Implicit Bias and the Illusion of Mediator Neutrality

Carol Izumi[*]

INTRODUCTION

Plaintiff (P), the owner/operator of a carpet cleaning business, sued the defendant-homeowners for $500 in a breach of contract action for the unpaid balance of a $1,000 carpet cleaning agreement. Defendants (Ds or Mr. and Mrs. D) counterclaimed for the return of the $500 deposit they paid before work began. Ds hired P to dry out and clean the soaked carpet in their basement, which had flooded during a storm. Ds refused to pay the balance because the carpet had not dried out as P promised. Under the small claims court mediation program, the parties were required to attempt mediation before a trial date was set.

P was a middle-aged white male who attended the mediation in work clothes. Ds were an equally mature married couple of Asian descent who spoke with noticeable accents. They were dressed in what might be called "business casual" attire. The mediation was conducted around a large conference table by two white co-mediators: a male who looked to be in his forties and a younger female. The mediators conducted a "caucus model" facilitative-style mediation. P presented the case as a simple breach of contract: the agreement between the parties required the homeowners to make two

$500 payments and the second payment had not been made. Mr. D complained that the business owner was trying to cheat him by charging him for work that was unsatisfactory. During the mediation, P and Mr. D had markedly different demeanors. P was matter-of-fact and even-tempered. Mr. D was angry and agitated. Mrs. D sat quietly behind and to the right of her husband during the mediation. She spoke once and was quickly shushed by her husband.

In the joint session, P described the business transaction and his actions placing large fans in the basement to dry out the carpet. He stated that he had stressed to the homeowners the importance of keeping the upstairs door to the basement open for air to circulate. However, when he went to the house the following day, he found the door shut. P argued that the carpet did not dry as he expected because Ds did not keep the door open as instructed. The mediators asked P a number of questions about the contract, his interaction with Ds, and his professional cleaning techniques. When it was his turn to speak, Mr. D argued that P failed to complete the work as promised and that P's work was unsatisfactory. He asserted that the door was kept open as instructed; P saw it closed because Ds were preparing food and had temporarily shut the basement door in the kitchen because of the musty odor downstairs. During their co-mediator caucus after the joint session, the mediators commented that Ds failed to keep the door open.

In the individual sessions with the disputants, the mediators gathered and clarified information and explored options. P reiterated his position that he was entitled to the contract price since Ds' failure to keep the door open protracted the carpet drying process. In their individual session, Ds pressed that they were not satisfied with P's work because the carpet did not dry out in the promised time frame. Mr. D said he entered into the transaction cautiously because he was aware that American businesses sometimes take advantage of customers. After these two individual sessions, the mediators caucused and decided that the parties had reached an impasse. They brought the parties back together, conducted a bit more discussion, and concluded the session. The mediation was terminated in less than an hour without an agreement, and the matter was scheduled for trial. With more cases awaiting mediation, the mediators were quickly assigned another small claims case.

The preceding description is based on a small claims case mediation that I witnessed as a requirement for civil mediator certification in Michigan.[1] As an observer, I wondered why the mediator team decided that Ds failed to keep the door open despite their consistent assertions to the contrary. What judgments did the mediators make to reach such a determination? I was curious as to why the mediators failed to explore the door open/door closed issue in the individual sessions with the parties since it seemed significant. What factors and phenomena might have influenced the mediators' thought processes, judgment, and decision-making? I immediately thought about the possibility that racial dynamics played a role. None of the other observers I asked imagined that racial issues were at play. Being the sole non-white observer, perhaps I was more sensitive to potential racial aspects in the mediation.

One could view this mediation in a number of ways. When I presented this scenario to a group of mediation academics, one colleague opined that it was simply an example of bad mediation. In his view, the mediators seemed poorly skilled and their process lacked a systematic exploration of party interests, goals, priorities, and options. To him, the mediators were guilty of incompetence, nothing more. Another colleague supposed that the mediators were pressured by time limits and a waiting room full of parties in other cases. To this colleague, it was merely an example of "speed mediation." A third professor reasoned that the mediators made a credibility determination and decided that P was more believable. She allowed that mediators make credibility calls all the time and acknowledged that race could play a role in determining credibility. For all three mediation experts, nothing in the scenario raised concerns about mediator neutrality. I offer this mediation scenario as an opportunity to explore the nuances of mediator neutrality, consider the pervasiveness of unconscious bias, and provoke new dialogue.

This Article probes the complex challenges of a mediator's ethical duty to mediate disputes in a neutral manner against the behavioral

---

1. Observation of two mediations was required as part of the Michigan civil mediator certification process. MEDIATOR TRAINING STANDARDS AND PROCEDURES § 5.2.3 (Office of Dispute Resolution, Mich. Supreme Court 2005), *available at* http://courts.michigan.gov/scao/resources/standards/odr/TrainingStandards2005.pdf.

realities of mediator thought processes, actions, motivations, and decisions. Part I begins with a dissection of the elements of mediator neutrality. Part II introduces the science of implicit social cognition and its application to various legal contexts, turning to the mediation process as a focal point. In Part III, using one particular racial category (Asian Americans), I tease out ways in which implicit bias might affect the mediators' conclusions and actions in a particular situation.[2] Ending with Part IV, I present ideas that may help us get closer to the ideal of attaining "freedom from bias and prejudice" in mediation. I conclude that the reduction of bias and prejudice demands more attention and effort than mediators currently devote to it. We must have the intention and motivation to undertake deliberate actions to reduce unconscious bias. Bias mitigation also requires proactive steps and a more robust curriculum than what is offered in many mediation trainings, programs, and classrooms.

I. THE ESSENTIALITIES OF NEUTRALITY

Mediator neutrality is universally understood to be a vital attribute of the mediation process. The traditional definition of mediation from the 2005 revised Model Standards of Conduct for Mediations ("Model Standards"), originally approved in 1994 by the American Arbitration Association, the American Bar Association Section of Dispute Resolution, and the Association for Conflict Resolution, states, "Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute."[3] Textbook definitions of the mediation process invariably use language about the involvement of a "neutral" or "impartial" third party. A sample of dispute resolution casebooks reveals similar descriptions of mediation as:

---

2. I chose Asian Americans as the focal group because of the Ds' ethnicity. Although I frame the discussion around this discrete group, I would suggest that many issues and ideas presented could be extrapolated to apply to other groups as well.

3. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Preamble (2005), *available at* http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf.

- "[A]n informal process in which an *impartial* third party helps others resolve a dispute or plan a transaction but does not impose a solution."[4]

- "[A] process of assisted negotiation in which a *neutral* person helps people reach agreement."[5]

- "[A] process in which a *disinterested* third party (or *'neutral'*) assists the disputants in reaching a voluntary settlement of their differences through an agreement that defines their future behavior."[6]

- "[A] process in which an *impartial* third party acts as a catalyst to help others constructively address and perhaps resolve a dispute, plan a transaction, or define the contours of a relationship."[7]

- "[A] process in which a *neutral* intervener assists two or more negotiating parties to identify matters of concern, develop a better understanding of their situation, and, based upon that improved understanding, develop mutually acceptable proposals to resolve those concerns."[8]

Neutrality is a core concept of mediation.[9] Within the profession, there is widespread consensus about the vital importance of neutrality.[10] Neutrality, along with consensuality, gives the mediation process legitimacy.[11] "The essential ingredients of classical mediation

---

4. LEONARD L. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 16 (4th ed. 2009) (emphasis added).

5. DWIGHT GOLANN & JAY FOLBERG, MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL 95 (2006) (emphasis added).

6. JOHN W. COOLEY, THE MEDIATOR'S HANDBOOK: ADVANCED PRACTICE GUIDE FOR CIVIL LITIGATION 2 (2000) (emphasis added).

7. CARRIE MENKEL-MEADOW ET AL., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 266 (2005).

8. JAMES J. ALFINI ET AL., MEDIATION THEORY AND PRACTICE 1 (2d ed. 2006) (emphasis added).

9. KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 211 (3d ed. 2004).

10. KATHERINE V.W. STONE, PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION 33, 41 (2000).

11. Hilary Astor, *Rethinking Neutrality: A Theory to Inform Practice—Part I*, 11

are: (1) its voluntariness—a party can reject the process or its outcomes without repercussions; and (2) the mediator's neutrality, or total lack of interest in the outcome."[12] As a principle "central to the theory and practice of mediation," neutrality serves "as the antidote against bias, . . . [which] functions to preserve a communication context in which grievances can be voiced, claims to justice made, and agreements mutually constructed."[13]

Mediator neutrality is foundational to the mediation process. Other essential values, such as confidentiality and party self-determination, rest upon the parties' perception of the mediator as an unaligned participant. Mediator neutrality legitimizes the mediation process because the parties, rather than the mediator, are in control of decision-making.[14] To encourage the parties to share information freely and candidly with the mediator, the mediator promises not to take sides with the other party or use the information to advance the opponent's interests. Mediator neutrality makes it possible for parties to discuss issues of their choosing, negotiate with opponents, and design their own agreements.[15] Moreover, the parties' expectation of mediator neutrality is the basis upon which a relationship of trust is built.

> Trust is attained and maintained when the mediator is perceived by the disputants as an individual who understands and cares about the parties and their disputes, has the skills to guide them to a negotiated settlement, treats them impartially, is honest, will protect each party from being hurt during mediation by the other's aggressiveness or their own perceived

---

AUSTRALASIAN DISP. RESOL. J. 73, 73 (2000).

12. COOLEY, *supra* note 6, at 2.

13. Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 LAW & SOC. INQUIRY 35, 35 (1991).

14. Hilary Astor, *Rethinking Neutrality: A Theory to Inform Practice—Part II*, 11 AUSTRALASIAN DISP. RESOL. J. 145, 146 (2000).

15. *See* Leah Wing, *Whither Neutrality?: Mediation in the Twenty-First Century*, *in* RE-CENTERING: CULTURE AND KNOWLEDGE IN CONFLICT RESOLUTION PRACTICE 93, 94 (Mary Adams Trujillo et al. eds., 2008); *see also* Scott R. Peppet, *Contractarian Economics and Mediation Ethics: The Case for Customizing Neutrality Through Contingent Fee Mediation*, 82 TEX. L. REV. 227, 256 (2003) ("[N]eutrality is considered fundamental to the self-determination for which mediation strives. To the extent that a mediator is biased towards one party, the mediator may undermine the parties' ability to craft their own solution to their problem.").

inadequacies, and has no interests that conflict with helping to bring about a resolution which is in the parties' best interest. Only when trust has been established can the parties be expected to be candid with the mediator, disclose their real interests and value the mediator's reactions . . . .[16]

Neutrality is critical to the role of the mediator.[17] Mediators must meticulously avoid even the appearance of partiality or prejudice throughout the mediation process.[18] One mediation scholar has cautioned:

Whether there is such a thing as pure neutrality or not, we know, and our clients know, that when we commit to being neutral, we are committing to not intentionally promoting one party's interests at the expense of another. When we choose to play that role, we must truly honor it, and the fact that we have a choice and decision to make about whether to put ourselves forward as a third-party neutral should only emphasize how important that commitment is.[19]

While the importance of mediator neutrality is undisputed, what actually constitutes neutrality is less clear. Neutrality is discussed, practiced, and researched rhetorically, but there are no empirical studies demonstrating exactly what neutrality means.[20] The mediator's function is nebulous due to the difficulty in defining neutrality.[21] Despite its importance, mediation literature offers slim guidance on how to achieve neutrality.[22] "Neutrality is a hard concept to nail down. It has different meanings in different cultural contexts. In some contexts, the term *neutral* is associated with being inactive,

---

16. NANCY ROGERS & RICHARD SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW 7–39 (1987), *as reprinted in* STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 113 (4th ed. 2003).

17. KOVACH, *supra* note 9, at 211.

18. COOLEY, *supra* note 6, at 28.

19. BERNARD S. MAYER, BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION 242 (2004).

20. Cobb & Rifkin, *supra* note 13, at 36–37.

21. MAYER, *supra* note 19, at 83.

22. Peppet, *supra* note 15, at 253–54.

ineffective, or even cowardly. In others, it is viewed as a sine qua non for third parties to establish respect."[23]

Comprehension of mediator neutrality is complicated by the lack of consistency in definitions. The dispute resolution lexicon is imprecise. "One reason that the theoretical concepts seem divorced from practice is that we do not yet have a shared vocabulary in our field. Although neutrality has aspects similar to fairness, justice, and appropriateness, as well as impartiality and lack of bias, it is not the same as those concepts."[24]

There is no consensus within the dispute resolution community that neutrality and impartiality are terms of art or synonyms in the vernacular.[25] Commentators and guidelines employ neutrality and impartiality circularly, asserting, for example, that "mediators shall at all times remain impartial,"[26] or "a mediator needs to remain impartial to be able to fulfill her role."[27] Neutrality and impartiality are often used synonymously when discussing a mediator's ethical duty. One reason for this is because distinctions between the terms may appear synthetic or arbitrary.[28] In their studies, Sara Cobb and Janet Rifkin found that fourteen out of fifteen mediators defined neutrality by using the word "impartiality."[29]

Other commentators and guidelines apply "neutrality" to the outcome or the elements of any resolution and "impartiality" to engagement with the parties.[30] Douglas Frenkel and James Stark propose:

---

23. MAYER, *supra* note 19, at 83.

24. Alison Taylor, *Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence, and Transformative Process*, 14 MEDIATION Q. 215, 217 (1997).

25. KOVACH, *supra* note 9, at 212 ("Neutrality is often used interchangeably with a variety of other words and phrases: *impartiality*; *free from prejudice or bias*; *not having a stake in the outcome*; and *free from conflict of interest*. Other synonyms include *unbiased*, *indifferent* and *independent*. There is dissention within the mediation community about whether all of these terms define neutrality, and somewhat surprisingly, whether all, or any, are appropriate characteristics for mediators.").

26. *Id.*

27. Peppet, *supra* note 15, at 264 ("I agree with the classical conception of neutrality to the extent that it recognizes the importance of impartiality.").

28. William Lucy, *The Possibility of Impartiality*, 25 OXFORD J. LEGAL STUD. 3, 13 (2005).

29. Cobb & Rifkin, *supra* note 13, at 42.

30. KOVACH, *supra* note 9, at 212–14.

> "Impartiality," as we define the term, means that the mediator does not favor any one party in a mediation over any other party. Favoritism might be caused by a prior relationship or alliance with a mediation participant or by a personal bias for or against a participant based on that person's background, position, personality or bargaining style. Impartiality thus means a freedom from bias regarding the mediation *participants*.[31]

They define neutrality as meaning "that the mediator has no personal preference that the dispute be resolved in one way rather than another. The mediator is there to help the parties identify solutions that *they* find acceptable, not to direct or steer the parties toward results he favors."[32] Stated another way, neutrality is "a mediator's ability to be objective while facilitating communication among negotiating parties,"[33] and impartiality is "freedom from favoritism and bias in word, action and appearance."[34]

Despite this lack of clarity in the field, four key elements of neutrality are discernable: no conflict of interest; process equality; outcome-neutrality; and lack of bias, prejudice, or favoritism toward any party.[35] At a minimum, mediator neutrality is understood to mean

---

31. DOUGLAS N. FRENKEL & JAMES H. STARK, THE PRACTICE OF MEDIATION: A VIDEO-INTEGRATED TEXT 83–84 (2008).

32. *Id.* at 84; *see also* Susan Oberman, *Mediation Theory vs. Practice: What Are We Really Doing? Re-Solving a Professional Conundrum*, 20 OHIO ST. J. ON DISP. RESOL. 775, 802 (2000). Oberman defines impartiality as "the ability of the mediator to maintain non-preferential attitudes and behaviors towards all parties in dispute; it is the ethical responsibility of the mediator to withdraw if she or he has lost the ability to remain impartial." *Id.* She defines neutrality as the "alleged ability of the mediator to remain uninvested in the outcome of a dispute, to be aware of any contamination of neutrality, and to withdraw if he or she has lost it." *Id.*

33. Susan Nauss Exon, *The Effects that Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation,* 42 U.S.F. L. REV. 577, 580 (2008) (citing JAMES J. ALFINI ET AL., MEDIATION THEORY AND PRACTICE 12 (2001)).

34. *Id.* at 581 (quoting DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 68 (Phyllis Bernard & Bryant Garth eds., 2002)).

35. *See* Susan Douglas, *Questions of Mediator Neutrality and Researcher Objectivity: Examining Reflexivity as a Response*, 20 AUSTRALASIAN DISP. RESOL. J. 56, 57 (2009). This study found that mediators are aware of three themes regarding neutrality and per these themes, neutrality "is understood as impartiality, even-handedness and as central to the distinction between the process and content or outcome of a dispute." *Id.* A fourth theme is also important to understanding neutrality: "'value neutrality' or the absence of a situated perspective on experience." *Id.*

that the mediator has no pecuniary interest in the subject matter, no undisclosed relationship to the parties, and no possibility of personal gain.[36] Avoiding any actual or apparent conflict of interest is subsumed in the concept of neutrality. The Uniform Mediation Act states that:

> [B]efore accepting a mediation, an individual who is requested to serve as a mediator shall: (1) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation; and (2) disclose any such known fact to the mediation parties as soon as is practical before accepting a mediation.[37]

The Model Standards contain a similar prescription on conflicts:

> [A] mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.[38]

---

36. *See, e.g.*, ETHICAL GUIDELINES FOR THE PRACTICE OF MEDIATION § 4.2 (Wis. Ass'n of Mediators 1997), *available at* http://wamediators.org/pubs/ethicalquidelines.html ("As WAM members, we disclose to the parties any dealing or relationship that might reasonably raise a question about our impartiality. If the parties agree to participate in the mediation process after being informed of the circumstances, we proceed unless the conflict of interest casts serious doubt on the integrity of the process, in which case we withdraw."); *see also* COLORADO MODEL STANDARDS OF CONDUCT FOR MEDIATORS § II.A (2000), *available at* http://dola.colorado.gov/dlg/osg/docs/adrmodelstandards.pdf ("The mediator shall advise all parties of any prior or existing relationships or other circumstances giving the appearance of or creating a possible bias, prejudice, or partiality.").

37. UNIF. MEDIATION ACT §§ 9(a)(1)-(2) (2003), *available at* http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf.

38. MODEL STANDARDS OF CONDUCT FOR MEDIATORS III(A) (2005), *available at* http://www.abanet.org/dispute/documents/model_standards_conduct_apn12007.

The source of the mediator's fees may compromise neutrality. A mediator must disclose any "monetary, psychological, emotional, associational, or authoritative affiliations" with any of the parties that might arguably cause a conflict of interest.[39] This aspect of neutrality has special consequences for attorney-mediators:

> One major issue for lawyers who alternate between the roles of advocate and neutral is the potential for conflicts of interest—the possibility that a party in a mediated case will be a past or future legal client of the mediator-lawyer. This is a particular concern in large law firms, where a lawyer-neutral's partners may be concerned that a single modestly compensated mediation will disqualify the entire firm from representing the party in a much more lucrative matter. Standards for neutrals call for disclosure in such situations.[40]

A second facet of neutrality is process-based or procedural, requiring that the mediator conduct the mediation process in a manner that is even-handed.[41] The Model Standards require a mediator to conduct a mediation in a manner that promotes party participation and procedural fairness.[42] "The mediator's task is to control the process of the mediation, providing a procedural framework within which the parties can decide what their dispute is about and how they wish to resolve it."[43] Process symmetry may be manifested by maneuvers such as ensuring an equal number of caucuses with the disputants or spending roughly the same amount of time with each party. It also means enforcing stated guidelines in a

---

39. KOVACH, *supra* note 9, at 213.
40. JAY FOLBERG ET AL., RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW 447 (2005).
41. MODEL STANDARDS OF CONDUCT FOR MEDIATORS VI.A (2005), *available at* http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf ("Quality of the Process: A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.").
42. *Id.*
43. Hilary Astor, *Mediator Neutrality: Making Sense of Theory and Practice*, 16 SOC. & LEGAL STUD. 221, 223 (2007); *see also* Wing, *supra* note 15, at 94 ("[M]ediators are seen as only interested in the *process*, in ensuring that it is fair and that parties to the dispute are the decision-masters on any mutually acceptable agreement formulated.").

fair manner. For example, if the mediator sets a deadline for the submission of written statements or enforces behavioral guidelines, the parties expect enforcement to be equal. "One feature of procedural impartiality is that the rules constitutive of some decision-making process must, at a minimum, favour neither party to the dispute-cum-competition or favour or inhibit both equally."[44]

Expectations of mediator neutrality encompass both procedural and outcome impartiality.[45] Neutrality in mediation is widely understood to mean that the mediator does not influence the content or outcome of the mediation. The mediator's ethical duty to be impartial throughout the process applies to her interaction with the parties and to the substance of the dispute.[46] Content-neutrality is closely linked to consensual decision-making by the disputants; it constrains mediators from usurping party control over choices and judgments.[47] Outcome neutrality requires the mediator to refrain from promoting either party's interests.[48] This component of neutrality also means the mediator should not press the parties to reach a resolution at all. "Some would draw a line at content-neutrality, however, when the result would be unfair to one of the parties or have detrimental effects on individuals with interests that are not represented at the table."[49]

A mediator's ethical duty and ability to be outcome-neutral have inspired significant debate within the profession.[50] For years, scholars

---

44. Lucy, *supra* note 28, at 11.

45. *Id.* at 8.

