific BIPOC group—a primarily Latinx population in the southwest United States with roots in Mexico and Central America.[149] It is based on a framework developed by John Paul Lederach from studying disputes in Latin America,[150] an analysis of cultural variations in third-party involvement in conflict,[151] and an understanding of the unique aspects of this Latinx culture that need to be taken into account in designing dispute resolution mechanisms for this group.[152] Here is a summary of their conclusions about the most important considerations for adapting court-connected mediation to the local Latinx population:

- the need to bring mediation into the community and use mediators who are familiar with the Latino culture and possibly even with the parties;
- "the need to gather perspectives on the dispute from people other than the immediate parties;
- the need to look for collective, holistic interests as well as individual interests;
- the need for the mediator to be more active in developing solutions; and
- the potential that the mediator may play a role in monitoring compliance with the agreement or even be involved more actively with disputants as they work out their relationship and agreement."[153]

Implementing tailored mediation programs such as this could be a significant step toward eliminating the color blindness of court-connected mediation. It would demand flexibility and creativity on the part of a court system but would show true commitment.

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[149] *See* Weller, Martin & Lederach, *supra* note 38.

[150] John Paul Lederach, *Of Nets, Nails, and Problems: The Folk Language of Conflict Resolution in a Central American Setting, in* Conflict Resolution: Cross-Cultural Perspectives, 165–86 (Kevin Avruch, Peter W. Black & Joseph A. Scimecca eds., 1991).

[151] Weller, Martin & Lederach, *supra* note 38, at 189–93.

[152] *Id.* at 193–94.

[153] *Id.* at 195.

V. Mediation and White Superiority

Tone policing and color blindness draw much of their force from white superiority. Saad asserts that we are exposed to ideas that whiteness is "of higher rank, quality, or importance" at a very young age, before we are consciously aware that this is happening.[154] In addition to the topics we discussed earlier, we think an additional example that applies to mediation, as a field, is that mediation "uphold[s] white superiority through a lack of representation of BIPOC at leadership levels."[155]

Concerns about racial and ethnic diversity in the dispute resolution field are not new,[156] but the level of BIPOC participation as mediators has remained low. There is a lack of representation not only in leadership positions, but at all levels and in all types of cases. In 2011, Sharon Press assessed the effort to diversify mediator pools as having made a "good start," but with "a long way to go."[157] Unfortunately, there is still a long way to go. Mediators continue to be noticeably white, male, and older, especially in the context of higher-dollar case mediations.[158] The pool of mediators who work as volunteers in community dispute resolution programs

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[154] Saad, *supra* note 4, at 64 (quoting Merriam Webster dictionary).

[155] *Id.* at 66.

[156] *See, e.g.*, Howard Gadlin, *Conflict Resolution, Cultural Differences, and the Culture of Racism*, 10 Negot. J. 33, 44 (1994) (bemoaning the lack of diversity among ADR neutrals); 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, 120 n.2 (2008) (describing diversity initiatives dating back to the late 1980s).

[157] Press, *supra* note 58, at 848.

[158] *See* Urska Velikonja, *Making Peace and Making Money*, Disp. Resol. Mag., Winter 2011, at 20, 23 ("most financially successful mediators are white males with legal training in their fifties or older"). Precise figures are hard to come by, with numbers of minority mediators and arbitrators often combined into one statistic. *See, e.g.*, Marcie Dickson, *Diversity in ADR: Time for Another Uncomfortable Conversation*, Litig. Daily, Aug. 10, 2020, https://www.law.com/litigationdaily/2020/08/10/diversity-in-adr-time-for-another-uncomfortable-conversation%E2%80%8B/?slreturn=20210226121143 (citing information that "17 of 412 neutrals at a top ADR provider with a panel of primarily judges are BIPOC . . . in other words 4%"). The initial qualifications set for mediators in higher-dollar cases contributed to this lack of representation. For example, under Florida's initial rules, one had to be a Florida attorney with five years of Florida practice or a retired judge from any U.S. jurisdiction (in addition to completing required training) to be certified as a mediator for circuit cases. In 1987, when these requirements were adopted, these categories were disproportionally white and male. They still are today. A.B.A., ABA Profile of the Legal Profession: 2020 (2020), https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf. The qualifications were changed in 2006 to a "point system" eliminating this bias, but it is unclear whether the damage was already done in terms of creating expectations by parties' attorneys for mediator qualifications in these cases.

tend to be more diverse across all measures, but even in that context mediator demographics do not consistently match the overall population.[159]

In terms of data on the racial and ethnic characteristics of mediators for court-connected programs, one important source is the rosters of certified mediators in Florida maintained by the Office of the State Courts Administrator.[160] When we examined the current rosters, we found very low representation of self-identified[161] BIPOC mediators across all categories of court-connected programs. The following chart details the distributions. While the relative proportions of different racial and ethnic minorities will likely vary in other states based on minority populations, we suspect that the overall picture—one of low minority inclusion—is representative in general.

