JUSTICE FOR ALL IN MEDIATION: WHAT THE PANDEMIC, RACIAL JUSTICE MOVEMENT, AND THE RECOGNITION OF STRUCTURAL RACISM CALL US TO DO AS MEDIATORS

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INTRODUCTION

This issue of the *Washington University Journal of Law and Policy*, titled "New Directions in Dispute Resolution and Clinical Education in Response to the COVID-19 Pandemic," raises an important question: What has the pandemic crisis taught us about where dispute resolution practice and theory should be going? The "pandemic crisis" is generally understood to mean the spread of the highly infectious, and sometimes deadly, COVID-19. Like all viruses, COVID-19 does not respect persons or borders, so the virus has spread globally and infected countless individuals.[1] A deeper look reveals the virus has had a disparate impact on poor and Black communities—with those communities experiencing higher rates of infection and serious health complications, including death.[2] Such disparate

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1. Like the former president of the United States. *Trump Flown to Hospital After Covid-19 Diagnosis*, BBC NEWS (Oct. 3, 2019), https://www.bbc.com/news/world-us-canada-54396670 [https://perma.cc/7Y32-3AVB].

2. *See, e.g.*, Keeanga-Yamahtta Taylor, *The Black Plague*, THE NEW YORKER (Apr. 16, 2020), https://www.newyorker.com/news/our-columnists/the-black-plague [https://perma.cc/GMY8-YH3S] (discussing the fact that reports show African Americans are more likely to die of COVID-19 than any other group in the United States and noting that the focus on African American dietary and exercise

impacts negatively affect the financial and mental health of these communities.[3] The pandemic health crisis revealed the deep structural inequalities in American society, that are both class-based and racially-based. In addition, while the killing of Black and Brown people by the police is not a new phenomenon, the murder of George Floyd—which people around the world watched on video—brought this issue into mainstream American consciousness and discourse, leading to multiracial protests against such killings across the country during the summer of 2020.[4] The protests, and the sometimes violent police responses to those protests, have led to long overdue discussions on police violence, police accountability, the historical roots of American policing, and the various competing visions for what policing and public safety in America could and should look like. These painful truths—not just the apparent institutionalized violence within policing cultures—constitute a "racial reckoning" that is now being proclaimed in public discourse. This racial reckoning is a call to identify and address systemic racism—systemic because it permeates the health care and insurance framework, the economic structure, the policing systems, and all other institutional structures and organizations in the United States.

We in the dispute resolution community should take a special role in this time of renewed interest in, and urgency around, conversations related to race. We know that a purely adversarial approach to resolving deep-seated problems related to race and other social categories of subordinations will only exacerbate the divisive and corrosive elements of public discourse in contemporary American society. In order to fulfill this role, the dispute resolution community must take stock of itself, like so many other American institutions are claiming to do, and examine the ways in which we have or have not responded to racial violence and subordination in the past and accounted for systemic racism in the methods we use.

This work of self-reflection and self-criticism has already started, as can be seen in the January 2021 edition of *Dispute Resolution Magazine*. The

habits obscure the true causes of these unequal health outcomes—un/under employment, substandard housing, and inferior health care all based on systemic racism).

3. *See, e.g.*, Lonnie R. Snowden & Jonathan M. Snowden, *Coronavirus Trauma and African Americans' Mental Health: Seizing Opportunities for Transformational Change*, 18 INT. J. ENVIRON. RES. PUB. HEALTH 3568 (2021).

4. Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (Jul. 3, 2021), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/L3K9-HZYY].

entire issue was devoted to "Reckoning with Race and Racism," and the editors wrote a thoughtful editorial piece on the mixed history of the dispute resolution field around race and racial violence.[5] The article, and others in the January issue, continue this self-reflection and self-criticism process.

Our field of dispute resolution "is built on negotiation, mediation, dispute systems design and restorative practice."[6] In this Article, my focus will be on mediation and mediation-related processes, specifically dialogue, which are led by a third-party neutral without any power to impose a solution on the parties. These processes involve various party-driven approaches designed to encourage party self-determination as much as to obtain resolution of the conflict.[7] I am using "mediation" to mean a process with only two or very few parties involved, while "dialogue"—or "community dialogue"—would be used for groups of community members—especially in the context of facilitated conversations around race and other issues of subordination.[8]

My thesis in this piece is that the pandemic crisis and the racial reckoning call on the dispute resolution community to confront and wrestle with at least three (3) things:

(1) We, in the dispute resolution field, must understand that our field is not so unique that we are untouched by systemic racism. Systemic racism, by definition, means that racism—and other forms of oppression—are not

5. 27 DISP. RESOL. MAG. 2 (2021). The DRM Editorial Board wrote a self-reflective editorial which rejected using its editorial space or the issue of the magazine for self-congratulatory statements, but rather used the space to turn a critical eye on the field of dispute resolution. While noting that "[o]ur field [of dispute resolution] which is built on negotiation, mediation, dispute systems design, and restorative practices, has much to offer in this moment one in which racial justice, equality and reconciliation are at the forefront of the national consciousness," the Editorial Board rightfully asked whether the DR field had stepped up to provide relevant dispute resolution services at critical moments related to racial violence and subordination in the past. *Id.* at 2.

6. *Id.* at 2.

7. All forms of mediation intend to both support the parties' sense of power and self-determination as well as to help the parties resolve their immediate conflict. How self-determination and settlement are balanced is the source of debate within our dispute resolution community and the basis for the differing mediation models, e.g., evaluative, facilitative, transformative, and inclusive.

8. Carrie Menkel-Meadow, *Restorative Justice: What is it and Does it Work*, 3 ANN. REV. L. & SOC. SCI. 161, 164 (2007). Menkel-Meadow mentions the issue of whether specifically victim offender mediation, as a form of restorative justice, "can be scaled up to national levels or political and civic reconciliation, either through truth and reconciliations–like processes or through reparations." Her review of some of the "scaling up" processes and the fairly positive assessments that the studies at the time reported on these larger scale process suggests that "scaling up" is possible and positive. *Id.* I am using "dialogue" or "community dialogue" as a "scaled up" process from mediation that is not as large or complex as truth and reconciliation or reparations processes.

merely a result of individual bias and choice. The institutions in which we all live and function are imbued with racism. We can draw upon the work of Critical Race Theory (CRT) and Critical Race Feminist (CRF) scholars whose works expose the existence of racism and sexism that is embedded in all of our societal institutions in order to gain and anchor our knowledge of systemic racism.

(2) We also need to acknowledge that the presence of that racism and its negative impacts are embedded in the very structures of the mediation processes which we use. This acknowledgement involves revisiting some of the key values upon which mediation has rested. Does a rejection of mediator accountability for the just or substantive outcome of the mediation process enforce systemic racism? Does our attachment to a mediator's neutrality and impartiality ensure that systemic racism will go unchallenged in the mediation process? Does our unquestioned attitude toward a general party self-determination undermine the self-determination of parties who are Black, Indigenous, or from other communities of color (BIPOC)[9] by failing to account for systemic racism within our processes?

