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MINORITIES, MEDIATION AND METHOD: THE VIEW FROM ONE COURT- CONNECTED MEDIATION PROGRAM

*Phyllis E. Bernard, M.A., J.D.**

INTRODUCTION

This Article offers a granular, first-person view of cross-cultural dynamics in small claims court mediations in a metropolitan area with a population of one million people. It presents a four-year qualitative study of mediation processes in 125 cases involving minorities, drawn from studies involving about 300 cases. The study suggests three findings related to the long-running debate over the role of race in mediation: (1) minority status in terms of ethnicity, race, or national origin may not matter as much as gender; (2) neither gender nor ethnicity, race or national origin may matter as much as socio-economic class; and (3) a well-constructed, constantly monitored methodology for mediator training and supervision may assure fairness in many small claims cases, so long as the mediation is understood as an adjunct to the judge's role, not as a replacement. This review synthesizes multiple perspectives of case management, academic research and pedagogy as derived from my own experience, but speaks only on my behalf, not the mediation program examined.

For this Article, I reviewed some 300 mediation clinic small claims court analyses presenting law student mediator observations on the theme first published by Professor Richard Delgado and other critical race theorists. Should minorities be discouraged from participating in mediation because they are unlikely to achieve fairness in an informal process moderated by a third-party neutral arbitrator? Should minorities instead look to the formal process of litigation, relying upon the judge to assure fairness?¹

These questions become more than merely academic once those concerned about judicial administration consider access and fairness as a function of the design and funding of case management

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

systems. The “real world” iteration of that academic debate becomes: At what cost are cases diverted from public court rooms presided over by judges to mediations conducted behind closed doors with third-party neutrals? Traditionally, the success of such court-referred mediations is measured in quantitative terms of overhead costs saved and dollar amounts settled.

More difficult to assess is the qualitative success of court-referred mediations, capturing the subjective sense of justice in these out-of-court processes. For thoughtful program designers and users, the issue—particularly concerning persons who appear *pro se*—becomes whether the dynamics of race prejudice outweigh the touted benefits of flexibility and party self-determination?

The confidential nature of mediations generally thwarts attempts to understand the subjective experience of this particular legal process. The usual design of litigant mediation does not allow for the transparency needed to gather research ordinarily available to persons scrutinizing the dynamics of court room processes. Mediation’s inherent opacity leaves scholars and policy-makers with little contemporaneous information about mediation’s ostensible forte: guiding communication between parties in a manner designed to reduce personal conflicts in a litigated matter, thus opening the parties to craft a resolution offering a better (or more enforceable) alternative than the parties believe they would obtain through the judge’s decision.

Various scholarly approaches have been taken to deal with these problems inherent in trying to analyze mediation. Some have developed hypothetical stories to illustrate particular thematic issues.² Another option has been to identify a handful of actual cases, remove identifying names, and use them to illustrate specific theoretical points.³ At the other end of the spectrum we find a scant number of statistical studies, which—by their very nature—offer little insight concerning the ebb and flow of verbal and non-verbal cultural cues, situational context, and contemporaneous

2. See, e.g., Michael Z. Green, *Tackling Employment Discrimination with ADR: Does Mediation Offer a Shield for the Haves or a Real Opportunity for the Have-Nots?*, 26 BERKELEY J. EMP. & LAB. L. 321 (2005) (discussing the scenario of “Walter” used to describe the dynamics of race discrimination in the workplace and the potential for mediation as compared with litigation).

3. See, e.g., Cynthia A. Savage, *Culture and Mediation: A Red Herring*, 5 AM. U. J. GENDER SOC. POL’Y & L. 269, 269 n.1 (1996) (discussing a scenario that demonstrates value orientation in action involving “an actual mediation conducted by the University of Denver College of Law Mediation Clinic . . .”).

awareness of a theoretical framework.⁴ The law student reports summarized in this Article describe a view from the middle ground, drawn from more than 125 cases involving minority parties or mediators. The mediators changed from year to year, as did the parties, but the cross-cultural foci in the mediator reports remained the same. This Article uses these clinical analyses of session dynamics to inform theoretical analysis, rather than the reverse. This review focuses on qualitative empirical experience rather than quantitative empirical measures, and makes no claim to statistical validity.

Part I of this Article provides background information regarding a classic line of debate concerning race and mediation process design. The Article then identifies how the Oklahoma Supreme Court's mediation program has confronted the major objections raised by critical race theorists through court rules that make concern for actual and perceived fairness a cornerstone of the mediator's ethical obligation. To assure that this principle becomes more than mere hortatory language, the court-connected program has institutionalized behaviors designed to curtail prejudice through practical instruction from the following: a standardized court mediator training manual; a court-sponsored process for mediator supervision; continuing mediator education to reinforce program best methods; party feedback on satisfaction with services rendered; and an administrative mechanism offering parties a venue to enforce claims of bias in the mediation process.

Part II begins with an overview of the project design and the mediation clinic where the multi-year analysis was implemented. The student reports analyzed elicited observations testing cross-cultural theories about mediation. Part II summarizes the responses grouped around themes that emerged from the research material. This offers a deeper, richer view than most studies to date, but cannot provide parallel details directly from the parties. Recognizing this limitation, Part II identifies trends in these mediator observations, allowing the "voice" of the participants to speak whenever possible, without jeopardizing anonymity.

Part III concludes with an examination of the preliminary lessons learned in this four-year experiment. These findings indicate new layers of complexity in the evolving structures for court-connected mediation. The alternative dispute resolution ("ADR")

4. See generally Arup Varma & Lamont E. Stallworth, *Participants' Satisfaction with EEO Mediation and the Issue of Legal Representation: An Empirical Inquiry*, 6 *EMP. RTS. & EMP. POL'Y J.* 387 (2002).

field has awakened to the fact that the standard model of mediation assumes a balance of power between the parties, and that this is a false assumption in most small claims court cases, particularly in urban areas. If a court-connected mediation program seeks to be a vehicle for justice, it must consider power imbalance not only in terms of racial or ethnic demographics, but particularly in terms of socio-economic class. Further, court administrations must identify cross-cultural issues broadly and make non-bias a meaningful priority in the selection, training, and supervision of mediators. Lastly, while mediators can be trained to identify and accommodate cross-cultural differences in perception and presentation, the capacity to redress serious imbalances of power due to culture or class requires the active involvement of an attorney or judge.

**I. THE CRITICAL RACE THEORY (“CRT”) CRITIQUE AND
RESPONSE BY THE OKLAHOMA SUPREME COURT’S
EARLY SETTLEMENT MEDIATION PROGRAM**

A. The CRT Critique

1. *The Classic Race-Oriented Critique of Mediation*

In 1985 Professor Delgado cautioned against wide scale adoption of mediation pursuant to a doctrine that privileges peace—court-referred mediation that is ostensibly voluntary—over justice.⁵ This view remains consistent with that of many other scholars during the period examined in this Article, who do not claim a race-oriented critique. If a so-called “multi-door court house” values fairness, court dockets cannot consider mediators to be fungible with judges. Each brings different skills to different cases, and dockets should be managed with recognition of those differences.⁶

5. The coercive dynamics the CRT critique seeks to avoid are described thusly: [T]he risk of prejudice is greatest when a member of an in-group confronts a member of an out-group; when that confrontation is direct, rather than through intermediaries; when there are few rules to constrain conduct; when the setting is closed and does not make clear that “public” values are to preponderate; and when the controversy concerns an intimate, personal matter rather than some impersonal question.

Delgado et al., *supra* note 1, at 1402. The fundamental concern is that a party of “high status” will act out innate prejudices when formalism does not constrain behavior; and an individual of “low status” will be “less likely to press his or her claim energetically.” *Id.* at 1402-03.

6. See generally, e.g., Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood*, 11 OHIO ST. J. ON DISP. RESOL. 297 (1996).

Delgado took this a step further, arguing that if ADR is to grow “consistent with goals of basic fairness,” the growth must be shaped according to measures that look primarily to the potential for racial prejudice.⁷ Race was deemed sufficiently pervasive and invidious as to overshadow most other considerations.⁸ To raise awareness about the need to address racism in proposed multi-door court house projects, Delgado urged that areas of law and types of ADR be grouped to identify where “the dangers of prejudice are greatest.”⁹ Those cases should be directed solely “to formal adjudication” on the assumption that only a judge working with attorney advocates speaking on behalf of minority parties can protect against racism.

Delgado acknowledged the possible existence of cases where the risk of racial prejudice might not be “so great as to require an absolute ban.” Still, he argued that “checks and formalities must be built into ADR to ameliorate those risks as much as possible.”¹⁰ Then and now, this classic race-oriented critique posits that formal adjudication offers mechanisms of civil discovery, long-arm jurisdiction, and discovery administered through trained judicial temperament that “may equalize power and opportunity among litigants.”¹¹ Yet, simultaneously, CRT challenges the American trial system as being fundamentally biased against racial minorities.¹²

Delgado’s article noted a vital limitation that he and subsequent others have relegated to the sidelines of the debate. In his comparison of formal adjudication procedures with mediation process dynamics, he considered “only the safeguards afforded parties when their dispute actually goes to trial.”¹³ This assumes no safeguards exist for the overwhelming majority of cases that, as Delgado acknowledges, “do not go to trial, but are settled” and indeed Del-

7. Delgado et al., *supra* note 1, at 1404.

8. In the book *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* (Juan F. Perea et al. eds., West 2d ed. 2007) [hereinafter *RACE AND RACES*], edited in part by Prof. Delgado, an excerpt questions whether the flexibility and individualized justice of mediation are well-adapted to the best interests of minorities. *Id.* at 1077-82 (citing Delgado et al., *supra* note 1, at 1387-91, 1400-04). The excerpt frames the issue as one of overbearing cultural prejudice, tending to suggest few possibilities for ameliorating or minimizing the risks of racism in these out-of-court settings. *Id.*

9. Delgado et al., *supra* note 1, at 1404.

10. *Id.*

11. *Id.* at 1400-01.

12. This is the overriding theme of *RACE AND RACES*, *supra* note 8.

13. Delgado et al., *supra* note 1, at 1367 n.65.

gado condemns settlement negotiations as “relatively unguided and incapable of promoting public goals of the law.”¹⁴

2. *The Jurisprudential Debate:
Micro & Subjective vs. Macro & Objective*

Delgado is far from alone in this particular critique of ADR. Contemporaneously with the publication of *Fairness and Formality*,¹⁵ Professor Owen Fiss cautioned that ADR has the long term potential to weaken the public institutions of justice. Fiss’ *Against Settlement* built a lasting theoretical framework to assess the balance between private ordering and public goals,¹⁶ which Delgado addresses briefly but does not incorporate in some of the most important ways.¹⁷ Delgado ignores the compelling fact that the array of procedures both he and Fiss argue for in public adjudications only come into play when parties have sufficient financial resources. This, by definition, excludes most of the low status parties Delgado ostensibly seeks to protect.