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[159] An extensive national survey of over 1100 volunteer mediators in 2011 found significant discrepancies between demographic characteristics of volunteer mediators and the general population at a national level, especially in terms of race, age, educational background, and income level. Justin R. Corbett & Wendy E.H. Corbett, *Volunteer Mediators: The Composition, Contribution, and Consequences of ADR Altruists* 4–7 ADVANCING DR (2013), https://perma.cc/X83Y-WGN5. In a 2014 survey of community mediation centers, about half of the centers reported that their board members and mediators match the local population in terms of race and other characteristics. But half reported they do not. Lorig Charkoudian & Michal Bilick, *State of Knowledge: Community Mediation at a Crossroads*, 32 CONFLICT RESOL. Q. 233, 263–66, 271 (2014).

[160] *Alternative Dispute Resolution*, https://www.flcourts.org/Resources-Services/Alternative-Dispute-Resolution (last visited May 22, 2021).

[161] When mediators apply for certification, they are invited to respond to demographic questions which include race/ethnicity based on the categories listed.

Racial and Ethnic Identity of Certified Mediators on Florida Court Rosters[162]

Type of Mediator Certification	African American	American Indian/ Alaskan Native	Asian/ Pacific Islander	Hispanic	Caucasian	Other/ Unknown	Total
County[163]	227 (11.8%)	3 (0.2%)	30 (1.6%)	197 (10.2%)	1254 (65%)	9 (0.4%)/ 3 (0.2%)	1927
Family[164]	184 (8.3%)	3 (0.1%)	24 (1.1%)	244 (11.1%)	1470 (67%)	19 (0.87%)/ 2 (0.09%)	2194
Circuit[165]	127 (4.04%)	3 (0.09%)	35 (1.1%)	260 (8.3%)	2281 (72.6%)	13 (0.41%)/ 6 (0.19%)	3140
Dependency[166]	11 (5.2%)	0 (0%)	3 (1.4%)	28 (13.3%)	160 (75.8%)	3 (1.4%)/ 0 (0%)	211
Appellate[167]	24 (5.58%)	1 (0.23%)	5 (1.2%)	40 (9.3%)	313 (72.8%)	2 (0.46%)/ 2 (0.46%)	430

According to the U.S. Census Bureau, Florida's 2018 population was 15.3% Black or African American (Non-Hispanic), 2.72% Asian, 21.4% White-Hispanic, 2.94% Other Hispanic, and 53.3% White (Non-Hispanic).[168] The chart provides visual evidence that the mediator pool is not representative of the actual population. The most diverse pool of mediators is certified for county court mediations. Traditionally, these mediations were predominantly small claims mediations conducted by volunteer mediators, many of whom were retired from their primary profession. Diversity of mediators is lowest in dependency cases—abuse and neglect medi-

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[162] The raw numbers are followed by the calculation of the percentage of the total number of mediators for that level of certification.

[163] This certification category permits "mediation of civil cases within the jurisdiction of county courts, including small claims." Fla. Stat. § 44.1011(c). As of January 1, 2020, the jurisdiction of the county courts was extended to civil disputes involving $30,000 or less. When county court mediator qualifications were initially established in 1987, county courts had jurisdiction over civil dispute involving $5,000 or less.

[164] Family certification covers "mediation of family matters, including married and unmarried persons, before and after judgments involving dissolution of marriage; property division; shared or sole parental responsibility; or child support, custody, and visitation involving emotional or financial considerations not usually present in other circuit civil cases." Fla. Stat. § 44.1011(d).

[165] Certification for circuit courts qualifies a mediator for "mediation of civil cases, other than family matters in circuit court." Fla. Stat. § 44.1011(b). The current jurisdiction of the circuit court includes civil cases with claims above $30,000.

[166] Dependency cases are those involving allegations of abuse and neglect of a child.

[167] Appellate court mediations are "mediation[s] that occur[ ] during the pendency of an appeal of a civil case." Fla. Stat. § 44.1001(a).

[168] *Florida*, Data USA, https://datausa.io/profile/geo/florida (last visited Mar. 24, 2021) (describing the five largest ethnic groups in Florida).

ation—where the issues of white supremacy may be the most problematic.