(3) We also need to commit to transform our processes and approaches such that systemic racism and negative racial impacts may be reduced. This involves exploring what "justice" in mediation means. I will argue for using a robust and contemporary view of "restorative justice" that demands that we look at justice at both the individual and societal levels. Transforming our processes by incorporating a restorative justice lens involves the need to educate ourselves, as mediation scholars and practitioners, on the pervasive impact of the history of race and racism. It also requires that we alter how we use our processes to educate all parties and participants in the mediation process on the presence of systemic racism in order to undermine its impact on the process and outcome of mediation. In particular, we need to ensure that information about the larger historical and societal context within which any conflict arises is provided to the mediator and parties to the conflict.

9. I use the term "BIPOC" as alternative to the phrase "people of color;" as it is a label that intends to emphasize the special historical nature of oppression faced by Indigenous and African American people in the United States, while at the same time acknowledging that all peoples of color face their own unique experiences of discrimination and subordination in the nation. *See* Sandra E. Garcia, *Where did BIPOC Come From?*, N.Y. TIMES (Jun. 17, 2020), https://www.nytimes.com/article/what-is--bipoc.html [https://perma.cc/R7X4-2S9T].

I. UNDERSTANDING SYSTEMIC RACISM

As we in the dispute resolution community reflect upon and respond to the pandemic crisis and racial reckoning, we must address the issue of systemic racism and white supremacy.[10] As one popular white diversity consultant and author puts it, "white supremacy describes the culture we live in, a culture that positions white people and all that is associated with them (whiteness) as an ideal. This supremacy . . . is the deeper premise that supports this idea—the definition of whites as the norm or standard for humans and people of color as a deviation from that norm."[11] These times call for us to acknowledge that the most damaging impacts of racism come not from intentional individual acts of bigotry, but from the ways in which white privilege and the subordination of people of color, specifically Black people, is embedded in legal thought and doctrine as well as in the social institutions which the law helps to create and legitimize. The legal theoretical framework which helps us understand this is Critical Race Theory (CRT).[12]

CRT emerged in the 1980s and has been characterized as an encounter between the "vision of a reformist civil rights scholarship, on the one hand, and the emergent critique of left legal scholarship on the other."[13] CRT scholars celebrate the transformative vision of the civil rights movements and the improvement in the lives of subordinated peoples that the laws created and, at the same time, recognize the contingent nature of legal victories and "the limits of law to create institutional change."[14] One of the

10. "By 'white supremacy,' I do not mean to allude only to the self-conscious racism of white supremacist hate groups. I refer instead to a political, economic and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings." Frances L. Ansley, *Stirring in the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1024 n. 129 (1989). This Article uses the term in the same way.

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

12. CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 33 (Kimberle Crenshaw et al. eds., 1995).

13. *Id*. at xix.

14. Laura E. Gomez, *Trump's White House says Critical Race Theory is Anti-American. Here's the Truth*, THINK (Sept. 11, 2020), https://www.nbcnews.com/think/opinion/trump-s-white-house-says-critical-race-theory-anti-american-ncna1239825 [https://perma.cc/8HYJ-B8G8]. Professor Gomez is a co-founder and current director of the nation's first academic program on CRT located at UCLA Law School, the UCLA Law School Critical Race Studies Program.

key unifying interests that the range of scholars and scholarship writing as Critical Race theorists share is "to understand how a regime of white supremacy, and its subordination of people of color, has been created and maintained in America, and in particular, to examine the relationship between that social structure and its professed ideals such as 'the rule of law' and 'equal protection.'"[15] This same critical perspective designed to unearth the unstated white privilege behind and within apparently "neutral" concepts and categories has also informed the related legal theoretical approach, Critical Race Feminism: "[C]ritical race scholars and feminist theorists center their work on the assumption that domination—on the basis of gender, race, sexuality, class and disability for starters—are pervasive in the primary institutions of the market, the state and civil society."[16]

All of our dispute resolution processes, including mediation, have arisen out of the political, economic, social, and cultural context of American society. White supremacy is embedded in and behind constructions and processes that appear to be neutral on their face in other parts of American society; therefore, our own mediation processes have white supremacy embedded in them as well.[17] Based on this understanding, if we employ our dispute resolution processes without a more critical perspective on their core assumptions, their impact on subordinated people—in particular Black people—and without some kind of intentional corrective plan, then our processes will inevitably support the current relationships of subordination that exist in our society.

15. CRITICAL RACE THEORY, *supra* note 12, at xiii.

16. Angela Harris, *Beyond the Monster Factory: Gender, Violence, Race and the Liberatory Potential of Restorative Justice*, 25 BERKELEY J. OF GENDER, L. & J. 199, 210 (2010) (reviewing SUNNY SCHWARTZ WITH DAVID BOODELL, DREAMS FROM THE MONSTER FACTORY: A TALE OF REDEMPTION AND ONE WOMAN'S FIGHT TO RESTORE JUSTICE FOR ALL (2009)).

17. *See* Sharon Press & Ellen E. Deason, *Mediation: Embedded Assumptions of Whiteness*, 22 CARDOZO J. OF DISP. RESOL. 453 (2021). This is a recent article by two dispute resolution scholars who acknowledge that witnessing the murder of George Floyd made clear to them as white people "that law enforcement is based on a system that is the product of systemic racism and embedded notions of white supremacy." *Id.* They devote an entire section—Part II: Why Examine Mediation and White Supremacy—to acknowledging the existence of white supremacy in all American institutions. Their article is one of the most recent scholarly works "post" the racial reckoning that starts the examination of how the "white way" of doing things is embedded in mediation. *Id.* at 456–59.

II. ACKNOWLEDGING SYSTEMIC RACISM IN MEDIATION PROCESSES

Once we in the dispute resolution community understand that racism and white supremacy are embedded in all social structures, then it is incumbent upon us to explore the impact of systemic racism in our own mediation processes. It is important to note that this exploration is not new. In the 1980s and 1990s, mediation—as a form of informal or popular justice—was criticized by scholars from the Critical Legal Studies (CLS) school of thought,[18] Critical Race scholars,[19] and feminist legal scholars.[20]

All of these scholars criticized what is seen as valuable in dispute resolution circles: the informality of the mediation process. Professor Richard Delgado, a prominent CRT scholar, used psychological studies on the impact of unconscious racism or implicit bias to show how racism is so embedded in the American culture and psyche that the only way for the implicit biases that individuals harbor against subordinated groups to be managed and (possibly) eliminated is to have a formal process wherein the prejudiced, privileged person can be confronted with the inconsistency between their unconscious negative racial beliefs and American Creed ideals.[21] For CLS and feminist critics, the informality of mediation devalued or eliminated certain topics of conversation. As the noted CRF scholar Professor Trina Grillo observed, mediation's "informal law" requires participants avoid most discussions of principle, values, blame, and rights—largely in service to obtaining settlement.[22] She and other feminist scholars argued that this process approach undermines the need that women, socialized to be more relational than men and to put others' needs ahead of their own, have to identify and develop a strong and positive sense of self and self-interest in conflict situations. CLS scholars also viewed how mediation privileged informality and compromise as undermining all subordinated groups in society by encouraging them to believe that there is

18. *See* Isabelle Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1 J. OF DISP. RESOL. 55, 60–61 nn.26–27, 62 n.31 (1995).

19. *Id.* at 58–59 nn. 14–22.

20. *Id.* at 62 nn. 29–30, 63–64 nn.32–34.

21. Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WISC. L. REV. 1359.

22. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1590 (1991).

a shared consensus on social and political values when in fact, they argued, "haves" and "have-nots" in society have conflicting values that can best be articulated and seen in a formal and adversarial process. All of these scholars challenged the process we use and argued that subordinated groups—groups like women, people of color, and especially Black people[23]—would not receive the fair and just outcomes that were promised and that whites often received. And there were empirical studies that supported their concerns that women and men of color experienced worse outcomes in mediation compared with whites.[24]

My own work echoed these concerns.[25] I acknowledged that we value informality to allow parties to speak for themselves, and to have their own stories be heard in their own voice. This is a valuable element of self-determination that parties rarely are allowed in a formal trial or arbitral setting, where parties are represented by professionals who speak and shape their stories for them. I used a narrative approach to explore how the process of parties competing to nest their narratives into larger, socially positive pre-existing stories and cultural myths is part of this storytelling process in mediation. I argued that for subordinated groups, there are more negative cultural myths related to them and this undermines the ability of their narrative to compete effectively with parties who are part of more privileged social groups with access to a broad range of positive cultural myths.[26] As a dispute resolution scholar and practitioner, I both acknowledged the problem in our process and wanted to propose solutions so the advantages of mediation could be shared by all members of society. One of my proposals was that mediators use the opening statement to clearly inject the

23. *See* Taylor, *supra* note 2. This article describes the disproportionate negative impacts on African Americans in particular in a number of social and economic arenas.

24. Gary LaFree & Christine Rack, *The Effects of Participants Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 L. & SOC. REV. 767 (1996). This study done in New Mexico revealed that minority men and women who were claimants received significantly lower monetary outcomes when compared with Anglo claimants. *Id.* at 789. The study also revealed that minority men who were respondents in these civil cases paid more. *Id.* at 780. It should be noted that these results occurred only when one of the mediators was white. *Id.* at 789. *See also* Christine Rack, *Negotiated Justice: Gender & Ethnic Minority Bargaining Patterns in the MetroCourt Study*, 20 HAMLINE J. PUB. L. & POL'Y 211 (1999). Here, the author noted that a second study revealed that mediators showed "Anglo-protective bias" in the MetroCourt study. *Id.* at 212.

25. Gunning, *supra* note 18; Isabelle Gunning, *Know Justice, Know Peace: Further Reflections on Justice, Equality and Impartiality in Settlement Oriented and Transformative Mediations*, 5 CARDOZO J. OF CONFLICT RESOL. 87 (2004).

26. Gunning, *supra* note 18, at 68–80.

values of equality into the mediation process for all parties to address. Acknowledging that the definition of "equality" may be fluid and even have contradictory meanings for different parties, I still argued mediation should be another site for defining and redefining what most would accept is a core value of American political and legal life.[27]

In suggesting that mediators be more active in injecting specific values that are presumably shared by all participants (including the mediator), I had to confront and grapple with other mediation core values: the interrelated values of mediator neutrality/impartiality and party self-determination. These are the same core values we must interrogate now, even more deeply, as we confront the reality of systemic racism in our mediation processes.

A. The Mediator: Does Mediator Impartiality and Neutrality Ensure that Systemic Racism Will Go Unchallenged?

The discussion over what constitutes mediator impartiality or neutrality[28] is an important one. Scholar-practitioners Sharon Press and Ellen E. Deason have written one of the earliest self-reflective, self-critical pieces from members of our own dispute resolution community in light of the recent pandemic crisis and racial reckoning.[29] Their thoughtful and thought-provoking piece explores a range of problems and issues that arise when we confront the fact of racism embedded into the mediation practices we use so often. In discussing mediator impartiality and neutrality they note that, however labeled, there are two separate aspects to these concepts: "The first is that a mediator should not be biased for or against any *party* to the mediation. The second is that a mediator should be indifferent to the *outcome* of the process."[30]

We in the dispute resolution community are most comfortable defending the fairness of our mediation *processes*. But Professors Deason and Press explore other aspects of confronting systemic racism and doing justice in the mediation *process*. They note that while our focus around

27. *Id.* at 86.
28. I am going to use neutrality and impartiality interchangeably.
29. Press & Deason, *supra* note 17.
30. *Id.* at 474–75.

bias—implicit or explicit—has largely focused on the mediator,[31] parties to mediation will also bring implicit and sometimes explicit biases to the process. What can a mediator do in the face of one party's explicit bias or outright racism? The authors note white silence in the face of racism essentially serves the status quo of white supremacy and the maintenance of the mediator's own white privilege (if the mediator is white).[32] So a mediator ought to act. But if neutrality/impartiality means not favoring one or the other party, "not being biased for or against any party," and that is understood to mean that a mediator must treat both "evenhandedly" or the same, then the mediator can and should do nothing. This conflict means that our core values are "inconsistent with intervening in the face of expressions of racism."[33]

The authors raise the obvious consequence: that remaining impartial and neutral "works to preserve the status quo at the expense of BIPOC."[34] The authors next ask a good question: Is mediation an appropriate place for anti-racism work? In my view, the problem is we cannot do any mediation work and not be intentionally anti-racist. If we are not "doing" anti-racist work while we are "doing" mediation, then we will support the systemic racism embedded into our apparently "neutral" processes. We must be doing anti-racist work as an essential part of mediation if we intend to have the benefits of mediation—both in terms of process and outcomes—accrue to all parties beyond the white and privileged participants.

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31. *Id.* at 475 (noting that mediators face the large task of confronting not only their conscious biases but addressing their implicit biases—which the authors assert is "unattainable and illusory.").

32. *Id.* at 473 (citing LAYLA F. SAAD, ME AND WHITE SUPREMACY: COMBAT RACISM, CHANGE THE WORLD, AND BECOME A GOOD ANCESTOR 54 (2020) to note that white silence in the face of racism may be about discomfort but "it serves to defend the status quo of white supremacy; it is a way of 'holding onto one's white privilege through inaction'").

33. *Id.* at 476. This approach is explicitly endorsed by two mediation approaches: transformative mediation and inclusive mediation. Transformative mediation (or dialogue), with its emphasis on party-driven processes, also criticizes those dialogues and, by extension, mediation processes, which "require[] that facilitators control the kind of speech taking place, [which] can inhibit transformation because conflict is not fully expressed and what is difficult is not confronted." Erik Cleven et al., *Living with No: Political Polarization and Transformative Dialogue*, 2018 J. DISP. RESOL. 53, 57 (2018). Inclusive mediation is an effort to include all participants' ideas and experiences and establishes no communication guidelines. Thus, "[c]ursing, language charged with the weight of racial or other oppression, and what some might consider 'verbal abuse' also do not cause an Inclusive mediator to intervene with guidelines of ground rules." Caroline Harmon-Darrow et al., *Defining Inclusive Mediation: Theory Practice and Research*, 37 CONFLICT RESOL. Q. 305, 317 (2020).

34. Press & Deason, *supra* note 17, at 476.

The dispute resolution community tends to be divided over our responsibility for fairness and justness in the mediation *outcome*; in theory we are to be "indifferent" as to outcome, but for many, an indifference to outcome translates into an indifference to and lack of responsibility for the fairness or justness of that outcome. But Professors Deason and Press argue that mediators are not, in practice, "indifferent to the outcome," noting that common practices designed to encourage the parties to settle do not show an indifference to the outcome.[35] I agree with them that the emphasis on reaching a settlement in mediation has gone too far as mediation has become professionalized and court-connected.