The overarching debate represents a tension in American jurisprudence. As alternatives to court room litigation have grown, concerns about the eventual status of the structure of law may increase. Does the private ordering of mediation undermine the public function of the law?

A macro interest in the system as a whole requires that law be interpreted and applied in public venues using formalized, predictable structures. The judiciary’s pronouncement of legal principles in an open forum sets and affirms precedents, assuring the rule of law. Thus, if common law veers too far out of line with the will of the people, as articulated through statutory law, the legislative branch can formulate suitable amendments. Similarly, law made in the open venue of a courtroom carries the enforcement powers of the state, requiring compliance irrespective of a party’s personal preference. Such compulsion may prove essential in order to protect the interests of unpopular or less powerful parties. It can also be crucial to execute changes in social policy where the law articulates a change in acceptable conduct. Hence, behaviors that formerly were marginally tolerated or merely admonished as moral misconduct, such as sexual harassment, become subject to legal consequences.

14. *Id.*

15. *See generally id.*

16. 93 Yale L.J. 1073 (1984).

17. Delgado et al., *supra* note 1, at 1398-99.

Paradoxically, this objective vision of the law's potential often collides with the subjective needs of the parties; even, or most especially, parties lacking the financial resources to access the grand system of justice described in the preceding paragraph. Although the system has been worked and re-worked to protect the interests of the less powerful members of society, that same class status makes it more difficult for them to afford the attorney representation necessary to receive the benefits of formalism. The individual's needs may revolve around a subjective sense of fairness, based on the dignity with which they were heard and whether the proceedings resulted in a pragmatic solution to their problem.

These two perspectives need not be wholly at odds with each other. The rule of law can play a role on the micro level, providing a less powerful party leverage such a party would otherwise lack. The crucial component is knowledge: the parties must know what protections the law affords and what documentation is required to substantiate claims or defenses under the law. While the mediated settlement may not be expected to conform to the strictures of the law, the law nevertheless provides appropriate guidance when parties' concepts of moral conduct are misaligned.

How do parties gain this pivotal knowledge? Through the literacy afforded by membership in a higher socio-economic class, or by seeking counsel from attorney or non-attorney sources concerning the law. An alternative is to structure the mediation program to function not as a replacement for the judge, but as a complement to the judge's active presence. Thus, when parties or the mediator have reason to believe the mediation process can no longer render even subjective justice, the case returns immediately for adjudication.

B. The Early Settlement Mediator Model: A Complementary Function

1. A Division of Labor in Small Claims Court

The title "small claims" belies the impact of the legal dispute on the lives of the parties involved. The jurisdictional limit for small claims court in Oklahoma is \$6000.¹⁸ Matters typically include the termination of a lease, garnishment of wages, or collection of debts by a personal or corporate creditor. Many litigants teeter on the edge of bankruptcy or homelessness, depending on the outcome of the court action.

18. OKLA. STAT. ANN. tit. 12, § 1751A(1) (West 2007).

Delgado relies heavily upon the trial rules of evidence and civil procedure to protect the rights of parties and to ensure fairness in the litigation process. However, most small claims courts nationwide do not apply rules of civil procedure or evidence, and most parties appear pro se. Once the alleged protections of procedure are removed, leveled by dint of the trial venue, the only significant remaining difference is the third-party neutral.

Delgado relies upon the judge's "professional position" to exert "internal constraints" that will limit expressions of bias or prejudice.¹⁹ His support for trial over mediation rests upon the assumption that a judicious, objective temperament develops over time, reinforced by the monitoring force of appellate review. While some judges surely meet the aspirational standards described by Delgado, there are few if any systems in place to assure this as a matter of process in most jurisdictions.²⁰

What difference do the status and training of the third-party neutral make in small claims court cases? The Oklahoma model suggests that both the mediator and the judge have roles to play, in conjunction with each other.

In mediation, parties present their arguments to each other through the mediator who engages in a formalized style of communication. This stylized communication elicits from parties their subjective perceptions of the dispute, which may differ significantly from the legal captioning of the matter. Mediators are trained to facilitate the exploration of feelings underlying the documented facts, insofar as those feelings impact decision-making.

The mediation often focuses on culturally framed issues of relationships—respect and morality—that are typically out of place in a trial setting. The mediator facilitates the development of a pragmatic resolution based on the parties' expressed needs and abilities, which may or may not align with strict expectations of the law.²¹ Under the CRT view articulated in *Fairness and Formality*, a mediation that strays from the strictly defined legal issues simply

19. Delgado et al., *supra* note 1, at 1368-69.

20. Delgado admits that the Code of Judicial Conduct provisions permitting a judge's impartiality to be challenged are "invoked sparingly," reserved for cases demonstrating "the more extreme instances of judicial bias." *Id.* at 1369.

21. An important skill taught to mediators is to help parties "[i]dentify other sources of meeting needs" which "may not be readily apparent to the parties," for example "trade-offs such as work for money" or the "[t]rade [of] something of value for money owed." STATE OF OKLAHOMA ALTERNATE DISPUTE RESOLUTION SYSTEM, MEDIATION TRAINING MANUAL AND RESOURCE GUIDE, SUPREME COURT OF OKLAHOMA 46 (1994) [hereinafter ADRS TRAINING MANUAL].

invites victimization of the minority party by the majority party by opening the door to personal, racial aggression.²²

In a trial the parties present their case directly to the judge for a ruling. Documented facts carry the case, largely uninfluenced by the cultural issues open for discussion in the mediation session. The comparatively restrictive trial format favors the party who can articulate a logical, linear story in a concise format. Time allotted for party presentations is severely limited due to crowded urban case dockets.²³

The cases analyzed in Part II suggest that the combination of having both a mediator and an available judge offers empowering options for parties. Whether the case is ultimately decided by the judge or not, the mediation provides an on-site, informal conference between the parties before they stand in front of the judge. As described by some judges when introducing the Early Settlement mediation option, the session provides parties an opportunity to speak, listen, and exchange documents in order to gauge for themselves the strengths and weaknesses of their positions. The mediator assists in developing mutually agreeable terms for settlement, oftentimes including a workable payment schedule for debts.

Upon termination of the mediation—at whatever stage—the parties again appear before the judge. They may present the judge with their own settlement terms for approval, to be entered as the judgment of the court. Alternatively, the judge will conduct an extremely limited hearing and decide for one party and against the other, based largely upon written documentation, with little or no witness testimony and very limited time allocated.

Which is better when the case involves minorities? It varies from case to case, party to party, circumstance to circumstance, as described in the reports that follow. But, at a minimum, having the mediator and judge serve complementary roles assures process integrity typically unavailable to the pro se party appearing solely in either setting.

22. Delgado et al., *supra* note 1, at 1387. The concept that mediators would be trained to manage, deflect, and curtail the venting of “hostile or denigrating attitudes toward members of minority groups” has not taken traction. *Id.*

23. Mediation allows parties “to tell their stories even if some pieces of the stories would be considered immaterial, irrelevant, and hearsay in a courtroom.” Joan R. Tarpley, *ADR, Jurisprudence and Myth*, 17 OHIO ST. J. ON DISP. RESOL. 113, 119 (2001). In cases where values and beliefs are at issue—more obviously than money—parties’ communications can become explosive as “turf, ego, control and reputation” come to the fore. *Id.* at 122. These values and beliefs are shaped by culture writ large: ethnicity, religion, gender, geography, education, age, and class. *Id.*

2. *Institutionalization of Fairness in Mediation:
The Early Settlement Method*

Before discussing the attributes of fairness in mediation, a common definition of mediation must first be established, distinguishing it from arbitration or settlement negotiations. Delgado uses the definition, “a neutral, noncoercive, nonadversarial third party coordinates and facilitates negotiations between disputants.”²⁴ This third party is the mediator, who only encourages settlement, while “the parties retain ultimate decision-making authority.”²⁵

This definition comports almost word for word with that set forth in the Oklahoma Dispute Resolution Act (“ODRA”), which establishes the statewide Early Settlement Mediation Program.²⁶ Court rules implementing the statute place the principle of party self-determination as the lodestar to gauge the mediator’s ethical conduct: “Those who act as mediators must be dedicated to the principle that all disputants have a right to negotiate and attempt to determine the outcomes of their own conflicts.”²⁷ The mediator has an ethical obligation to encourage active participation by the parties,²⁸ never to force a resolution,²⁹ nor to make decisions on behalf of the parties.³⁰ To maintain impartiality³¹ and avoid giving legal advice,³² the mediator must “allow parties to independently assess their legal position and/or seek the assessment of an attorney.”³³

More than 100 pages of the Oklahoma State Mediation Training Manual concern a variety of specific behaviors designed to assure party participation and informed decision-making in line with the Code of Conduct.³⁴ The training and selection process evaluated mediator candidates based upon their observed skills in demonstrating the use of these behaviors, stage by stage throughout the

24. Delgado et al., *supra* note 1, at 1363.

25. *Id.*

26. *See generally* OKLA. STAT. ANN. tit. 12, § 1802 (West 2007).

27. Rules and Procedures for the Dispute Resolution Act, OKLA. STAT. ANN. tit. 12, app. A, § A(2) (West 2007).

28. *See id.* § B(1)(b)(1) (“The mediator urges that the parties agreeing to mediation take an active role in the mediation process.”).

29. *See id.* § B(1)(d)(2) (“The mediator never forces parties into reaching a settlement.”).

30. *See id.* § B(1)(d)(3) (“The mediator never makes decisions for parties.”).

31. *See id.* § B(2)(c)(1) (“The mediator shall maintain impartiality at all times.”).

32. *See id.* § B(2)(d)(1) (“The mediator shall not offer legal advice to parties.”).

33. *See id.* § B(2)(d)(2).

34. *See* ADRS TRAINING MANUAL, *supra* note 21, at 1-69, 9-0 to 9-52.

mediation session.³⁵ This set of behaviors standardized the type of mediator services provided by the court's program and informed the "Seven Parameters of Mediator Performance" used for mediator self-assessment and program supervisor reviews.³⁶

Some see standardization as stifling the full expression of the mediator's personality, however, it assured that mediators operating under the court's supervision provided a dependable and understandable method of dispute resolution that did not hinge upon the idiosyncrasies of an individual mediator. The standardized methodology, as taught in the training manual, served as a quid pro quo for the limited mediator immunity provided under the ODRA. Mediators whose behavior conformed to the ethics code and imple-

35. Upon completion of each stage in the five-stage process of mediation, each candidate was observed in a role play, using former Early Settlement cases as the fact situation. *See id.* at 64-69. Certified Early Settlement mediators served as coaches, evaluating candidates based upon a series of factors, including "[d]emonstrated [i]mpartiality and [n]eutrality," "encourag[ed] [p]arty [p]articipation in [r]eaching [s]olutions," and "us[ed] [r]esources/[r]eferrals as [a]ppropriate." *Id.* at 66-68.