Moreover, the composition of mediator rosters is only half the story. This data does not indicate who is chosen from the roster to serve as a mediator. Even when BIPOC would-be mediators obtain training and, where relevant, certification, unless they are employed by an institution as mediators they need to be chosen to serve. That often entails selection by attorneys for the parties, which has been suggested as one of the reasons for the lack of diversity.[169] The gatekeepers are members of the legal profession, which has a poor record of BIPOC in leadership positions, where an "old boys club" mentality that embeds white superiority still tends to dominate.[170]

Diversity of all kinds matters in every walk of life, and there are reasons to be concerned in the field of mediation. There is some research suggesting that we should worry about disparate outcomes when a white mediator works with a minority party. A study of mediation outcomes for small claims cases in Bernalillo County, New Mexico (the MetroCourt study), found that Anglo claimants received more money compared to their demands (higher monetary outcome ratios (MORs)) than minority male and female claimants. However, it is important to note that much of the effect of ethnicity and gender on monetary outcomes was due to underlying differences in the cases in which the different ethnicities/genders were involved.[171] It is also possible that different ethnic groups place different values on monetary versus nonmonetary outcomes in mediation, which were not considered in this study. However, the observation that may be relevant to the potential effect of a lack of diversity in the mediator pool was that the lower MORs for minority claimants occurred only when one or both of the mediators was Anglo.[172]

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[169] *See* Velikonja, *supra* note 158, at 23.

[170] Even when attorneys of color choose the dispute resolution neutral, they can face a double-edged sword if they select a minority person, at least in the context of arbitration. *See* Ellen E. Deason et al., *ADR and Access to Justice: Current Perspectives*, 33 Ohio St. J. on Disp. Resol. 303, 324 (2018) (quoting comments from Michael Z. Green on the need to create incentives for selection of neutrals of color).

[171] LaFree & Rack, *supra* note 38, at 789 ("In general, minorities and women were less likely to be . . . repeat players: They were less likely to be in collection cases and to be represented by attorneys; they were more likely to file as individuals and to be in private cases."); *see also id.* at 793 (reporting that "there was little evidence that minority and female respondents were disadvantaged in either [adjudication or mediation].").

[172] *Id.* at 789. Cases mediated by two minorities resulted in lower MORs regardless of claimant ethnicity. *Id.* It would be interesting to know how variations in the ethnicities of parties (two

In addition to the role that attitudes of white superiority may play in limiting opportunities for BIPOC in the field of mediation, we suspect that other aspects of white supremacy also play an important role. Maria Volpe and fellow researchers who conducted interviews of BIPOC ADR practitioners in the New York City area in 2005-2006 found that these ADR practitioners perceived many practical barriers to their entry into the profession.[173] Significantly, however, the researchers also found support for a hypothesis that we will quote in full because of its implications for the role of white supremacy as a factor that may reduce the interest of BIPOC in participating in the field:

> [B]ecause of different social or cultural traditions and orientations, core assumptions about human behavior that permeate work in mainstream North American conflict resolution processes do not resonate with underrepresented racial and ethnic groups. For example, there may be differences in views about the relative importance of characteristics such as rationality versus emotion and expressiveness, autonomy versus belonging and community, linear versus cyclical development, structure versus flow, and the material versus the spiritual. As a result of these differences, ADR practitioners from underrepresented groups are pressured to utilize processes based on mainstream premises, which may be substantially different than those processes these practitioners would otherwise employ. This dissonance between the values or cultural orientation of underrepresented racial and ethnic groups and the mainstream discourage their participation.[174]

Our contention is that "mainstream premises" of North American mediation are shaped by the assumptions of white supremacy. We have discussed above how an expectation of rationality can suppress emotion and expressiveness through tone policing, and how mediation incorporates the assumptions of linearity and autonomy embedded in the Western approach to negotiation. These factors may have racist effects on the recruitment of BIPOC mediators as well as on BIPOC participants in mediation.

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minorities versus an Anglo with a minority) might have affected the finding associated with Anglo mediators. *See also* Christine Rack, *Negotiated Justice: Gender & Ethnic Minority Bargaining Patterns in the MetroCourt Study*, 20 HAMLINE J. PUB. L. & POL'Y 211, 212 (1999) (concluding based on a second study that mediators showed "Anglo-protective bias" in the MetroCourt study).

[173] Volpe et al., *supra* note 156, at 136–41.

[174] *Id*. at 125.

VI.   Mediation Values and Anti-Racist Work

We have identified how some of the practices of mediation can be problematic in terms of expressing aspects of white supremacy and how the mediation value of neutrality is in tension with mediators taking an active anti-racist role in the process. But there is also a firmly established mediation value that supports anti-racist work, namely participant self-determination.