If we release our attachment to having the parties reach an agreement, can mediators remain indifferent as to outcome? If a mediator is interested in ensuring that all parties, regardless of their race or social position, will receive fairness and justice in a mediation, doesn't she inevitably have an interest in the *outcome* of the mediation process? It is not an interest in seeing one side or the other "win," but it is an interest in seeing "justice" done both in process and result. This is not quite an "indifference" to the outcome. In my own earlier work, I used a troubling situation where mediator "indifference" to outcome raised serious justice concerns.[36] The example involved a contentious heterosexual divorce mediation wherein the husband bullied and lied to the wife in order to secure a settlement that would be unacceptable in a court that applied the laws related to divorce. I questioned the appropriateness of a mediator remaining "indifferent" to the evident injustice of the result and argued that intervention, by providing or ensuring that the wife was aware of the applicable laws, was proper and not a violation of the mediator's neutrality or impartiality.[37]

Professor Whitney Benns, a young dispute resolution scholar and practitioner, also raises some fundamental questions about the neutrality/impartiality concept. Focusing again on the issue of the justness of the mediation outcome and mediator responsibility for this, she challenges the very idea that we, as mediators, could ever not be implicated in the outcomes of the mediations we manage.[38] She rightfully asserts we

35. *Id*. at 475.
36. Gunning, *supra* note 18, at 81.
37. *Id*.
38. Alonzo Emery, *A Conversation with Whitney Benns, Educator, Facilitator and Emotional Labor Organizer: One Experts, "Neutrality" and Protest as a Powerful Tool*, 27 DISP. RESOL. MAG. 10 (2021). In this article, Professor Benns references the fact that our notion that the observer (mediator)

use neutrality and impartiality as substitutes for "trust"[39]—why should the parties *trust* us to mediate, facilitate, or manage their dispute? Why *trust* someone you do not know and with whom you have no relationship? Professor Benns powerfully asserts that trust is secured *through* relationships, not in their absence, and that using neutrality/impartiality as a substitute for trust is not only inadequate but inaccurate and dangerous:

> The way neutrality gets claimed, asserted, and held up as the gold standard has a lot to do with the maintenance of power. It is asserted as a poor substitute for trust and accountability by equating neutrality with fair process and then equating fair process with a fair outcome. It is an assertion of legitimacy drawing on legal values and a rhetorical fiction that is false in the case of courts and the legal systems and false in the space of ADR. I have seen that "neutral" really means alignment with the norms of white spaces, cis-gendered spaces, straight spaces—if you are protecting those norms, you are protecting the status quo. That is not neutral. The status quo is protecting a power paradigm that is causing all types of harm.[40]

Professor Benn's argument is blunt and accurate. Whatever goes unnoticed is our status quo. And once we have understood that the status quo is embedded with systemic racism—even when processes and outcomes are not intentionally labeled or designed to be racially discriminatory—then to allow for our process and outcome to default to the status quo is to allow for systemic racism to go unchallenged. The results for BIPOC and other subordinated people are then less than just or fair.

Indeed, at least one prominent dispute resolution practitioner and scholar has acknowledged that this is the case. Professor Robert Baruch Bush, who developed transformative mediation, has stated that "[i]t . . .

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can ever be separated from the observed (parties, process, outcome) is a cultural value that is Western and positivist. *Id*. *See* Press & Deason, *supra* note 17, at 477–78.

39. John Paul Lederach & Ron Kraybill, *The Paradox of Popular Justice: A Practitioner's View*, *in* THE POSSIBILITY OF POPULAR JUSTICE 357 (Sally Engle Merry & Neal Milner eds., 2004). Lederach and Kraybill compare the San Francisco Community Board mediation with Mennonite mediation. They note that the urban neighborhood-based SFCB was based on "neutrality" while the religious congregation mediation was based on trust. They argue that the Mennonites have "trust" based mediation because of the shared experiences and culture. *Id.*

40. Emery, *supra* note 33, at 14.

appears valid to say that mediation and social justice are at serious odds and that the use of mediation may inevitably undermine the goal of social justice."[41] He argues this apparently pessimistic conclusion may not be as bad as it seems because there are other values that mediation serves that "trump the goal of social justice," namely "supporting party self-determination and enhancing inter-party understanding."[42] Bush suggests these values may positively impact larger public values around civic education and strengthening civility.

Professor Bush articulates the sharp contrast of values: How important is social justice and just outcomes for all participants compared with other cherished mediation values, in particular self-determination?[43] Interrogating the meaning of self-determination is essential.

B. The Party: Can One Definition of Self-Determination Undermine the Self Determination of BIPOC Parties by Failing to Account for Systemic Racism in Our Process?

Parties' self-determination is a core mediation value to be preserved. Concerns for what practices might violate this value in our attempts to address systemic racism in our mediation processes call for an examination of what is meant by "self-determination." The Model Standards of Conduct for Mediators defines self-determination as "the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome."[44]

Looking at the plain language, the concerns for party self-determination if mediators intervene or exert any control over the process would appear to rest on the idea that such mediator intervention or control will constitute "coercion" and thereby violate the parties' self-determination. While this is certainly possible, there are also more fluid options that "facilitative" mediators who employ party driven approaches[45] may use to engage in a more collaborative approach *with* parties around the mediation process. All mediations provide some kind of "introduction" on what the participants

41. Robert Baruch Bush, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO ST. J. ON DISP. RES. 1, 33 (2012).
42. *Id.* at 36.
43. *Id.*
44. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, STANDARD I.A. (2005).
45. Bush, *supra* note 41, at 13.

can expect to happen in the process in which they will engage. Parties will expect some description of how this "mediation process" differs from others, e.g., court. What the mediator says the mediation process will entail could include a component that involves exchanges between both the mediator and the parties that can result in agreements on the process and values involved. Moreover, the idea that "any" mediator intervention or control over the process translates into coercion of parties' self-determination seems to undermine the belief that "people have the inherent capacity for self-determined choice and responsiveness to others"[46] which undergirds much of our work as mediators. Parties, when given a chance, have a greater capacity to engage with mediators on process than the critics of any mediator involvement with process give them credit.

Coercion is not the only issue at stake in self-determination. "Free and informed choices as to process and outcome"[47] are also at stake. But, as in my earlier example, how can any mediator sit back as the bullying and lying husband coerces the wife, *ignorant of the laws of her state*, into a divorce settlement that would be in violation of the laws of the state for the sake of party self-determination claim that the wife had exercised a "free and informed choice as to process and outcome?" If self-determination includes "informed choices," then a process which allows for no introduction of the needed information upon which a party could make an actual informed decision has also violated party self-determination.[48]

Similarly, the "voluntary" nature of the decision made is also at stake in understanding "self-determination." What is "voluntary" is related to "uncoerced" and is complicated. The concepts cannot really be understood in an abstract, acontextual, or ahistorical way. One concrete example is unhoused individuals. Consider the famous Anatole France quote: "The law, in its majestic equality, forbids all men to sleep under bridges, to beg in the streets and to steal bread—the rich as well as the poor."[49] As many cities struggle with homelessness, which not surprisingly has only increased

46. Cleven, *supra* note 33, at 56.

47. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, STANDARD I.A. (2005).