46. COOLEY, *supra* note 6, at 23.

47. Taylor, *supra* note 24, at 218 ("[T]he mediator is not to determine the outcome, but allow a process where decisions are made by the participants.").

48. CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 52 (2d ed. 1996) ("What impartiality and neutrality do signify is that mediators can separate their personal opinions about the outcome of the dispute from the performance of their duties and focus on ways to help the parties make their own decisions without unduly favoring one of them.").

49. EDWARD BRUNET ET AL., ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE 200 (3d ed. 2006). In certain contexts, mediators have duties that extend beyond the immediate parties. In environmental disputes, international conflicts, and family law matters, for example, strict neutrality yields to normative consensus and standards to protect outside interests.

50. *See, e.g.*, Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 46–47 (1981) (asserting that environmental mediators ought to accept responsibility for ensuring that agreements are as fair and stable as possible, even though

and practitioners have questioned whether a mediator should be a mere facilitator of party-initiated outcomes or should assertively prevent agreements that are unfair or favor more powerful parties.[51] From one perspective, neutral mediators are viewed as being interested solely in ensuring a fair process, leaving the disputants to determine any mutually agreeable resolution.[52] An alternative philosophy is that mediators may or must interact with the parties unequally to account for differences such as resources, power, educational level, and financial sophistication.[53] This debate is less about how we define neutrality and more about how neutrality meshes with equally valued norms of fairness and justice, process legitimacy and quality, and party self-determination.[54] While it is important for mediators to engage in that colloquy, it is not the focus of this Article.

The final element of neutrality, and the one I want to emphasize, is the mediator's duty to "avoid bias or the appearance of bias."[55] "Impartiality between the parties and neutrality regarding the outcome are only two forms of bias. The sum total of the life experience of the mediator, the subjective self, enters into each mediation and impacts the process and outcome."[56] The Model Standards capture this in Standard II, which states in pertinent part:

"such intervention may make it difficult to retain the appearance of neutrality and the trust of the active parties"); Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 86 (1981) ("It is precisely a mediator's commitment to neutrality which ensures responsible actions on the part of the mediator and permits mediation to be an effective, principled dispute settlement procedure."); *see also* Evan M. Rock, *Mindfulness Meditation, the Cultivation of Awareness, Mediator Neutrality and the Possibility of Justice*, 6 CARDOZO J. CONFLICT RESOL. 347, 355 (2005) (citing Peppett, *supra* note 15, at 255); Sydney E. Bernard et al., *The Neutral Mediator: Value Dilemmas in Divorce Mediation*, 4 MEDIATION Q. 61, 66 (1984).

51.   *See* Carrie Menkel-Meadow, *Professional Responsibility for Third-Party Neutrals*, 11 ALTERNATIVES TO HIGH COST LITIG. 129 (1993).

52.   Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARVARD NEGOT. L. REV. 71 (1998); Wing, *supra* note 15, at 94.

53.   Bernard et al., *supra* note 50, at 66–67.

54.   For example, family mediators must remain neutral as to outcome and impartial toward the parties but protect the best interest of children. *See* Kimberly A. Smoron, *Conflicting Roles in Child Custody Mediation: Impartiality/Neutrality and the Best Interests of the Child*, 36 FAM. & CONCILIATION CTS. REV. 258, 261 (1998).

55.   Astor, *supra* note 11, at 77.

56.   Oberman, *supra* note 32, at 819–20 (citing Deborah M. Kolb & Jeffrey Z. Rubin, *Mediation Through a Disciplinary Prism*, *in* RESEARCH ON NEGOTIATION IN ORGANIZATIONS

A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.

1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.[57]

As of 2007, over a dozen states have implemented standards in which neutrality is defined as "freedom from favoritism or bias either by word or action, and a commitment to serve all parties as opposed to a single party."[58] Favoritism might be caused by a personal bias for or against a participant based on that person's background, position, personality or bargaining style; as such, impartiality means a freedom from bias towards the mediation participants.[59] For the disputants in mediation, a paramount concern is that the mediator has no prejudice against them on any level.[60]

To maintain neutrality, mediators must be aware of their assumptions, biases, and judgments about the participants in the process, particularly in cases where they have strong reactions to one of the parties.[61] Achieving impartiality requires mediators to have "insight into their own perspectives and experiences and [to understand] the impact that these have on their relationship with the parties in mediation."[62] "There remains the concern that the mediator's ideas and approaches to a problem will intrude and affect

---

231, 240 (Max H. Bazerman et al. eds., 3d ed. 1991)).

57. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard II (2005), *available at* http://abanet.org/dispute/documents/model_standards_conduct_april2007.pdf.

58. Exon, *supra* note 33, at 585 (quoting MINN. R. GEN. PRAC. 114 app. I cmt. 1, *available at* http://www.mncourts.gov/rules/general/GRtitleII.htm; STANDARDS OF PRACTICE: ETHICAL GUIDELINES FOR FULL MEMBERS 4 (Mont. Mediation Ass'n 1998), *available at* http://mtmediation.org/doc/Full%Ethics%20and%20Quals.pdf).

59. FRENKEL & STARK, *supra* note 31, at 83–84.

60. COOLEY, *supra* note 6, at 28.

61. Taylor, *supra* note 24, at 226.

62. Astor, *supra* note 11, at 77.

the direction of the process of mediation and its outcomes, as well as the difficulty of monitoring unconscious bias."[63]

This Article highlights the impartiality dimension of mediator neutrality in order to examine the imposing challenge presented by one form of bias,[64] i.e., implicit or unconscious bias. The next Part begins with a condensed review of the science of implicit social cognition and the phenomenon of implicit bias. It introduces the work of "behavioral realists" who import scientific research into legal analysis, and concludes with the application of these concepts to the mediation process.

II. IMPLICIT BIAS, BEHAVIORAL REALISM, AND APPLICATION TO MEDIATION

An impressive body of social science research produced over the past decades illuminates in new ways how our minds work. Advances in experimental psychology provide a deeper understanding of human perception, attention, memory, judgment, and decision-making. Cognitive social psychology studies persuasively show[65] that

---

63. *Id.*

64. There are many ways that "bias" operates in dispute resolution. *See, e.g.*, Robert S. Adler, *Flawed Thinking: Addressing Decision Biases in Negotiation*, 20 OHIO ST. J. ON DISP. RESOL. 683 (2005) (arguing that cognitive biases often associated with availability and representative and anchoring heuristics can be helpful, but can lead to stereotyping of large numbers of people based on limited past experiences; also argues that egocentric bias can affect one's perception of fairness); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974) (contending that by understanding the positive and negative aspects of heuristics and biases, one can improve one's judgments and decisions when faced with uncertainty); John Livingood, *Addressing Bias in Conflict and Dispute Resolution Settings*, DISP. RESOL. J., Nov. 2007–Jan. 2008, at 53, 54–59 (asserting that judgment in conflict situations can be affected by four core biases: learned, incident-driven, process-driven and attributional); Joel Lee, *Overcoming Attribution Bias in Mediation: An NLP Perspective*, 15 AUSTRALASIAN DISP. RESOL. J. 48 (2004) (arguing that neuro-linguistic programming (NLP) can be useful to a mediator in helping parties understand and deal with attribution biases). A discussion of these forms of bias in mediation and negotiation is beyond the scope of this Article.

65. This research has critics and defenders. Some argue that implicit association test data do not support the conclusion that implicit bias leads to discriminatory behavior. *See* Amy L. Wax, *The Discriminating Mind: Define It, Prove It*, 40 CONN. L. REV. 979, 985 (2008) (contending that it is not "proper to equate unconsciously biased mental associations with the tendency to engage in unlawful discrimination"); R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169, 1187–88 (2006) (asserting that the Implicit Association Test (IAT) is not significantly

unconsciously held attitudes and stereotypes can affect our interaction with others and may predict behavior.[66] This rich reservoir of scientific material deserves a more expansive presentation than I am able to offer here. What follows is a selective summary of some of the fascinating, and often startling, experimental discoveries about the insidious operation of unconscious bias. In the interest of space, I omit detailed descriptions of experimental design and administration and refer readers to the sources for explanations of methodologies and statistical analyses.

Following this summary of implicit bias research, I present the work of "behavioral realists." These legal academics and social scientists use social cognition research to measure how legal doctrines and institutional processes address discriminatory behavior. In contexts such as peremptory challenges, judicial decision-making, employment, and jury selection, scholars argue that current procedural and substantive legal protections fail to account for the

---

correlated to discriminatory behavior because subtle behaviors such as eye contact, speech errors, and body language do not constitute discriminatory action); Philip E. Tetlock, *Cognitive Biases and Organizational Correctives: Do Both Disease and Cure Depend on the Politics of the Beholder?*, 45 ADMIN. SCI. Q. 293 (2000) (arguing that studies should not focus on judgmental shortcomings but on the fact that everyone cannot fit in a particular category, and that an ideological bias on the part of researchers does not always translate to a "real-world" setting); Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006) (claiming that implicit bias research is invalid and should not be used in developing antidiscrimination law). There are rebuttals to this criticism. *See* Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477 (2007) (discrediting critics such as Mitchell and Tetlock for dismissing research unscientifically and subjectively, and further arguing that sufficient evidence exists to show that implicit biases lead to discrimination, and that antidiscrimination laws should be used to counter implicit bias effects); David L. Faigman et al., *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389, 1389–99, 1426–29 (2007) (arguing that expert testimony regarding research on implicit bias should be admissible in Title VII discrimination cases as a general background of implicit bias to give triers of fact understanding and context because "studies using a variety of measures and techniques have demonstrated the effects of implicit bias on judgments and behavior, creating a broad research base that spans several social scientific disciplines including psychology, sociology, and organizational behavior"; therefore "it is a mistake to conflate the existence of implicit bias with any one measure such as the IAT," or Implicit Association Test, and "it is a mistake to assume that critiques of one particular measure such as the IAT undermine the entire body of evidence showing the existence of implicit stereotypes and bias and their impact on judgments and behavior in the workplace").

66. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 954–55 (2006).

operation of unconscious biases. With evidence that implicit attitude measures reveal much more bias favoring advantaged groups than do explicit measures, adherents of behavioral realism advocate legal reform to adequately address prejudiced behavior. I examine the mediation process through a behavioral realism lens and suggest that mediators regularly fail to act in unbiased ways.

A. Implicit Bias Research

Implicit social cognition is "a broad theoretical category that integrates and reinterprets established research findings, guides searches for new empirical phenomena, prompts attention to presently undeveloped research methods, and suggests applications in various practical settings."[67] Implicit social cognitionists posit that we can learn more about stereotypes and prejudice when we examine their unconscious operations. For example, experiments examining the causal relationship between unconscious stereotypes and biases in perception and memory have shined new light on social interactions and led theorists to recommend corrective actions to counteract the pervasiveness of unconscious biases.[68] Mental processes such as implicit memory, implicit attitudes, implicit self-esteem, implicit perception, and implicit stereotypes operate outside conscious attention and thereby unconsciously influence judgment.[69] "The term *implicit*, contrasted with *explicit*, is used to capture a distinction variously labeled as unconscious versus conscious, unaware versus aware, and indirect versus direct."[70] The most commonly used techniques for studying implicit social cognition are priming tasks with rapid response time measures and the Implicit Association Test (IAT), which is described below.[71]

---

67.   Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 4 (1995).

68.   Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Stereotyping and Prejudice, in* 7 THE PSYCHOLOGY OF PREJUDICE: THE ONTARIO SYMPOSIUM 55, 56 (Mark P. Zanna & James M. Olson eds., 1994).

69.   Greenwald & Krieger, *supra* note 66, at 947.

70.   Mahzarin R. Banaji, Curtis Hardin & Alexander J. Rothman, *Implicit Stereotyping in Person Judgment,* 65 J. PERSONALITY & SOC. PSYCHOL. 272 n.1 (1993).

71.   Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 428, 431 (2007).

Implicit bias refers to:

> [A]n aspect of the new science of unconscious mental processes that has substantial bearing on discrimination law. Theories of implicit bias contrast with the "naïve" psychological conception of social behavior, which views human actors as being guided solely by explicit beliefs and their conscious intentions to act. A belief is *explicit* if it is consciously endorsed. An intention to act is *conscious* if the actor is aware of taking an action for a particular reason. . . . In contrast, the science of implicit cognition suggests that actors do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions.[72]

An overview of implicit social cognition research draws four main conclusions about the collective findings: (1) there is a variance, sometimes wide, between implicit and explicit cognition; (2) there is a discernable, pervasive and strong favoritism for one's own group, as well as for socially valued groups; (3) implicit cognitions, often more accurately than explicit, predict behavior; (4) implicit social cognitions are not impervious to change.[73]

Two concepts are key to the study of implicit social cognition: attitude (or preference) and stereotype (or belief).[74] Attitudes can be defined as dispositions toward things, such as people, places, and policies.[75] Stated another way, "an *attitude* [is] an evaluative disposition—that is, the tendency to like or dislike, or to act favorably or unfavorably toward, someone or something."[76] Explicit attitude expression can come in the form of action, such as selecting something we like or rejecting something we dislike.[77] Implicit attitudes are "introspectively unidentified (or inaccurately identified) traces of past experience that mediate favorable or unfavorable

---

72. Greenwald & Krieger, *supra* note 66, at 946.
73. Lane, Kang & Banaji, *supra* note 71, at 431–38.
74. *Id.* at 429.
75. Greenwald & Banaji, *supra* note 67, at 7.
76. Greenwald & Krieger, *supra* note 66, at 948.
77. *Id.*

feeling, thought, or action toward social objects."[78] For example, "[a]n implicit attitude toward B may be indirectly indicated by a (direct) measure of evaluation of A, when A and B have some relation that predisposes the implicit influence."[79] "Halo effect" research provides another example: physically attractive men and women "are judged to be kinder, more interesting, more sociable, happier, stronger, of better character, and more likely to hold prestigious jobs" by operation of an "objectively irrelevant attribute [physical attractiveness] that influences evaluative judgment on various other dimensions."[80]

A stereotype "is a mental association between a social group or category and a trait."[81] Stereotyping is "the application of beliefs about the attributes of a group to judge an individual member of that group."[82] A person's attitude toward someone or something is a consistent positive or negative response to an object.[83] On the other hand,

> a stereotype may encompass beliefs with widely diverging evaluative implications. For example, the stereotype of members of a certain group (e.g., cheerleaders) may

---

78. Greenwald & Banaji, *supra* note 67, at 8.

79. *Id.*

80. *Id.* at 9 (citing Karen Dion, Ellen Berscheid & Elaine Walster, *What is Beautiful is Good*, 24 J. PERSONALITY & SOC. PSYCHOL. 207 (1972)). The act of voting presents another example of implicit attitude. Voting for Obama because you know you like his beliefs and policies would be an explicit attitude expression. However, "a vote might function as an *implicit attitude indicator*—that is, an action that indicates favor or disfavor toward some object but is not understood by the actor as expressing that attitude. For example, a voter may vote for a particular candidate even though the voter knows nothing other than the candidate's name shares initial letters with the voter's name. In such a case, the vote can be understood, at least in part, as an implicit expression of the voter's self-favorable attitude." Greenwald & Krieger, *supra* note 66, at 948. Reliable research finds that most people have a positive attitude about themselves. Thus, "an expectable form of implicit attitude effect is that novel objects that are invested with an association to self should be positively evaluated." Greenwald & Banaji, *supra* note 67, at 10. Continuing with the voting example, even if you know nothing about Obama's sister, you might like his sibling. "This favorable attitude is an *implicit indicator* of attitude toward the candidate. Here, the 'implicit' designation indicates that the attitude expressed toward the candidate determined the attitude toward the relative, even though the liking or disliking for the relative may be experienced as an independent attitude." Greenwald & Krieger, *supra* note 66, at 948–49.

81. Greenwald & Krieger, *supra* note 66, at 949.

82. Banaji & Greenwald, *supra* note 68, at 58.

83. Greenwald & Banaji, *supra* note 67, at 7.

simultaneously include the traits of being physically attractive (positive) and unintelligent (negative). Stereotypes guide judgment and action to the extent that a person acts toward another as if the other possesses traits included in the stereotype.[84]

Stereotypes are activated automatically, generally leading to the presumption that "the operation of the stereotype or prejudice [is] unintended by the research participants (i.e., not deliberate), either because they are unaware of certain critical aspects of the procedure or because they are operating under conditions that make it difficult to deliberately base responses on specific beliefs or evaluations."[85] For example, a 1983 experiment conducted by Samuel Gaertner and John McLaughlin provided one illustration of stereotype activation, demonstrating that subjects more quickly identified word pairs if they were consistent rather than inconsistent with African American stereotypes (e.g., Blacks-lazy vs. Blacks-ambitious).[86]

More recently, Mahzarin Banaji and Curtis Hardin conducted two priming task experiments on gender stereotyping.[87] Subjects saw gender-related primes (e.g., mother, father) or neutral primes (e.g., parent, student) followed by target words. Subjects in the first experiment were asked to respond as to whether the following target pronoun, either gender-related (e.g., he, she) or neutral (e.g., it, me), was male or female. Participants were able to respond faster to pronouns that were consistent with the gender stereotype of the prime; this result occurred independently of explicit beliefs about gender stereotypes.[88] The second experiment asked participants only to identify whether the target word was a pronoun or not a pronoun, but still resulted in similar effects of gender stereotyping.[89] These

---

84. *Id.* at 14.

85. Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 243 (2002).

86. *Id.* at 242 (citing Samuel L. Gaertner & John P. McLaughlin, *Racial Stereotypes: Associations and Ascriptions of Positive and Negative Characteristics*, 46 SOC. PSYCHOL. Q. 23 (1983)).

87. *See* Mahzarin R. Banaji & Curtis D. Hardin, *Automatic Stereotyping*, 7 PSYCHOL. SCI. 136 (1996).

88. *Id.* at 136–39.

89. *Id.* at 139–40.

experiments "demonstrated that judgments of targets that follow[ed] gender-congruent primes are made faster than judgments of targets that follow[ed] gender-incongruent primes," showing that gender information imparted by words can automatically influence judgment, even in unrelated tasks.[90] Other studies bolster the finding that "[p]eople may often not be aware of what they are doing, they might even intend to be doing something else; perhaps worst of all, the operation of stereotypes and prejudice may be outside of their control."[91]

Automatic activation of stereotypes "provides the basis for implicit stereotyping."[92] "*Implicit stereotypes* are the introspectively unidentified (or inaccurately identified) traces of past experience that mediate attributions of qualities to members of a social category."[93] In one study, Mahzarin Banaji and Anthony Greenwald examined the relationship between implicit stereotypes and gender.[94] When testing participants' recognition of famous names, participants were more likely to falsely identify a male name as famous than they were to falsely identify a female name as famous. The false-fame effect was substantial when the names were male but weaker when the names were female, demonstrating an implicit indicator of the stereotype that associates maleness with fame (and achievement).[95] Researchers observe that stereotypes are often expressed implicitly in the behavior of people who expressly disavow the stereotype. Because race and gender stereotypes have been studied more often, they provide the "most persuasive evidence for implicit stereotyping."[96]

"*Implicit biases* are discriminatory biases based on implicit attitudes or implicit stereotypes. Implicit biases are especially

---

90. *Id.* at 140. In another experiment, researchers discovered that by activating abstract knowledge about beliefs associated with men and women, such as dependence and aggressiveness, subjects judged male and female targets more harshly when the targets' group membership stereotypically matched (e.g., after the subject's exposure to dependence primes, the subject will judge the female target to be more dependent). Banaji, Hardin & Rothman, *supra* note 70, at 272.

91. Blair, *supra* note 85, at 242.

92. Greenwald & Banaji, *supra* note 67, at 15.

93. *Id.*

94. Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Gender Stereotyping in Judgments of Fame*, 68 J. PERSONALITY & SOC. PSYCHOL. 181 (1995).

95. *Id.*

96. Greenwald & Banaji, *supra* note 67, at 15.

intriguing, and also especially problematic, because they can produce behavior that diverges from a person's avowed or endorsed beliefs or principles."[97] The existence of stereotypes and biases does not mean that a person necessarily holds consciously prejudicial beliefs. Stereotypes and prejudices unconsciously and naturally form "through ordinary biases rooted in memory" to simplify cognitive processes.[98] To a varying degree, all of us are subject to the operation of implicit stereotyping and prejudice.[99] "The best of intentions do not and cannot override the unfolding of unconscious processes, for the triggers of automatic thought, feeling, and behavior live and breathe outside conscious awareness and control."[100]

In large part, implicit social cognition research has advanced because of the development and accessibility of the Implicit Association Test (IAT), an instrument that produces an implicit-attitude measure based on response speeds in two four-category tasks.[101] Since 1998, self-administered IAT demonstrations have been available online.[102] The most widely used version is the "Race IAT" which measures implicit attitudes toward African Americans (AA) relative to European Americans (EA).[103]

Using the IAT, social scientists have found that most Americans exhibit a "strong and automatic positive evaluation of White

---

97.   Greenwald & Krieger, *supra* note 66, at 951.

98.   Mahzarin R. Banaji & R. Bhaskar, *Implicit Stereotypes and Memory: The Bounded Rationality of Social Beliefs, in* MEMORY, BRAIN, AND BELIEF 139, 167 (Daniel L. Schacter & Elaine Scarry eds., 2000).

99.   *Id.* at 143.

100.   *Id.* at 142–43.

101.   *See* Anthony G. Greenwald, Mahzarin R. Banaji & Brian A. Nosek, *Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm*, 85 J. PERSONALITY & SOC. PSYCHOL. 197 (2003).