36. *Id.* at 66-68. These parameters include:

(1) "Investigation: Effectiveness in identifying and seeking out relevant information pertinent to the case." *Id.* at 9-47. The mediator is expected to "vigorously [seek] to understand facts, reasons and interests behind initial positions and counter-proposals of the parties." *Id.* An unacceptable investigation would be characterized by the mediator having asked "few or mostly irrelevant questions" or having failed to "explore the settlement possibilities for both sides on most or all issues." *Id.*

(2) "Empathy: Conspicuous awareness and consideration of the needs of others." An effective mediator must have "avoided appearance of bias or favoritism for or against either party." *Id.* The mediator should have "showed recognition of importance of problems and issues raised by others" and "concern for others' rights in making decisions." *Id.* At the opposite end of this spectrum, the mediator who "saw others' problems as of their own making and did not want to be bothered" would be ineffective and at risk of being charged with bias. *Id.* at 9-48.

(3) "Inventiveness and problem-solving: Pursuit of collaborative solution, and generation of ideas and proposals consistent with case facts and workable for opposing parties." *Id.* at 9-48.

(4) "Persuasion and Presentation Skills: Effectiveness of verbal expression, gesture, and 'body language' (e.g., eye contact) in communicating with parties." *Id.* at 9-49 (parenthetical in original).

(5) "Distraction: Effectiveness at reducing tensions at appropriate times by temporarily diverting parties' attention." *Id.* at 9-49. At the high level of effectiveness, the mediator would demonstrate an "acute sense" when tension was rising, and would have a "tactic ready to disarm [the] situation." *Id.* at 9-49. An ineffective mediator would have "[m]ade little or no effort to provide perspective on the parties' problems or to engineer lighter moments." *Id.* at 9-50.

(6) "Managing the Interaction: Effectiveness in developing strategy, managing the process, coping with professional representatives." *Id.* at 9-50.

(7) "Substantive Knowledge: Expertise in the issues and type of dispute." *Id.* at 9-50.

mented guidelines of the training manual could not be sued in civil court. However, failure to comply with the standards designed to implement the ethics code could result in an administrative hearing to sanction the mediator, along with the loss of statutory immunity.³⁷

In terms of a subjective sense of justice, the formalization of training, format, and supervision provided a sense of ritual that rendered the mediation sessions less formal than the court room, yet never casual. Of greatest value, the institutionalized principles of fairness provided grounds for a reasonable expectation that parties would not only have an opportunity to speak, but also to be heard in a dignified manner.

These principles allowed Early Settlement mediators to achieve much of the impartiality—both real and apparent—that critics sought in judges.³⁸ The court's training manual pursued the issue of bias and personal awareness with a specificity that surpassed the guidance of the Model Code of Judicial Conduct.³⁹ The program's oversight of mediator conduct created a mechanism for informal and formal assessment of mediator adherence to these parameters in ways that were inconceivable for judges.

3. *Identifying Behaviors Linked to Bias and Prejudice*

No legal system can enter an individual's mind or soul to monitor bigotry; observable conduct must serve as the next best evidence. Still, behavior and its interpretation remain vulnerable to the parallax of perspective and cultural context. As a document of the court, the ADRS Training Manual identified outward behaviors as parameters of mediator effectiveness, citing dynamics of individual human communication rather than making assumptions about group norms.⁴⁰

The court's training did not ignore culture and its potential for creating bias among all involved. Verbal and non-verbal communi-

37. OKLA. STAT. ANN. tit. 12, app. C, § E (West 2007).

38. These behaviors included the following factors used in training, certification, and continuing mediator education: Did the mediator build “[t]rust and [r]apport”? ADRS TRAINING MANUAL, *supra* note 21, at 65. Did the mediator take time to assess the readiness of the parties to participate in mediation? *Id.* What non-verbal communication was helpful or harmful? *Id.* Did the mediator engage in active listening throughout the session? *Id.* at 66. Did the mediator properly probe to collect facts? *Id.* Did the mediator identify the key issues and concerns, as the parties understood them? *Id.* Did the mediator recognize the emotions of the parties and deal with them in a professional way? *Id.* at 68.

39. OKLA. STAT. ANN. tit. 5, app. 4, canon 3, § (B)(4) (West 2007).

40. *See generally* ADRS TRAINING MANUAL, *supra* note 21.

cation were conceived as “signs” that are taught from birth throughout life,⁴¹ and culture was seen as being influential, just as “exacting” a teacher as parents.⁴² The mediator was asked to recognize that the neutral’s own learning can be limited by the neutral’s “culture and family-induced . . . preconceived notions of how things are”⁴³ The mediator was cautioned that these “prejudices” and “die-hard” opinions can “seriously bar” communication with someone who recognizes different “signs” derived from “social classes” and “mores and folkways.”⁴⁴

The otherwise ineffable quality of judicial temperament, so valued by Delgado, can—to an extent—be taught to qualified mediators. Oklahoma’s standards for court mediators required “conspicuous awareness and consideration” of parties’ needs, demonstrated through tone and timing in communication. Mediators were taught to avoid the appearance of bias or favoritism by asking “tough questions” but “in an empathetic manner.”⁴⁵ That manner included listening “politely to others and responding with understanding.”⁴⁶ The unbiased mediator will not “antagonize” the parties, but will instead convey “appreciation of parties’ priorities.”⁴⁷

By contrast, in a session that failed the standards for mediator conduct, the mediator asked “misleading, loaded or unfair questions exhibiting bias.”⁴⁸ Such bias could be found in “oppressive questioning to the disadvantage of one of the parties.”⁴⁹ A mediator communicating in ways open to charges of prejudice would have broken into discussions “abruptly” in order “to challenge” the participants.⁵⁰ When warnings arose in the mediation session, the biased mediator disregarded those signals.⁵¹

Most urgent among possible warning signals were indicators that the will of any party was overborne in the session.⁵² The Code of

41. *Id.* at 37.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 9-47.

46. *Id.*

47. *Id.* at 9-48.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. Immediately following the presentation of the Code of Conduct, the court’s training manual for mediators summarizes the fundamental principle as follows: “Establishing Disputant Equality is the single most important action you must take in a mediation session.” *Id.* at 24.

Professional Conduct for Mediators states that “the mediator suspends or terminates mediation when it appears that continuation would harm or prejudice any party;”⁵³ if a party is “unable or unwilling to make an effort to meaningfully participate in the mediation process;”⁵⁴ or if a party “appears to be intoxicated, irrational or exhibits impaired judgment.”⁵⁵ The mediator was encouraged to use the separate session, or caucus, to assess the emotional dynamics of communication, the participants’ level of trust and safety in the mediation process.⁵⁶

Early Settlement program directors in each regional office regularly monitored the results of mediation. During each session, the mediator solicited feedback from the parties on any behaviors that may have caused discomfort, especially any negative behaviors of the mediator herself. After the mediation closed, the program office solicited feedback, conducting telephone interviews with parties to assure satisfaction with the services provided. If a party believed the mediator exhibited bias during the mediation, the party was invited to participate in the court’s complaint system against mediators, or to speak with the program director to correct, retrain, or terminate the mediator’s services.

Do civil courts offer the same selection, training, and monitoring for judges? In a word, no.

II. CROSS-CULTURAL MEDIATION CASE ANALYSIS

A. A Court-connected Mediation Program as a Law School Site for Pedagogy and Research

Over a ten-year period, law students who were trained, certified, and supervised by the Administrative Office of the Court for the Oklahoma Supreme Court served as the “mediator for the day” for small claims court judges throughout the Oklahoma City metropolitan area. The regional office for the central three-county area, Early Settlement Central (“ESC”), operated under contract with the Oklahoma City University School of Law (“OCU”). In the period under review, ESC carried an average annual mediator roster

53. OKLA. STAT. ANN. tit. 12, app. A, § B(1)(e)(1) (West 2007).

54. *Id.* § B(1)(e)(2).

55. *Id.* § B(1)(e)(4).

56. The ADRS Training Manual advises mediators to separate the parties when “destructive comments may only serve to further polarize the disputants.” ADRS TRAINING MANUAL, *supra* note 21, at 3-2. The separate session is intended to create “a much safer environment in which the exploration of settlement offers can be done with minimal risk.” *See id.* at 3-2, 9-40 to 9-41 (defining “impasse”).

of approximately sixty attorney and non-attorney mediators from the local community, in addition to six to ten OCU law students annually who became court-certified mediators as part of the mediation clinic.⁵⁷ Only small claims court cases involving mediation clinic students are included in this Article.

From 2000-2004, the mediation clinic required law students to delve more deeply into their work. In addition to providing the standard report to the court's program on each case, the students were required to prepare, for research and pedagogy purposes, a written analysis of personal interactions in mediations they observed or conducted. These analyses were designed not to elicit statistical data on outcomes, but rather to elicit perspectives on the dynamics of the process. The project sought qualitative, not quantitative, information.⁵⁸ Standardized questions invited reflection on major themes in the scholarly literature on mediation, comparing theory with practice as experienced in each mediation session. Mediator responses were amplified by weekly classroom discussions, which I led as both clinic instructor and director of ESC.

Further queries quickly emerged. Fairness and justice as experienced by the participants may be highly subjective, nearly ontological concepts. But court procedures prohibit the mediation program from soliciting that subjective party perspective when the session has immediately ended. This was sought in telephone evaluations thirty and sixty days after the mediation. As occurs frequently with any telephone delayed survey, response rates were limited and the surveys were generally not illuminating regarding the details of participants' personal interactions in the session.⁵⁹

The failure to obtain complex information from telephone delayed surveys compelled a research design relying upon the ob-

57. See Phyllis E. Bernard, Early Settlement Central Mediation Program Annual Reports (1998-2001, 2003-2004) (on file with author).

58. The project sought to identify and articulate aspects of what is commonly referred to as "culture." Mediation clinic students were encouraged to consider "cross-cultural" factors in the broadest possible way beyond typical categorizations. Geography—even within the same city—can create or reinforce different cultures based upon patterns of settlement. "Value orientations" ostensibly reflect a culture; however, age, class, employment, and even a history of military service can create sub-cultures of enough significance to render cultural labels irrelevant. See Savage, *supra* note 3, at 272-74.

59. Nevertheless, each telephone evaluation specifically questioned parties concerning perceptions of fairness or bias by the mediator. During the 1995-2005 period in which this author directed the program, ESC received no complaints concerning a law student mediator. Affidavit of Sue Darst Tate, Director, Alternative Dispute Resolution System, Administrative Office of the Courts for the Oklahoma Supreme Court (Sept. 28, 2007) (on file with author).

servations of the mediator candidate (during their post-training mentorship) and mediator (after certification). In turn, the quality of responses depended upon each individual's capacity to confront challenges in self-awareness and situational awareness. Thus, the four-year experiment evolved into a close study of unconscious personal bias, institutional racism, sexism, and socio-economic class.