48. Gunning, *Know Justice, Know Peace*, *supra* note 25, at 93 ("When a mediator considers intervening to prevent bullying, to stop lying or to provide information in order to increase the chances of a just outcome it is not at all clear that such interventions violate party self determination. If self determination is divorced from informed decision-making or voluntary consent it cannot claim to constitute authentic self determination.").

49. ANATOLE FRANCE, LE LYS ROUGE (1894).

during the pandemic and racial reckoning,[50] unhoused people are too often arrested[51] as if their "sleeping under bridges" in the face of a dire lack of affordable housing were a "voluntary" act. No party can define his/her/their sense of self as if that "self" were unconnected to the social, political, economic, and cultural context within which she/he/they live. How "voluntary" a party's decision is in mediation is framed and constrained not just by what happens "at the mediation table," but also by the social context within which the party lives outside of the mediation room.

Inequality is real and the result of both explicit and implicit racism in the American context. Parties bring to "the mediation table" those socially constructed categories within which they find themselves along with their "place" on the societal hierarchy of those categories. Returning to Professor Bush's clear contrast and comparison of social justice and self-determination, it is important to note that Professor Bush is aware of the inequality that parties bring to mediation. Professor Bush likens inequality in mediation to lions and lambs. He positively recites a quote on this from a labor mediator, noting "[o]ne experienced labor mediator used to say, in explanation of his strictly neutral posture despite the inequality of power that often existed in his mediations, that after the mediation, the lion remains a lion, and the lamb remains a lamb and that his job was to 'make the lion-lamb relationship clear to the lamb.' In short, he didn't encourage lambs to roar at lions."[52] If the point of mediation is to "make the lion-lamb relationship clear to the lamb," then the idea that disadvantaged groups—the "lambs"—might ever hope for real justice in a mediation or in life is not even a goal of mediation. One must also wonder if the "lambs" have experienced self-determination in the mediation process.

Interestingly, Professors Press and Deason argue that Professor Bush's transformative mediation may be best suited of all mediation approaches to do anti-racist work. They argue that transformative mediation is the mediation approach that "prioritizes party self-determination to the greatest

50. Thomas C. Frohlick, *Sheltering the Homeless: These 48 Major U.S. Cities Face Growing Homeless Populations*, USA TODAY (Oct. 7, 2019), https://www.usatoday.com/story/money/2019/10/07/48-major-us-cities-struggling-to-shelter-growing-homeless-population/40242171/ [https://perma.cc/3KTA-69B7].

51. Gale Holland & Christine Zhang, *Huge Increase in Arrests of Homeless in L.A.- but Mostly for Minor Offenses* (Feb. 4, 2018), https://www.latimes.com/local/politics/la-me-homeless-arrests-20180204-story.html.

52. Bush, *supra* note 41, at 31 (internal citations omitted).

degree" by incorporating party-driven practices into both the mediation process and outcome.[53] Transformative mediation's focus on party empowerment (each party reclaiming a stronger sense of self and capability) and recognition (each party reclaiming their ability to empathize with others) over settlement is key to its ability to support party self-determination at a high level. They "hypothesize that the empowerment aspect of transformative mediation might be especially impactful for BIPOC. And perhaps the awareness and recognition thread could be especially impactful for white participants. At the very least, participants with a racial edge to their dispute might emerge from the process with a feeling that they experienced authentic communication with each other."[54]

However, the complicated nature of self-determination—certainly for Black or BIPOC people—is not so easily supported in transformative mediation as might seem. One example involves whether the mediator should provide any rules or guidelines on the type or style of communication in which parties should engage. Transformative mediation provides no process rules or guidelines so parties can choose their own ways of communication.[55] Professors Press and Deason show that the typical rules in non-transformative mediation create problems by explaining how these rules, which they characterize as "tone-policing," are ways in which white supremacy can infect the process of mediation. They note that Opening Statements which include ground rules that state to use "common courtesy" and "respect" and require that one "speak calmly" and to "not use inflammatory language" are actually ambiguous instructions that either are, or can be, culturally defined. They rightfully question whether it is not racist for a white person to command a BIPOC person on how she/he/they should describe their own lived experiences.[56] They raise the issue that "anger" in Black people is generally viewed by white people as "scary" and

53. Press & Deason, *supra* note 17, at 487.

54. *Id.* at 489.

55. Transformative mediation or dialogue with its emphasis on party-driven processes also criticizes those dialogues (and by extension mediation processes) which " . . . require[] that facilitators control the kind of speech taking place, and this can inhibit transformation because conflict is not fully expressed and what is difficult is not confronted." Erik Cleven et al., *supra* note 33, at 57. Inclusive mediation is also explicit that this process in an effort to include all participants' ideas and experiences establishes no communication guidelines. Thus "[c]ursing, language charged with the weight of racial or other oppression, and what some might consider 'verbal abuse' also do not cause an Inclusive mediator to intervene with guidelines of ground rules." Caroline Harmon-Darrow et al., *supra* note 33.

56. Press & Deason, *supra* note 17, at 471–72.

"aggressive" in contrast to how the same expression of anger or distress might be viewed in another white person.[57]

On the other hand, in a mediation with a racial edge that involves both white and Black parties, transformative mediation's lack of communication guidelines creates a problem if the white party is allowed to unleash a torrent of false and racist statements about the nature of American history and of Black people in general. Professors Press and Deason note the negative impact of white silence when a mediator allows parties' biases to pass without comment: white silence defends the status quo of white supremacy and is a way of holding on to white privilege.[58] In addition, the experience for the Black or BIPOC party is likely not going to be one of "authentic communication." Rather, they will have just experienced yet another space in American society where his/her/their humanity is again challenged, questioned, and undermined, and they are left alone to battle for their dignity and humanity.

Another aspect to the concern on tone policing or any rules on communication is the concern over asking or requiring that the parties speak with "respect." The fact that "respect" has cultural dimensions and variations is true. On the other hand, for Black Americans, with our history of enslavement and the indignities and *lack* of respect that that ugly and brutal history has meant from the time of slavery until now through the perpetuation of white supremacy, a process that does not imagine that a Black party would or should be "respected" also creates problems. For Black Americans, respect is a key issue.[59]

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57. Brett Molina, *Cashing Checks, Napping, More Activities Leading to Police Calls on Black People in 2018*, USA TODAY (Dec. 20, 2018), https://www.usatoday.com/story/news/nation/2018/12/20/black-people-doing-normal-things-who-had-police-called-them-2018/2374750002 [https://perma.cc/8JW7-9LJJ].