While ethical standards for mediators vary from jurisdiction to jurisdiction, the requirement that mediators honor party self-determination is central to the process.[175] In the Model Standards, self-determination is defined as "the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome."[176] The standard continues that such decisions may occur at "any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process and outcomes."[177]

The connection between party self-determination in mediation and white supremacy is that if a mediator were truly able to completely honor party self-determination, the mediator's background and beliefs would become irrelevant. All that would matter would be how the participant sees the situation and what s/he chooses to do about it. We have identified two types of mediation that recognize the value of self-determination in ways that are especially relevant to the questions we raise in this Article: transformative mediation and inclusive mediation.

Transformative mediation is the approach to mediation that prioritizes party self-determination to the greatest degree. It applies this value to choices about both process and outcome. Transformative mediation is based on the idea that conflict is the manifestation of individuals feeling weak and self-absorbed, which causes them to vilify the "other." In order for individuals to shift in relation to a conflict, they need to experience empowerment and recognition. When individuals begin to feel stronger (empower-

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[175] Model Standards of Conduct for Mediators, *supra* note 115, std. I(A) ("A mediator shall conduct a mediation based on the principle of party self-determination."). The 1994 version of the Model Standards of Conduct for Mediators described self-determination as "the fundamental principle of mediation." Model Standards of Conduct for Mediators, 17 J. Nat'l Ass'n Admin. L. Judiciary 323, 324–25 (1997). *See also* Omer Shapira, *Party Self-Determination*, *in* A Theory of Mediators' Ethics: Foundations, Rationale, and Application 127–62 (2016).

[176] Model Standards of Conduct for Mediators, *supra* note 115, std. I(A).

[177] *Id*.

ment), they are able to see the other (recognition). And it is also true that if someone experiences recognition, they begin to feel stronger. These shifts, according to transformative theory, create a cycle which lifts people out of conflict.[178]

In practice, this means that mediators who adopt a transformative perspective will use every opportunity to create space for empowerment and to lift up moments of recognition. Empowerment, moving from weakness to strength, means that transformative mediators will ask participants to make all decisions—substantive *and* procedural. The concept is called "following the parties." In contrast, mediators who practice from a facilitative or evaluative perspective often subscribe to the adage that the parties control the substance while the mediator controls the process. In terms of recognition of the other, mediators using transformative theory don't force this on the parties (they don't force anything). Instead, an important technique they use in response to relational weakness or self-absorption is to reflect back what they are hearing, both positions and emotional heat.[179] In hearing this reflection, parties can add to or correct what the mediator heard. The mediator's act of reflection gives parties opportunities for recognition because the counter parties may be able to hear a message in a new way. And even if the counter party doesn't respond, a party can experience recognition because the mediator has heard them.

It is these opportunities for empowerment and recognition, rather than settlement, that become the focus of a transformative mediation. It is not hard to see how this change in focus impacts many of the issues we raise.[180] First, transformative mediation practices may be immune to the critiques based on tone policing. For example, because the underlying philosophy of transformative mediation is that the mediator follows the participants rather than guiding them to settlement, a transformative mediator avoids neutralizing their language or repressing their anger and other strong emotions. Second, transformative mediation also avoids some ma-

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[178] *About Transformative*, Inst. for The Study of Conflict Transformation, http://www.transformativemediation.org/about-transformative/ (last visited Mar. 24, 2021).

[179] *See* Robin Brzobhatý & Tereza Hanajová, *Reflection as a Manifestation of Recognition Beyond Relational Weakness*, https://www.transformativemediation.org/reflection-as-a-manifestation-of-recognition-beyond-relational-weakness-and-self-absorption/.

[180] Robert Baruch Bush and Joseph Folger go so far as to claim that "if mediators consistently use specific practices that fully respect and support party decisionmaking, on both substance *and* process, the risk of micro-level injustice is slight because the sources of those risks are removed." Robert A. Baruch Bush & Joseph P. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 Ohio St. J. on Disp. Resol. 1, 44 (2012) (emphasis in original).

jor effects of color-blindness. By leaving the process in the hands of the parties, transformative mediation allows the parties to decide what they would like to discuss. The mediator does not impose a limit on discussing past events or blame and the parties are permitted to develop their own narratives without selective guidance from the mediator.

More broadly, it is possible that transformative mediation might be better suited for anti-racist work than many other approaches to mediation. Robert Baruch Bush and Joseph Folger speculate (and hope) that private transformative practices can translate into public benefit:

> [O]ne spillover impact could be that parties of unequal power who have found the strength to make strong justice claims in mediation, and the empathy to be responsive to them, are more likely to act with the same kind of strength and empathy in the future, not only in their private lives but in the public square.[181]

We hypothesize that the empowerment aspect of transformative mediation might be especially impactful for BIPOC. And perhaps the awareness and recognition thread could be especially impactful for white participants. At the very least, participants with a racial edge to their dispute might emerge from a process in which they were able to participate authentically with a feeling that they had experienced real communication with each other.