This project was not intended to prove or disprove any particular theory. Rather, the project sought contemporaneous observations, piled layer upon layer, to indicate whether the standard theories should be modified. The result was a nuanced refinement of those theories as crafted from the voices of the mediation sessions.

It was difficult to extract from mediations sufficient information to monitor the need for changes in methods, while honoring the confidentiality of all sessions. The raw mediation clinic analyses—both as written and as amplified in classroom discussion—provided detailed information that cannot be shared publicly. Information gained in my capacity as program director also informed this scholarship. Unfortunately, the sources cannot be cited in the standard methodology of legal scholarship due to confidentiality restrictions. This might reduce the value of the findings for some readers, but may represent an acceptable trade-off to permit a textured view of mediation processes involving minorities.⁶⁰

B. Case Analyses

1. *The Ontology of Minority Status*

Who counts as a racial or ethnic minority in the United States? This ostensibly simple question is far more complex than the multiple choice boxes of the U.S. Census Bureau.⁶¹ Traditional, rigid

60. All of this work was conducted under the auspices of the Early Settlement Advisory Board and the leadership of Sue Darst Tate, Director of the Alternative Dispute Resolution System for the Administrative Office of the Courts for the Oklahoma Supreme Court. *See id.* Without the mediation clinic students, attorney and non-attorney mediator mentors, ESC staff, and our small claims court judges, the contributions offered by this project would not have been possible. This author assumes full responsibility for the project design and execution, including any errors or misinterpretations.

61. Amongst other changes, the 2000 Census significantly altered the methodology for gathering data on race, ethnicity, and ancestry; for the first time, people could mark one or more boxes as to what race, ethnicity and ancestry a person considers himself or herself to be a part of, including such options as: (1) White; (2) Black, African American, or Negro; (3) American Indian or Alaska Native; (4) Asian Indian; (5) Native Hawaiian or Other Pacific Islander alone; (6) Chinese; (7) Some other race. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, UNITED

categories of ethnic and racial identification seem especially inapplicable in metropolitan areas with (1) fluid first or second-generation immigrant populations and (2) increasing numbers of interracial families.

Racial categories are subjective, not only according to the outer experience of the observer, but also according to the inner experience of the observed. Particularly when one parent is European-American and the other parent is of Native American, Hispanic, African, or Asian descent, “race” becomes a matter of ontology. The pre-2000 Census Bureau mentality required a person of mixed heritage to select one race or another. What if the person has chosen to self-identify demographically as part of the white majority but according to skin color, hair texture, and eye color, this person appears to be a minority?⁶²

Approximately one-third of the mediators in this study appeared to be of mixed ethnic heritage—not classically “white.” This study analyzed the dynamics of these mediations according to the most likely perception of the parties: that the mediator’s “race” was mixed, and therefore minority. The parties themselves were not separately queried concerning racial or ethnic identity. Again, inferences were drawn from stated self-identification and physical appearance.

2. *Self-awareness and Situational Awareness*

The mediator reports analyzed in this study test the depths of a mediator’s ability to reflect upon his or her identity, personality traits, and value systems as each is continuously modified by the ethics rules, mediation protocols, and monitoring by the court pro-

STATES CENSUS, LONG FORM QUESTIONNAIRE, 3, available at <http://www.census.gov/dmd/www/pdf/d02p.pdf>. The 1990 Census only allowed reporting one race option, not a choice of two or more different options. See U.S. Census Bureau, Major Differences in Subject-Matter Content Between the 1990 and 2000 Census Questionnaires, Nov. 23, 1999, <http://www.census.gov/population/www/cen2000/90vs00.html> (explaining the differences between the 1990 and 2000 Census questionnaires).

62. Findings of the Human Genome Project present major challenges to the racialism on which America has functioned since its inception. See Human Genome Project Information, Minorities, Race, and Genomics, http://www.ornl.gov/sci/tech/resources/Human_Genome/elsi/minorities.shtml (stating that “no consistent patterns of genes across the human genome exist to distinguish one race from another.”) (last visited Nov. 19, 2007). Others have similarly argued that race is a social construct and an illusion. See generally Ian F. Haney Lopez, *The Social Construction of Race*, 29 HARV. C.R.-C.L. L. REV. 1 (1994), reprinted in *CRITICAL RACE THEORY: THE CUTTING EDGE*, 191-203 (Richard Delgado ed., Temple Univ. Press 1995) [hereinafter *THE CUTTING EDGE*]; Ian F. Haney Lopez, *White by Law*, in *THE CUTTING EDGE*, at 542-50.

gram. Each individual mediator's capacity to express self-awareness at all levels, concerning not only demographic dynamics, differed. With regard to cross-cultural issues, responses ranged from the breezy, non-specific conclusion that "race or ethnicity played no discernible role,"⁶³ to responses where the mediator noted that the perceived ethnicity of the participants seemed significant, based on verbal and non-verbal cues.⁶⁴ Some of the most helpful but infrequent responses noted differences in ethnic identity but acknowledged that although the mediator concluded race played no discernible role, this could stem from the mediator's lack of awareness.

This latter type of response requires a more complex level of self-awareness. Paradoxically, expanding introspection moves the mediator past awareness of his or her own values toward reading subtexts and interrelationships among all participants in the session. Such high level situational awareness can be daunting for newly trained mediators. Hence, mediation clinic responses ranged from a shallow, perfunctory denial of cultural dynamics in any form (hypo-awareness)⁶⁵ to an undefined, non-verbalized sense that the parties were dissatisfied that the mediator was not white (hyper-awareness).⁶⁶

63. The standard response of both majority and minority mediators alike to the question of whether race, ethnicity, or national origin played a discernible role was that it did not. *See, e.g.*, Written Synthesis No. 5, Mediation Clinic, Oklahoma City University School of Law (Spring 2001) (on file with author). This was the written response in an estimated 90% of cases involving at least one minority mediator, party, or witness.

64. Often, the ability to read cues depends on the mediator's breadth of cultural experience. Thus, a minority female mediator in a 2001 collections case observed: "The Initiator was white and the Respondent was black. The role of race was not obvious in the session. However, the possibility exists that the Respondent's defeatist attitude was somehow related to race." Written Synthesis No. 14, Mediation Clinic, Oklahoma City University School of Law (Fall 2001) (on file with author). In the mediation, the Respondent explained his extenuating circumstances, which Initiator acknowledged and offered to modify the payments to conform with Respondent's changed circumstances. *Id.* Respondent ultimately declined to settle due to a pervasive sense of distrust and victimization as "[h]e kept saying, 'I'm gonna lose anyway.'" *Id.* Note that additional behaviors and demands indicating racial distrust have not been included to preserve anonymity of the parties.

65. *See, e.g.*, Written Synthesis No. 5, *supra* note 63 (where the author's responses to questions on the form routinely reduced the analysis to mere shorthand such as "N/A", meaning not available or no response).

66. For example, in a 2002 consumer debt dispute, a black male mediator conducting one of his first cases without a mentor present wrote: "I can't really put my finger on it, but I got the sense that neither party dealt with African-Americans much in the past, however I cannot readily identify any impact that my race played—they did reach an agreement." Written Synthesis No. 8, Mediation Clinic, Oklahoma City

Most student mediators in this study began the semester absorbed in the task of managing their newly acquired skills, while operating under the watchful eye of the certified mediator assigned to them. Further, each mediation clinic student anticipated his or her work would be reviewed weekly by his or her professor and classmates as part of a two-hour deconstruction of theory and practice. Some mediators found it difficult to express introspection on paper; thus, the written self-analyses of certain mediators remained opaque throughout their eight-month service. Yet, in-class oral deconstruction of the cases revealed insights deepening the students' practice. The most graphic, articulate student analyses, offering the clearest sense of a party "voice" from the sessions have been included here. Quoted excerpts from written syntheses are representative of these oral analyses conducted in class by additional law student mediators.

For most law students studied, well-moderated situational awareness grew as they gained more experience conducting mediations. This accelerated and coalesced in the clinic's second semester, when students began to write papers comparing their case experiences with scholarly writings on topics such as the appropriateness of mediation in lieu of litigation,⁶⁷ power imbalances in mediation,⁶⁸ the role of the attorney in mediation,⁶⁹ and gender and

University School of Law (Fall 2002) (on file with author). One month later, the mediator's confidence had grown to a level where in mediating a property dispute he wrote: "They were all white. I don't see how my race influenced anything." *Id.* Four months later, this same mediator opened to the possibility that there could still be subtle dynamics at play: "I saw no impact on the mediation that race could have played. I'm not white of course, but I don't see how it made a difference to the participants who were all white." Written Synthesis No. 8, Mediation Clinic, Oklahoma City University School of Law (Spring 2003) (on file with author). One should note, however, that in each case the parties expressed a willingness to participate in mediation and a desire to cooperate with each other and with the mediator.

67. Fiss, *supra* note 16, at 1075.

68. See Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 *BUFF. L. REV.* 441, 445-46 (1992) (discussing mediation's tendency to place women in inferior bargaining positions, thereby disempowering them); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 *YALE L.J.* 1545, 1550 (1991) (arguing that mediation does not embrace a woman's relational position and life experiences).

69. See Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 *MINN. L. REV.* 1317, 1394 (1995) (arguing that lawyers should participate actively in negotiated settlement conferences or mediation on behalf of their clients in order to rebalance power and protect their client's interests in ways the mediator ethically cannot); Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 *S. TEX. L. REV.* 407 (1997).

race in mediation.⁷⁰

3. *The Judge's Power in Framing Mediation Referrals*

The self-analysis report had mediators note with specificity how the case was directed to mediation. Under the ODRA, all Early Settlement mediations are voluntary. A judge can order parties to attend, but cannot order them to participate, nor to settle. Nevertheless, style and language seemed to have a significant impact on the mediation process.

The judge's introduction of the dispute resolution option, the mediator, and the judge's own assessment of the worst alternative to a negotiated agreement set the tenor of mediations.⁷¹ The judge's tone and manner of referral seemed to have a discernible impact where the third-party neutral was a minority and parties were either white or mixed.⁷²

Judges' styles ranged as follows: (1) directly ordering parties to mediation, with little explanation of the process; (2) a "bare bones" presentation of mediation as an option, with neither an explanation of the process nor an endorsement; (3) an explanation that mediation allows parties to hand-craft a "win-win" agreement that is mutually agreeable, compared to the more harsh, "win-lose" outcome the judge will mandate; or (4) an endorsement of the mediation process enthusiastically combined with a glowing recommendation of the mediator serving that day.⁷³ Particularly for

70. See generally Penelope E. Bryan, *The Coercion of Women in Divorce Settlement Negotiations*, 74 *DENV. U. L. REV.* 931 (1997) (identifying conscious and unconscious strategies used by divorcing spouses to reduce compliance with legal and ethical duties of support); Delgado et al., *supra* note 1.