58. Press & Deason, *supra* note 17, at 473.

59. *See* Jordan Green, *Can Greensboro Model a National Truth and Reconciliation Process*, SOJOURNERS MAG. (Oct. 14, 2020), https://sojo.net/articles/can-greensboro-model-national-truth-and-reconciliation-process [https://perma.cc/2TD4-ZAN7]. One example would be Reverend Nelson Johnson of Greensboro, North Carolina. In 1979, the reverend led a labor and civil rights march that ended in five people being murdered by members of the Ku Klux Klan and the American Nazi party, which became known as the Greensboro Massacre. *Id. See also* Gary Hume, *Rev. Nelson and Joyce Johnson*, ENCORE, https://encore.org/purpose-prize/nelson-johnson/ [https://perma.cc/6AKK-9BS6]. A key Klan member involved was a paid informant for the Greensboro Police Department which was aware of the violence planned against the marchers but did nothing to warn or protect them. In the aftermath, Reverend Johnson and his wife, Joyce, led the way towards healing in the Greensboro community through the establishment of the Greensboro Truth and Reconciliation Commission. He and his wife, through their organization Beloved Community Center, now advise other cities on establishing

In interrogating more deeply and contextually the elements of self-determination, it is a more complicated concept than is often addressed in mediation discussions around its importance. This is not an argument to suggest that self-determination is not important, but we must explore its contours more carefully. We as mediators cannot assume that the "formal equality" of the parties as they engage in the informal process of mediation is sufficient to address the challenge of how that inequality, that subordination, will impact the process and outcome of the mediation.

III. COMMITMENT TO CHANGE IN THE DISPUTE RESOLUTION COMMUNITY TO COMBAT SYSTEMIC RACISM IN OUR MEDIATION PROCESSES

A. If DRC Commits to Justice—What Does Justice Look Like?

This Article cannot come up with a definitive definition of justice, but providing some framework for a working definition is needed. There has been a tension in mediation scholarship and practice between an idea of justice defined by the application of articulated laws, legal norms and accepted societal norms, and the kind of "justice-from-below" that parties can provide for each other during and through mediation.[60] On the one hand, there are mediation models, often characterized as "evaluative," that involve norm-educating as well as norm-advocacy, where mediators see their role to include providing information on the applicable legal norms to either ensure that all parties are fully informed of their legal rights (but leaving the parties free to accept or reject the law) or to not only educate but ensure that any agreement will conform to the prevailing legal requirements.[61] On the other hand, there are mediation models that involve norm generation, where mediators see their roles as providing little to no information to the parties

truth and reconciliation commissions. *Id.* When Reverend Johnson modeled the kind of conversation he would want to see as the basis for a truth process in the United States, respect was part of his framing: "We don't have to be enemies. Both of us are better off if we're not. Let me hear what you got to say, and I promise you I'm going to be *respectful*. And then I'll say what I've got to say and I want you to *respect* me." *Id.* (emphasis added).

60. Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 CLIN L. REV. 157, 162 (2002).

61. Ellen Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703 (1997).

so that the parties can generate whatever norms will work best for them and their particular conflict. It is the norm generating models that have attracted the critics, myself included, who are concerned that disadvantaged groups—BIPOC and white women—will forfeit legal rights out of ignorance and/or pressure within the mediation context.

The current racial reckoning demands we address and balance these tensions. The idea that civil rights laws designed to ensure equality for all regardless of race should be ignored when racial inequality clearly continues in deadly forms would seem to reveal an indifference to the facts and pain so publicly revealed over the past year. Still, the racial reckoning is also making clear what racial and social justice activists and CRT/CRF scholars have known and discussed, which is that our very laws have been defined only with the voices, views, and circumstances of a small and privileged few out of the white American populace and that the resultant legal definitions promote and preserve white supremacy. Civil rights laws which support or enhance equality for all—as an example, laws that expand voting rights for all voters rather than create barriers to restrict voting rights—ought to be encouraged and promoted while processes that allow for norm generation that includes the voices of people who have been excluded from positions of power are also encouraged and promoted. This type of norm generation, the "justice-from-below" that parties or people give to each other, rests upon the relationships that parties or people have with each other as they live and function in community and communities. Consequently, I want to explore a framework for justice that embraces the individual and the society as well as the relationships that individuals have with each other in community.

Justice or "social justice" must encompass individually experienced outcomes as well as societal structures that support just outcomes equally for all. I take as a foundational definition of justice from dispute resolution scholar Professor Bush. Professor Bush's definition of "social justice" states the term

> is generally used to refer to a state of affairs in which inequalities of wealth, power, access and privilege—inequalities that affect not merely individuals but entire classes of people—are eliminated or greatly decreased. Social justice in short means achieving a relative equality of conditions (not just opportunities) as between all groups

> or classes within the society. Since the absence of such equality often results from social and organizational structures or systems—such as educational systems, housing markets, employment markets, etc.—rather than individual behavior, social justice is understood as the absence of structural injustice or inequality.[62]

Our work in mediation needs to recognize the societal and structural nature of inequality and thus the need to support and advocate for those social norms and laws that support individual *and* structural equality. And our work in bringing people together in a space that supports their self-determination and empathy can be a place of generation for norms that build and expand upon the equality-promotion laws and norms of other parts of society.

Mediation and mediation processes could be one place to encourage the voices of people left out of the formal legal or norm generating process. What we do in supporting parties in mediation is support their *relationship* with each other. People can only provide "justice" for each other when they are in relationship. The quality of that relationship and the respect within that relationship matters. Consequently, our definition of justice must also include how we support not only individual self-determination and empowerment but also how we support parties' relationship to each other. My desire to define a framework for justice that includes the individual, society, and relationships among those individuals in society has led me to advocate for our embracing restorative justice as the framework for our justice discussion.

Restorative justice practices originated in indigenous approaches to justice and conflict resolution; the modern, Western-oriented version dates back to the 1970s as a response to the failure of the retributive approach to criminal law and punishment.[63] The idea of restorative justice was to

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62. Bush, *supra* note 41, at 3. He also makes a good point on the difference between **"**micro social justice" which is the process fair and with just outcomes for the parties involved, and the "macro social justice" which is how much can mediation get at structural change and systemic social justice. *Id.*

63. Menkel-Meadow, *supra* note 8, at 10.6–10.8. See also the works of those who Professor Menkel-Meadow characterizes as the "conceptual and practical founders" of the field of restorative justice: John Braithwaite, for example, JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989) and JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION (2002); Howard Zehr, for example, HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE (2002); and Mark Umbreit, for example, MARK UMBREIT, VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE

transform how criminal or bad acts are viewed and how we should respond based on the recognition that any single criminal or bad act affects many people beyond the victim, the offender, and the state—for example, the family members of the person harmed, the family members of the person doing the harm, and other community members who witness or hear about the wrongdoing.[64] Rather than punishment, restorative justice seeks to heal the harm and injury experienced by all those affected and to restore the offender and the community to wholeness. Over time, restorative justice has evolved into a movement in schools and communities both domestically in the United States and globally and has enveloped a broad range of legal as well as non-legal disputes beyond actual criminal activity.[65]

While restorative justice has its Western roots in the criminal justice arena, it has already moved beyond a focus on crimes to embrace how individuals and societies might be transformed. These are the elements of restorative justice that resonate with dispute resolution work. As an example, consider the language of transformative mediation that emphasizes party-focused and party-directed processes that support parties' sense of self-empowerment and recognition of others. This approach echoes the foundational approach of restorative justice. In Professor Carrie Menkel-Meadow's extensively researched article on restorative justice, she does a review of the restorative justice literature and describes some of the foundational concepts: "Restorative justice hopes to harness the commission of wrongful acts to the making of new opportunities for personal, communal and societal growth and transformation through empowerment of both victims and offenders in direct and authentic dialogue and recognition." While this language is still connected to crime, victims, and offenders, the broader approach involves using wrongful acts in the ways that we use conflict: as opportunities for growth through "empowerment" and "authentic dialogue and recognition." Notably, Professor Menkel-Meadow's distillation of the restorative justice approach underscores that it includes the transformation of the individual, the community, and society.