Inclusive mediation is another form of mediation that highly values participant self-determination. It has its roots in community mediation and evolved as an approach distinct from facilitative mediation beginning in the 1990s in Maryland.[182] The method identifies with "the earliest theoretical values of mediation," namely "nonjudgment, individual self-determination, and community empowerment."[183] At its center is "radical inclusion of any person, place, time, or problem," especially "all ideas and forms of expression."[184] This foundation is based on the belief that the best way to

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[181] *Id.* at 47; *see also id.* at 48–51 (urging a return to the first principles of self-determination and dialogue).

[182] Caroline Harmon-Darrow et al., *Defining Inclusive Mediation: Theory, Practice, and Research,* 37 Conflict Resol. Q. 305, 317-318 (2020). Inclusive mediation was initially developed to serve Baltimore city residents. The changes from the facilitative model were refined not only in mediation sessions, but also in inner city community education work such as "the chaotic environment of mandatory Police Academy and inservice trainings, workshops with middle schoolers, neighborhood skill-building workshops, [and] teacher professional development." *Id.* at 319.

[183] *Id.* at 317.

[184] *Id.* at 307, 309.

reach a lasting resolution to conflict is to include "all participants' ideas and experiences, in whatever messy, real form they take, and working on understanding those ideas and experiences in a deeper way."[185]

Inclusive mediation consists of a five-step process that is usually followed linearly.[186] It is characterized by a commitment to joint sessions as opposed to caucuses and by using co-mediation as the norm.[187] A central feature of the process is that it eschews communication guidelines or ground rules in order to foster the inclusion of all ideas, feelings, and values. Putting the method of communication in the hands of the participants reflects the "belief that only authentic conversation leads to authentic change; that forcing one communication style is culturally insensitive or biased; that neutrality is compromised; and that critical information may be shut out."[188]

Consistent with the rejection of communication ground rules, inclusive mediators use techniques to avoid molding the conversation or the development of solutions. They use what is called "inclusive listening" rather than traditional active listening. This means that they do not "mirror" or repeat positions when they reflect the participants' statements because that does little to build understanding. Instead, they limit their reflection to participants' feelings, values, and topics.[189] They "do not attempt to 'positively reframe' the comments or reflect them back euphemistically."[190] Inclusive mediation sees this as a judgment on the intensity of the exchange and as detracting from authentic conversation and movement toward resolution. Finally, mediators using an inclusive approach withhold all their opinions. This goes beyond avoiding predictions and suggesting options; it also includes all reactions:

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[185] *Id.* at 309.

[186] *Id.* at 311.

[187] *Id.* at 310. There are several practical reasons for using co-mediators in inclusive mediation. Because it encourages the expression of all ideas and uses a format without communication guidelines, two mediators are often needed to keep up with the content. *Id.* Co-mediation also provides a setting to model collaboration, an opportunity to match the race of the participants and the mediators, *see infra* notes 214–215 and accompanying text, and allows mediators to engage in structured mutual feedback after each mediation session. *Id.* at 311.

[188] *Id.* at 317 (reporting inclusive mediation's recognition that "[a]llowing participants to engage in raw and sometimes painful exchanges, supports them to find their own way forward to understanding and often to develop a new way of communicating. If mediators control these conversations, rather than work toward deeper understanding, they rob participants of the opportunity to speak for themselves toward accountability and transformation.").

[189] *Id.* at 316.

[190] *Id.*

opinions that express appreciation or normalize a situation as well as negative judgments.[191]

Inclusive mediation's commitment to "radical inclusion" of all ideas, feelings, values. and methods of communicating avoids the issues we raise regarding tone policing and color blindness in "traditional" mediation frameworks. Indeed, the approach was forged in a setting where a model with these issues would be ineffective.[192] As such, the practices used in inclusive mediation may have much to offer to help make other mediation contexts more hospitable for those with justice claims.

VII. SUGGESTIONS

As we stated early in this Article, we are not the first to raise concerns about the use of mediation and the impact it has on communities of color. Many of these scholars have also offered suggestions for ways that these concerns may be addressed. While by no means a full catalog, in this section we describe some of these suggestions before concluding with our thoughts for next steps.

Some of the early critiques of ADR, including those provided by Richard Abel,[193] Jerold Auerbach,[194] Richard Hofrichter,[195] Laura Nader,[196] and Owen Fiss,[197] found the problems for the "unempowered, poor and other disadvantaged groups"[198] caused by the informalism inherent in ADR (especially mediation) so troubling that they did not provide suggestions for improving the use of ADR. In contrast, Richard Delgado, while accepting the premise that the social science and left-wing critiques of ADR

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[191] *Id.* at 317.