102.   PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/ (last visited Nov. 6, 2010).

103.   The IAT works as follows: "[R]espondents first practice distinguishing AA from EA faces by responding to faces from one of these two categories with the press of a computer key on the left side of the keyboard and to those of the other category on the right side of the keyboard. Respondents next practice distinguishing pleasant-meaning from unpleasant-meaning words in a similar manner. The next two tasks, given in a randomly determined order, use all four categories (AA faces, EF faces, pleasant-meaning words, and unpleasant-meaning words). In one of these two tasks, the IAT calls for one response (say, pressing a left-side key) when the respondent sees AA faces or pleasant words, whereas EA faces and unpleasant words call for the other response (right-side key). In the remaining task, EA faces share a response with pleasant words and AA faces with unpleasant words." Greenwald & Krieger, *supra* note 66, at 952–53.

Americans and a relatively negative evaluation of African Americans."[104]

An analysis of data archived from many years of web-accessed IAT interactive demonstrations compared the level of favoritism toward advantaged versus disadvantaged groups revealed by implicit and explicit measures. Over two million people have taken the IAT; 90 percent have been American.[105] Eighty-eight percent of white test takers have manifested implicit bias in favor of Whites and against Blacks.[106] Over 80 percent of heterosexuals manifested implicit bias in favor of straights over gays and lesbians.[107] Non-Arab and non-Muslim test takers manifested strong implicit bias against Muslims.[108] These results are in sharp contrast to self-reported attitudes.[109] The following generalizations are apparent as to these self-selected users: explicit measures show much greater evidence for attitudinal impartiality or neutrality, and the IAT measures revealed greater bias in favor of the advantaged group. Implicit attitude measures reveal far more bias favoring advantaged groups than do explicit measures.[110] Interestingly, only African Americans failed to show substantial pro-EA race bias on the Race IAT.[111] From this, one can draw the conclusion that "*any* non-African American subgroup of the United States population will reveal high proportions of persons showing statistically noticeable implicit race bias in favor of EA relative to AA."[112]

Becca Levy and Mahzarin Banaji surveyed research that utilized the IAT and implicit priming to measure automatic attitudes and stereotypes related to age.[113] Based on 68,144 tests that included people along a wide spectrum of ages, Levy and Banaji offered three

---

104. Nilanjana Dasgupta et al., *Automatic Preference for White Americans: Eliminating the Familiarity Explanation*, 36 J. EXPERIMENTAL SOC. PSYCHOL. 316, 316 (2000).
105. Shankar Vedantam, *See No Bias*, WASH. POST MAG., Jan. 23, 2005, at 12, 15.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. Greenwald & Krieger, *supra* note 66, at 955.
111. *Id.* at 956.
112. *Id.*
113. Becca R. Levy & Mahzarin R. Banaji, *Implicit Ageism*, *in* AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS 49, 51–52 (Todd D. Nelson ed., 2002).

key findings.[114] First, ageism, defined as "an alteration in feeling, belief, or behavior in response to an individual's or group's perceived chronological age[,] . . . can operate without conscious awareness, control, or intention to harm."[115] Levy and Banaji found implicit ageism to be among the largest negative implicit attitudes observed, even larger than the anti-black attitude among white Americans.[116] Second, explicit age attitudes toward the elderly are negative, but implicit age attitudes are far more negative overall.[117] Third, a peculiar feature of implicit ageism is that it does not appear to vary as a function of age, since both older and younger subjects tend to have negative implicit attitudes toward the old and positive implicit attitudes toward the young.[118] The authors argue that ageism occurs implicitly and that all people are implicated in it. "Once age stereotypes have been acquired, they are likely to be automatically triggered by the presence of an elderly person."[119]

When implicit and explicit attitudes toward the same object vary, the discrepancy between the two is referred to as dissociation. This is often seen in attitudes toward stigmatized groups defined by age, race, sexual orientation, and disability.[120] Experiments show that implicit expressions of beliefs and attitudes are unrelated to explicit versions of the same. Two studies explored the use of the IAT "to chart the emergence of implicit attitudes in early and middle childhood."[121] The first study examined white American children's attitudes of blacks and Japanese.[122] The second also tested for explicit and implicit race biases but used a sample from a rural Japanese town where participants had little exposure to out-groups.[123] Generally, implicit and explicit biases existed at the earliest ages tested, but dissociation began around age ten or middle childhood as

---

114. *Id.* at 54.
115. *Id.* at 50.
116. *Id.* at 54–55.
117. *Id.* at 55.
118. *Id.*
119. *Id.* at 64.
120. Greenwald & Krieger, *supra* note 66, at 949.
121. Yarrow Dunham et al., *From American City to Japanese Village: A Cross-Cultural Investigation of Implicit Race Attitudes*, 77 CHILD DEV. 1268, 1270 (2006).
122. *Id.* at 1270–71.
123. *Id.* at 1274.

participants' explicit bias began to dissipate.[124] Researchers consistently observed dissociation between conscious and unconscious social judgment.[125]

Significantly, implicit bias predicts individually discriminatory behaviors.[126] Studies substantiate that "implicit measures of bias have relatively greater predictive validity than explicit measures in situations that are socially sensitive, like racial interactions, where impression-management processes might inhibit people from expressing negative attitudes or unattractive stereotypes."[127] An experiment featuring doctors making patient assessments provides an example of discriminatory behavior predicted by implicit bias measures.[128] Physicians with stronger implicit anti-black attitudes and stereotypes were not as likely to prescribe a medical procedure for African Americans compared to white Americans with the same medical profiles.[129] In addition, implicit measures are relatively better predictors of "spontaneous behaviors such as eye contact, seating distance, and other such actions that communicate social warmth or discomfort."[130] "Those who possess stronger negative attitudes toward a stigmatized group tend to exhibit more negative behaviors (e.g., blinking) and less positive behaviors (e.g., smiling) when interacting with a member of that group."[131]

Researchers conclude:

The exposure of stereotyped knowledge in these studies represents an experimental analog of the countless ways in everyday life by which stereotyped information is continuously made available. . . . [I]mplicit stereotyping effects undermine the current belief about the role of consciousness in guaranteeing equality in the treatment of individuals irrespective of sex, class, color, and national origin. . . . Implicit stereotyping critically compromises the efficacy of

---

124. *Id.* at 1270, 1274–76.
125. Banaji & Bhaskar, *supra* note 98, at 146.
126. Lane, Kang & Banaji, *supra* note 71, at 436.
127. Greenwald & Krieger, *supra* note 66, at 954–55.
128. Lane, Kang & Banaji, *supra* note 71, at 430.
129. *Id.*
130. Greenwald & Krieger, *supra* note 66, at 955.
131. Lane, Kang & Banaji, *supra* note 71, at 436.

"good intention" in avoiding stereotyping and points to the importance of efforts to change the material conditions within which (psychological) stereotyping processes emerge and thrive.[132]

B. Behavioral Realism

With so much laboratory evidence to support findings in implicit social cognition, many commentators have argued that we should consider the legal implications of this new science.[133] Over twenty years ago legal scholar Charles Lawrence called attention to the effects of unconscious racism in an oft-cited law review article, noting that "a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation."[134] Social science research has spawned a new generation of academics who question whether existing legal doctrines realistically account for the operation of implicit social cognition on human actors.[135]

---

132. Banaji, Hardin & Rothman, *supra* note 70, at 280.

133. Several authors have surveyed research and experiments on metacognitive processes to show how awareness, control, and intentionality (features of consciousness) relate to the formation of beliefs, attitudes, and behaviors. They argue that research on implicit social processes, particularly data on influences outside conscious awareness, control, and intention, may drive re-conceptualization of the legal notion of intention as it relates to discrimination. *See, e.g.*, Lane, Kang & Banaji, *supra* note 71; Banaji & Bhaskar, *supra* note 98; Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006); Mahzarin R. Banaji & Nilanjana Dasgupta, *The Consciousness of Social Beliefs: A Program of Research on Stereotyping and Prejudice*, *in* METACOGNITION: COGNITIVE AND SOCIAL DIMENSIONS 157, 167 (Vincent Y. Yzerbyt et al. eds., 1998).

134. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

135. *See generally* Jennifer S. Hunt, *Implicit Bias and Hate Crimes: A Psychological Framework and Critical Race Theory Analysis*, *in* SOCIAL CONSCIOUSNESS IN LEGAL DECISION MAKING: PSYCHOLOGICAL PERSPECTIVES 247, 255 (Richard L. Wiener et al. eds., 2007) (arguing that implicit stereotypes and prejudice may "tip the scale" in triggering hate crimes by causing hostile interpretations, increasing the likelihood of categorizing an individual as a member of a stigmatized group, activating aggressive behavioral tendencies, and/or lowering the decision threshold for aggressive behavior); Antony Page, *Unconscious Bias and the Limits of Director Independence*, 2009 U. ILL. L. REV. 237 (arguing that rules regarding director independence are flawed because they do not account for sources of bias, especially unconscious bias); Sara R. Benson, *Reviving the Disparate Impact Doctrine to Combat Unconscious Discrimination: A Study of* Chin v. Runnels, 31 T. MARSHALL L. REV. 43, 58–59 (2005) (arguing that the intent doctrine should be struck and the disparate impact doctrine should be reinstated in Equal Protection cases to combat implicit discrimination).

In *Trojan Horses of Race*, an exposition on selected findings in social cognition research, Jerry Kang describes "'racial mechanics'— the ways in which race alters intrapersonal, interpersonal, and intergroup interactions."[136] With an emphasis on implicit bias material, Kang urges that "it is time for a new 'behavioral realist' approach, which draws on the traditions of legal realism and behavioral science."[137] The term "behavioral realism" was coined by a collection of academics to identify a collaboration of legal scholars and social cognitionists that "seeks to apply the best model of human behavior that science has made available to questions of law and policy."[138] The idea of behavioral realism is that law and jurisprudence should be consistent with accepted interpretations of behavioral science.[139] One example of this type of collaboration is Kang and Banaji's proposal to apply implicit social cognition research to create a new framework for affirmative action, using a methodology that "forces the law to confront an increasingly accurate description of human decision making and behavior, as provided by the social, biological, and physical sciences."[140] Kang and Banaji contend, "[b]ehavioral realism identifies naïve theories of human behavior . . . [and] juxtaposes these theories against the best scientific knowledge available to expose gaps between assumptions embedded in law and reality described by science. When behavioral realism identifies a substantial gap, the law should be changed to comport with science."[141]

A number of scholars have employed a behavioral realist approach to evaluate legal doctrines that require a showing of explicit

---

136. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1493 (2005).

137. *Id.* at 1494 n.21.

138. *Id.*

139. *See, e.g.*, Dale Larson, *Unconsciously Regarded as Disabled: Implicit Bias and the Regarded-As Prong of the Americans with Disabilities Act*, 56 UCLA L. REV. 451, 476, 484–87 (2008) (citing a study that found "[p]reference for people without disabilities compared to people with disabilities was among the strongest implicit and explicit effects across the social group domains," and concluding that amendments to the Americans with Disabilities Act, which would reinstate a broader definition of a key element of actionable discrimination, are an important step forward in protecting against disability discrimination resulting from implicit bias).

140. Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1064–65 (2006).

141. *Id.* at 1065.

bias and conscious racial motivation. In the area of employment discrimination law, Linda Krieger and Susan Fiske assert that requirements based on intentionality and consciously discriminatory motivations are out of sync with empirical data from psychological science.[142] Relying on studies showing commonly held gender stereotypes and research indicating that implicit stereotypes remain in people who expressly hold egalitarian views, David Faigman, Nilanjana Dasgupta, and Cecilia Ridgeway argue that employment discrimination law requires new interpretations relying on more than explicit motivations.[143]

   In articles addressing juror and judicial decision-making, authors present scientific research to show that implicit bias affects courtroom proceedings, suggesting that judges who prohibit references to race or other social characteristics during the proceedings are actually allowing discrimination to continue rather than helping to stop it.[144] Judges who strive to create a prejudice-free courtroom face an additional quandary. Studies confirm that unconscious bias may explain, at least in part, disparities in judicial decision-making, such as with convictions and sentencing.[145] Concerned with the impact of implicit bias in the process of creating a fair cross-section of jurors, one judge recognized that racial dynamics played out in jury deliberations, but she was frustrated in her attempts to remove prejudiced jurors from the pool.[146] Looking at

----

   142.   Krieger & Fiske, *supra* note 133, at 1061–62.

   143.   Faigman et al., *supra* note 65, at 1434 (concluding that expert testimony regarding research on implicit bias should be admissible in Title VII discrimination cases to provide a general background of implicit bias and give triers of fact understanding and context, but not for testimony that implicit bias influenced an employment decision in a specific case).

   144.   *See* Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, *in* CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY, RACE, AND LAW 11 (Gregory S. Parks et al. eds., 2008).

   145.   *See* Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1202 (2009). The authors found that the white judges in their study may have been compensating for unconscious racial biases in their decision-making, at least when the defendant's race was clearly identified. *Id.* at 1223. However, the black judges in the study had a greater propensity to convict the African American defendant, perhaps, as the authors speculate, because "[b]lack judges . . . might have been less concerned with appearing to favor the black defendant than the white judges." *Id.* at 1224.

   146.   Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1030 (2008) ("The harsh reality for judges conducting voir dire aimed at seating only fair and impartial jurors is that the jurors themselves may not be able to assist."); *see also* Turner v.

peremptory challenges, Anthony Page argues that the current three-step *Batson* approach[147] is inadequate to address the phenomenon of racially motivated challenges in jury selection.[148] The *Batson* approach requires that the challenging lawyer actually be conscious of her reason for striking, but research shows that unconscious bias can easily alter our perceptions of others.[149] Page's piece, along with other social science articles, was cited by Justice Breyer in *Miller-El v. Dretke*, a case in which the Supreme Court concluded that a prosecutor's use of peremptory challenges to strike several black jurors constituted purposeful discrimination.[150] Justice Breyer commented that "[s]ubtle forms of bias are automatic, unconscious, and unintentional,"[151] operating outside the knowledge of the person acting in a biased manner.

C. Application to Mediation

Unlike judges, mediators lack the authority to render binding judgments. Nevertheless, they may have significant influence on individual lives. A mediator's actions, judgments, strategic choices, and interactions with the disputants have an undeniable impact on the substance of the mediation and the results of the mediation process. In her book on mediator behavior, Deborah Kolb described her

---

Stime, 222 P.3d 1243 (Wash. 2009) (holding that the jurors' racially biased conduct in regards to a Japanese lawyer supported grounds for a new trial); Martha Neil, *New Trial Sought After Jurors Mock Lawyer's Heritage*, ABA JOURNAL (Jan. 15, 2008, 4:34 PM), http://www.aba journal.com/news/new_trial_sought_after_jurors_mock_lawyers_heritage (Washington lawyer sought new trial after jurors mocked his Japanese heritage during deliberations).

147. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court provided a three step approach for constitutional claims regarding the use of peremptory challenges. The first step requires the defendant to raise the inference that the prosecutor used peremptory challenges to exclude possible jurors based on race. *Id.* at 96. In the second step, the prosecution has the burden of producing a race-neutral explanation for the exclusion of the jurors. *Id.* at 97. In the third step, the trial court must determine if the defendant has proven purposeful discrimination. *Id.* at 98.

148. Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005).

149. "[T]he problem with *Batson* is its inability to address the honest, well-intentioned lawyer who nevertheless still discriminates." *Id.* at 179 (emphasis added). The lawyer's lack of self-awareness may lead to peremptory challenges being exercised in a discriminatory manner even though the lawyer states, and believes, she has a non-discriminatory reason. *Id.* at 234–35.

150. Miller-El v. Dretke, 545 U.S. 231, 265–66 (2005).

151. *Id.* at 268 (Breyer, J., concurring) (internal quotations omitted).

observations of labor mediators during several mediations.[152] She observed two contrasting types of mediator behavior, leading her to classify mediators as either "orchestrators" or "dealmakers".[153] Orchestrators tended to require that the parties take more responsibility for negotiating, designing settlement proposals, and convincing their colleagues to accept a given settlement.[154] Dealmakers, on the other hand, saw themselves as responsible for creating, pushing, and "selling" an ultimate settlement to the parties.[155] Mediators in Kolb's study admitted to "manipulat[ing]" the parties to certain outcomes.[156] Kolb observed mediators using "direct persuasion . . . resulting in a deal that bears the imprint of the mediator as much as it does the parties."[157]

This spectrum of mediator behavior has been described in various ways. Leonard Riskin's well-known grid situates mediators within a "facilitative-evaluative/broad-narrow" framework.[158] Ellen Waldman uses "Norm-Generating," "Norm-Educating," and "Norm-Advocating" terminology.[159] Hilary Astor compares a "robust" approach, in which the mediator is "assertive, active, and interventionist," to a "minimalist" approach that entails convening, stimulating information flow, and identifying options.[160] For every mediator who argues that a facilitative model is the better or "correct" approach, another advocates a more directive approach in fulfilling duties.[161] By analyzing mediators in practice, observers

---

152. DEBORAH M. KOLB, THE MEDIATORS (1983).

153. *Id.* at 25.

154. *Id.* at 34–41, 42–43.

155. *Id.* at 34–42.

156. *Id.* at 41.

157. *Id.* at 42.

158. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 16–35 (1996); Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and The New New Grid System*, 79 NOTRE DAME L. REV. 1, 12–13 (2003) (proposing substituting "directive" and "elicitive" for "evaluative" and "facilitative").

159. Ellen A. Waldman, *The Challenge of Certification: How to Ensure Mediator Competence While Preserving Diversity*, 30 U.S.F. L. REV. 723, 728–43 (1996).

160. Astor, *supra* note 11, at 75–76.

161. *Compare* Kimberlee K. Kovach & Lela P. Love, *"Evaluative" Mediation is an Oxymoron*, 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996) ("An essential characteristic of mediation is facilitated negotiation. . . . 'Evaluative' mediation is an oxymoron. It jeopardizes neutrality because a mediator's assessment invariably favors one side over the other."), *with*

have concluded that evaluative mediators cross the neutrality line in ways that facilitative practitioners do not.[162] It is when mediators move from "educative" and "rational-analytic" roles to "therapeutic" and "normative-evaluative" roles "that an ethics dilemma regarding neutrality and impartiality may arise."[163]

Exoneration of facilitative mediators from neutrality breaches, however, may be too generous. Under the assumption that "mediators themselves routinely and unabashedly engage in manipulation and deception to foster settlements," James Coben argues that "[t]his is not simply a matter of mediator style—the [much-discussed] distinction between facilitative and evaluative approaches."[164] Despite neutrality constraints, Coben asserts that mediators "*are directly involved in influencing disputants toward settlement*."[165]

Mediator partiality is manifested in subtle ways.[166] Two studies reveal a significant disconnect between the articulated practice goal of neutrality and the actual techniques and strategies of mediators. In the first study, empirical research into community mediation in neighbor disputes showed that mediators (paid staff and trained volunteers) found it difficult to ignore "personal bias and evaluations of the worthiness of particular claims and disputants."[167] Mediators confessed to being so angry or frustrated with a disputant that on occasion "they felt they could not even make a pretence at remaining neutral."[168] Instead of being a rare occurrence, mediators stated their

---

Donald T. Weckstein, *In Praise of Party Empowerment—and of Mediator Activism*, 33 WILLAMETTE L. REV. 501, 504 (1997) ("When consistent with the parties' expectations and the mediator's qualifications, activist intervention by the mediator should be encouraged rather than condemned.").

162. Linda Mulcahy, *The Possibilities and Desirability of Mediator Neutrality—Towards an Ethic of Partiality?*, 10 SOC. & LEGAL STUD. 505, 510–11 (2001).

163. Taylor, *supra* note 24, at 221.

164. James R. Coben, *Mediation's Dirty Little Secret: Straight Talk About Mediator Manipulation and Deception*, 2 ALTERNATIVE DISP. RESOL. EMP. 4 (2004).

165. *Id.* at 5 (citing CHRISTOPHER MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 327 (2d ed. 1996)); *see also* Astor, *supra* note 11, at 74 ("Significant attacks on mediator neutrality have come from academics who have pointed out, trenchantly and repeatedly, that mediators are not neutral. Research has clearly demonstrated that mediators do inject their own values into mediation.").

166. Mulcahy, *supra* note 162, at 511.

167. *Id.* at 516.

168. *Id.* at 516–17.

reactions were common.[169] Their mediation training "assumed that they could keep such negative evaluations of the disputants at bay."[170] However, the mediators felt constrained by an expectation of neutrality, as the expectation "was impossible to achieve" and "made them feel as though they were constantly doomed to failure."[171]

A second study showed that mediators influence the content and outcome of mediations by instigating party engagement at certain times in the process to make certain outcomes more likely.[172] This study looked at divorce mediations, analyzing data from forty-five mediation sessions which covered fifteen cases handled by three mediators.[173] Researchers found that mediators directed the process towards the outcomes they favored.[174] "The pressure that the mediator exerts toward the favored and against the disfavored outcome is largely managed by differentially creating opportunities to talk through the favored option rather than, for example, repeatedly producing evaluative statements about the positions of the two clients or the options open to them."[175] The authors label this technique "selective facilitation"[176] and admonish that it should be "introduced with sufficient clarity for clients to be able to recognize it and choose whether to go along with it."[177]

An additional layer should be explored to address concerns of partiality in actual mediator behavior: the danger of unconscious bias against a party. As previously described, research shows the

---

169. *Id.* at 517.