71. This was routinely done with even-handed candor concerning the realities of judicial administration. See Written Synthesis No. 3, Mediation Clinic, Oklahoma City University School of Law (Fall 2002) (on file with author) (quoting one mediator's experience of how judges had suggested mediation: "(1) I don't know when I will get to your case; (2) I strongly encourage you to mediate; (3) It's free."). Some judges introduce mediation through wry good humor. See Written Synthesis No. 2, Mediation Clinic, Oklahoma City University School of Law (Fall 2002) (on file with author) (quoting a mediator's description of how the referral to mediation was made: "[O]ne of you will be lucky enough to have your case mediated.").

72. One black male mediator identified this as a pattern, as seen for example in a landlord-tenant case he mediated in 2002: "Race, etc. did not play a major role because the parties were confident in my abilities because Judge [name omitted to assure anonymity] had given me such a good introduction in court." Written Synthesis No. 4, Mediation Clinic, Oklahoma City University School of Law (Fall 2001) (on file with author).

73. The impact of the judge's role cannot be understated, not only in terms of the mediation sessions day-to-day but also in regard to perceptions of program success and value. Judge Wayne Brazil cautions about the dangers of measuring mediation

cases where the mediator was a minority and/or of a different gender or age group than the parties, the fourth category of framing helped shape a positive mediation session. Public statements by the judge that he or she respected the process and the mediator transferred to the mediation session itself.⁷⁴

4. *Transformative Orientation vs. Results Orientation*

The mediator's introduction from the judge elaborates upon mediation both as a process and as an adjunct to the judge's role. Over several years, mediation clinic experiences helped refine the mediator's opening to explain how various judges in the service area routinely describe mediation and its utility. Interestingly, most judges focused less on mediation results, and more on providing a forum for the parties to ventilate personal issues that hinder achieving a lasting resolution. In analytical terms, the process is facilitative with a transformative orientation, rather than evaluative with a results orientation.⁷⁵ The standardized opening also informed parties that the mediator does not report back to the judge.

success by a quantitative approach, emphasizing whether the docket pressure has been reduced through higher settlement rates in mediation. See Wayne D. Brazil, *Should Court-Sponsored ADR Survive?*, 21 OHIO ST. J. ON DISP. RESOL. 241, 265-66 (2006) (describing "settlement obsession" as distorting the role of the mediator, especially private, paid mediators who believe they will not be retained on the court roster unless they "deliver the deals.") (internal quotations omitted).

74. For example, in the period under review, one Judge often introduced mediators in the following style: "The mediators are well trained. They know what they are doing. I am sure you can reach a settlement if you are reasonable with the mediator. If you can't reach agreement you can come back to me for a decision." See Written Synthesis No. 4, *supra* note 72 (quoting from a black male mediator before receiving a 2002 landlord-tenant case involving two white parties).

75. The articulated goals of most small claims court judges included in this study comport with the goals of the transformative model of mediation used in the U.S. Postal Service REDRESS mediation program, designed by Robert A. Baruch Bush, Joseph P. Folger and Dorothy Della Noce. See James R. Antes, Joseph P. Folger & Dorothy J. Della Noce, *Transforming Conflict Interactions in the Workplace: Document Effects of the USPS REDRESS (TM) Program*, 18 HOFSTRA LAB. & EMP. L.J. 429, 430 (2001) (explaining in an analysis of the program that the emphasis generally was "on the qualitative shifts that occur in parties' conflict interaction."). The program noted the same changes in United States Postal Service workers seen by the judges when parties returned after an Early Settlement mediation, whether the case resulted in a full resolution or not. *Id.* As described in the analysis of REDRESS mediations:

Participants often came to the mediation expressing strong emotion, usually anger or fear. Faces were flushed, voices were trembling, strong and harsh words were spoken. Defensiveness was prominent Over time, sometimes quickly and sometimes quite slowly, parties changed the ways they expressed themselves and how they interacted with one another. Voices became calmer and words became less harsh. Participants became aware that

The judges' general preference for mediation as a way to help parties better understand their situation—including how their own actions contributed to the dispute—appeared justified in nearly every case.⁷⁶ Many parties had either not spoken at all before the mediation, or their last communication was months or years prior.⁷⁷ Thus, for such parties the small claims court lawsuit was a means to reinitiate contact. Other parties had never seen the documents shared in the session, and might have been prepared to fashion an agreement once technical differences in accounting or other similar areas had been reconciled. Still others may have declined the mediated settlement because they did not have sufficient time to integrate the new knowledge gained in the session.⁷⁸ Prior con-

the other party experienced the events of the conflict quite differently and that, at least, there was another way to think about past events. Parties began to demonstrate that they understood better what happened and what their current choices were. Body posture changed—participants faced one another and began to interact directly.

Id. at 430, 453-54. As summarized by one small claims court judge who strongly endorsed use of Early Settlement mediation: “When they return to me, they are different people. They are ready to listen. They are ready to accept my judgment.” Orientation of Mediation Clinic Students to Small Claims Court (Aug. 2001) (on file with author).

76. As summarized by Judge Brazil, even in the “relatively small percentage of cases that ultimately could not be resolved by agreement, the ADR process would have helped the parties understand more clearly why they were going to trial—an understanding of considerable value, given the expense and strain that trial entails.” Brazil, *supra* note 73, at 269.

77. For example, in a 2000 service/labor dispute between two white businessmen, the black male mediator noted one of the most important achievements of the session was that the parties “talked to each [other]—which they had not done for almost two years.” Written Synthesis No. 12, Mediation Clinic, Oklahoma City University School of Law (Fall 2000) (on file with author). The mediator, a former federal agency official, believed “too much time had passed between the rise of the dispute and the time of mediation.” *Id.* The difficulty was not only that positions had hardened, but past events were now hazy. *Id.* The original dispute arose from nebulous circumstances, mere hearsay about the quality of repairs done. *Id.* The complaining party had not checked the workmanship personally. *Id.* “Neither party had spoken to each other to try to resolve [the] problems at the time of completion of the work.” *Id.* Neither party was represented by legal counsel, and ultimately relied upon the discussions in mediation to explore the nature of the dispute, just as the small claims court judges routinely advised. *Id.*

78. For example, in a 2001 dispute over auto repairs, the minority female mediator observed that the black female Respondent “felt an imbalance of power. She was very concerned about being taken advantage of.” Written Synthesis No. 7, Mediation Clinic, Oklahoma City University School of Law (Fall 2001) (on file with author). She had previously believed there was a preliminary agreement with the auto mechanic who was the one who initiated lawsuit and was a white male. *Id.* “Once the session began the Respondent had the opportunity to speak and hear what she agreed to and didn’t like it. She changed her mind several times The reputation of auto mechanics’ taking advantage of women was surely in her mind.” *Id.* “[She] was

sultation with an attorney or other specialist in common legal issues could have greatly improved decision-making and fairness.

5. *Party Self-determination Includes the “Right to Be Wrong”*

Parties’ assertions of self determination and the right to have justice served are central to the debate over fairness and formality. If justice is measured primarily by the dollar amount won or lost in mediation compared to the likely outcome in litigation, the answers appear self-evident.⁷⁹ On the other hand, if a system genuinely values a party’s right to have their say, respecting the often non-linear, storytelling styles common to many ethnic cultures and among many women, then the system must acknowledge justice as something more than a monetary award.⁸⁰

At a deeper level aligned with the traditions of many ethnic peoples, justice is a process of human interaction. The most important outcome might be something other than money. A party’s greater need may be respect, including respect from the mediator, adversary, and others who have becoming triangulated in the dispute, such as family members, friends, or co-workers. Thus, the most vital function of the mediation process is to help parties recover or retain their dignity. That is to say, the mediator’s true goal may be to help all involved “sav[e] face.”⁸¹

concerned that the shop took advantage of her by over-charging her for labor costs She didn’t seem to understand the mechanic’s billing procedures.” *Id.* The Respondent declined to settle according to the installment plan negotiated in the mediation. “The Judge found for the Initiator with the entire amount due immediately. The Respondent asked the Judge if they could go back to the mediator—too late.” *Id.*

79. See, e.g., Christine Rack, *Negotiated Justice: Gender & Ethnic Minority Bargaining Patterns in the Metro Court Study*, 20 *HAMLIN J. PUB. L. & POL’Y* 211 (1999) (focusing upon patterns of offers and counter-offers in monetary settlements).

80. Understanding the role or contours of justice in mediation presents a daunting task whether the mediations involve minority parties or not. See Joseph B. Stulberg, *Mediation and Justice: What Standards Govern?*, 6 *CARDOZO J. CONFLICT RESOL.* 213 (2005) (suggesting that party acceptability may not be a sufficient measure of mediation success, especially if the parties are not represented by counsel, or there appears to be a significant imbalance in capacity to give knowing, informed consent).

81. Written Synthesis No. 11, Mediation Clinic, Oklahoma City University School of Law (Fall 2002) (on file with author). In a 2002 neighbor dispute, the black male mediator observed that respect for social status seemed to be the predominant concern. *Id.* The neighbors lived in an upper middle class community and appeared well educated. *Id.* Respondents were Hispanic, and Initiators were white. *Id.* The husband “did not have a good command of the English language.” *Id.* The mediator also noted that “[t]he Hispanic Respondents spent a lot of time ‘saving face.’ The wife spent a lot of time trying [not to be perceived as] the typical [negative] image.” *Id.* Both sets of parties had never been in court before, and were grateful for an opportunity to preserve their privacy and dignity by using mediation. *Id.*

While this may hold true for many cases, in others the preservation of material resources may prove equally important or so the mediator believes. Moreover, the mediator may consider a party's decision to accept or to decline a settlement offer not only inexplicable but harmful. Yet, under the principle of respecting party self-determination, "a person has a right to be wrong."⁸²

Questions about informed consent in mediated settlements naturally arise most frequently in cases that involve inherent, usually severe imbalances of material power, such as landlord-tenant or creditor-debtor disputes. Concerns about coercion and potential violence, however, especially after leaving the court house, can arise even in matters of commerce. To the extent the mediation stirred volatile reactions, mediated resolutions may not reflect self-determination.⁸³ In any of these situations, the determination of the judge may be essential to achieve closure.