[192] Inclusive mediation listening skills, for example, were tailored for individuals whose "listening skills were refined in the real life of Baltimore city streets and schools with high rates of volatility and serious violence. If the skills did not work in high-pressure situations, did not work to include all types of speakers in all types of conversations, and did not produce authentic shifts in anger and hostility, Inclusive listening trainers would not have been invited back. The skills had to work in practice." *Id.* at 319.

[193] Richard L. Abel, *The Contradiction of Informal Justice, in* 1 THE POLITICS OF INFORMAL JUSTICE 267 (1982).

[194] JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? (1983).

[195] Richard Hofrichter, *Justice Centers Raise Basic Questions, in* NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA (Roman Tomasic & Malcolm M. Feeley eds., 1982).

[196] Laura Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998 (1979).

[197] Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

[198] Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1391 (1985).

were at least partially valid,[199] explored whether the risks could be minimized without eliminating the benefits of ADR.

Delgado concluded that "ADR should be reserved for cases in which parties of comparable power and status confront each other"[200] and should not be used in cases that "have a broad societal dimension."[201] Further, he recommended that if, "for reasons of economy or efficiency,"[202] ADR was used when the issues touched a sensitive or intimate area of life ("for example, housing or culture-based conduct"),[203] there should be rules clearly specifying the scope of the proceedings and forbidding irrelevant or intrusive inquiries, the proceedings should be open, and there should be some form of review.[204] In addition, the facilitator should be "a professional" who is acceptable to both parties and any party who wants assistance should be provided an attorney or advocate.[205]

Others believe that Delgado's recommendations would render mediation too similar to litigation and instead propose more modest adjustments. Trina Grillo would eliminate mandatory mediation and instead require all mediation to be engaged in voluntarily. She maintains that "[w]hen mediation is imposed rather than voluntarily engaged in, its virtues are lost."[206] In her view, when mediation is mandatory it "becomes the patriarchal paradigm of law it is supposed to supplant . . . . [I]ts messages disproportionally affect those who are already subordinated in our society, those to whom society has already given the message . . . that they are not leading proper lives."[207]

With regard to communication issues, Joel Lee suggests that mediators can match the mode of communication (direct or indirect) of the parties when they both prefer communicating in the same mode.[208] If the parties prefer different modes of communication or other culture issues arise, mediators should not rely on their own preferences, since they could then be seen as partial to one of the participants. Instead, Lee recommends that the mediator take

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[199] *Id*. at 1400.

[200] *Id*. at 1403.

[201] *Id.* at 1404.

[202] *Id*. at 1403.

[203] *Id*.

[204] Delgado et al., *supra* note 198.

[205] *Id*.

[206] Grillo, *supra* note 53, at 1610.

[207] *Id*.

[208] Lee, *supra* note 144, at 338.

on one of three roles, namely, translator, reframer, or coach.[209] For example, in order to bridge a gap of understanding between the participants, a mediator may play the role of translator by assisting the communicator with the direct style in understanding the indirect communicator. Or, the mediator may play the role of reframer in order to soften direct communications so as to be less abrasive and able to be heard. Finally, the mediator might also take on the role of coach to assist a party, in a separate session, to communicate in a manner that "better fits the other party," and assist the parties in constructing agreements that both give and save face.[210]

Based on research conducted in a court-attached custody and visitation program in Colorado, Steven Weller, John A. Martin, and John Paul Lederach conclude that "[d]eveloping culturally competent responses to the needs of different cultures requires improving the entire justice system infrastructure as well as increasing the awareness of all personnel supported by that infrastructure."[211] While they recognize how important it is that individuals who work with different cultures increase their general awareness and understanding of those cultures, they point out that it is equally important to recognize that the courts and the justice system embody the values and expectations of the dominant Anglo-European culture.[212] Because mediation takes place in the shadow of the court system,[213] these systemic issues will be problematic until the entire justice system frees itself from the dominant culture norms and expectations.

A common recommendation is to utilize diverse co-mediator teams.[214] In addition, to helping the mediators bring different perspectives into the mediation, a diverse mediation team signals to the participants that the mediators respect differences. Isabelle Gunning expands on this idea by suggesting that the use of diverse mediator teams conveys that the mediators value equality and that they expect "the participants to focus on American Creed values of equality rather than to assume that because the setting is private

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[209] *Id.* at 339.

[210] *Id.*

[211] Weller, Martin & Lederach, *supra* note 38, at 201.

[212] *Id.* at 200.

[213] Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. (1979).