JUSTICE AND MEDIATION (1994) and MARK UMBREIT, FACING VIOLENCE: THE PATH OF RESTORATIVE JUSTICE AND DIALOGUE (2003).

64. Menkel-Meadow, *supra* note 8, at 10.2.

65. *Id.* at 10.3–10.4.

The historical approach taken by restorative justice has only increased with contemporary restorative justice practitioners. Dr. Fania E. Davis, a nationally recognized restorative justice scholar and practitioner defines restorative justice in this way:

> Consonant with African and other indigenous communitarian values, restorative justice (RJ) is profoundly relational and emphasizes bringing together everyone affected by wrongdoing to address needs and responsibilities and to heal the harm to relationships and community to the degree possible. While often mistakenly considered only a reactive response to harm, restorative justice is also a proactive relational strategy to create a culture of connectivity where all members of a community thrive and feel valued.[66]

Modern restorative justice practice approaches embrace both individual and group or community healing and have also embraced an analysis which recognizes systemic racism as embedded in the people and society to be healed. Dr. Davis's compelling work argues for the convergence of racial/social justice and restorative justice by clearly articulating the fact that restorative justice work cannot be done acontextually:

> Restorative justice exists within and is informed by racist structures, institutions and individual bias. Structural racism is not something present-day white people chose or created. They benefit from it, however and are responsible for changing it because the status quo is racism. Good intentions notwithstanding, doing nothing about racism necessarily reproduces it; to fail to take action is to be complicit.[67]

66. FANIA E. DAVIS, THE LITTLE BOOK OF RACE AND RESTORATIVE JUSTICE: BLACK LIVES, HEALING AND US SOCIAL TRANSFORMATION 19 (2019). The importance of "being relational" and "relationships" is a reminder that restorative justice is the form of justice we want to promote as mediators because of these key aspects; we as mediators need to move in conscious ways towards how trust is actually built rather than relying solely on unexamined notions of neutrality and impartiality to ensure that we as mediators can be "fair" and "just" to all comers.

67. *Id.* at 35.

This view of the justice for which we as mediators and dispute resolution practitioners and scholars are accountable should anchor itself in restorative justice principles that encompass both rights and healing for individuals as well as support the transformation and healing for the larger society. In many ways, this is something of a return to our (Western) roots. Much of the conversation in the 1970s and 1980s around popular justice and community mediation projects not only focused on consensual, non-violent approaches and processes to resolve conflict or dispute among individuals, but also imagined that communities would be renewed such that new norms reflecting these renewed community values would be created, promoted, and applied through these "popular justice" alternatives to state violence and coercion.[68] And "a key feature of popular justice is its ideology of social change."[69] Our current mediation processes have historical roots in visions for not only individual empowerment but also the transformation of our communities. The health of our renewed and transformed communities will rest on both the health of the individuals who make up those communities and the health of the relationships that exist between and among them. Our work as mediators has been and is to create spaces for individuals to empower themselves, acknowledge each other with empathy, and improve relationships among the parties and even those who are not parties but are related to them. The pandemic and racial reckoning is asking us to return to the larger dreams and visions that we used to have to not just settle individual disputes, but to transform lives and our society.

B. What Could Incorporating Restorative Justice Principles Look Like in Our Mediation Processes—Examples of Providing Information on Race in Community Dialogues

If we in the dispute resolution community are to "answer the call" to support the needed, difficult dialogues that must happen around race and white privilege in this country, then, once we acknowledge the presence of white supremacy in our processes and likely outcomes, we must make some changes. What all those changes should be will obviously involve long term conversations and debates. In my previous work,[70] I advocated for Opening

68. Merry & Milner, *supra* note 39, at 1.
69. *Id.* at 23.
70. Gunning, *supra* note 18, at 85–86.

Statements which would include ground rules—to which parties would be asked if they can agree—and which might also include mutual respect and equality as a shared value. I argued then that if we were to confront the implicit bias, which we were already aware was undermining the results of mediation for BIPOC, we would have to be more explicit about the shared values to be applied and even redefined in the mediation process. I continue to believe that this is essential. And now I think that this current racial reckoning demands we explore how we can add even more information into mediations with a "racial edge"[71] to address the structural racism that is embedded in the very processes that we use.

I argue for the inclusion of more information based upon my work as a facilitator in community dialogues in the Los Angeles area. In several of the dialogues or group mediations (described below), the organizers provided the participants with factual information related to the subject matter—race, policing, homelessness—that was the topic of the dialogue. This was a necessary step because, without any intervention providing necessary information, we know that the status quo of racial subordination is all too likely to prevail in the process and outcome. Additionally, in our current times, educational information is essential. Given the amount of disinformation—especially around racial matters—that exists from the successful disinformation campaign around the nature of the Civil War and Reconstruction in most American textbooks[72] right up to the massive backlash against Critical Race Theory and honest renditions of American racial history,[73] people need to be provided with accurate information as a starting point for difficult community dialogues. This is a value that is seen in truth and reconciliation processes, as noted by the very name. While community dialogue is not as encompassing as a truth and reconciliation process, similar values—that factual truth is important—should be applied.[74]

71. Press & Deason, *supra* note 17, at 489.

72. Cynthia Greenlee, *How History Textbooks Reflect America's Refusal to Reckon with Slavery*, BLACK AGENDA REP. (July 15, 2021), https://www.blackagendareport.com/how-history-textbooks-reflect-americas-refusal-reckon-slavery [https://perma.cc/7L23-GSWK].

73. Rachel Hatzipanagos, *What the Founders of Critical Race Theory Have to Say About the Conservative Attacks*, WASH. POST (July 22, 2021), https://www.washingtonpost.com/nation/2021/07/22/critical-race-theory-founders/ [https://perma.cc/58SE-QTJN].

74. For example, the Preamble language to the legislation which established the Maryland Lynching Truth and Reconciliation Commission, House Bill 307, notes "Whereas, Restorative justice requires a full knowledge, understanding and acceptance of the truth before there can be any meaningful

i. Days of Dialogue

Days of Dialogue is a program of city-wide dialogues around pressing and divisive matters affecting the Los Angeles community. The program was started by Los Angeles City Council Member Mark Ridley-Thomas in 1995 in the aftermath of the OJ Simpson trial and acquittal, which polarized people in Los Angeles.[75] Since then, Days of Dialogue has hosted "tens of thousands of people both locally and nationally"[76] in dialogues that have involved topics such as gun violence, child abuse, health care, predatory practices in subprime lending along with race and policing matters.[77]

On August 11, 2015, Days of Dialogue organized city-wide dialogues in various neighborhoods of Los Angeles on the future of policing in commemoration of the fiftieth anniversary of the Watts Rebellion—an uprising in a section of the African American community that resulted from a violent police-civilian encounter.[78] The Dialogue had Ground Rules for participants. Three of those seven rules included "respect." More significantly, these rules were included in a colorful, glossy brochure which also included quotations from a range of perspectives—ranking police officers to a Black Lives Matter activist and an ACLU attorney—on policing. All the quotes, though from very different perspectives, supported the need for improvement in policing practices. In addition, the brochure included graphs depicting the race/ethnicity and ages of people most likely to be killed by the police (white people were not even on the list until the last grouping—number ten—"Average, all ages and races," which was by

reconciliation . . . ." Maryland Lynching Truth and Reconciliation Commission, H.R. 307, 2019 Leg., 440th Sess. (Md. 2019).