The issue of physical intimidation and coercion began to appear intermittently in a category of cases not usually seen in small claims court: alleged debts between estranged spouses or mates concerning child support or disputed property. Under ordinary circumstances, these cases would not have been heard in small claims court but in family court.⁸⁴

82. Bryant A. Garth, Remarks at the Annual American Bar Association Dispute Resolution Section Meeting, Breaking Impasse, Workshop Co-presented with Phyllis E. Bernard, (Apr. 2002).

83. Concerns about physical and psychological intimidation are not limited to divorce mediations, but should extend to all small claims court cases, if only because the parties have not been pre-screened. Further, although the dollar amount at issue may appear small, the feelings may be quite large. For example, in 2001, a white male mediator conducted a lengthy session to resolve a dispute between a Hispanic male auto mechanic (accompanied by his black male witness) and a white male manager of an auto parts store. Written Synthesis No. 5, *supra* note 63. The mediator noted that the mechanic may have possessed greater technical expertise about the issue than the store manager. *Id.* The mediation lasted throughout the morning, until lunch when the mediator terminated the session to return the parties to the judge. *Id.* While the judge dealt with a matter in chambers, the parties engaged in further unmediated discussion. *Id.* "The discussion became heated and both parties were in each other's face. The (Initiator's) witness and I were able to calm them down." *Id.* The white, male judge returned to the bench, briefly heard the parties' positions and entered judgment for the Hispanic Initiator. "After court Respondent wanted to discuss the matter with me. I said I couldn't talk about it and he left stating that he just didn't understand how the judge could have ruled against him." *Id.* One can only ponder how much Respondent's emotional upheaval stemmed from a presumption that his majority status and somewhat higher social position should have assured victory?

84. Additionally, Oklahoma's court-connected mediation procedures would have mandated pre-mediation interviews to assess the appropriateness of the case for mediation, searching especially for issues of domestic violence, psychological abuse, substance abuse, or alcoholism. See Phyllis E. Bernard, *Teaching Ethical, Holistic Client*

Court protocols require mediators to continuously assess the case for severe imbalances of power. Moreover, as explained earlier in Part I, court rules vest the mediator with authority to discontinue the mediation *sua sponte* if the mediator had reason to believe that the process was being manipulated or abused. Such cases are returned to the judge at a point the mediator deems least likely to provoke further damage.

Thus, mediations between estranged parents over child care finances may have been initiated at the judge's recommendation, but were discontinued by the mediator when the session revealed a history of violence and the existence of restraining orders not part of the current small claims matter.⁸⁵ Only three cases among the 125 studied for this Article indicated concerns about threats or intimidation during the mediation session. This left a significant number of cases where parties agreed to settlement terms that might seem of dubious benefit, exercising what may have been their right to be wrong.

Over time, some themes emerged to illuminate party decisions that initially seemed irrational or self-defeating from a lawyer's perspective.⁸⁶ The major incentive for parties to mediate a debt was to gain an extension of time for payment. In a landlord-tenant case, the tenant needed additional time to find another residence. In a creditor-debtor dispute, the debtor could pay only if given a reasonable installment plan. Even a small amount of flexibility can be valuable to a party with limited resources. A party in these situations would agree to terms that an outsider, with a wider range of

Representation in Family ADR, 47 *LOY. L. REV.* 163 (2001) (describing this process more fully, including how it was integrated into the OCU law school curriculum).

85. For example, in a 2003 property dispute between former lovers, the black male mediator wrote: "The Initiator was African-American like myself, while his former mate was white/Native American. . . . [T]here was past domestic violence and the Respondent was fearful even being in court. When she mentioned that he had tried to choke her to death I wanted to end the session immediately." Written Synthesis No. 24, Mediation Clinic, Oklahoma City University School of Law (Fall 2002) (on file with author). Because the judge had ordered the case to mediation, the mediator continued through the initial stages of mediation but discontinued before negotiations began. *Id.*

86. This question of perspective deserves examination not only through the narrow lens of statutes, common law, and procedural rules, but through the prism of race, class, and being. It demands a bold exercise of self-awareness and situational awareness similar to that required of the mediators in this project, but rather applied to the next level. See Reginald Leamon Robinson, *Human Agency, Negated Subjectivity, and White Structural Oppression: An Analysis of Critical Race Practice/Praxis*, 53 *AM. U. L. REV.* 1361, 1367-68 (2004) (critiquing CRT methodology as "failing to see ordinary people as powerful agents" capable of acting through their own will instead of solely in response to "white structural oppression").

resources at hand, might decline. Such decisions can be seen as rational, even potentially empowering.⁸⁷ By contrast, if the party's credit history was already badly damaged and the party had no assets worth seizing, a mediated settlement—even with ostensibly favorable terms—would only protract the inevitable. Declining to settle would be logical.⁸⁸

Finally, some parties declined a mediated settlement because they felt more comfortable yielding to the power of the judge than voluntarily yielding to the power of their adversary. This last theme dominated cases involving coworkers and neighbors where constituencies had become involved in the dispute, and parties' reputations among other coworkers,⁸⁹ family members, and friends were at stake. Again, respect and relationships sometimes matter more than money alone.

6. *Gender-oriented Values and Communication Styles*

In contemporary America, cultural norms that privilege the maintenance of relationships are often portrayed as feminine values. These ostensibly inclusive values are seen as a manifestation of the instinctive maternal drive to nurture, which has taken root in

87. See Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 65-66 (1996) (pointing to the value which law brings to guide mediations, even if resolutions are not ultimately crafted in strict accordance with that same law).

88. For example, in 2002 a black female mediator conducted a session involving a white creditor and black debtor. Written Synthesis No. 32, Mediation Clinic, Oklahoma City University School of Law (Fall 2002) (on file with author). Respondent had purchased and financed an automobile from the Initiator's dealership. *Id.* It had been repossessed, leaving \$6000 still owing. *Id.* After strenuous negotiations, the Initiator was willing to reduce the debt to \$2000, which Respondent had earlier indicated he might be able to pay in installments. *Id.* Nevertheless, Respondent was determined not to accept the offer. *Id.* The mediator was baffled. *Id.* The decision appeared irrational, even self-defeating; until she remembered that Respondent had also indicated he intended to file bankruptcy for which he needed a \$6000 judgment in order to qualify. *Id.* A \$2000 judgment would not be sufficient to allow him to file for protection from creditors. *Id.*

89. For example, in a 2000 dispute concerning a car accident that occurred at work, the white male mediator wrote:

The parties did not want to mediate. They wanted the judge to make a ruling. Neither party wanted to admit to any negligence on their part. They did not want to work out any deals. One party (Initiator) wanted \$1500 and the other (Respondent) did not feel he was responsible to pay in any way [because Initiator's car was illegally parked].

Written Synthesis No. 22, Mediation Clinic, Oklahoma City University School of Law (Fall 2000) (on file with author). Both parties were black males employed by the same city agency. *Id.*

popular concepts about male-female communication styles.⁹⁰ This suggests that the bulk of women care more about emotional content than tangible facts.⁹¹

Recognition of relationship orientation and holistic communication styles can prove helpful in understanding the dynamics of cross-cultural mediation. Linking them primarily to gender, however, may create artificial barriers to dispute resolution. Virtually all of the ostensibly “feminine values” identified by scholars are also values held by America’s minorities and many urban neighborhoods and associations where community life retains its vitality.⁹² In some settings such as the workplace, coworkers become the relevant community, such that relationships remain paramount, whether for reasons of status, mutual support or simple dignity. Relational values—even among men and businesses—can form common ground for resolution.⁹³

90. For a helpful summary of the literature and its relevance to mediation, see generally Michelle R. Evans, Note, *Women and Mediation: Toward a Formulation of an Interdisciplinary Empirical Model to Determine Equity in Dispute Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 145 (2001).

91. Some of the case reports by minority female mediators offered very different views. For example, in a 2002 case where a black female mediator conducted a session to resolve a business dispute between white males, the mediator found the involvement of one party’s wife a serious disruption. See Written Synthesis No. 31, Mediation Clinic, Oklahoma City University School of Law (Fall 2002) (on file with author) (“I think she thought that because I was female I could relate to family issues, money, financial difficulties and whatever else she was saying from a woman’s point of view.”). From the mediator’s point of view, this attempt at gender bonding threatened to compromise her neutrality. *Id.*

92. A dozen years after publishing his landmark article preferring for minorities court room hearings before a judge over mediation, Delgado acknowledged the importance of “narrativity” or “storytelling” and the expression of emotion as a part of genuine, subjective “due process.” He further acknowledged that these are generally not welcome in the court room—at least not when expressed by a minority litigant. Richard Delgado, *Rodrigo’s Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61, 80-81 (1996). As “Rodrigo” states: “[s]ome . . . have advocated the formality of the court setting as a positive advantage over nonformal dispute resolution, such as mediation, for cases presenting an imbalance of power, as most civil rights cases do. Unfortunately, I think litigation is not a very promising avenue of relief for society’s . . . most disadvantaged classes.” *Id.* at 80. Would more empathic judges improve the effectiveness of law to achieve social reform? “Less than we might hope . . . Law is structurally biased against any display of empathy.” *Id.*

93. The observations of one newly certified black female mediating a 2002 employer-employee dispute between two white males are significant:

What I have noticed is that men tend not to be emotional nor do they have loud outburst[s]. They explain their side and that’s it. It’s cut and dry for them. My role as a female mediator is to move them along and that’s what I found myself doing, because with men, once they explain their sides they are through. I was very surprised with this mediation and the emotions the men showed. One of the parties began tearing up (crying) and I knew then that

On the other hand, women can behave in ways as confrontational and non-cooperative as men are reputed to behave. Sometimes women see adjudication, not mediation, as the only reliable way to restore their status in a relational matter. For such women, mediation is not an option.⁹⁴

With that being said, some cases present more immediate opportunities for resolution when the mediator shares the same gender as one or both parties. Typically, an issue relating to family is the most important thread which, if suitably addressed, can resolve the entire case. Or, as the judges have experienced, if the mediation can deal sensitively with the painful emotional issues, the parties will more readily accept and comply with the judge's ruling—whether the mediation results in a settlement or not.⁹⁵

Interestingly, when a minority mediator conducted a cross-cultural session involving both gender and ethnicity, the female mediators tended to perceive their gender as playing a more significant role than race.⁹⁶ Minority male mediators generally per-

they were friends and something just went bad. . . . A settlement was reached. . . . Once it was over the parties began talking about family and friends and shook hands and left together just talking away.

Written Synthesis No. 33, Mediation Clinic, Oklahoma City University School of Law (Fall 2002) (on file with author).

94. In a 2001 dispute over a personal loan between long-time members of the same church, the white female mediator wrote: “[B]oth [parties were African-American] women who had a point to prove and neither was going to budge unless demanded by the judge. Both the Initiator and Respondent had protective postures like women have when protecting their families. Neither backed down from that posture.” Written Synthesis No. 17, Mediation Clinic, Oklahoma City University School of Law (Fall 2001) (on file with author).