[214] *See, e.g.*, Izumi, *supra* note 76, at 141; LeFree & Rack, *supra* note 38, at 780; Gunning, *supra* note 109, at 89.

and informal that prejudice and negative cultural myths will prevail."[215]

Another approach is to use "matching" between mediators and participants. A potential problem is that when matching is based on racial or ethnic group membership, it relies on the false assumption that group identification indicates a common culture. As Lorig Charkhoudian and Ellen Kabcenell Wayne have observed, "[t]his use of matching thus directly raises the tension between necessary cultural awareness and harmful oversimplification of intragroup cultural diversity."[216] Yet, as a practical matter, a study of matching between parties and mediators in small claims court mediations found significant positive effects when parties shared their race with the neutral. Matching race had a positive effect on 1) participants' sense of self-efficacy, 2) participants' belief that the court cares about resolving disputes, and 3) participants' sense that they heard and understood each other.[217] But, matching race or ethnicity needs to be done with care. An earlier study, with cases which included family, neighborhood, small claims, and interpersonal conflicts, showed that matching needs to take into account more than whether there is a BIPOC mediator in cases with a BIPOC participant. In this study, when the race of a participant did not match that of a mediator, there was little effect on the participant's reactions to the mediation process.[218] However, there were significant negative effects for the participant whose race differed from both that of the mediator(s) and the other mediation participant(s). The participants who were isolated in terms of race in this way were less likely to perceive that the mediator listened without judging and less likely to feel an in-

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[215] Gunning, *supra* note 109, at 89.

[216] Charkoudian & Wayne, *supra* note 38, at 32.

[217] Charkoudian et al., *supra* note 50, at 110, 118. These effects of race were observed even after holding strategies used by the neutral and other factors constant. *Id.* at 118. Most of the mismatched cases used for comparison in this study, which did not show these positive effects, involved African American parties with white neutrals. So it is possible that the beneficial results associated with racial matching reflected not the matching itself, but the specific effects of the white mediator. *Id.* It would be interesting to include a measure of implicit bias in future research on racial matching.

[218] Charkoudian & Wayne, *supra* note 38, at 43. There was, for example, no significant difference in participant ratings of effective communication, a perception that the mediator took sides, or the participant's satisfaction with the mediation process. The only significant effect observed was that when no mediator matched a participant's race, the participant was more likely to experience a decrease in feeling that conflict usually could be dealt with productively, which suggests less optimism about constructive conflict management. *Id.*

creased sense of control over the conflict situation after the mediation.[219]

These results support the use of co-mediation. Racially diverse co-mediators not only make possible the positive effects from matching when parties are racially diverse, but this structure can also help avoid the negative effects of racial isolation.[220] The studies also underscore the importance of a racially diverse group of mediators. Charkoudian and Wayne state that "[i]t is essential to have a diverse mediator pool, in part to make it possible to avoid isolating any participant. In particular, it is critical to realize that an overwhelmingly white mediator pool will repeatedly increase the possibility of isolating minority participants."[221] In addition, they observe that the importance of having a diverse group of mediators continues to be firmly rooted in other social goals. These include integrating the values and skills of a variety of cultures into the mediation community.[222]

Finally, in Carol Izumi's exploration of implicit bias and its impact on mediation, she calls for more "deliberate, informed, and self-conscious practices by mediators"[223] and suggests some individual implementation strategies. For our purposes, we want to focus on the more systemic suggestions she offers, the first regarding training, and the second on expanding the number of minority mediators and the opportunities for them.

Training is an essential aspect because white persons' perspectives on racial issues are generally inadequate. In describing a typical white professional's education, D'Angelo provides a powerful indictment (with our substitution of language for the context of mediation):

> I can be seen as qualified to [mediate a dispute involving people of different races and ethnicities] with no understanding whatsoever of the perspectives or experiences of people of color, few if any relationships with people of color, and virtually no ability to engage critically with the topic of race. I can get through gradu-

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[219] *Id.*; *see also* 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.

[220] Charkoudian & Wayne, *supra* note 38, at 47. An alternative approach to avoid the negative effects of racially isolating a participant would be to use a mediator who does not match the race or ethnicity of either party. *Id.*

[221] *Id.*

[222] *Id.* at 48.

[223] Izumi, *supra* note 76, at 155.

ate school without ever discussing racism. I can graduate from law school without ever discussing racism.[224]

Izumi suggests that mediation programs should make bias and prejudice reduction an important part of training and develop self-awareness, self-monitoring, and self-correction protocols.[225] Specifically, she calls for mediators to be required to complete "rigorous anti-bias training, much more than a one-hour Elimination of Bias class"[226] and to be subject to regular observations and evaluations.[227] LeBaron and Patera go further in positing that "courses delivered by culturally different trainers are likely to be far richer than those given by single trainers alone."[228] Although they are addressing negotiation training, their point that "[p]articipants will not only hear a greater range of ideas . . . but will have a powerful model of intercultural collaboration in the way the training is presented,"[229] applies equally to mediation.