75. Brochure, Days of Dialogue: On the Future of Policing, Inst. for Non-Violence in L.A. (2016) (on file with author); Janell Ross, *Two Decades Later, Black and White Americans Finally Agree on O.J. Simpson's Guilt*, WASH. POST (Mar. 4, 2016), https://www.washingtonpost.com/news/the-fix/wp/2015/09/25/black-and-white-americans-can-now-agree-o-j-was-guilty/ [https://perma.cc/Y5QN-HM8W].

76. Brochure, Days of Dialogue: On the Future of Policing, Inst. for Non-Violence in L.A. (2016) (on file with author).

77. *Id.*

78. *Watts Rebellion*, HISTORY (June 24, 2020), https://www.history.com/topics/1960s/watts-riots [https://perma.cc/Y9D7-MVB8].

far lower than all the rest); comparisons between the United States and other nations in the world on civilian killings by the police and guns per capita; along with information that reveal bipartisan support for body-worn cameras by the police.[79]

In addition, it included brief quotes and citations to several websites where research and reports on policing had been conducted. Several citations, including a reference to the Department of Justice investigation into Ferguson, contained statistics revealing disproportionate stops and arrests of African Americans. It also included a short section on "Resources" which included citations to several police reform bills, the "Final Report of the President's Task Force on 21st Century Policing," a study on "Racial Bias Among Millennials" and a YouTube talk by Michelle Alexander, the author of *The New Jim Crow*.[80]

It is key that in this one-day dialogue, the organizers knew that providing some factual basis from which all the participants could anchor their comments, feelings, and opinions would be important. This type of information allowed participants who may live in communities of racial privilege whose experiences with the police are different from those of communities of color to be presented with some of the *facts* of the lives of BIPOC people and the police. It also allowed for the inclusion of voices that advocate for changes in policing practices from within law enforcement departments that are not often portrayed in the media.

ii. Trust Talks

Trust Talks involved a series of five community dialogues organized by a group of clergy located in downtown Los Angeles designed to gather all the stakeholders in the downtown area to have conversations around policing, especially as related to unhoused people and those experiencing drug or mental health challenges. These community conversations were held from April 25, 2015, to March 28, 2017.

The Trust Talks were organized to include community dialogue along with the presentation of factual information related to the topic. For example, in Trust Talk II, Professor Kelly Lytle Hernandez, a prominent historian and abolitionist at UCLA, spoke to the group about the history of

79. *Id.*
80. *Id.*

Black and Brown policing in Los Angeles.[81] Participants were provided with an accurate, if too often untold, history of race in our own city to anchor our dialogue on the possibilities we might have for our future. In Trust Talk III, Mollie Lowery, one of the founders of Los Angeles Men's Place (LAMP), a program providing permanent supportive housing and complementary social services for both men and women, spoke on the conditions for unhoused people and those with mental illness living on the streets. Also presenting was Dr. Luann Pannell, the Director of Education and Training for the Los Angeles Police Department.

As can be seen by these examples, participants—the facilitators and the "parties," the community members made up of residents, business owners, activists, and police officers—were not left to imagine or rely on media reports on the facts of the history or contemporary conditions around race or homelessness or policing. People were anchored in facts from which their perceptions, feelings and individual experiences might be measured.

Were these injections of facts successful? Obviously, Los Angeles has not resolved racism in policing nor solved our homelessness problem nor provided sufficient mental health and drug rehabilitation services for all who need them.[82] But to demand that the issues be resolved to claim success for these kinds of dialogues which include factual information for the participants, is to return to the idea that "settlement" is the key measure for what makes any mediation a success. As we take another look at our practices, we can see that our attachment to settlement has in some cases actually undermined some of the very values we have claimed for

81. The author attended the Trust Talks discussed. Professor Kelly Lytle Hernandez is considered to be one of the leading experts on race, immigration, and mass incarceration. She is an award-winning author of several books: Migra! A History of the U.S. Border Patrol (first significant academic history of the enforcement organization) and City of Inmates: Conquest, Rebellion, and the Rise of Human Caging in Los Angeles (an ambitious study that reconstructs the history of how Los Angeles County built what is today the largest jail system in the United States). In addition to her work as a writer, a professor, and a historian, Kelly Lytle Hernandez is the Director and Principal Investigator for Million Dollar Hoods (a university-based, community-drive research project that maps the fiscal and human cost of mass incarceration in Los Angeles). She has received the 2018 Local Hero Award, the 2019 Catalyst Award, and the MacArthur "genius" Fellowship in 2019. *See Kelly Lytle Hernandez*, UCLA, https://history.ucla.edu/faculty/kelly-lytle-hernandez [https://perma.cc/K5LP-6KQE].

82. It is important to acknowledge positive changes that have occurred in Los Angeles County. As one example, the County has increased funding for community investment projects directed at juvenile justice, mental health, and homelessness. *See LA County Commits to Community Investment – To Match Measure J, Which Court Put On Hold*, L.A. DAILY NEWS (Aug. 10, 2021), https://www.dailynews.com/2021/08/10/la-county-commits-to-community-investment-to-match-measure-j-which-court-put-on-hold/.

mediation.[83] I argue that these dialogues were successful because the participants engaged in positive ways. Difficult conversations were had but the general atmosphere at the conclusions of the facilitations in which I participated was upbeat and optimistic.

CONCLUSION

This Article is part of the much longer project of self-reflection and self-criticism in which we in the dispute resolution community must engage to not only improve the mediation processes we use every day, but also to be a positive part of supporting the difficult conversations that our nation faces at this important historical juncture. I do not offer a specific plan of action for how—in more individually focused mediations with a racial edge—we include additional information about the history of race and white supremacy in America. I do think that as many of us have proposed a deeper interrogation into how mediators are trained should be a part of our planned changes for the future.[84] Including materials not just on implicit bias but also on white supremacy in the training for all mediators is essential. In addition, we still need to increase the diversity of our mediator membership ranks.[85] How these educated and aware mediators will add their knowledge to any particular mediation with a racial edge is another matter. But I do propose that it is essential that we look at what has happened—and should continue to happen—at the community dialogue level and develop approaches that inject such factual information into our mediations where BIPOC people will be disadvantaged by the default to implicit bias and structural racism that we know exists in us and our processes. To avoid this discussion and the changes that are needed is to give up on the promise of mediation—for all parties, especially those in subordinated racial groups—that we have all embraced and promoted for so long.

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83. Press & Deason, *supra* note 17, at 488 (discussing the strengths of transformative mediation in supporting the values of empowerment and recognition over other forms of mediation which are guided by the goal of settlement).

84. *Id.* at 495–96. *See* Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 J.L. & POL'Y 99, 152 (2010); Carol Izumi, *Implicit Bias and Prejudice in Mediation*, 70 SMU L. REV. 681, 691 (2017). *See also* Gunning, *supra* note 18, at 87.

85. Press & Deason, *supra* note 17, at 482–85 (noting that data on the racial and ethnic characteristics of mediators is "hard to come by" and using some statistics on Florida certified mediators to show low minority inclusion).