95. For example, a 2002 mediation sought to resolve a money dispute between sisters regarding funeral expenses for their mother. Written Synthesis No. 34, Mediation Clinic, Oklahoma City University School of Law (Fall 2002) (on file with author). As the black female mediation candidate observed:

There was a lot of deep-rooted underlying issues between the sisters and it worked as a barrier in coming up with an agreement. . . . It was basically one person's word over the next, and the stories were not matching up and the initiating party became visibly angry and frustrated. I think that the parties had been dealing with this problem for some time and they just wanted someone to rule on it. And in this case that was the only something that the Judge could do. They had been trying to resolve this issue on their own, but that was not possible. A ruling in this case could provide closure for both parties.

Id.

96. In a 2001 consumer dispute, the black female mediator wrote:

Maybe the fact that I was a black female, the same race and gender as the initiating party may have made her feel more comfortable. At first she did not want to mediate at all but when she realized I was going to be the media-

ceived their gender as a neutral factor.⁹⁷ Class or shared work experience may have had more influence, irrespective of the minority or majority status of the mediator.⁹⁸

7. *Cultural Bonding: Manipulation or Motivation?*

This Article has discussed the importance of diversity in a mediator roster. This Section analyzes diversity dynamics in action as revealed by case studies, including: (1) twenty-seven cases with a white mediator and one minority party or witness; (2) seven cases with a white mediator and minority parties; (3) fifty-five cases with a minority mediator and white parties; (4) thirty-four cases with a minority mediator and one minority party or witness; and (5) two cases with a minority mediator and minority parties.

To repeat, the direct questions presented to each mediator were: “Did ethnicity, race, or national heritage play a discernible role? Was it an apparent factor in the mediation? If so, can you describe how?”⁹⁹ Mediators were encouraged to provide as much detail as possible, and to elaborate, offering personal insights. Classroom discussions provided further illumination beyond the written self-analyses.

tor she changed her mind. (I am sure the Judge’s prodding had something to do with it as well.)

Written Synthesis No. 20, Mediation Clinic, Oklahoma City University School of Law (Fall 2001) (on file with author). In the eleven case studies involving black female mediators conducting sessions with all white participants, all mediators reported gender as more important than race. If this category is expanded to include all minority female mediators, again, gender was perceived both by the mediator and by mediation clinic observers to be more important than race in all but a handful of cases in the four-year period under review.

97. Except in cases where sexual orientation was an issue, no male mediator—minority or majority—reported gender as an issue in a mediation they conducted.

98. For example, in a 2000 dispute over reimbursement for labor and materials, a white male mediator from the same class background as the disputants believed the case was resolved rather quickly and without regard to race. Written Synthesis No. 10, Mediation Clinic, Oklahoma City University School of Law (Fall 2000) (on file with author). The mediator observed that the “Initiator, an Afro American, felt he didn’t articulate himself well. In actuality, he did fine.” *Id.* Conceivably, parties had assumed the mediator—a person for whom law was a second career—required more elaborate, or legalistic explanations, as would be expected in court. *Id.* Instead, the matter resolved rather simply because not only the parties, but also the mediator were “blue collar.” *Id.* As the mediator explained: “Both recognized each other’s position.” *Id.*

99. *See, e.g.*, Written Synthesis No. 4, *supra* note 72 (containing the questions asked to each mediator).

a. “No Discernible Role”

The overwhelming majority of approximately 125 cases reported that race, ethnicity, or national origin played no discernible role in the mediation.¹⁰⁰ It is noteworthy that this response dominated nearly every category of mediator-party/witness arrangement outlined above. As alluded to in the discussion of self-awareness and situational awareness, the weight this response deserves varies. Some mediators are more introspective, intuitive, and detail-oriented than others.

In a multicultural country where race, ethnicity, and national origin often engender volatile responses, however, the very fact that racial or ethnic identity appeared to play no role is significant. This fact is susceptible to a number of interpretations. Conceivably, the U.S. is evolving into a truly color-blind society where both the mediator and the parties do not notice or have a predetermined opinion about color.¹⁰¹ More likely, however, all participants noticed color.¹⁰² At some conscious level during the mediation, one or more participants opted to make color a secondary consideration. Another possibility, which is just as likely, is that the mediator steered the parties in a neutral direction by application of mediation protocols. Lastly, it could be that due to judicial framing, race or ethnicity drifted into the background or became a non-issue because the judge’s style of referral imbued the mediator and the process with the imprimatur of neutrality and respect.

b. “Race Mattered”

Remarkably few cases reported race, ethnicity, or national origin as a dynamic. Of the approximately 300 cases reviewed, 175 in-

100. *See id.*

101. For instance, in a 2002 dispute over goods and services, a white male mediator wrote: “The Init[iator] was hispanic and the Resp[ondent] was African-American. I think the only color that was important was green \$.” Written Synthesis No. 15, Mediation Clinic, Oklahoma City University School of Law (Fall 2002) (on file with author).

102. For white male mediators, the racial dynamics generally needed to be articulated aloud. For example, in a 2001 suit to recover money for property damage caused by a black process server, the mediator wrote: “While counsel for the [I]nitiator [a white male process server] responded that this was not a racial issue, rather one dealing with an attack by one person on another, the [R]espondent [a black male professional in the insurance industry] repeatedly asserted that it was a racial issue. In his opinion, had any other person, other than an [African-American], done what he did (essentially in his opinion protect his person and property), nothing would have been done.” Written Synthesis No. 23, Mediation Clinic, Oklahoma City University School of Law (Spring 2001) (on file with author).

volved white mediators with parties who appeared to be white, American-born, and for whom English was their first language. No mediator identified race as having mattered. Viewed from another perspective, it was shared majority status that rendered race inapplicable.

Across the board, minority and self-identified mixed heritage mediators articulated heightened intuitive awareness of cross-cultural issues.¹⁰³ Characteristically, one party sought to use the mediator's minority status to his or her own benefit. Through reference to a shared cultural reference point, the party hoped to establish a bond with the mediator.¹⁰⁴ Sometimes, a minority party expressed a special bond with the mediator through non-verbal cues, such as body positioning.¹⁰⁵

On each reported occasion, the mediator recognized and categorized the behavior. Following protocols, the mediator then took appropriate steps to reinforce even-handedness in dealing with both parties. Sometimes, this proved a delicate balancing act since the perceived emotional bond with the mediator often played a

103. On rare occasions, a white mediator—usually a woman—recognized that race sometimes plays a subtle but definite role. In a 2001 consumer dispute the white female mediator wrote: “Race may have played a part in the [I]nitiator’s initial unwillingness to mediate [an older black woman].” Written Synthesis No. 16, Mediation Clinic, Oklahoma City University School of Law (Fall 2001) (on file with author). The mediator’s life experience suggested that elders may be more resistant to the idea of allowing a person “of another race call the shots.” *Id.* This may have been an accurate surmise.

The [R]espondent [a woman agent for a hearing aid company] was very sure they could reach an agreement. She did not want to give up on mediation. This was a case about a hearing aid refund. The agent the company sent has needed hearing aids since she was five. I believe that this gave the opposing part[ies] a common bond

Id.

104. For example, in a 2002 neighbor dispute the black female mediator wrote that: The plaintiff and attorney were [C]aucasian and the defendant and his witness were African American. Sometimes I think that when I have parties who are of the same cultural identity as me, they feel as though they have someone on their side automatically. There is a potential bias from the parties [sic] point of view.

Written Synthesis No. 28, Mediation Clinic, Oklahoma City University School of Law (Fall 2002) (on file with author).

105. For example, in a 2003 landlord-tenant case the black female mediator wrote: Because I am black and the [I]nitiator to[sic] was black, he kind of leaned toward me because I think he felt as though he was in a comfort zone. However I really can’t say how that might have [a]ffected the [R]espondent because she did the same thing in relation to gender.

Written Synthesis No. 19, Mediation Clinic, Oklahoma City University School of Law (Fall 2002) (on file with author).

necessary role in creating an atmosphere that encouraged minority party engagement.¹⁰⁶

In some cases, race played a negative role not only in the mediation but throughout the dispute.¹⁰⁷ Rarely, but powerfully, a minority party vocalized a profound and bitter conviction that the entire legal system was biased against minorities.¹⁰⁸ It was not clear whether on these occasions it was a ploy to gain sympathy from the mediator. The minority party may have vented genuine disillusionment in the mediation session, viewing it as a more appropriate and potentially effective forum for expression of these sentiments than the court room.¹⁰⁹

106. For example, in a 2002 landlord-tenant case where a black female mediator candidate observed a black male mediator, the student wrote:

The mediator was an [African-American] male and the [I]nitiator was an [African-American] female. All [three] [R]espondents were [white]. Perhaps [the] Initiator felt a little bit at ease [because] she could relate to the mediator culturally. I don't think the [R]espondents had a problem with the mediator because he was well-spoken and educated and had some knowledge o[f] the subject matter.

Written Synthesis No. 29, Mediation Clinic, Oklahoma City University School of Law (Fall 2002) (on file with author).

107. For example, in a 2000 consumer dispute, a newly trained male mediator of mixed heritage wrote:

It was difficult to get the Initiator [white] to get past his obvious contempt for the Respondent [black] and the mediation process. I remained patient and further invited Initiator to shed more light on the series of events by offering his perspective. He declined. . . . I believe the Initiator resented the Respondent for being a successful African-American and for openly calling the quality of his work into question. That was my impression.

Written Synthesis No. 25, Mediation Clinic, Oklahoma City University School of Law (Fall 2000) (on file with author).

108. In a 2001 dispute between a former boyfriend and girlfriend, the black male mediator wrote:

The [I]nitiating boyfriend stated that he felt the combination of his gender (male) and race (black) made mediation and court poor options for him because he felt that he would be judged and forced to pay based on his appearance rather than on the facts in his case. I informed him that my job as mediator was not to judge, but for both parties to attempt to come to a fair solution. . . . Both parties were angry at first, and though they did not settle their dispute, according to them, that was the first time they had spoken civil[ly] to each other in a long time; which I think is good for their child.

Written Synthesis No. 35, Mediation Clinic, Oklahoma City University School of Law (Fall 2001) (on file with author).