Izumi's second point is that we need to increase the number of minority mediators and expand practice opportunities for mediators of color[230] because bias can be reduced through exposure to individuals who are not like us.[231] As a practical matter, she suggests that if every court-connected program utilized co-mediation teams with at least one person of color, the diversity of mediators would change in a positive direction.[232]

VIII. CONCLUSION

We began this piece by stating our intention to use this forum to raise questions in the hope that this would stimulate more discussion and deeper attention by dispute resolution scholars and practitioners to these issues. We would like to close with some suggestions for what is needed.

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[224] DiANGELO, *supra* note 25, at 8.

[225] Izumi, *supra* note 76, at 152; *see also* Gunning, *supra* note 109, at 87 (suggesting that participants share "knowledge and misperceptions of different identity groups" as part of basic mediation training).

[226] Izumi, *supra* note 92, at 691.

[227] *Id.* at 692.

[228] LeBaron & Patera, *supra* note 137, at 60.

[229] *Id.*

[230] Izumi, *supra* note 76, at 150.

[231] Lederach, *supra* note 150.

[232] Izumi, *supra* note 92, at 692.

First, we stand by the notion that more discussion about the embedded assumptions of whiteness in mediation is extremely important. This discussion and reflection would benefit greatly from more quantitative and qualitative research on the actual experience that BIPOC have in mediation. Much of what we wrote was our own speculation with extrapolation from other contexts. In order to fully understand the contours of the issue, the field needs much more research.

Recognizing the limitations that we are under without additional research, we still believe that there are some common-sense interventions that we could endorse as a structural matter. Specifically, we agree with the authors cited above that the regular use of co-mediation to bring diversity of thought and experience into the room makes sense. When co-mediators have different backgrounds, it will help prevent a mediator from assuming that there is one "right" approach in the mediation. Co-mediation also makes it easier to avoid the deleterious effects of isolating one party by race or ethnicity. And it allows rigorous debriefing and evaluation in collaboration with the co-mediator.

We also endorse a careful examination of training standards and the way that mediation is taught. While mediation is inherently an activity performed by individuals, the way to affect what a mediator does in a mediation goes back to how the mediator was trained. Programs and trainers should follow research on implicit bias and potential ways to reduce or counter it and mediation training standards should require this topic be taught. In addition, one needs to look not only at the standards, but also at how those training standards are implemented. This extends to the question of who is conducting the training and what lens they bring to the material, as well as the material used. Mediation training material should be reviewed to eliminate hidden messages of white superiority and new thinking is needed about how to prepare appropriate materials. Changes need to go beyond updating the names used in scenarios and descriptions to be representative of a range of ethnicities and racial backgrounds, which can be seen as merely a band-aid. More importantly, simulation scenarios should include a range of issues, including ones involving racial and ethnic conflicts, which need to be debriefed with sensitivity to the issues we have raised.

The Cardozo Symposium was on the use of "presumptive" mediation by the courts. While much of what we have raised so far applies in the private sector as well as court-connected environ-

ments, we believe that the court-connected setting offers some opportunities and creates some special challenges. In the court-connected setting, training standards can be adopted and enforced. On the other hand, many of the issues we raised are heightened in the context of court-connected mediation if the court program dictates (as many do) that mediations be completed in limited time frames.

The issues are also exacerbated when a court program emphasizes a settlement focus. Court-connected programs need to examine all of their policies and procedures to ensure that the mediations conducted under the auspices of the court can be completed in a manner that does not reward or compel mediators to become more directive in order to secure a settlement. We believe that the more directive a mediator is, the more likely that mediator is to insert his/her own narratives and style of communication. And when that mediator is white, and one or more of the parties is not, the issues described in this Article are more likely to occur. Therefore, we endorse less directive mediation styles and commend consideration of potential contributions of transformative mediation and inclusive mediation to anti-racism work.

We also need to recognize that our justice system was created by whites and has the white way of doing things baked in. For example, who gets to participate in mediation? Is it automatically just named parties or is there a more comprehensive understanding of who will be impacted by the decision, such as an extended family (individualistic or collectivist approach)? Should there be a written agreement that is signed? Not all cultures find that to be the most appropriate way to end a conflict. Keep in mind Grillo's admonition: "subordinated people can go to court and lose; in fact, they usually do. But if mediation is to be introduced into the court system, it needs to be a better alternative."[233]

Finally, this Article has considered what happens "at the table" in terms of systemic aspects of mediation practices that can generate racist effects. There is a need for a concurrent examination of what has happened "in the field" of mediation in this regard. It is time for reflection on the way that attitudes of theoreticians and practitioners alike have shaped these practices, with the goal to form a foundation for finding paths that the field can take toward constructive change.

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[233] Grillo, *supra* note 53, at 1610.

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