170. *Id.*

171. *Id.*

172. David Greatbatch & Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 LAW & SOC'Y REV. 613 (1989).

173. *Id*. at 617.

174. *Id.* at 618. Information from the sessions "demonstrates that the mediator is working with notions of what kind of settlement would be desirable (a favored outcome) and what kind of settlement would be undesirable (a disfavored outcome), and seeks to guide the interaction accordingly." *Id*.

175. *Id.* at 636. "More commonly, mediators seem to proceed not by using the negative power of a veto but through the positive power of encouraging discussion in specific directions." *Id*. at 617.

176. *Id*. at 618.

177. *Id.* at 639. "Mediator influence becomes a problem only when formal and substantive neutrality are confused so that the pressure becomes invisible or when the choice of goals remains a purely personal matter rather than one for which the practitioner may be socially accountable." *Id*.

influence of implicit bias on our evaluation of others, judgments, and behavior, which is often inconsistent with express statements. "[E]x ante exhortation not to be intentionally unfair will do little to counter implicit cognitive processes, which take place outside our awareness yet influence our behavior."[178] In their introductory comments to the parties, mediators generally state that they will act in a neutral and impartial manner. Ethical and professional standards impose on mediators a moral imperative to avoid discrimination in their mediations. It is up to the parties to prove discriminatory treatment, even though people often do not perceive discrimination. "A behavioral realist analysis has demonstrated that such a model of explicit discrimination is not up to the task of responding to implicit bias, which is pervasive but diffuse, consequential but unintended, ubiquitous but invisible."[179]

Decades ago, critics cautioned that the mediation process may be particularly ill-suited to identify and confront discriminatory behavior.[180] As Richard Delgado and his colleagues warned, "ADR might foster racial or ethnic bias in dispute resolution."[181] Because formal adjudication explicitly manifests "societal norms of fairness and even-handedness" through symbols (flag, black robe), ritual, and rules, the adversarial process counteracts bias among legal decision makers and disputants.[182] These commentators conclude that members of the majority are most likely to show prejudicial behavior in informal ADR settings.[183] They argue that

> ADR is most apt to incorporate prejudice when a person of low status and power confronts a person or institution of high status and power. In such situations, the party of high status is more likely than in other situations to attempt to call up prejudiced responses; at the same time, the individual of low status is less

---

178. Kang & Banaji, *supra* note 140, at 1079**.**
179. *Id.* at 1079–80 (citing Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1 (2006)) ("Recognition of the pervasiveness of implicit bias lends support to a structural approach to antidiscrimination law.").
180. Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359.
181. *Id.* at 1367.
182. *Id.* at 1387–88.
183. *Id.* at 1391.

likely to press his or her claim energetically. The dangers increase when the mediator or other third party is a member of the superior group or class.[184]

To test the "informality hypothesis" that the effects of gender and ethnicity will be greater in mediated rather than adjudicated small claims cases, Gary LaFree and Christine Rack examined ethnicity and gender among participants and mediators in Bernalillo County, New Mexico ("MetroCourt study").[185] These researchers compared the impact of disputants' ethnicity and gender on monetary outcomes in 312 adjudicated and 154 mediated civil cases.[186] They found support for the informality hypothesis (i.e., disparities between Anglo males and others will be particularly significant in mediation) in contrasts between minority and Anglo claimants.[187] "The strongest support for the informality hypothesis is for minority male claimants, who received significantly lower MORs [monetary outcome ratios] in mediation, even when case variables are controlled for."[188] The study found no evidence that minorities or women were "especially disadvantaged as respondents in mediation."[189] The researchers concluded there was some support for an informality hypothesis, i.e., "that ethnic and gender disparities are greater in mediation than in adjudication."[190]

LaFree and Rack also sought to test the "disparity hypothesis" that minority and female disputants will achieve less favorable outcomes than majority and male parties whether their cases are adjudicated or mediated, and they found "considerable support" for it.[191] Data for mediated outcomes showed that minority men and women received significantly lower MORs as claimants, and minority men paid

---

184. *Id.* at 1402–03. For a response to Delgado's criticisms, see Sara Kristine Trenary, *Rethinking Neutrality: Race and ADR*, 54 DISP. RESOL. J. 40, 44 (1999).

185. *See generally* Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 LAW & SOC'Y REV. 767 (1996).

186. *Id.* at 771.

187. *Id.* at 778.

188. *Id.* at 780.

189. *Id.* at 778.

190. *Id.* at 789.

191. *Id.* at 788.

significantly more as respondents.[192] The study's overall results showed

> the strongest evidence of ethnic and gender disparity in the treatment of minority claimants in mediation. In the analysis including product terms, both minority male and female claimants received significantly lower MORs – even when we included the nine case-specific and repeat-player variables. Of greatest concern is the fact that this disparity was only present in cases mediated by at least one Anglo mediator. Cases mediated by two minorities resulted in lower MORs, regardless of claimant ethnicity.[193]

Rack conducted a second MetroCourt study involving a full data set of 603 small claims cases, of which 323 were adjudicated and 280 were mediated.[194] The study looked at a subset of 138 mediated cases which resulted in monetary agreements.[195] Rack compared party negotiations before the mediation with negotiation movement during the session to assess how the mediation process itself affected disputants.[196] She organized data to view cases as status relationships between claimants and the respondents, using five status dimensions: race-ethnicity, gender, socio-economic, corporate, and legal representation.[197] She found that ethnic minority claimants settled for less than Anglo claimants in mediation.[198] Compared to Anglo counterparts, minority respondents admitted higher liability at the outset and reported similar pre-mediation concessions; however, during the mediation sessions minority respondents conceded proportionally more than Anglo respondents to Anglo claimants.[199]

---

192. *Id.* at 780.
193. *Id.* at 789.
194. Christine Rack, *Negotiated Justice: Gender & Ethnic Minority Bargaining Patterns in the MetroCourt Study*, 20 HAMLINE J. PUB. L. & POL'Y 211, 212 (1999).
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* at 217. In the total sample, those coded as "minority claimants" were: 182 Hispanics (30.4%), 11 African-Americans (1.8%), 4 Asians (0.7%), 7 Native Americans (1.2%), and 5 "others" (0.8%). Those coded as minority respondents were: 216 Hispanics (36.1%), 22 African-Americans (3.7%), 11 Asians (1.8%), 5 Native Americans (0.8%), and 14 "others" (2.3%). *Id.* at 238.
199. *Id.* at 249.

"In sum, patterns shown here reflected firm bargaining by higher structural status claimants (high initial demands, concession resistance, undermatching, and little end stage concession-making). At the opposite pole, minority claimants were the softest bargainers."[200] Interestingly, "claimant ethnicity was the significant factor differentiating respondent concession-making; Anglos and men were more willing to pay Anglo than minority claimants."[201] According to Rack, the study showed that "Anglos and women [are] more likely to show insider bias."[202]

Mediators in Rack's study exhibited "Anglo-protective bias."[203] "Especially when the respondent was Anglo, mediators' status deference and ethic of 'neutrality' became a means through which the mediation environment served to support exploitation of soft bargaining."[204] Rack observed that "[o]vert prejudice was rarely acknowledged by disputants or recognized by mediators although the effects were apparent in the outcomes."[205] Noting that "[n]on-dominant groups may hold different fairness values, hold unequal power in negotiations with more dominant parties, and accept disadvantaged outcomes," Rack concluded that "those who are traditionally perceived as less competent continue to be perceived that way persistently so that hierarchies are recreated through a process of self-fulfilling prophecy. Attempts to break free of others' expectations are often negatively misperceived and actively discouraged until less privileged actors retreat from trying."[206]

Rack's MetroCourt study raises concerns that "insider bias" and "Anglo-protective" behavior on the part of mediators, along with settlement pressure to avoid perceived risks of adjudication, put minority parties at a significant disadvantage. Her case studies "suggest what appeared to be primary mediator patterns in these cases; Anglo mediators leaned on external status characteristics to

---

200. *Id.* at 253.
201. *Id.* at 258.
202. *Id.* at 289.
203. *Id.* at 273.
204. *Id.* at 262.
205. *Id.* at 276.
206. *Id.* at 230–31 (citing Cecilia L. Ridgeway, *Interaction and the Conservation of Gender Inequality: Considering Employment*, 62 AM. SOC. REV. 218, 218–35 (1997)).

grant legitimacy in the absence of cultural understanding, a pattern that apparently reinforced a pattern of hierarchy acceptance within the minority culture."[207] Rack noted, "The interest-based negotiation process and the mediators' often unexamined and unintended influence (or lack thereof), offered various opportunities for betrayals of justice. . . . Minority disputants, not Anglo women, manifested bargaining patterns that implied socialization patterns that could be and were substantively exploited by more dominant parties."[208] Rack concluded that "data suggested that the most imbalanced outcomes resulted from settlement pressure through constructing non-monetary substitutes for monetary claims, and by invoking, perhaps misrepresenting, evidentiary rules to discourage disputants from adjudication."[209]

Unique conditions of the mediation process may contribute to discriminatory mediator action (or inaction) in another way. In *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, Lu-in Wang examines the influence of situational context on discriminatory behavior in social interactions.[210] Wang argues that race functions as a proxy for negative characteristics associated with skin color, such as "laziness, incompetence, and hostility . . . lack of patriotism or disloyalty to the United States . . . susceptibility to some diseases . . . [and] criminality and deviance."[211] Wang contends that "fewer individuals than in the past are likely to be motivated by discriminatory animus. . . . Most of us are afflicted instead with unconscious cognitive and motivational biases that lead us to reflexively categorize, perceive, interpret the behavior of, remember, and interact with people of different races differently."[212]

---

207. *Id.* at 263. The minorities involved were Latinos. Rack expressly stated that the same patterns may not be found in research with other minority groups. *Id.*

208. *Id.* at 294–95. "Disparate outcomes were created by apparently soft bargaining that was leveraged by mediators and exploited by opportunistic respondents into greater concessions. Minority claimants were vulnerable to suggestions that they could not expect much from their judicial alternative." *Id.* at 286.

209. *Id.* at 296.

210. Lu-in Wang, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DEPAUL L. REV. 1013 (2004).

211. *Id.* at 1013–14. Proxy captures the unconscious and habitual "'default' manner in which race often influences decision-making." *Id*. at 1015.

212. *Id.* at 1017.

Wang advocates an examination of "social constraints" as powerful unseen influences on discriminatory behavior.[213] Contextual circumstances and "external factors" work to create "channel factors" which direct behavior by (1) determining how an individual defines a situation, and (2) channeling her behavior by indicating the appropriate conduct for that situation, "essentially opening or closing pathways for action."[214] Wang cites studies that show that "situations that include clear indications of right and wrong behavior [] tend to lessen the likelihood of discrimination."[215] Normative ambiguity tends to promote discrimination and "the power of ambiguity to channel discrimination goes hand-in-hand with its ability to mask it."[216] Normative ambiguity can arise where appropriate behavior in a particular context is not clearly identified and where clearly negative behavior can be justified on a basis other than race.[217] Stated another way, "normative clarity discouraged racial bias, but normative ambiguity channeled it."[218]

Could normative ambiguity in the mediation process channel biased mediator behavior as Wang posits? Mediators lack the surety of clearly defined rules of intervention. Among mediation professionals, there is little normative consensus regarding appropriate actions and behavior. The mediator's judgments about the parties, her decision to intervene or remain passive at any given time, and her use of various techniques to encourage agreement may be rationalized as "neutral," thus masking bias. An individual "is likely to discriminate in ambiguous situations despite her egalitarian values and lack of prejudice, because she may not be aware of the need to monitor her response and because racial stereotypes are

---

213. *Id.* at 1025.
214. *Id.* at 1026 (citing Lee Ross & Richard E. Nisbett, The Person and the Situation: Perspectives of Social Psychology 10 (1991)).
215. *Id.* at 1038.
216. *Id.*
217. *Id.* at 1038–39. Citing juror studies, Wang notes that subjects were more likely to engage in discriminatory behavior when they could point to a non-discriminatory reason to rationalize their actions. For example, subjects might rationalize that verdicts were motivated by a desire to not let a guilty person go free rather than by racial bias. *Id.* at 1043.
218. *Id.* at 1039.

always accessible and automatically activated, and will lead her to discriminate despite her best intentions."[219]

Against this backdrop of implicit bias research and the operation of mediator partiality in actual practice, the next Part returns to the case scenario as a vehicle to contemplate subtle dynamics that might operate within a discrete mediation context.

IV. APPLICATION TO ASIAN AMERICANS[220] IN MEDIATION

Turning back to the Michigan small claims mediation described in the Introduction, I hope to stimulate a fresh inquiry into mediator actions. What influence, if any, might implicit bias have had on the mediators' perception and judgment of the parties? Is it possible that the mediators unintentionally favored the business owner in the mediation? As in the MetroCourt study, did the mediators demonstrate "insider bias" or in-group protectionism? Could the mediators' attitudes toward the homeowners have been colored by Asian stereotypes? In what ways could unconsciously held stereotypic views of a group operate in a seemingly simple non-racialized dispute? "[S]tereotypes about ethnic groups appear as part of the social heritage of society. They are transmitted across generations as a component of the accumulated knowledge of a society. They are as true as tradition, and as pervasive as folklore. No person can grow up in a society without having learned the stereotypes assigned to the major ethnic groups."[221] At the outset, let me state that I believe the mediators conducted the process earnestly and without indication of explicit negative or positive attitudes toward either party. They showed no outright bias, favoritism, or prejudice during the mediation. They employed a facilitative style of

---

219. *Id.* at 1045 (citing Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 15–16 (1989)).

220. The United States Census Bureau defines Asian-American as "[a] person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam. It includes 'Asian Indian,' 'Chinese,' 'Filipino,' 'Korean,' 'Japanese,' 'Vietnamese,' and 'Other Asian.'" U.S. Census Bureau, *State & County QuickFacts*, CENSUS.GOV, http://quickfacts.census.gov/qfd/meta/long_RHI425200.htm (last visited Nov. 30, 2010).

221. HOWARD J. EHRLICH, THE SOCIAL PSYCHOLOGY OF PREJUDICE 35 (1973).

mediation as taught in the required forty-hour Michigan Civil Mediation Training.[222] I suggest that the likelihood that implicit bias operated is as great as, or even greater than, the likelihood it did not.

A. Evolution of Asian American Stereotypes

Asian American stereotypes have notably evolved over the past century. Chinese in the United States in the late 1800s were characterized as opium-smoking, morally deficient sub-humans.[223] Fearing the "yellow peril" at the turn of the nineteenth century, Americans portrayed Chinese as military, cultural, or economic enemies and unfair competitors.[224] Courts and legislatures have a long history of discrimination against Asian Americans.[225] In *People v. Hall*,[226] Chinese were described as people

> whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and

---

222. This assumes the training they underwent was similar to the one I completed in order to mediate small claims cases.

223. Neil Gotanda, *Asian American Rights and the "Miss Saigon Syndrome," in* ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 1087 (Hyung-Chan Kim ed., 1992); RONALD T. TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 99–112 (rev. ed. 1998); Keith Aoki, *"Foreign-ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 ASIAN PAC. AM. L.J. 1, 18–23 (1996); Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 12–15 (1994).

224. TAKAKI, *supra* note 223, at 81; *see also* Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71, 72 (1997).

225. For example, the Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, barred Chinese immigration and "caused untold suffering and hardship, separating families, creating a society of single men, and institutionalizing hostility, prejudice against and isolation of Chinese immigrants and Chinese Americans." City & Cnty. of S.F. Bd. Res. 363–09 (San Francisco, Cal. Sept. 15, 2009). Resolution No. 363-09 of the San Francisco Board of Supervisors "acknowledg[es] the regrettable role that San Francisco has played in advancing the policies of the Chinese Exclusion Act of 1882, the first federal law to discriminate against a specific group solely on the basis of race or nationality." *Id.*

226. 4 Cal. 399 (1854).

physical conformation; between whom and ourselves nature has placed an impassable difference.[227]

The Supreme Court upheld the denial of citizenship to Japanese and Hindus from India, concluding that the forefathers intended to exclude "Asiatics" from naturalization and citizenship.[228] "Alien Land Laws" denied Americans of Japanese ancestry the right to own property.[229] Fervent anti-Japanese sentiment and suspicion ultimately led to the incarceration of 120,000 Japanese American citizens and legal permanent residents during World War II.[230]

The next forty years witnessed a shift in the way Asian Americans were perceived. As time passed, Asian Americans went from being a "bad" minority to a "good" minority. They were viewed as smart, industrious, and unassuming.[231] William Peterson first coined the term "model minority" in a 1966 *New York Times Magazine* article about Japanese Americans.[232] Asian Americans were held up as examples of minority success through hard work, sacrifice, following rules, keeping their noses to the grindstone, and minding their own business. Asian Americans, in short, achieved the American Dream. Americans have embraced the model minority perception as the contemporary Asian American stereotype.[233]

---

227. *Id.* at 405. The court found that section 13 of the Act of April 16, 1850, prohibited Chinese people from testifying in favor of or against white men. *Id.* The court thus reversed the conviction of a white man who was found guilty of murder based on the testimony of Chinese witnesses. *Id.*

228. Ozawa v. United States, 260 U.S. 178, 195–96 (1922). In *Ozawa*, the Court found that section 2169 of the Revised Statutes, which limited naturalization to aliens who were "free white persons" and to aliens of African descent, applied to the Naturalization Act of June 29, 1906, ch. 3592, secs. 355–353, § 1, 34 Stat. 596 (1906). *Ozawa*, 260 U.S. at 194. This made the Japanese appellant ineligible for naturalization because he was not a free white person. *Id.* at 198; *see also* United States v. Thind, 261 U.S. 204 (1923) (determining that the term "free white persons" was to be interpreted as a common man would understand it; that the term was found to be synonymous with the word "Caucasian"; and that a high caste Hindu of full Indian blood was not included in that term).

229. Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37, 38 (l998).

230. ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 4 (2001).

231. Saito, *supra* note 224, at 71.

232. Chew, *supra* note 223, at 24 (citing William Petersen, *Success Story, Japanese-American Style*, N.Y. TIMES MAG., Jan. 9, 1966, at 20–21, 33, 36, 40–41, 43).

233. *Id.* at 24.

The model minority stereotype, like all stereotypes, is inaccurate. Lumping all Americans of Asian descent into one homogeneous category ignores vast differences among the many ethnicities. Dozens of different ethnic groups fall under the "Asian American" umbrella.[234] In fact, the pan-Asian identity reflected in the term did not develop until the 1960s.[235] Three main factors complicate any assumption of Asian Americans as a monolithic group: country of ancestry, length of residence in the United States, and gender.[236]

The model minority myth also has a negative side. Quiet, high achieving, workaholic go-getters may also be seen as cut-throat, inscrutable, and sneaky.[237] Asian Americans are viewed as skilled in scientific, technical, and quantitative fields, but lacking in verbal, social, and interpersonal skills.[238] This positive/negative duality of the stereotype is "akin to the paradoxical topology of a mobieus strip. If pressed, the so-called 'good' attributes . . . easily transform into the 'bad' attributes . . . and vice versa."[239]

The model minority myth masks challenges faced by Asian Americans who are over-credited with ascension on the ladder of success. The poverty rate for Asian Americans is almost twice that of white Americans.[240] Family income comparisons fail to recognize that Asian families typically have more workers per family than families with higher individual incomes.[241] Perceptions of Asian

---

234. *Id.* at 25.

235. YAMAMOTO ET AL., *supra* note 230, at 269–70.

236. Chew, *supra* note 223, at 26. For example, a fourth-generation Japanese American in California has very little in common with a recent Hmong immigrant in Minnesota, and Native Hawaiians have a vastly different set of experiences and perspectives than mainland Asian Americans.

237. Saito, *supra* note 224, at 72; Chew, *supra* note 223, at 38.

238. The "Asians are good at math" stereotype is so strong that it is even internalized by Asian Americans. The Math Test study by Margaret Shih showed that by unconsciously activating a particular identity (Asian) in Asian American female undergraduates, performance on a difficult math test was improved. Conversely, when female identity was unconsciously activated, the students' performance was depressed downward. Margaret Shih et al., *Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance*, 10 PSYCHOL. SCI. 80 (1999).

239. Aoki, *supra* note 223, at 35–36.

240. Saito, *supra* note 224, at 90 (citing William R. Tamayo, *When the "Coloreds" Are Neither Black Nor Citizens: The United States Civil Rights Movement and Global Migration*, 2 ASIAN L.J. 1, 15 n.97 (1995)).

241. TAKAKI, *supra* note 223, at 475.

Americans include the belief that they are not the targets of racial discrimination[242] and that they are represented throughout the ranks of industries and professions.[243] Discussing Asian Americans, one scholar commented that "[a]lthough they are often needy and disadvantaged, they are not perceived as facing any obvious barriers greater than those of previous immigrant groups. . . . For example, there is less concern about [them] than about blacks, and they are less negatively stereotyped."[244] The model minority myth sends a message that Asian American claims of discrimination are not to be taken seriously.[245]

The stereotype that Asian Americans are deferential and unassertive hurts their potential to advance in various professional fields. Asian Americans are under-represented at the top levels of corporate, legal, and commercial management.[246] "[B]eliefs about Asian Americans as individually passive, obedient, hardworking, and socially inept encourage employers to hire them, but not promote them to upper levels of management. The combined effect of these racial beliefs produces a glass ceiling."[247] Stereotyping of this nature is evident in a recent case involving the exclusion of Asian Americans as grand jury forepersons.[248] In *Chin v. Runnels*, a

---

242. Gotanda, *supra* note 223, at 1091. One study found that nearly 40 percent of whites thought that with regard to job and housing discrimination, Asian Americans experience "little" or "none." Chew, *supra* note 223, at 8 (citing Michael McQueen, *Voters' Responses to Poll Discloses Huge Chasm Between Social Attitudes of Blacks and Whites*, WALL ST. J., May 17, 1991, at A16). In contrast, another study indicated that 49 percent of Asian Americans stated they had experienced discrimination. *Id.* at 8 (citing *Study Says Asians Feel Bias More Than Hispanics*, L.A. DAILY J., Dec. 12, 1985, at 1).