109. In a 2001 assault and battery case, the male mediator (who was of mixed heritage) wrote:

Race was a critical issue. The Respondent felt he was the victim of a far reaching racial conspiracy against him because he was black and the Initiator was a white woman. This conspiracy included the judge, the responding police officers on the scene and members of his local town hall. He expressed

Some minority mediators discovered how to use their lack of obvious cultural alignment with parties as a positive dynamic. Hence, in a setting where all participants were white, a black female mediator might frame this as an advantage, assuring her neutrality and thereby creating a solid foundation for confident and unbiased problem-solving.¹¹⁰

8. *Literacy and Socio-economic Class: The Most Important Single Variable*

Throughout all of the approximately 125 cases involving minorities, the most consistent variable that played a discernible role in mediation was general literacy and formal education, serving as proxies for socio-economic class.¹¹¹ Mediators generally made assessments of socio-economic class based upon the speaker's sophistication and comfort in speaking English, attire,¹¹² and party references to education and training.¹¹³ In some situations, mediators did not need to make inferences. A conflict in lifestyles would quickly manifest as a key dynamic in the mediation. In some cases, minority parties took pains to separate themselves

sincere gratitude for the chance to mediate [because] he said it was the [first] time he had actually had a "voice."

Written Synthesis No. 30, Mediation Clinic, Oklahoma City University School of Law (Spring 2001) (on file with author).

110. For example, one black female mediator wrote in one of several such cases: "I was the only [African-American] in the room amongst all [whites]. I think this cultural difference put me in a neutral advantage. Also [sic] being a woman, the men weren't threatened. I do believe that they were surprised that I knew as much as I did, especially the attorney" Written Synthesis No. 13, Mediation Clinic, Oklahoma City University School of Law (Fall 2002) (on file with author).

111. The question asked in each mediation clinic self-analysis was: "Did both parties appear to be literate? Did they function at the same level of literacy? Even if they were both reasonably literate, did one party have a greater amount of specialized knowledge about the subject matter of the dispute? How did you handle these issues?" See, e.g., Written Synthesis No. 4, *supra* note 72.

112. In a 2000 case involving a breach of contract between business partners the minority male mediator noted class difference among the majority parties: "The Respondent stated several times that she was not as well spoken as the Initiator, but her rights meant just as much. She may have perceived an imbalance of power due to the manner of speech and dress of the Initiator as compared to herself." Written Synthesis No. 36, Mediation Clinic, Oklahoma City University School of Law (Fall 2000) (on file with author).

113. For instance, in a 2001 multiple-session corporate dispute concerning the installation of computer communications devices, the white male mediator wrote: "While the parties' representatives were racially different, their performance on a professional level prevented any racially related problems. Mutual respect for each other's position was obvious." Written Synthesis No. 37, Mediation Clinic, Oklahoma City University School of Law (Spring 2001) (on file with author).

from negative stereotypes associated with their ethnic heritage, distinguishing themselves as members of a more upwardly mobile class.¹¹⁴ In other cases, minority status did not appear as mere subtext. Instead, the struggle between parties based on socio-economic differences was self evident.¹¹⁵

Other class struggles stemmed more clearly from severe imbalances in knowledge, information, and experience. This divide formed a chasm of misunderstanding between the parties, which sometimes might not be capable of being bridged without the intervention of the judge. Nevertheless, court mediators were trained to make adjustments to rebalance power without tipping the scale, biasing one side or another, or usurping the right of party self-determination.

Imbalances in levels of literacy and formal education among the parties factored heavily in case origination and outcome. For many parties, the original consumer debt or lease problem stemmed from an inability to read and understand written contracts. To moderate this imbalance of power between parties, mediators were trained to read documents out loud, never assuming that each participant could read for themselves.¹¹⁶ Mediation training taught the third-party neutral to use active listening, restatement and reframing ostensibly as a means of educating themselves about complicated business concepts. Mediators blended this non-confrontational, in-

114. In a 2003 neighbor dispute the black male mediator wrote: "I got the impression that Respondent's wife was trying to prove herself and to not feed into Hispanic stereotypes. She constantly made references to 'not being familiar with the court system' and was not 'accustomed to being in debt.'" Written Synthesis No. 21, Mediation Clinic, Oklahoma City University School of Law (Fall 2002) (on file with author).

115. For example, in 2002 a white male mediator candidate observed a white female certified mediator conduct a session between Respondent homeowners and Initiator contractor—two married couples both represented by legal counsel: "I saw not so much an imbalance of power so much as conflict between two levels of lifestyle, so different as to be almost alien. The defendants [Hispanic Respondents] were nouveau riche and very successful. The plaintiffs [white Initiators] were entrepreneurs as well, but struggling by comparison." Written Synthesis No. 6, Mediation Clinic, Oklahoma City University School of Law (Fall 2002) (on file with author). The mediator candidate surmised that the case finally settled when Respondents' attorney advised them that the Initiator appeared highly litigious, and that trial would be more costly—in terms of money, time and energy—than settling. *Id.* Nevertheless, both sides were ultimately "disgusted" and exhausted by the situation, and sought closure. *Id.*

116. In a 2002 observation of a white female certified mediator conducting a session with a white Initiator and black Respondent, the white male mediator candidate wrote: "I could not tell if the Respondent was literate. I do not think that they functioned at the same level. The mediator read the Consent form, Rule 10, etc. She did very well." Written Synthesis No. 27, Mediation Clinic, Oklahoma City University School of Law (Fall 2002) (on file with author).

direct approach with direct inquiries to the less literate party to check for comprehension.¹¹⁷

Less literate or articulate parties were encouraged to take advantage of proffered breaks in the mediation session. By initiating the invitation to separate sessions, the mediator removed the stigma from the disadvantaged party of acknowledging his or her need for additional assistance. Mediation protocols did not permit the mediators to give advice. Instead, mediators were trained to engage parties in visualizing the likely outcome of various options, encouraging parties to gauge their ability to live with a range of proposed terms, including declining all offers.

III. CONCLUSION

The case studies examined in this Article reveal that each mediation has its own flow, rhythms, and subtleties. Sometimes, patterns seem to emerge that appear linked to race, but more often, not. Why? Because we are dealing not with pre-2000 Census Bureau categories, but with people. And people—whether of minority or majority status in America’s social demography—are not “carbon copies.”¹¹⁸

It is time to reconsider the CRT critiques of mediation, to evaluate how far we have come, and how far we may yet have to go. In *Fairness and Formality*, Professor Delgado staked out a number of issues as the sine qua non of justice, and using these standards, generally found mediation to be unjust if minorities are involved.¹¹⁹ It is time to re-examine some of these concepts using a broader, less rigid and more culturally sensitive understanding of the true nature of justice. It is time to re-examine culture from perspectives that eschew essentialism.

117. For example, in a 2001 mediation of an attorney-client dispute, the white female mediator wrote:

I had the feeling that the responding party was rather dismissive of the Initiator but am not sure whether that was because the [Initiator] was female, or because she was [b]lack, or just because [Respondent] felt superior because he was an attorney. . . . Both parties were literate, but the level was definitely different. [Respondent] was an attorney, fully conversant with legal terminology, etc. I handled it by taking extra care about mirroring in clear terms what I heard [Initiator] saying and also clarified for her some of the things [Respondent] was saying.

Written Synthesis No. 18, Mediation Clinic, Oklahoma City University School of Law (Spring 2001) (on file with author).

118. Cf. Cynthia R. Mabry, *African-Americans Are Not “Carbon Copies” of White Americans*, 13 OHIO ST. J. ON DISP. RESOL. 405 (1998).

119. See generally Delgado et al., *supra* note 1.

We have gained too much experience now to conflate culture, race, and gender into artificial monoliths of behavior based on identity politics. We also have learned too much about the benefits of mediation to clarify issues for parties to label anything other than a “full settlement” a failure.¹²⁰

The original CRT critique has in many ways been superseded by functional reality. Reality seems to have reshaped the question. To keep pace with current trends, we must ask more than whether there should be mediation. Instead we should ask how mediation should be conducted. The de facto substitution of ADR in place of trials is becoming an increasingly economics-based decision directed by concerns about administrative overhead and docket management. These concerns increase as the budgets of urban governments shrink. Today’s debate should concentrate on how to bring the attributes of fairness invested in the formalities of the court room to the informal process of mediation—without converting mediation into a mini-trial that lacks the protections of a genuine trial.

Financial access to legal representation makes all the difference in whether the processes touted by Critical Race Theorists serve as protection for minorities or as a weapon against them. As Fiss points out, the person who is able to afford a lawyer can readily use the formalities of trial either to rebalance power or to shift power fully to their side.¹²¹ A party who cannot afford counsel may be bereft of justice, too. This does not marginalize the issue of racial prejudice. It simply incorporates fully the socio-economic reality of America.

The answer rests in framing the role of mediation in terms that extend beyond purely monetary outcomes and settlement rates. Resources must be budgeted to support the careful selection, training, and supervision of mediators to serve as the formalized mechanism for interpersonal communication in resolving part or all of a case that has arrived at court. A combination of complementary services, by the mediator and judge, can provide protection both for the objective goals of the rule of law and the subjective needs of the parties.

The long-term search for a balance in court-sponsored mediation services begins by understanding justice not as merely a concept to

120. See Green, *supra* note 2, at 358 (suggesting that mediation can bring focus to a situation where “true justice, as some Critical Race Theorists have argued, cannot be delivered through informal and private dispute systems”).

121. See generally Fiss, *supra* note 16.

be found in the law books and court house, but as a relationship—a process of human interaction. Perhaps our forebearers understood better what justice can and should be. Maybe true justice is something that we do.¹²² It is how we, as individuals and as a community, see and deal with one another.

The minority person is first and foremost a person, not a category. In mediation, they can become an active player in the process of holding themselves and others accountable. Under appropriate conditions, this problem-solver can reach closure on terms he or she determines to be satisfactory according to his or her own priorities. It might not be the resolution that others would have chosen on their behalf, namely, the audience of attorneys and legal scholars. But, this is what it means to leave behind even well-intentioned paternalism and classism: we respect the choices of the minority person, believing that he or she is neither crippled, nor an eternal victim.

Still, in many situations, the imbalance of power is not merely a subjective, intuitive matter. All persons engaged in the legal system require and deserve ready access to pre-mediation assistance or advice in some format, even such persons cannot obtain affordable attorney services. If pro se parties are to have any chance at justice, our society must level the playing field identified in this study as the most prejudicial: lack of knowledge.

122. Consider the ancient philosophies of the “People of the Book”—Jews, Christians, and Moslems. The concept of justice as a transitive verb is enunciated in a famous passage from the Hebrew Bible: “He has shown you, O man, what is good; And what does the Lord require of you but to do justly, to love mercy and to walk humbly with your God.” *Micah* 6:8 (King James Revised Standard Version). The Islamic tradition also treats justice more as a matter of personal relationships than mere legalisms: “True justice accords with Allah’s Law. Follow not men’s selfish desires, [b]ut Allah’s Will, which was revealed [t]o Moses and Jesus, and now to Muhammad. . . . [R]ecognise with justice [t]hose who are sincere and humble, [t]hough they may be themselves [n]ot of your flock, if they witness to Truth.” ABDULLAH YUSUF ALI, *THE HOLY QUR’AN: TEXT, TRANSLATION AND COMMENTARY* 261 (New Revised Edition 1989).