243. Chew, *supra* note 223, at 46.

244. David O. Sears, *Racism and Politics in the United States*, *in* CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 76, 95 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998).

245. Gotanda, *supra* note 223, at 1089.

246. Chew, *supra* note 223, at 47–49.

247. Don Operario & Susan T. Fiske, *Racism Equals Power Plus Prejudice: A Social Psychological Equation for Racial Oppression*, *in* CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 33, 52 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998).

248. *See* Darren Seiji Teshima, *A "Hardy Handshake Sort of Guy": The Model Minority and Implicit Bias About Asian Americans in* Chin v. Runnels, 11 ASIAN PAC. AM. L.J. 122 (2006) (arguing that court officials, implicitly biased because of the model minority stereotype, believed that Asian Americans were not good forepersons because they were not good leaders); *see also* Benson, *supra* note 135, at 47 (hypothesizing that a judge who accepted prejudiced stereotypes of Asian Americans as "introverted and timid" would not select a Chinese American foreperson).

Chinese-American defendant claimed that exclusion of Chinese-Americans, Hispanic-Americans, and Filipino-Americans as grand jury forepersons violated his right to equal protection under the Fourteenth Amendment.[249] Petitioner established a prima facie case of discrimination in the selection of jury forepersons under a process in which the judge and others identified "leadership capabilities."[250] The court expressly entertained the claim that unconscious biases may have contributed to this forty year exclusion, concluding that there may be "a sizeable risk that perceptions and decisions made here may have been affected by unconscious bias."[251]

The second pervasive stereotype of Asian Americans is known as the "perpetual foreigner syndrome."[252] This element of "foreignness" is rooted in the racial categorization of Asians as the "Mongolian or yellow race," as distinguished from the "white or Caucasian race."[253] Even Asian Americans who are native-born citizens have historically been viewed as foreigners.[254] Foreignness became linked with political disloyalty.[255] The imprisonment of Japanese Americans, many of whom were U.S. citizens, during World War II presents a glaring example of this conflation of native-born Asian American citizens with a foreign enemy.[256] Similarly, the foreignness-disloyalty connection has been applied to Korean Americans and Vietnamese Americans during conflicts with Asian countries.[257] The imagery of

---

249. Chin v. Runnels, 343 F. Supp. 2d 891, 892 (N.D. Cal. 2004).

250. *Id.* at 896–97, 901. Statistical evidence showed that between 1960 and 1996, not one Chinese American, Filipino American, or Hispanic American served as jury foreperson, and that the statistical likelihood of this occurring was 0.0003%. *Id.* at 895.

251. *Id.* at 908. The court denied petitioner's habeas claim but intimated that under de novo review, petitioner likely would have been granted relief. *Id.* at 905–08.

252. FRANK H. WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE 79–129 (2002); Saito, *supra* note 224, at 76; Gotanda, *supra* note 223, at 1097; Chew, *supra* note 223, at 34.

253. *See* Saito, *supra* note 224, at 78 (citing *In re Ah Yup,* 1 F. Cas. 223 (D. Cal. 1878)); *see also* Aoki, *supra* note 223, at 9–10.

254. Saito, *supra* note 224, at 75–76; *see also* Chew, *supra* note 223, at 35.

255. Saito, *supra* note 224, at 82.

256. YAMAMOTO, *supra* note 230, at 4; Saito, *supra* note 224, at 81–83. General John L. DeWitt, leader of the Western Defense Command who favored internment of West Coast Japanese Americans, famously said, "A Jap's a Jap. . . . It makes no difference whether he is an American citizen, [theoretically,] he is still a Japanese." YAMAMOTO ET AL., *supra* note 230, at 99.

257. Saito, *supra* note 224, at 84.

Asian Americans as the enemy persists through economic competition and American trade protectionism, from the 1980s "Japan bashing" caused by automotive competition to imposition of tariffs on cheaper tires imported from China in 2009.[258]

  Social cognition research by Thierry Devos and Mahzarin Banaji in 2005 substantiated the perpetual foreigner syndrome. Their study revealed that Asian Americans are perceived as being less American than both Whites and African Americans.[259] Experimental subjects linked American-ness more with white Europeans (e.g., Hugh Grant) than with famous Asian Americans (e.g., Connie Chung).[260] "The conclusion that can be drawn on the basis of the six studies presented here is unambiguous. To be American is to be White."[261] The model minority myth and perpetual foreigner syndrome were confirmed by scientific method in 2009. A survey conducted by Harris Interactive in January 2009 using a computer-assisted telephone interviewing system ("C100 Survey") assessed current attitudes toward Chinese

---

  258.   WU, *supra* note 252, at 70, 88–89; Peter Whoriskey & Anne Kornblut, *U.S. to Impose Tariff on Tires From China*, WASH. POST, Sept. 12, 2009, at A1.

  259.   Thierry Devos & Mahzarin R. Banaji, *American = White?*, 88 J. PERSONALITY & SOC. PSYCHOL. 447, 463 (2005). Readers may recall MSNBC's gaffe in 1998, running the headline "American Beats Out Kwan" on a story about Tara Lipinski's defeat of her favored U.S. teammate, Michelle Kwan. *See* Steve Mirsky, *Birth of a Notion: Implicit Social Cognition and the 'Birther' Movement*, SCI. AM., Oct. 2009, at 100.

  260.   Devos & Banaji, *supra* note 259, at 456–57.

  261.   *Id.* at 463. Devos conducted a more recent study that found that the participants more closely associated Hillary Clinton with American sentiments than they did Barack Obama. This was true regardless of whether race, gender, or personal identity were emphasized, though it was more pronounced when race was emphasized. Thierry Devos, Debbie S. Ma & Travis Gaffud, *Is Barack Obama American Enough to Be the Next President?: The Role of Ethnicity and National Identity in American Politics*, http://www.rohan.sdsu.edu/~tdevos/thd/Devos_ spsp2008.pdf. The researchers concluded, "A Black candidate is implicitly conceived of as being less American than a White candidate when perceivers focus on the targets' ethnicity." *Id.*; s*ee also* Gregory S. Parks, Jeffrey J. Rachlinksi & Richard A. Epstein, Debate: *Implicit Bias and the 2008 Presidential Election: Much Ado about Nothing?*, 157 U. PA. L. REV. PENNUMBRA 210 (2009), *available at* http://www.pennumbra.com/debates/pdfs/Implicit Bias.pdf. Parks, Rachlinski, and Epstein argue that while Obama's election represents a monumental stride forward for race relations, any announcement of a post-racial America is premature because of the race-tinged aspects of the election, including perceptions of Obama as insufficiently patriotic or American. Citing implicit bias, they caution that "[m]odern racism no longer produces an overt smoking gun marking its influence; one has to look fairly carefully to find its influence. It operates not as an absolute barrier, but as a kind of tax on members of racial minorities. It facilitates certain negative assumptions through an invisible influence." *Id.* at 214.

and Asian Americans.[262] The survey covered issues such as "race relations, social equality, immigration, and factors influencing public attitudes."[263] It compared responses from the general population sample and responses from the Chinese American sample. Related to the model minority myth, "[o]ver half of both the general population and Chinese Americans believe Asian Americans achieve a higher degree of overall success often or always in comparison to other Americans."[264] Reflecting perpetual foreigner status, 74 percent of the general population sample overestimated the proportion of the U.S. population that is made up of Asian Americans; contemporaneously, 51 percent underestimated the population of Asians born in the United States.[265] Judging loyalty, three-quarters of the Chinese American over-sample said that Chinese Americans "would support the U.S. in military or economic conflicts between the U.S. and China," but only about half of the general population "believe Chinese Americans would support the U.S. in such conflicts."[266] On racial profiling, only two-fifths of the general population think the FBI might prematurely arrest an Asian American;[267] more than half of the Chinese American respondents believe the FBI would arrest an Asian American without sufficient evidence.[268]

---

262. COMMITTEE OF 100 & HARRIS INTERACTIVE, STILL THE "OTHER?": PUBLIC ATTITUDES TOWARD CHINESE AND ASIAN AMERICANS (2009), *available at* http://www.survey. committee100.org/2009/files/FullReportfinal.pdf. The survey followed up on a 2001 study "to gauge shifts in attitudes" and to "explore factors that help formulate perceptions and the reasoning behind attitude changes." *Id*. at 8. The survey used "split samples to compare attitudes toward Chinese Americans, Asian Americans, and other racial or religious groups. In addition to the general population sample, an over-sample of Chinese Americans was conducted." *Id*.

263. *Id.*

264. *Id.* at 42.

265. *Id.* at 40.

266. *Id.* at 43.

267. *Id.* at 45.

268. *Id.* at 44. For a discussion of the Wen Ho Lee case as a recent example of Asian American racial profiling, see Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689, 1692–94 (2000).

B. Revisiting the Small Claims Case

Returning to the small claims mediation, let us reexamine the mediators' conclusion that the door was closed. Presumably, the mediator team was aware of the importance of mediator neutrality to their role and to the sustention of a legitimate process.[269] The Michigan Standards of Conduct for Mediators require the mediators to "remain impartial."[270] Studies find that implicit bias is so pervasive, it is likely most of us are affected.[271] Also, IAT data show unconscious racial bias among European American test takers toward disadvantaged groups.[272] Dissociation between implicit and explicit attitudes is common, so these mediators may hold explicit anti-discrimination attitudes and espouse egalitarian views but still have implicit racial biases.[273]

> At a very early age, young Americans learn the stereotypes associated with the various major social groups. These stereotypes generally have a long history of repeated activation, and are apt to be highly accessible, whether or not they are believed. . . . [O]ne can be "nonprejudiced" as a matter of conscious belief and yet remain vulnerable to the subtle cognitive and behavioral effects of implicit stereotypes.[274]

Also, implicit attitudes are better predictors of some behaviors than explicit attitudes.[275] It is conceivable that the mediators interacted

---

269. With regard to impartiality, the Standards of Conduct for Mediators put forward by the State Court Administrative Office of the Michigan Supreme Court state:

> A mediator shall conduct the mediation in an impartial manner. The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which it is possible to remain impartial and even-handed. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

STANDARDS OF CONDUCT FOR MEDIATORS (State Court Admin. Office, Mich. Supreme Court 2001), *available at* http://www.courts.michigan.gov/scao/resources/standards/ odr/conduct.pdf.

270. *Id.*
271. Lane, Kang & Banaji, *supra* note 71, at 433–37.
272. Greenwald & Krieger, *supra* note 66, at 955–58.
273. *Id.* at 955–56.
274. Krieger & Fiske, *supra* note 133, at 1033.
275. Lane, Kang & Banaji, *supra* note 71, at 435–37.

with the parties in a way that was unconsciously more favorable toward the business owner and less favorable toward the homeowners. We learned that group membership implicitly affects a person's identity formation and unconscious expressions of feeling and thought, and that in-group favoritism is strong.[276] "A person may have a view of herself as egalitarian but find herself unable to control prejudicial thoughts about members of a group, perhaps including groups of which she is a member."[277] A person's membership in a group implicitly affects that person's identity formation and "ingroup bias occurs automatically or unconsciously under minimal conditions."[278]

Considering potential mediator bias and favoritism in light of the science of implicit social cognition, it is conceivable that Asian American stereotypes were automatically activated when the mediators met the homeowners. "[M]erely encountering a member of a stereotyped group primes the trait constructs associated with and, in a sense, constituting, the stereotype. Once activated, these constructs can function as implicit expectancies, spontaneously shaping the perceiver's perception, characterization, memory, and judgment of the stereotyped target."[279] Clearly, race alters interpersonal, intrapersonal, and intergroup interactions.[280]

With activation of the stereotype that Asians are untrustworthy, the mediators may have unconsciously viewed the homeowners as less credible or as giving a less reliable account of the rug cleaning situation. They may have implicitly favored the story put forward by the carpet cleaner (in-group) and discredited the version offered by the homeowners (devalued out-group). Perceiving the homeowners as

---

276. Thierry Devos & Mahzarin R. Banaji, *Implicit Self and Identity*, *in* HANDBOOK OF SELF AND IDENTITY 153, 154–58 (M.R. Leary & J.P. Tangney eds., 2003), *reprinted in* 1001 ANNALS N.Y. ACAD. SCI. 177, 179–85 (2003).

277. *Id.* at 179.

278. *Id.* at 185.

279. Krieger & Fiske, *supra* note 133, at 1033.

280. Kang, *supra* note 136, at 1493; *see also* Kang & Banaji, *supra* note 140, at 1085 ("An individual (target) is mapped into a social category in accordance with prevailing legal and cultural mapping rules. Once mapped, the category activates various meanings, which include cognitive and affective associations that may be partly hard-wired but are mostly culturally-conditioned. These activated meanings then alter interaction between perceiver and target. These [racial] mechanics occur automatically, without effort or conscious awareness on the part of the perceiver.").

foreign may have activated mental links associating them as an "enemy." The mediators may have unconsciously judged the homeowners as less deserving of relief because of the model minority myth and their "success" in relation to the carpet cleaner.

Mediator memory may have played a role here. Experiments reveal a causal relationship between unconscious stereotypes and biases in perception and memory.[281] Memory errors may occur "because of the human mind's heavy reliance on stereotypes during the encoding and recall of information."[282] Justin Levinson conducted a study testing the effect of implicit racial bias on juror memory.[283] After reading a story about an incident (a fight or employment termination) and performing a distraction task, 153 students of diverse backgrounds[284] answered a questionnaire about the story. The race of the actors in the story was a variable (black/white/Hawaiian).[285] Overall, participants misremembered information in a racially biased way against blacks, less so for Hawaiians.[286] Participants recalled aggressiveness of blacks more easily and generated false memories of their aggression, whereas false memory toward the white actor was positive (receiving an award).[287] Recall is more accurate and false memory generation occurs more with stereotype-consistent information.[288] In addition, "cognitive confirmation effect" has been verified experimentally.[289] Once a social schema (e.g., race, gender) has been activated, a person will often actively search for information that supports that schema

---

281. *See* Banaji & Greenwald, *supra* note 94.

282. Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 376 (2007).

283. *Id.* at 345.

284. *Id.* at 390–91. The study consisted of 71.2 percent women. Approximately 20 percent of the participants were Japanese American, 20 percent were white, 50 percent were of mixed ethnicity, 2 percent were Hawaiian, 4 percent identified as Other, and there were no African Americans. *Id.*

285. *Id.* at 394.

286. *Id.* at 398.

287. *Id.* at 398–99.

288. *Id.* at 400–01.

289. Page, *supra* note 149, at 216–17 (citing John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCHOL. 20, 20 (1983)).

rather than information that is inconsistent, a process that occurs unconsciously.[290]

Discrimination on the basis of the Asian homeowners' accent is another possible influence on the mediators. Mari Matsuda cautions that "discrimination against accent is the functional equivalent of discrimination against foreign origin."[291] Accent discrimination is triggered by "the collective xenophobic unconscious" bias that operates when a different voice is devalued.[292] A prejudiced listener will attach "a cultural meaning, typically a racist cultural meaning, to the accent."[293] Matsuda suggests that awareness that accent discrimination is a potential problem can help listeners avoid unconscious negative reaction to the accents.[294] Interestingly, not all accents evoke negative reactions. Writing about university tenure decisions, an academic observed that accent is usually a factor in tenure decisions when the professor is a member of an Asian, Indian, African, or Middle Eastern culture; it rarely arises in the case of native speakers of European languages.[295] In the Michigan case, the homeowners' accents, coupled with negative Asian stereotypes, may have caused the mediators to devalue their statements which contradicted the carpet cleaner.

---

290. *Id.*

291. Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1349 (1991). Observing that speech can position people socially, Matsuda claims that "certain dialects and accents are associated with wealth and power. Others are low-status with negative associations." *Id.* at 1352 (citing Marc Fisher, *At GWU, Accent is on English for Foreign Instructors: Student Complaints About Teaching Assistants Lead to Testing Program*, WASH. POST, Nov. 29, 1986, at B1); *see also* Beatrice Bich-Dao Nguyen, *Accent Discrimination and the Test of Spoken English: A Call for an Objective Assessment of the Comprehensibility of Nonnative Speakers*, 1 ASIAN L.J. 117, 122 (1994); Kristina D. Curkovic, *Accent and the University: Accent as Pretext for National Origin Discrimination in Tenure Decisions*, 26 J.C. & U.L. 727 (2000); Mary E. Mullin, Comment, *Title VII: Help or Hindrance to the Accent Plaintiff*, 19 W. ST. U. L. REV. 561, 571 (1992); Brant T. Lee, *The Network Economic Effects of Whiteness*, 53 AM. U. L. REV. 1259, 1275 (2004).

292. Matsuda, *supra* note 291, at 1372 (citing ROBERT TAKAKI, FROM DIFFERENT SHORES: PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA (1987)) (asserting that accent discrimination involves "a set of ingrained assumptions that are inevitably lodged in the process of evaluation and in the ways in which we assign values").

293. *Id.* at 1378.

294. *Id.* at 1373.

295. Curkovic, *supra* note 291, at 742–43.

The previous sections of this Article are intended to provoke, not proselytize. The purpose of presenting the small claims scenario is to raise the issue of implicit bias, not to resolve it definitively. As instructors and providers of mediation services, we should understand that mere good intentions to act impartially are insufficient to counter unconscious biases.

> Mediation, despite its image as a neutral procedure in which all values are honored equally and all parties are free to express their points of view, can often be skewed by bias. Mediators often make quick judgments and proffer strong statements infused with their biases, which, though not legally binding, can powerfully impact the outcome of a settlement. . . . Moreover, bias on the part of any mediator can creep into the process in even more subtle ways, such as in the subjective matters of how questioning occurs and how and whether private caucuses are conducted.
>
> Compounding the problem, it is nearly impossible to accurately observe or address issues of bias in the informal consensus-building environment of mediation, especially because there is an unspoken taboo against acknowledging it.[296]

IV. WHAT DO WE DO?

The prospect of mitigating mediator bias is daunting, but myriad acts and practices within the control of mediators may help address the problem. As a first step, mediation professionals must be realistic and frank about the vast range of mediator behavior and the maneuvers mediators employ to meet the ethical standard of neutrality. We should accept that mediator neutrality is elusive and shape-shifting; it is neither a condition nor characteristic that one possesses or lacks. It is a complex, multi-layered relationship and a system of interaction with the parties that requires constant vigilance. A mediator does not enter a mediation as a "neutral" entity, free from

---

296. Frederick Hertz, *Bias in Mediation and Arbitration*, CAL. LAW., Nov. 2003, at 37–38.

judgments, values, ideologies, attitudes, and pre-conceived perceptions. Like other human beings, mediators bring prejudices and preferences into the sessions. We should envision neutrality as an unending search, not a state of being.

Realistically, pure impartiality cannot exist in a mediation setting. That said, we should not abandon neutrality as a goal. Rather, mediation practitioners and academics must seek greater understanding and candor about what is done in these confidential, closed-door encounters.

> Neutrality is not an attribute that mediators do, or do not, possess but it is an issue which must be attended to throughout a mediation and which requires constant process of evaluation and decision-making. . . . If we view neutrality through a binary lens, so that it is either present or absent, the research demonstrates as it must, that mediators are not neutral."[297]

As mediators, we should increase our efforts to use the best practices to conduct the process in a way that integrates all aspects of neutrality, i.e., no compromising interests held by the mediator, procedural even-handedness, outcome neutrality, and without bias, prejudice or favoritism toward any party.[298]

To fulfill our commitment to act in a nondiscriminatory manner, it is productive to conceive of mediator neutrality as having both external and internal components.[299] External neutrality consists of conduct and statements to show freedom from bias or favoritism in the way the mediation is conducted. Internal neutrality is the state of being aware of the operation of biases toward the disputants and working to minimize it. I separate bias reduction ideas into these two distinct categories, but I recognize that they coalesce in certain instances. In addition to collecting views from a wide variety of observers, I offer experiences from my law school mediation programs as examples of potentially constructive approaches.

---

297. Astor, *supra* note 11, at 79–80.
298. *See supra* Part I.
299. Rock, *supra* note 50, at 355 ("Internal neutrality refers to the absence of emotions, values or agendas from the mind of the mediator. External neutrality refers to the absence of emotions, values or agendas from the words, actions, and appearance of the mediator.").

A. External Neutrality

The external aspect of neutrality demands paying attention to process attributes, nuances of language and narrative, and the physicality of mediator actions. As practitioners, we are trained to attend to process management and procedures. We strive for external neutrality by conducting an outwardly even process, eliminating conflicts of interest that may arise from proprietary, monetary, relational, and other interests, and abstaining from advocating or pressing for a particular outcome. We seek to ensure our external neutrality through "process policing" techniques: how we engage the parties, manage their interaction, and orchestrate the sessions.[300] A large part of the mediator's job is "maintaining the orderly character of talking and listening, including such matters as organizing the opening and the closing of the session, keeping the parties focused on the current topic, and managing the changes from one topic to another."[301] Management of the agenda goes to the process of interaction, and therefore "can be thought of as being executed in ways that are both formally and substantively neutral."[302]

1. Process Management and Mediator Communication

Mediators manifest external neutrality by being deliberate in planning and conducting each mediation to "place and keep the power of self-determination with the parties, while protecting all parties' abilities to present issues and concerns equally in the mediation session."[303] Practitioners should be mindful of the difference between even-handed process management and "selective facilitation," or maneuvers that are designed to influence and favor certain outcomes. These maneuvers include inhibiting discussion of a

---

300.   External neutrality techniques would include the "*agenda management* that goes on in any orchestrated encounter. . . . Orchestration is one of the means by which speech exchange is ordered in multi-party encounters." Greatbatch & Dingwall, *supra* note 172, at 636 (citation omitted).

301.   *Id.* at 637.

302.   *Id.*

303.   Rock, *supra* note 50, at 356.

disfavored option or moving to close a session without systematic exploration of both parties' preferences.[304]

External neutrality should be assessed through all stages of the process, from pre-mediation preparation through post-mediation evaluation and debriefing. Rather than routinizing procedures for assembly line mediation, mediators should "customize" the sessions for the special dynamics involved.[305] Departure from procedural defaults may be more appropriate under the circumstances. The Michigan mediators followed the general rule for small claims mediation: they asked the party who initiated the matter to make his presentation first. The mediator team may have considered this to be a neutral selection, but it could be perceived as favoring the businessman and disadvantaging the homeowners. After inviting the business owner to speak first, the Michigan mediators posed more inquiries to the business owner than to the homeowners in the joint session and individual sessions. They may have devoted more time to the carpet cleaner and interacted less with the homeowners for various reasons (such as Mr. D's anger, the Ds' accents, or their "foreignness").

External neutrality efforts include consideration of table arrangements and seating arrangements. In the Michigan scenario, the white male mediator sat closer to the business owner. Such an arrangement could create a more intimate conversational dynamic between the two men and give the impression they are "chummy" or in alignment. Both homeowners were seated farther from the mediators than the business owner, making them seem like more remote "outsiders." Both homeowners should have been placed literally "at the table," rather than letting Mrs. D sit behind her husband. If one party is harder to comprehend (perhaps because of accent, soft voice, or looking down), the mediators could alter the arrangement and form a tight circle with no table. Mediators should be careful about chair placement and body positioning so as not to turn their backs toward one disputant more than the other. Special

---

304. Greatbatch & Dingwall, *supra* note 172, at 637–38.

305. ABA SECTION OF DISPUTE RESOLUTION, TASK FORCE ON IMPROVING MEDIATION QUALITY FINAL REPORT 12–13 (2008), *available at* http://www.abanet.org/dispute/documents/FinalTaskForceMediation.pdf.

challenges may be presented when language interpreters or other third parties are in attendance, as this may make the unassisted party feel outmanned. Interpreters (of American sign language, for example) may need to be seated to accommodate the need to communicate adequately with their clients. Physical limitations of the participants should be considered with external neutrality in mind.[306]

All subtleties of a mediator's mode of communication, including tone of voice, speed of speech, demeanor, eye contact, facial expressions, body language, and physical signals and gestures, are important for attending to external neutrality.[307] Mediators who are fast talkers may disfavor or alienate parties who speak more slowly or who are less fluent in English. We need to be patient with parties who are less articulate or direct than ourselves, and refrain from interrupting, completing sentences, and filling space with words. Regional differences in speech patterns might create mediator affinity with one party over another.[308] Unevenness in eye contact, body placement and movement (sitting forward or leaning back), and attentiveness (looking down while taking notes) may send signals of mediator approval or friendliness, or a lack thereof. When mediating with parties who have physical, cognitive, or intellectual disabilities, we must monitor habits that may inadvertently slight or alienate them. Mediators must be attuned to unintended differential or compensatory treatment (e.g., speaking in a loud voice to a party for whom English is a second language) that may be regarded as treating one participant more positively or negatively than the other. We should be aware of the inadequacy of our usual mannerisms with certain parties; for example, muted visual cues may disadvantage deaf parties who focus more on visual cues and facial expressions.

---

306. For instance, with my limited range of neck motion due to arthritis, as a mediator I must be seated so that I can make eye contact with and view all parties equally.

307. Rock, *supra* note 50, at 358.

308. For example, the East Coast students in my mediation clinic who talk as fast as a "New York minute" often get impatient with parties who speak slowly.

2. Language, Narratives, and Cultural Myths

The importance of language in mediation cannot be overstated. Sarah Burns recommends that mediators be cognizant of the impact of metaphors.[309] Common metaphors may be thought of as mere figures of speech, but they "can have the effect of alienating, excluding, or seeming to disregard certain groups."[310] Burns uses the example of metaphors in which black is a negative referent, which may be awkward or offensive to African Americans.[311] Mediators should be sensitive to terms that may seem innocent but have a hurtful impact on others. An example from my own perspective is the acronym for "Jewish American Princess," "JAP." As a person of Japanese ancestry, I view that abbreviation as a homonym for a racial epithet. Stock phrases in mediation, such as "I hear what you're saying," may come across as insensitive to a hearing-impaired party. Dale Bagshaw observes that "[l]anguage is laden with social values and both carries ideas and shapes ideas."[312] Dominant discourses in Western societies tend to be Anglo-centric, as well as "agist, racist, heterosexist and homophobic."[313] Moreover, "throughout recorded history such discourses have been used by legal and social science professionals to justify categorising people as '(un)deserving,' '(ab)normal,' '(dys)functional,' '(in)competent,' '(mal)adjusted,'

---

309. Sarah E. Burns, *Thinking About Fairness & Achieving Balance in Mediation*, 35 FORDHAM URB. L.J. 39, 54 (2008). Burns' "Practice Recommendations" are associated with five general aspects of cognition: categorization (naming our world), attribution (explaining our world), metaphor (orienting our world), normative (prescribing behaviors), and framing. *Id.* at 43.

310*. Id.* at 54.

311. *Id.* (e.g., "these were dark times" or "he was one of the guys in a black hat").

312. Dale Bagshaw, *Language, Power and Mediation*, 14 AUSTRALASIAN DISP. RESOL. J. 130, 136 (2003) (citing BENJAMIN LEE WHORF, LANGUAGE, THOUGHT, AND REALITY (John B. Carroll ed., 1956)).

> Dominant dispute resolution discourses in Western cultures have tended to favour adversarial approaches to conflict and rules of law applied in formal law courts are seen as the paramount 'truths'. However, 'law' can be seen as a dominant discourse, elevated by a dominant group in a particular culture at a particular point in time, and as such can marginalise and ignore the 'truths' or ways of knowing of minority cultural groups.

Id. at 132.

313. *Id.*

'subversive,' 'delinquent' or 'deviant.'"[314] When analyzing discourses, Bagshaw notes that "[i]t is therefore crucial to identify the relationship between *what is said* and *who said it*."[315] With this understanding, discourse analysis may reveal sexist or racist assumptions. "Language influences our attitudes and behaviour and can be used to reinforce harmful or hurtful stereotypes, such as those that are agist, sexist, racist and so forth."[316]

Bagshaw cautions mediators "to be careful in the choice of language, interpretations and the meanings they ascribe to a person's identity. Essentialism can contribute to mediators categorising and labelling clients and their problems in a way that impedes opportunities for client-centered practice and reifies and reinforces the power/knowledge of the mediator."[317] To allow parties to "supply the interpretive context for determining the meanings of events, the nature of a presenting problem, intervention and treatment,"[318] Bagshaw urges a "*reflexive* approach to [mediation] practice."[319] "In self-reflexive mediation practice it is recognised that it is impossible to be 'neutral' and the influences of characteristics such as gender, race, class, age, and sexuality on the mediator's relationship with the participants are critically examined."[320] Reflexivity demands awareness and control of the mediator's own personal and cultural biases "in order to understand the standpoint of the 'other.'"[321]

Sara Cobb and Janet Rifkin also emphasize discourse and reflexivity in their critique of mediator neutrality. They view neutrality "as a practice in discourse"[322] and assert that "existing rhetoric about neutrality does not promote reflective critical examination of discursive processes."[323] In their observations of

---

314. *Id.*
315. *Id.* at 136.
316. *Id.* at 137.
317. *Id.* at 139 ("Traits such as those linked to ethnicity, age, sexuality, ability or gender, should not be automatically assigned to a person's self-image as any one of those factors may not be seen by the person as relevant or important, depending on the context.").
318. *Id.*
319. *Id.*
320. *Id.* at 140.
321. *Id.* at 141.
322. Cobb & Rifkin, *supra* note 13, at 36.
323. *Id.* at 50.

mediators, they noted that mediators "participate politically by asking questions and making summaries. Their questions bring the focus to one particular event sequence (plot), or particular story logic (theme), and/or adopt the character positions advanced by one disputant *about* another (character)."[324] In addition to mediator actions, "the structure of the mediation session itself contributes to allowing one story to set the semantic and moral grounds on which discussion and dialogue can take place."[325]

Cobb and Rifkin contend that in an effort to reduce adversarialness, mediators explore emotions, interests, fears, hopes, and needs which "obscure[] the role of discourse in the session; the mediators cannot witness their own role in the creation of alternative stories, nor can they address the colonization of one story by another."[326] The end result is that mediators contribute "to the marginalization and delegitimization of disputants."[327] For Cobb and Rifkin,

> [n]eutrality becomes a practice in *discourse*, specifically, the management of persons' positions in stories, the intervention in the associated interactional patterns between stories, and the construction of alternative stories. These processes require that mediators participate by shaping problems in ways that provide all speakers not only an opportunity to tell their story but a discursive opportunity to tell a story that does not contribute to their own delegitimization or marginalization (as is necessarily the case whenever one party disputes or contests a story in which the person is negatively positioned).[328]

Drawing on the work of Cobb and Rifkin, Isabelle Gunning describes mediation as the interaction of narratives in which the parties compete over definitions, moral positioning, and descriptions

---

324. *Id.* at 54.
325. *Id.* at 56.
326. *Id.* at 59–60. Cobb and Rifkin "recast ideology in mediation to encompass those discursive practices that privilege one story over another, that legitimize one speaker over another, that reduce any speaker's access to the storytelling process." *Id.* at 51 (citing Stuart Hall, *Signification, Representation, Ideology*: *Althusser and the Post-Structuralist Debates*, 2 CRITICAL STUD. IN MASS COMM. 91 (1985)).
327. *Id.* at 60.
328. *Id.* at 62.

of social relations.[329] "[T]he process of story-telling or narratives, while it has its positive aspects, may also be at the heart of the problem of bias in mediation."[330] Conversational practice is such that the first, or "primary," narrative sets the sequential and interpretive framework, and subsequent narratives are constructed in relation to that primary narrative.[331] Gunning cautions that speakers draw from the history and norms of the larger society, and when they draw on "bits and pieces of larger cultural myths" during the mediation process, "they must choose some relevant socially constructed category for themselves and others."[332] "[T]he cultural myths surrounding identity groups involving disadvantaged group members are often both negative and purely based upon derogatory conjecture and assumptions about group members."[333]

To heed these caveats about discursive practices, mediators should be extremely careful about making broad assumptions regarding a party's "culture"; "the problem with identifying 'cultural competence' as a form of neutrality is that it downplays the very real choice that mediators make in identifying 'culture.'"[334] In domestic mediations involving persons of color, generalizations about a disputant's cultural orientation based on race, ethnicity, or national origin may reflect stereotypical thinking, be over-inclusive, and be insulting to the party.[335] Cynthia Savage argues that "the common approach of defining 'culture' as being synonymous with one facet of

329. Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 68.

330. *Id.*

331. *Id.* at 68–69.

332. *Id.* at 70.

333. *Id.* at 72.

334. Clark Freshman, *Privatizing Same-Sex "Marriage" Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687, 1757 (1997) (commenting on a mediation involving a Vietnamese couple and Canadian mediators where "the problematic and unspoken assumption about 'neutrality' and 'cultural competence' is that the only relevant culture is Vietnamese culture").

335. For example, a statement that "blacks might respond to the mediation context by being more expressive, using intense language as a means of communicating sincerity, or remaining fairly distant from the [white] mediator, which may increase the level of biased information coming from the disputing [black] couple" fails to account for vast differences among African Americans as individuals. *See* William A. Donohue, *Ethnicity and Mediation*, *in* COMMUNICATION, CULTURE, AND ORGANIZATIONAL PROCESSES 134, 147 (William B. Gudykunst et al. eds., 1985).

cultural identity, such as race, ethnicity, or gender, is a red herring which diverts attention from the search for a more accurate and constructive approach to exploring the impact of cultural diversity on mediation."[336] Conflating culture with ethnicity may perpetuate stereotypes and ignore subcultures that contribute to an individual's cultural identity.[337]

References to culture are particularly tricky when it comes to Asian Americans who are often mistakenly thought of as natives of Asian countries instead of U.S.-born citizens. Mia Tuan's study of the "Asian ethnic experience" indicates that third- and fourth-generation Asian Americans are generally highly assimilated to white, middle-class American mainstream cultural styles and values and do not retain Chinese or Japanese cultural traditions except for commemorative events.[338] Despite this, "Asian ethnics face societal expectations to *be ethnic* since others assume they should be closer to their ethnic roots than to their American ones."[339]

Gunning exhorts us to explore cultural myths regarding disadvantaged group members in mediation through techniques such as "race-switching," or changing the races of the parties in a case study.[340] In one example, she changes the race of one character from white to Asian. In so doing, she challenges us to contend with "parts of the pre-existing narrative legitimized by the larger society, the myth that they are the 'model minority'."[341] To prevent these cultural myths from contributing to or bolstering the primary narrative, Gunning contends that mediators must "recognize that some of the cultural myths at work in the mediation process are drawn from negative taboos relating to disadvantaged groups."[342] Gunning

---

336. Cynthia A. Savage, *Culture and Mediation: A Red Herring*, 5 AM. U. J. GENDER & L. 269, 271 (1996) (proposing a "value orientation" framework as a useful way to explore cultural diversity in mediation).

337. *Id.* at 273.

338. MIA TUAN, FOREVER FOREIGNERS OR HONORARY WHITES?: THE ASIAN ETHNIC EXPERIENCE TODAY 155 (1998).

339. *Id*. at 156.

340. Gunning, *supra* note 329, at 74.

341. *Id.* at 75. Gunning observes, "Specifically, Asian-Americans of various national origins face the cultural myth of immutable foreignness . . . . There is always the question with 'foreigners' that they don't really understand 'our ways.'" *Id*.

342. *Id.* at 80.

prescribes intervention to combat negative cultural myths. Her focus on mediator intervention is a situation in which the parties interject cultural myths, urging that the mediator "may also need to flag for the parties that that is what is occurring."[343] Turning the mirror around, I urge constant vigilance and self-correction for instances when the mediator is drawing on cultural myths.

When we re-examine the Michigan mediation, we see a discursive example that disfavored and marginalized the homeowners. After the business owner presented his opening remarks and framed the dispute as a breach of contract case, the mediators questioned him in a way that reinforced his narrative. The homeowners tried to defend themselves by countering the allegation that they failed to comprehend or follow his instructions by shutting the basement door. By asking for the return of the first payment, the homeowners appeared unreasonable. If the mediators had invited the homeowners to go first in the joint session or had refrained from bolstering the carpet cleaner's narrative, the matter may have been framed as a contractor overselling his abilities and overcharging the customers.

We can imagine how the Asian American negative cultural myth of "immutable foreignness" may have bled into the Michigan mediation. In the mediators' encounter with the homeowners, the "simultaneous operation of excitatory and inhibitory cognitive processes" may have determined one category to be more dominant, and the other more suppressed.[344] If the mediators perceive the homeowners' racial category as dominant, xenophobic and race-based biases may have operated against the couple.

3. Reflexivity and Role-Playing

Bagshaw, Cobb, and Rifkin, among others, advocate reflexivity in mediation practice as a check on prejudiced subjectivity. Susan Douglas urges mediators to abandon attempts at objectivity and to instead examine one's own experiences within the mediation.[345]

---

343. *Id.*
344. C. Neil Macrae et al., *The Dissection of Selection in Person Perception: Inhibitory Processes in Social Stereotyping*, 69 J. PERSONALITY & SOC. PSYCHOL. 397, 404 (1995).
345. Douglas, *supra* note 35, at 62.

Douglas endorses reflexivity as "a useful means of conceptualising both the impact of mediator predispositions and the co-construction of meaning within the encounter."[346] Viewed this way, "reflexivity represents a rejection of mediator neutrality (in any absolute sense), an acknowledgement of the impact of mediator subjectivity and a means of addressing that subjectivity in practice."[347]

Echoing these views, Linda Mulcahy claims that her study of community mediation validates a reflexive approach in mediation.[348] Her empirical research examined one of the largest community organizations in the United Kingdom.[349] The mediators in her study admitted to having difficulty ignoring personal bias and their subjective evaluations of the merit of particular claims and parties.[350] Acknowledging these feelings, the co-mediators had debriefing sessions to discuss how their personal assessments impacted option development and process management.[351]

The Michigan mediators should have adopted reflexivity as an anti-bias method of self-assessment throughout the session. After reading the file in the small claims case, the mediators could have discussed initial reactions, assumptions, and potential issues of bias during their preparatory caucus. After the joint session, the mediators would have benefitted from a co-mediator caucus to exchange views about the parties and their respective demands. They could have made appropriate adjustments in the individual sessions to counter non-neutral thoughts and behavior. Similarly, a reflexive co-mediator discussion after each individual session may have enabled the pair to steer the mediation in a direction that was more beneficial for the parties. Even if the parties ultimately reached an impasse, they may have gained a fuller understanding of the situation and of one another's perspectives and principles. By diluting the homeowners'

---

346. *Id.* at 63 ("Reflexivity as mutual collaboration highlights the active role of the mediator in mutually reflexive dialogue . . . . Unavoidably, the mediator, rather than being a neutral facilitator of conversations, is an active coauthor in the construction of dispute narratives.").

347. *Id.* at 65.

348. Mulcahy, *supra* note 162, at 517.

349. *Id.* at 515.

350. *Id.* at 516.

351. *Id.* at 517.

narrative and failing to explore a range of options, the mediators legitimized the business owner's version of entitlement.

Through the use of various practices, we attempt to incorporate discursive and reflective theories in a law school mediation clinic. As Cobb, Rifkin, and Gunning make apparent, the party who speaks first has the advantage of painting a subjective picture of the circumstances underlying the dispute.[352] Student-mediators are eager to ask a litany of "fact-gathering" questions (to the point of interrogation) to the first speaker before listening to the second speaker's narrative. By doing so, students add their own "spin" and make assumptions that may be tainted by their own experiences and expectations. Thus, they may re-characterize or validate the first speaker's presentation through their own additions. Rather than presenting her own "story," the second speaker is reduced to opposing a pre-determined version embellished by the mediators. This can frustrate and incite defensiveness in the second speaker who has been asked to wait her turn and not interrupt.

Recognizing this dynamic, students are directed to refrain from asking questions until both parties have had the opportunity to supply their narratives in their own words and styles. In what may be an atypical practice, we refrain from summarizing and reframing the first person's statements before the second person speaks. While there is always some perceived favoritism that one party goes first, withholding questions and postponing summarizing or reframing lessens the likelihood that the second speaker's narrative will be molded by others.

It is also important to model lack of bias in selecting the party who speaks first. Asking the parties who would like to go first may be perceived as rewarding one party over the other (the more assertive party or the one closest to the mediator, for example). Mediators evidence external neutrality by being transparent in decision-making. Parties should be told why and how the mediators determined the order of presentations (for example, a random method of selection, such as by alphabetical order or coin toss).

---

352.   Gunning, *supra* note 329, at 68–70.

Reflective learning has been described as "an intentional social process, where context and experience are acknowledged, in which learners are active individuals, wholly present, engaging with others, open to challenge, and the outcome involves transformation as well as improvement for both individuals and their environment."[353] Like many clinical legal educators, I have included role-playing exercises as a reflective teaching opportunity in the mediation clinic for decades.[354] Role-plays contain the essential elements of learning and reflection: (1) "a genuine situation of experience"; (2) a "genuine problem in that situation"; (3) "information and observation about the situation"; (4) "suggested solutions for which the student [is] responsible"; and (5) "opportunity . . . to test ideas by application."[355] By practicing in an academic setting, students will (hopefully) transfer the lessons to their actual cases.

My mediation clinic students participate in five increasingly difficult two-hour role-plays as parties, co-mediators, and observers.[356] In addition to helping the students to improve their mediation skills, the role-plays enable the students to develop empathy and view the process from the perspective of the disputants. Students are encouraged to experiment and put ideas into action. During the role-plays, mediators explore their decision-making processes, assess progress, and consider their reactions to options. Mediators are asked to express how their thoughts and feelings motivated them and evaluate to what extent they pushed options.[357] During class discussion, we deconstruct the mediation role-play and

---

353. Samantha Hardy, *Teaching Mediation as Reflective Practice*, 25 NEGOTIATION J. 385, 389 (2009) (quoting ANNE BROCKBANK & IAN MCGILL, FACILITATING REFLECTIVE LEARNING IN HIGHER EDUCATION 36 (2d ed. 2007)).

354. For a critique of role-plays as a learning activity, see Nadja Alexander & Michelle LaBaron, *Death of the Role-Play*, *in* RETHINKING NEGOTIATION TEACHING: INNOVATIONS FOR CONTEXT AND CULTURE 179, 179–97 (Christopher Honeyman et al. eds., 2009).

355. Hardy, *supra* note 353, at 390 (citing BROCKBANK & MCGILL, *supra* note 353, at 23).

356. By this time, they have also viewed a small claims mediation at the courthouse, observed an in-class mock mediation demonstration by experienced mediators, and engaged in skills development exercises.

357. Hardy, *supra* note 353, at 397 (quoting MICHAEL D. LANG & ALISON TAYLOR, THE MAKING OF A MEDIATOR: DEVELOPING ARTISTRY IN PRACTICE 54 (2000)) ("Elicitive questioning" presses "mediators to uncover for themselves what was successful or unsuccessful, and to identify the reasoning behind their strategies and approaches, and . . . consider the impact of their interventions on the disputants.").

all students offer oral comments. Both the students and the instructors also complete written critiques.[358] The purpose of feedback is not merely to give mediators a "360 degree" evaluation but also to allow the students and instructors to engage in collective problem-solving and to examine assumptions and reactions.[359] We record the role-plays and make them available for students to view on their laptops. By watching their performances and the reactions of the parties, student mediators can see or contest the validity of the feedback that was offered. They can also see if they were guilty of behavior that reflected bias or favoritism, such as facial expressions, body language, or blinking.

Mediation teachers and trainers should answer Gunning's call for more deliberate confrontation of racial stereotypes and assumptions in training.[360] With that goal in mind, I designed a role-play simulation based on community tensions in Washington, D.C., for use in my mediation course.[361] It is a composite of disputes arising out of years of ongoing tension between Korean American shopkeepers and African American customers.[362] I have varied my approach over time. I initially played the shopkeeper and later opted to recruit volunteers from student groups to play the disputants. For

---

358.   Students complete evaluations as mediators, parties, and observers.

359.   Hardy, *supra* note 353, at 393 (quoting BROCKBANK & MCGILL, *supra* note 353, at 5). In this way, "learners and teacher engage and work together so that they jointly construct meaning and knowledge from the material." *Id.*

360.   Gunning, *supra* note 329, at 86–88.

361.   In fact, as a participant at a conference hosted by the UCLA Center for Study and Resolution of Interracial/Interethnic Conflict, March 28–30, 1996, Professor Gunning offered constructive comments to refine the role-play. For an analysis of Black-Korean tension, see Kyeyoung Park, *Use and Abuse of Race and Culture: Black-Korean Tension in America*, *in* THE CONFLICT AND CULTURE READER 152, 152–62 (Pat K. Chew ed., 2001).

362.   *See, e.g.*, Michael A. Fletcher, *Asian-Owned Carryout is Focus of Rally: Small Group Protests Nonblack Business*, WASH. POST, Oct. 19, 1996, at D4 (reporting on African American protestors engaged in a protest rally outside of an Asian-American restaurant in D.C.); *see also Mayor's Proposed Fiscal Year 2010 Budget: Before the Committee on Aging and Community Affairs*, Apr. 24, 2009 (statement of Francey Youngberg, Chair, DC Fair Access Coalition) ("According to the *Washington Post*, two-thirds of all business licenses are owned by Asian Pacific Americans in the District. D.C. agencies estimate that 60% of corner groceries and 57% of lotteries are sold through Asian-owned stores.") (copy on file with author). According to the 2000 U.S. Census, roughly 60 percent of D.C. residents are black. *District of Columbia-DP-1. Profile of General Demographic Characteristics: 2000*, CENSUS.GOV, http://factfinder.census. gov/servlet/QTTable?_bm=y&-geo_id=04000US11&-qr_name=DEC_2000_SF1_U_DP1&ds_ name (last visited Nov. 8, 2010).

the past few years, I have shown a videotape demonstration; this technique has the advantage of making the discussion about process dynamics and co-mediator choices easier. The demonstration allows students to discuss stereotypes, prejudice, and bias in a controlled and confidential setting. We also use other role-plays and scenarios that involve racial or gender dynamics.

4. Co-Mediation and Race-Matching

Co-mediation offers a number of advantages for advancing external neutrality.[363] We use a co-mediation model exclusively in our community program.[364] Having "two heads" allows the co-mediator team to engage in an explicit discussion of how "neutrally" they are operating within a particular mediation context.[365] In co-mediator caucuses, the team can engage in active reflection to assess the discursive dialogues, interactions with and between disputants, and inclinations to favor or disfavor options. Rather than rushing to an agreement on approach and actions, co-mediators can play "devil's advocate" to affirmatively critique their behavior and choices. A co-mediator provides the eyes and ears for peer evaluation. Although mediators may be reluctant to offer constructive criticism (since it is not anonymous), a mutual co-mediator evaluation can incorporate elements of debriefing, reflection, positive feedback, and suggestions for future improvement. These co-mediator assessments would provide a useful supplement to party evaluations, which are employed by most mediation programs. Peer evaluation of mediators could be accomplished in other ways. For example, the D.C. Superior Court Multi-Door Dispute Resolution Branch uses a one-way mirror so evaluators can observe mediations without being seen by the participants.

---

363. Gunning, *supra* note 329, at 88–89 (citing the benefits of using mediator teams to combat negative cultural myths).

364. Students in my Consumer Mediation Clinic are sole mediators of consumer-business disputes, whereas students in my Community Dispute Resolution Center Project co-mediate adult misdemeanor, juvenile delinquency, and police-civilian disputes.

365. For good suggestions on making the most of co-mediation, see Lela P. Love & Joseph B. Stulberg, *Practice Guidelines for Co-Mediation: Making Certain That "Two Heads Are Better Than One,"* 13 MEDIATION Q. 179 (1996).

Co-mediation also leverages differences in perspectives and experiences when you have mediators of different ethnicities, genders, or abilities.[366] This can provide a check on biased and discriminatory mediator actions. For example, a female mediator might help her male partner avoid gendered comments and assumptions. In some mediation contexts, pairing mediators is done deliberately and strategically to create complementary duos.[367] Advocates of "race-matching" co-mediator teams to mirror the racial or ethnic distribution of the parties cite several benefits: symbolic fairness, increased likelihood that mediators and parties will have shared experiences, modeling equality, and broader interpretive frameworks.[368]

Clark Freshman points out several dangers of matching parties with mediators based on common traits or affiliations.[369] "First, psychologists have found it notoriously difficult to predict precisely how individuals, be they mediators or not, will see some as 'we' and others as 'they.'"[370] Second, there may be biases within individual communities. "Leading psychologists of discrimination suggest that, as much as we think we know how others see themselves, individuals may divide the world in many different ways."[371] He adds that "[a] reciprocal problem may arise when some who identify strongly with a community have negative views of those who they feel have betrayed their 'true' identity by trying to assimilate or fit some other community instead."[372] Another problem with matching mediators is that the practice may exacerbate discrimination outside the community.[373] This operates in two ways: positive contact with

---

366. Gunning, *supra* note 329, at 88–89.

367. For example, in emotional family disputes, a team containing a lawyer and therapeutic counselor might be beneficial. In a heterosexual divorce, a male and female mediator team might be used. *Id.* at 88.

368. *Id.* at 89.

369. Clark Freshman, *The Promise and Perils of "Our" Justice: Psychological, Critical and Economic Perspectives on Communities and Prejudices in Mediation*, 6 CARDOZO J. CONFLICT RESOL. 1, 10–11 (2004).

370. *Id.* at 10.

371. *Id.* at 11. Freshman uses the example of relatively assimilated Jews who "may often express more negative views about those not assimilated than even the most inside group." *Id.* at 12.

372. *Id.*

373. *Id.*

dissimilar persons often reduces prejudice, and unconscious bias against the group may become less prevalent.[374]

Furthermore, race-matching risks essentialism and reflects reductionist assumptions about individuals.[375] Amartya Sen describes a kind of reductionism that he refers to as "singular affiliation."[376] This reductionism "takes the form of assuming that any person preeminently belongs, for all practical purposes, to one collectivity only—no more and no less. Of course, we do know in fact that any real human being belongs to many groups, through birth, associations, and alliances."[377] Individuals should be able to choose which affiliations are more relevant or important in any social context and not have others impose that on them; political affiliation or religion, for example, may trump race.[378] Race-matching the mediators for parties of Asian descent ignores ethnic, national, regional, political, religious, socio-economic, and other differences that may be more relevant or important in a given situation than shared racial category.[379]

Finally, a study of race-matching revealed that "[w]ith regard to mediation outcomes . . . it is not so clear that creating racial matches between mediation participants and mediators is as important as we have thought in the past."[380] A multiyear research project in Maryland community mediation centers determined that

> when the mediator is not of the same race as either participant, participants believe that they have been heard by the mediator. In contrast, when the mediator's race matches that of the opposing party, the participant is less likely to feel that the

---

374. *Id.* at 12–13. Freshman also notes that matching could "trigger the unconscious stereotype that 'they' are clannish." *Id.* at 13. Moreover, "even if one adopts the less separatist notion of teaching cultural 'sensitivity' to mediators . . . the 'sensitivity' may harden the way mediators automatically divide the world into group terms." *Id.*

375. *See* Bagshaw, *supra* note 312, at 139 (discussing the dangers of essentialism and assigning possibly irrelevant traits to a person's self-image).

376. AMARTYA SEN, IDENTITY AND VIOLENCE: THE ILLUSION OF DESTINY 20 (2006).

377. *Id.*

378. *Id.* at 29–32.

379. Bagshaw, *supra* note 312, at 139.

380. Lorig Charkoudian & Ellen Kabcenell Wayne, *Does It Matter If My Mediator Looks Like Me? The Impact of Racially Matching Participants and Mediators*, DISP. RESOL. MAG., Spring 2009, at 22, 24.

mediator listened to her. A similar negative effect occurs with regard to participants' sense of control over the conflict situation. This sense of control does not change when the mediators' race is different from both participants, but decreases from the beginning to the end of the mediation when the mediator's race matches only that of the opposing party. Again, it appears less important to have a mediator who 'looks like me' than it is to avoid having a mediator who 'looks like' the other participant and no mediator who 'looks like me.'[381]

The researchers suggest that their finding supports "the value of co-mediation, which creates more options for addressing racial balance amongst participants and mediators."[382]

5. Transformative Mediation and Procedural Justice

Transformative mediation and procedural justice theories suggest that external neutrality would be improved through a process that ensures a high degree of control for the disputants. Joseph Folger and Robert Baruch Bush postulate that neutrality is unachievable because the mediator's interests become part of the problem-solving endeavor; they propose that their transformative model ensures party self-determination.[383] They contend that a problem-solving mediation, which focuses on reaching agreement, "leads mediators to be directive in shaping both the problems and the solutions, and they wind up influencing the outcome of mediations in favor of settlement generally and in favor of terms of settlement that comport with their views of fairness, optimality, and so forth."[384] In transformative mediation, "[n]eutrality means that the mediator's only interest is the interest in using his or her influence to make sure that *the parties maintain control* of decisions about outcomes."[385]

---

381. *Id.* at 24.
382. *Id.*
383. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT 22–26, 105 (rev. ed. 2005).
384. *Id.* at 104.
385. *Id.* at 105. Astor also endorses an approach that emphasizes self-determination, party empowerment, and collaboration between the parties. Astor, *supra* note 11, at 78.

Mary Beth Howe and Robert Fiala analyzed randomly assigned small claims court mediation cases in New Mexico to evaluate factors affecting disputant satisfaction with mediation.[386] Data from the study show that certain factors in the mediator's control are strongly associated with party satisfaction. For example, party satisfaction increases when "the mediator appears neutral, is in control of the mediation, and allows participants to feel they are able to tell their story. Greater participant integration, less anger and hostility, and greater power in mediation are also linked to satisfaction."[387] Structural factors associated with social class, gender, and ethnicity showed "few and inconsistent links to satisfaction."[388]

In her exegesis of procedural justice literature, Rebecca Hollander-Blumoff identifies four dominant factors in assessments of process fairness: "opportunity for voice, courteous and respectful treatment, trustworthiness of the decision-maker, and neutrality of the decision-maker."[389] Procedural justice legitimizes the mediation process and increases the likelihood that the outcome will be accepted by the participants. In their well-known compilation of studies of dispute resolution systems, John Thibaut and Laurens Walker concluded that "the maintenance of a high degree of control . . . by disputants and, at the same time, . . . a high degree of regulated contentiousness between the disputants themselves" are important properties for a just procedure.[390] Their research revealed "that a procedure that limits third-party control, thus allocating the preponderance of control to the disputants, constitutes a just procedure."[391]

In short, we can draw upon multiple lessons to check external neutrality. Neutrality is promoted by managing the mediation process to maintain even-handed, respectful treatment of disputants and by

---

386. Mary Beth Howe & Robert Fiala, *Process Matters: Disputant Satisfaction in Mediated Civil Cases*, 29 JUST. SYS. J. 85 (2008).

387. *Id.* at 93.

388. *Id.* at 94.

389. Rebecca Hollander-Blumoff, The Theoretical and Empirical Case for Procedural Justice in Negotiation 9 (Sept. 9, 2009) (unpublished manuscript) (on file with author).

390. JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 119 (1975).

391. *Id.* at 118.

maximizing party control. In addition, mediators can attend to external neutrality concerns by: being sensitive to language usage; valuing individual party narratives; ensuring that disputants "tell their stories" in their own words and style; self-policing for essentialist assumptions; and monitoring for biased party interventions. Finally, adopting a reflexive approach that is deliberatively self-conscious; using co-mediator teams that leverage differences and similarities; and employing instructional methods that require mediators to grapple with racial and other difficult issues would further reduce the potential for mediator partiality and bias.

B. Internal Neutrality

Having identified steps a mediator may undertake to address external neutrality issues, we now look inward to consider what mediators can do to minimize the operation of biased mental processes that are automatic and not a part of our conscious awareness. Research shows that suppression of stereotyped associations and engagement of non-prejudiced responses requires "intention, attention, and effort."[392] Fortunately, mediators have the power and ability to improve internal neutrality measures to reduce bias and favoritism in mediation. Practical suggestions include setting goals, planning deliberate actions to reduce biased responses, increasing diversity of mediator contacts, applying mindfulness techniques, and developing a habit of practices that remove bias.

1. Awareness, Motivation, and Action

Awareness of bias is critical for mental decontamination success.[393] As one may expect, the first step toward internal neutrality is to acknowledge the existence of unconscious mediator biases and

---

392. Armour, *supra* note 144, at 24 (quoting Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 16 (1989)).

393. Laurie A. Rudman et al., *"Unlearning" Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes*, 81 J. PERSONALITY & SOC. PSYCHOL. 856, 866 (2001) (citing Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, PSYCHOL. BULL. 117, 117–42 (1994)).

prejudices. "[I]n order to counter otherwise automatic behavior, one must accept the existence of the problem in the first place. . . . We must be both aware of the bias and motivated to counter it. If we instead trust our own explicit self-reports about bias—namely, that we have none—we will have no motivation to self-correct."[394] Requiring mediators to take the IAT for an implicit bias "reality check" could potentially open their eyes to their own egalitarian shortcomings. I ask my students to do such an exercise early in the semester.[395] Although it is voluntary, I request that they take one of the implicit association tests and complete a questionnaire anonymously.[396] During the semester, we reflect on and refer back to the experience as it relates to actual cases.

When confronted with their own implicit attitudes and stereotypes, mediators can work to counter the operation of bias. With increased awareness of implicit bias and the goals and motivation to self-correct, mediators can begin to tackle the problem of unintentional unequal treatment of parties. Researchers found that merely knowing one's prejudice level was not sufficient to respond in a less prejudiced manner.[397] People who are externally motivated (wanting to appear non-prejudiced to other people) to reduce prejudice-related reactions are more likely to adjust a prejudiced act based on the social context they are in, while those who are only internally motivated (appearing non-prejudiced to oneself) may not be so affected by social pressures.[398] It is possible "that external motivation precedes internal motivation and that to initiate change, the social climate must discourage expressions of prejudice."[399] The

---

394. Kang, *supra* note 136, at 1529.

395. I got this idea from Gary Blasi, who posted an e-mail on the clinical list serve on August 1, 2007, in response to Gail Silverstein's inquiry about incorporating the IAT in clinic courses. Blasi explained that he has used the IAT, but he always used it in conjunction with reading and discussion of the science behind the IAT and the implication for lawyers." E-Mail from Gary Blasi, Professor of Law, UCLA Sch. of Law, to Gail Silverstein, Clinical Att'y, Civil Justice Ctr., Univ. of Cal. Hastings Coll. of Law (Aug. 1, 2007, 12:21:53 PST) (on file with author).

396. The simple questionnaire asks for their reactions and reflections on the test experience and their "scores."

397. E. Ashby Plant & Patricia G. Devine, *Internal and External Motivation to Respond Without Prejudice*, 75 J. PERSONALITY & SOC. PSYCHOL. 811, 826 (1998).

398. *Id.* at 825.

399. *Id.* at 827.

researchers observed that "although discouraging overtly prejudiced responses may be desirable, it appears that internal motivation may be necessary to sustain efforts to respond without prejudice over time, particularly when no immediate external standards are salient."[400]

Recent studies show that while stereotypes may be automatically *activated*, as conscious actors we may be able to affect the *application* of those stereotypes in our interactions, judgments, and decisions. Irene Blair and Mahzarin Banaji conducted a series of four experiments to observe the automatic activation of gender stereotypes and to assess conditions under which stereotype priming may be moderated.[401] They distinguish between stereotype activation (categorization) and stereotype application as sequential steps in the process. They believe that stereotype activation is an automatic process, whereas stereotype application is a controlled, or at least a controllable, process.[402] Their experiments revealed that even with the "strong and ubiquitous nature of stereotype priming, . . . such effects may be moderated under particular conditions. . . . [s]tereotype priming can be eliminated when perceivers have an intention to process counterstereotypic information and sufficient cognitive resources are available."[403]

In another experiment on reducing the application of stereotypes, Margo Monteith observed that low prejudiced individuals experienced prejudice-related discrepancies (i.e., a prejudiced response such as feeling uncomfortable sitting next to a gay male on a bus) even though they believed the response was inappropriate.[404] She investigated whether people can inhibit prejudiced responses and

---

400. *Id.* (citing David P. Ausubel, *Relationships Between Shame and Guilt in the Socializing Process*, 62 PSYCHOL. REV. 378, 378–90 (1955)). Later studies determined the importance of internal motivation, finding that the measure of implicit bias was lowest among individuals with high levels of internal motivation and low level of external motivation. *See* Patricia G. Devine et al., *The Regulation of Explicit and Implicit Race Bias: The Role of Motivations to Respond Without Prejudice*, 82 J. PERSONALITY & SOC. PSYCHOL. 835 (2002).

401. Irene V. Blair & Mahzarin R. Banaji, *Automatic and Controlled Processes in Stereotype Priming*, 70 J. PERSONALITY & SOC. PSYCHOL. 1142 (1996).

402. *Id.* at 1143.

403. *Id.* at 1159.

404. Margo J. Monteith, *Self-Regulation of Prejudiced Responses: Implications for Progress in Prejudice-Reduction Efforts*, 65 J. PERSONALITY & SOC. PSYCHOL. 469, 469 (1993).

respond on the basis of personal non-prejudiced beliefs.[405] She found that the discrepancy experience produced a negative self-directed effect which increased motivation for discrepancy reduction.[406] Increased attention to discrepancy-relevant information and personal discrepancy experiences may help low prejudiced individuals exert control over their biased responses.[407] Importantly, she found that "prejudice-related discrepancy experience enabled the low prejudiced subjects to be more effective at inhibiting prejudiced responses at a later time."[408]

In addition to recognizing implicit bias and having adequate motivation to reduce it, mediators must call upon cognitive control processes. Blair and Banaji's experiments examined the automatic processes underlying stereotyping and the role of intention and cognitive resources in moderating the influence of such processes on one's judgment.[409] The results suggest that people can control or eliminate the effect of stereotypes on their judgments if they have the intention to do so and their cognitive resources are not over-constrained.[410] After reviewing numerous studies, Blair discovered that automatic stereotypes are influenced by social and self-motives, specific strategies, the perceiver's focus of attention, and the configuration of stimulus cues.[411] In a study by Bruce Bartholow and colleagues, participants drinking alcohol showed significantly impaired regulative cognitive control and diminished ability to inhibit race-biased responses, suggesting that controlling racial bias can be a function of implementing cognitive control processes.[412]

With the requisite motivation and cognitive resources to draw upon, mediators are ready to operationalize a bias reduction plan. Gollwitzer, Sayer, and McCulloch propose "implementation-

---

405. *Id.* at 472.
406. *Id.* at 477.
407. *Id.* (citing JEFFREY A. GRAY, THE NEUROPSYCHOLOGY OF ANXIETY: AN ENQUIRY INTO THE FUNCTIONS OF THE SEPTOHIPPOCAMPAL SYSTEM (1982)).
408. *Id.* at 482.
409. Blair & Banaji, *supra* note 401, at 1142.
410. *Id.* at 1159.
411. Blair, *supra* note 85, at 242.
412. Bruce D. Bartholow et al., *Stereotype Activation and Control of Race Bias: Cognitive Control of Inhibition and Its Impairment by Alcohol*, 90 J. PERSONALITY & SOC. PSYCHOL. 272 (2006).

intention" as an approach to situations that may trigger implicit bias responses.[413] Goal-intention is expressed as "I intend to reach X goal."[414] Goal-directed behavior is important, but might not become part of everyday routine. "As a substitute, people can resort to forming implementation-intentions that strategically place the intended goal-directed behavior under direct situational control."[415] Implementation-intention is expressed as "if X, then I will do Y."[416] Implementation intentions are expressed as plans to reach the goal.[417] Implementation intention studies have shown promising results: participants were generally more likely to attain their goals, were more resistant to distracters, and showed less stereotype activation.[418]

Applying these strategies to mediation clinics and programs, instructors and administrators should articulate explicit program goals and guidelines about expected mediator non-prejudiced behavior and incentivize actions to meet those goals. In one example of an interesting innovation, the American Bar Association (ABA) has offered a continuing legal education program on "Creating a Culture of Inclusion" and made available "Elimination of Bias Credit."[419] In lieu of the typical pro forma "diversity" segment in mediation trainings, teachers and trainers should consider a more robust anti-prejudice curriculum. Gunning advocates inclusion of "misperceptions of different identity groups as part of the mediation training. These discussions and explorations would and should be a

---

413.   Peter M. Gollwitzer et al., *The Control of the Unwanted*, *in* THE NEW UNCONSCIOUS 485, 486–87 (Ran R. Hassin et al. eds., 2005).

414.   *Id.* at 487.

415.   *Id.* at 486.

416.   *Id.* at 486–87.

417.   Gollwitzer and his colleagues use this example:

  When participants had furnished their goal intentions of judging the elderly in a nonstereotypical manner with the respective implementation intention ("If I see an old person, then I will tell myself: Don't stereotype!"), the typical automatic activation of stereotypical beliefs . . . was even reversed. Similarly, when participants had the goal intention to judge female job applicants in a nonstereotypical manner and furnished an implementation intention to ignore a certain applicant's gender, no automatic activation of stereotypical beliefs about the female was observed.

Id. at 495.

418.   *Id.* at 496.

419.   Am. Bar Ass'n Ctr. for Continuing Legal Educ., *Creating a Culture of Inclusion*, AM. BAR ASS'N, http://www.abanet.org/cle/programs/t10cci1.html (last visited Nov. 8, 2010).

part of the basic mediation training not relegated as they so often are to some advanced form of training on 'cross-cultural mediation' or 'how to deal with power-imbalances'."[420] Mandatory continuing mediation education for mediators practicing in particular programs or jurisdictions could include "elimination of bias" credits and certification of anti-bias coursework.

In addition to the normative (external) incentive, mediators must set their own personal (internal) goals of egalitarianism. A general aspiration to be "neutral" is insufficiently specific. To achieve more fairness in mediation, Burns recommends that mediators affirm that their goal is to be fair and non-discriminatory.[421] She also urges mediators to monitor how they make distinctions and to assume they are biased in favor of members of their own group and against persons in other groups.[422] Internally motivated mediators should develop their own "intention-implementation plans" for goal attainment and tailor them for specific mediation settings. As part of pre-mediation preparation, mediators should consider potential bias pitfalls that might arise in interracial disputes and develop reaction plans to avoid or escape the traps.

2. Salience, Exposure, and Practice

Racially discriminatory behavior may be reduced more effectively when racial issues are made salient rather than ignored or obscured.[423] Research shows that focusing attention on the source of a possible implicit effect that interferes with judgment reduces or eliminates (or even reverses) the interference.[424] For example, the false fame effect was reduced when sufficient attention was focused on the initial list of non-famous names so the subjects would recognize non-famous names as having been encountered earlier in

---

420. Gunning, *supra* note 329, at 87.
421. Burns, *supra* note 309, at 44.
422. *Id.* at 45. "[E]ven if one somehow has been consciously oblivious to the presence of key social differences, failing to consider the effects of social difference is the strategy most likely to perpetuate historic patterns of bias." *Id.* at 50.
423. Wang, *supra* note 210, at 1038 (citing Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 220–21 (2001)).
424. Greenwald & Banaji, *supra* note 67, at 18.

the experiment.[425] "Drawing social category information into conscious awareness allows mental (cognitive and motivational) resources to overrule the consciously unwanted but unconsciously operative response."[426]

Taking a similar view, Jody Armour agrees that decision-makers would be more likely to become aware of their implicit biases, confront them, and hopefully counteract their effects when such references are explicitly made.[427] Citing the distinction between a habit (an automatic process done many times) and a decision (a conscious action), Armour proposes that "for a person who rejects the stereotype to avoid stereotype-congruent [behavior] responses to blacks (i.e, to avoid falling into a bad habit), she must intentionally inhibit the automatically activated stereotype and activate her newer personal belief structure."[428] Since people may act on stereotypes automatically and without knowledge, they must actively monitor and inhibit the automatic stereotype and replace it with a personal egalitarian belief.[429] "[U]nless a low-prejudiced person consciously

---

425. *Id.* (citing Larry L. Jacoby et. al., *Becoming Famous Overnight: Limits on the Ability to Avoid Unconscious Influences of the Past*, 56 J. PERSONALITY & SOC. PSYCHOL. 326 (1989)).

426. Banaji & Greenwald, *supra* note 68, at 70. Some studies, however, imply that stereotypes are more difficult to suppress through controlled processes. In an experiment that required subjects to make a judgment of criminality using names that vary racially (black, white, Asian), researchers found race bias was difficult to remove even when subjects were alerted that racist individuals are more likely to identify black compared to white names. *See* Banaji & Dasgupta, *supra* note 133, at 162. Another study showed that participants "explicitly instructed to *avoid using race* ironically performed worse (although not in a statistically significant way) than participants told nothing at all." Kang, *supra* note 136, at 1529 (citing B. Keith Payne et al., *Best Laid Plans: Effects of Goals on Accessibility Bias and Cognitive Control in Race-Based Misperceptions of Weapons*, 38 J. EXPERIMENTAL SOC. PSYCHOL. 384, 390–91 (2002)). Researchers have also observed an effect called "stereotype rebounding." When people attempt to repress stereotypic thoughts, these thoughts may subsequently reappear with even greater insistence and be even more difficult to ignore. C. Neil Macrae et al., *Out of Mind but Back in Sight: Stereotypes on the Rebound*, 67 J. PERSONALITY & SOC. PSYCHOL. 808 (1994).

Thought suppression operates by searching for a distracter to replace the unwanted thought; however, when cognitive resources are limited, the ability to search for a distracter is precluded and the unwanted thought becomes hyperaccessible. *Id.* at 809 (citing Daniel M. Wegner & Ralph Erber, *The Hyperaccessibility of Suppressed Thoughts*, 63 J. PERSONALITY & SOC. PSYCHOL. 903, 903–12 (1992)).

427. Armour, *supra* note 144, at 13.

428. *Id.* at 24.

429. *Id.* at 23–24.

monitors and inhibits the activation of a stereotype in the presence of a member (or symbolic equivalent) of a stereotyped group, she may unintentionally fall into the discrimination habit."[430] Importing this model to the mediation context, mediators must break the habit of stereotype-consistent behavior by making conscious decisions to act in accordance with their non-discriminatory beliefs.

We use mediation debriefings, case rounds, and journals to give students in the mediation clinic space within which to contemplate and comment on their reactions to situations in which prejudiced behavior and assumptions could, or did, surface. More importantly, students identify lessons they can take into future mediations. The practice of journaling, which is popular in law school clinics, is a learning device that would benefit veterans as well as new mediators. This type of written reflection could be adapted to court and community settings to encourage mediators to measure adherence to their own egalitarian goals throughout their mediations. Requiring mediators to articulate explicit plans for improvement challenges them to name their practice shortcomings and state personal performance goals and intentions. Administrators of mediation programs should embrace these activities by periodically bringing volunteers and staff together for candid conversations and brainstorming sessions on prejudice reduction strategies. Inexpensive "brown bag" lunch discussions on a regular basis would be a cost- and time-effective way to help mediators take basic steps toward bias reduction.

Implicit social cognition research indicates that bias can be reduced through exposure to individuals who are not like us.[431] This exposure can occur through interpersonal interaction and presentation of images. The "Social Contact Hypothesis" postulates that stereotypes and prejudice can be reduced when people of different social categories have face-to-face interaction under certain conditions.[432] A recent meta-analysis of studies found that intergroup contact correlates negatively with prejudice.[433] Intergroup contact

---

430. *Id.* at 24.
431. Kang & Banaji, *supra* note 140, at 1101.
432. *Id.*
433. *Id.* at 1102–03.

may actually reduce levels of implicit bias.[434] In one study, white subjects were asked to "take the race IAT and report the number of their close out-group friends: African-Americans in one experiment and Latinos in another. . . . The researchers found negative correlations between the number of interracial friendships and level of implicit bias."[435] Consistent with these findings, the C100 study referenced earlier revealed that "the more prejudiced respondents tend to interact less frequently with Chinese and Asian Americans."[436]

Along similar lines, implicit attitudes may be changed by exposure to positive images.[437] In one study, subjects were shown photos of Martin Luther King Jr. and Denzel Washington as positive Black images.[438] The group reduced implicit bias by more than half and the effect persisted for a full day.[439] In the same manner, counter-typical visualizations caused a decrease in implicit stereotypes in another experiment.[440] In an experiment on explicit and implicit bias against women, direct educational instruction by counter-typical exemplars (female faculty) over one year had significant decreasing effects on IAT scores.[441]

These research findings suggest that mediators may be able to reduce implicit bias through increased exposure to and encounters with positive examples of out-group members. Writing about racial

---

434.   Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 981 (2006) ("A significant body of social science evidence supports the conclusion that the presence of population diversity in an environment tends to reduce the level of implicit bias.").

435.   Kang & Banaji, *supra* note 140, at 1103 (citing Christopher L. Aberson et al., *Implicit Bias and Contact: The Role of Interethnic Friendships*, 144 J. SOC. PSYCHOL. 335, 340, 343 (2004)).

436.   COMMITTEE OF 100 & HARRIS INTERACTIVE, *supra* note 262, at 68.

437.   Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800 (2001).

438.   *Id.* at 802.

439.   *Id.* at 807; *see also* Irene V. Blair et al., *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCHOL. 828, 837 (2001); Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642 (2004).

440.   Kang & Banaji, *supra* note 140, at 1107 (citing Blair et al., *supra* note 439, at 828–29).

441.   *Id.* (citing Dasgupta & Asgari, *supra* note 439, at 651).

issues in mediation, Howard Gadlin decries the lack of diversity in the dispute resolution field and urges greater racial and ethnic integration.[442] Homogeneity among mediator ranks has spurred efforts to increase the numbers of minorities and expand practice opportunities for mediators of color.[443] Employing counter-typical mediation trainers and teachers and enlarging mediator diversity would be rational moves toward implicit bias reduction. Because in-group favoritism makes it hard to reduce prejudice, Carwina Weng notes that mere interaction with other groups is insufficient. Contact in a setting that promotes equality and openness is critical.[444] She lists cooperation, constructive conflict resolution and internalized civic values as elements for building an egalitarian community in which non-discriminatory relationships are fostered.[445]

A diversity training experiment supports Weng's suggestion that prejudice reduction is more successful when interaction is coupled with supporting knowledge and efforts. Researchers found that students enrolled in a prejudice and conflict seminar taught by an African American male professor were able to lower their bias by the end of the semester.[446] Specific data indicated that an "[i]ncreased awareness of discrimination against African Americans and motives to overcome prejudice in oneself" was more correlated with a reduction in explicit bias, while a "positive evaluation of the professor and the prejudice and conflict seminar," making friends with out-group members, and reporting feeling less threatened by out-group members, were more correlated with a reduction in implicit prejudice and stereotyping.[447] A control group taught by an African American professor showed no reduction in prejudice and bias, leading to the conclusion that the presence of an African American

---

442. Howard Gadlin, *Conflict Resolution, Cultural Differences, and the Culture of Racism*, 10 NEGOTIATION J. 33, 44 (1994).

443. Marvin E. Johnson & Homer C. La Rue, *The Gated Community: Risk Aversion, Race, and the Lack of Diversity in Mediation in the Top Ranks*, DISP. RESOL. MAG., Spring 2009, at 17.

444. Carwina Weng, *Individual and Intergroup Processes to Address Racial Discrimination in Lawyering Relationships*, *in* CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY, RACE, AND LAW 64, 70 (Gregory S. Parks et al. eds., 2008).

445. *Id*. at 73.

446. Rudman et al., *supra* note 393, at 856.

447. *Id.* at 865 tbl.7.

figure in a prominent position alone had little to no effect on implicit or explicit bias.[448]

3. Mindfulness Meditation

A growing number of dispute resolution scholars tout the benefits of mindfulness meditation for practicing lawyers, particularly in negotiation.[449] They contend that by adopting a non-judgmental perspective, mindfulness devotees "respond more appropriately to situations—and the thoughts, feelings, and bodily sensations that the situations elicit in us—rather than reacting in habitual ways."[450] Enthusiasts contend that Buddhist principles underlying mindfulness meditation and specific practice techniques can bring clarity of purpose and enhanced attention,[451] greater awareness and cognitive flexibility,[452] and the ability to make better choices.[453]

---

448. *Id.*

449. Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and their Clients*, 7 HARV. NEGOT. L. REV. 1 (2002). Riskin claims that mindfulness practice could make lawyers and law students "feel better and perform better at virtually any task" by reducing stress and improving the ability to concentrate. *Id.* at 46. He maintains that mindfulness meditation can help develop five emotional and social competencies of "emotional intelligence": self-awareness, self-regulation, motivation, empathy, and social skills. *Id.* at 47 (citing DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ (1995)); *see also* Darshan Brach, *A Logic for the Magic of Mindful Negotiation*, 24 NEGOTIATION J. 25 (2008); Clark Freshman et al., *Adapting Meditation to Promote Negotiation Success: A Guide to Varieties and Scientific Support*, 7 HARV. NEGOT. L. REV. 67 (2002) [hereinafter Freshman et al., *Adapting Mediation*]; Clark Freshman, *After Basic Mindfulness Meditation: External Mindfulness, Emotional Truthfulness, and Lie Detection in Dispute Resolution*, 2006 J. DISP. RESOL. 511 [hereinafter Freshman, *After Basic Mindfulness Mediation*].

450. Riskin, *supra* note 449, at 29.

451. Brach, *supra* note 449, at 27–28.

452. Freshman et al., *Adapting Mediation*, *supra* note 449, at 74. Freshman et al. identify empirical support for professed benefits of mindfulness, citing psychological studies. *Id.* at 72–77. Research "neatly shows that both regular concentration and mindfulness meditation are associated with greater awareness." *Id.* at 74. Importantly, awareness is essential to changing behavior. *Id.* at 74 (citing John D. Teasdale et al., *Metacognitive Awareness and Prevention of Relapse in Depression: Empirical Evidence*, 70 J. CONSULTING & CLINICAL PSYCHOL. 275 (2002)). "Social science research also suggests another promising object for mindful negotiators involves emotions." *Id.* at 79. Freshman et al. observe that mindfulness of emotions can improve "mood awareness," allowing negotiators to understand what objects and thoughts induce positive mood and better negotiation results. *Id.* at 80.

453. Riskin, *supra* note 449, at 66.

Mindfulness meditation may help mediators attain greater bias reduction competency.[454] If the ability to listen is the mediator's stock in trade and mindfulness helps lawyers surmount barriers to careful listening, mindful mediators would be free from "distracting thoughts and emotions, 'personal agendas,' and bias and prejudice based on the speaker's appearance, ethnicity, gender, speech or manner."[455] Mediators trained in mindfulness would be more conscious of bias and stereotypes seeping into their thoughts and judgments. With that heightened awareness, they could call upon improved concentration to make better choices in the way they conduct their mediations.[456]

In summary, mediators have the ability to enhance internal neutrality by adopting explicit plans to reduce the application of stereotypes activated through encounters with parties and by replacing biased thoughts and reactions with non-prejudiced ones. Mediators must be aware of and acknowledge unconscious biases in order to garner the motivation to self-correct. A mediator's de-biasing action plan should include external and internal motivation to intervene with disputants in an egalitarian manner, attentiveness to prejudice-related discrepancies, and application of cognitive resources to reduce biased judgments and actions. By adopting individual "implementation intention" goals and strategies, mediators can attenuate bias. To encourage and facilitate these efforts, mediation programs should incorporate bias-reduction teaching techniques, make bias and prejudice reduction a robust part of the curriculum, and develop protocols that stress self-awareness, self-monitoring, and self-correction. Practices that sharpen a mediator's awareness, listening skills, and concentration (such as mindfulness meditation) may help mediators attain freedom from bias and prejudice.

---

454.   *See* Rock, *supra* note 50.
455.   Riskin, *supra* note 449, at 50.
456.   *See* Brach, *supra* note 449, at 28 (arguing that mindfulness techniques may enhance "capacity to focus and sustain our attention consciously so that we can make the choices that serve our truest purposes").

CONCLUSION

Extensive research and analysis related to mediator behavior, the dynamics of the mediation process, and the science of implicit social cognition reveal a huge gap between the vision of mediator neutrality and the realities of biased mediator thoughts and actions. Well-meaning mediators who espouse egalitarian views need more than a "wish and a prayer" to actualize non-biased feelings, behaviors, and judgments. When confronted with scientific findings and empirical evidence, mediation professionals must concede that the requirements for eliminating racial, gender, and other types of bias in mediation have not been met.

I present the small claims mediation scenario as an example of a situation in which no one refers to race but "race [is] speaking *sotto voce*."[457] These types of cases are can be instructive because they "reveal how profoundly issues of difference have permeated the unconscious as well as the consciousness of people in our society."[458] Reflecting on such a case, Gadlin muses, "At times I feel so conscious of the way my response to peoples' stories and interventions in their conflicts is infiltrated by my own racial/ethnic/gender identity."[459] Mediation practice would be substantially improved if all mediators attained an equally critical self-consciousness.[460]

My goal in writing this Article is to challenge mediation teachers, trainers, and practitioners to admit to impartiality shortcomings and undertake concrete measures to alter the way we think and act. Defining what it means to be racially unbiased also presents difficulties. Many people think that being unbiased means they do not "see" race, gender, or ethnicity. People claim to be "color-blind," viewing this as the achievement of a non-prejudiced state of mind. "According to the most straightforward account, to be racially unbiased would require one to accord race no more significance than,

---

457.   Gadlin, *supra* note 442, at 34.
458.   *Id.*
459.   *Id*.
460.   *Id.*

say, eye or hair color, and to act as though one does not notice race."[461] But

> social practices and legal rules permit, indeed encourage, some species of race consciousness that virtually no one views as morally objectionable. Identifying racial bias, then, must entail deciding that some forms of race consciousness are more, or less, morally objectionable than others, a determination with respect to which reasonable minds may differ.[462]

Race has been such a pervasive and salient feature in our history and current society that everyone is subject to race consciousness.[463] The pervasiveness of implicit bias opens a new route to discussions of bias prevention and mitigation. The existence of unconscious bias does not necessarily mean that people with egalitarian beliefs are racists or liars.[464] Having discriminatory thoughts does not mean a low-prejudiced person endorses the belief; rather, it is an indication of the vigor of well-learned cultural stereotypes.[465]

Along the same lines, the operation of stereotypes need not be illustrative of a person's "moral failure." Gary Blasi points out that moralizing strategies are ineffective in combating stereotypes and prejudice.[466] He contends that "the science [of implicit social cognition] demonstrates in many ways that there is unlikely to be such a thing as a *non*racialized setting in the United States, if we include the various ways in which race operates indirectly."[467] He urges legal scholars and advocates to become knowledgeable about research on cognitive science and social psychology so they may overcome their own biases.[468] I call on mediators to do the same, lest

---

461. R. Richard Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169, 1171 (2006) (examining race consciousness in the criminal justice system).

462. *Id.*

463. *Id.* at 1184.

464. Armour, *supra* note 144, at 18–21.

465. *Id*. at 20.

466. Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1271 (2002).

467. *Id.* at 1273.

468. *Id.*

we be well-meaning but ineffective actors in the struggle to eliminate bias in mediation.

In a study of interracial tension, Patricia Devine and Kristin Vasquez considered the problem that the good intentions of low-prejudiced people

> are useful only if they are accurately interpreted by the target of those intentions. Intentions cannot be seen and must be inferred from behavior. This could be a problem if, for example, minority group members rely on the types of nonverbal behaviors that do not distinguish between anxiety and hostility.[469]

The authors note the potential for miscommunication that could escalate rather than alleviate tension.[470] They suggest that "the single most important problem facing us over time is that we are afraid to communicate."[471] They provoke with questions:

> What if we gave up the pretense that we 'should know what to do'? What if we admitted ignorance when it exists and confessed our desire to learn and understand? . . . But this approach may be a better starting point for alleviating tension than trying to fake it through the interaction and worrying the whole time about what we're doing wrong.[472]

The veneer of neutrality is stripped away by research findings that show convincingly that mediators fall far short of the ethical duty to treat parties impartially and without bias. Under current conditions, we are failing to meet our articulated goals and the expectations of the parties. Surely, it is naïve to think we can completely eliminate bias in mediation. It is equally certain that nondiscrimination in mediation is attainable only with more deliberate, informed, and self-conscious practices by mediators.

---

469. Patricia G. Devine & Kristin A. Vasquez, *The Rocky Road to Positive Intergroup Relations*, *in* CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE, *supra* note 244, at 234, 261.

470. *Id.*

471. *Id.* at 262.

472. *Id.*