Journal of Dispute Resolution

Volume 1995 | Issue 1 Article 5

1995

Diversity Issues in Mediation: Controlling Negative Cultural Myths

Isabelle R. Gunning

Diversity Issues in Mediation: Controlling Negative Cultural Myths

Isabelle R. Gunning[1]

I. INTRODUCTION

Mediation has become increasingly popular over the past two decades. It is one of several forms of conflict resolution called "alternative dispute resolution" (ADR) which contrast themselves with court room litigation.[2] The push for informal legal institutions actually began around the turn of this century out of concerns for both humanizing the conflict resolution process, equalizing access to legal institutions and, eventually, for decreasing its cost.[3] All of the "new"[4] ADR

---

1. Professor of Law, Southwestern University School of Law. BA, JD Yale University.

I am grateful to a number of persons and groups for their help and advice. I would like to thank my colleagues at Southwestern University School of Law many of whom provided me with valuable criticisms when I presented an early draft at a faculty scholarship luncheon; I especially thank Professors Karen Smith, Judy Sloan and Lawrence Sullivan. I thank Professor Stephen Ellman for his helpful comments and for encouraging me to present an early draft at the New York Law School Clinical Colloquium; I thank all the participants at the Clinical Colloquium who provided me with useful and encouraging feedback.

I especially want to thank two friends and colleagues, Professors Beryl Blaustone and Randy Hertz. They have been more than generous with their wisdom, time and encouragement. I am indebted to both of them. I must also thank my research assistants Sonja Gipson, Kristine Nishiyama and Melissa Decker. Research for this article was supported by a grant from Southwestern University School of Law.

2. Alternative dispute resolution (ADR) methods include arbitration, bilateral negotiation, mini-trial, summary jury trial, private judging, and mandatory settlement conferences along with mediation. They are characterized as "alternative" because all are seen in opposition to "full blown adjudication of the case in court." Robert Baruch Bush, *Efficiency and Protection or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 4 FLA. L. REV. 253, 254 n.1 (1989).

3. JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 95-115 (1983). *See also*, J. MARKS, E. JOHNSON, ET AL., DISPUTE RESOLUTION IN AMERICA: PROCESSES IN EVOLUTION (1984); ROSCOE POUND, THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE (1906), reprinted in 20 J. AM. JUD. SOC'Y 178 (1936); and Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1362.

In recent years volunteer mediation programs, specifically, have grown. *See, e.g.*, Stephen B. Goldberg et al., *ADR Problems and Prospects: Looking to the Future*, 69 JUDICATURE 291, 297 (1986) and Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 30, 30-34 (1982).

More importantly, the use of court connected mandatory mediation programs has surged. *See* FLA. STAT. § 44.302 (1987); TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.021-.023 (West 1987). These statutes also provide for the use of other ADR processes. Florida uses arbitration as well. FLA. STAT. § 44.303 (1987). Texas employs the mini-trial, settlement conference, summary jury trial and arbitration. TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.024-.027 (West 1987). Other states have narrower legislation allowing judges to mandate mediation in particular areas notably divorce or custody. *See, e.g.*, ALA. CODE § 25.20.080 (1983) (domestic relations); CAL. CIV. CODE § 4607 (West 1983 & Supp. 1989) (domestic relations); HAW. REV. STAT. § 672-73 (1986) (malpractice); LA. REV. STAT. ANN. § 9:332 (West Supp. 1995) (domestic relations); MICH. COMP. LAWS ANN. § 600.4951 (West 1987) (personal injury); MONT. CODE ANN. § 39-71-2401 (1993) (workers' compensation).

4. I have placed "new" in quotations because many of the approaches involved in ADR have in fact been used for centuries, often in a variety of non western countries. Scholars have noted that mediation, in some form, has been used for at least two millennia in various Eastern countries such

methods are marked by four common elements: privacy, procedural informality, absence of substantive rules and emphasis on compromise.[5] Mediation involves all of these elements, but distinguishes itself from other forms of ADR in that the "authority figure" involved in the process, the mediator, actually has no power to decide, judge or enforce. Whether an agreement is reached is determined, not by a judge or arbitrator, but by the parties themselves.

Proponents of mediation argue that it is very successful. A variety of studies have been done to document mediation's advantage over litigation based upon attainment of agreements,[6] reduced costs,[7] reduced court dockets,[8] compliance by parties,[9] parties' satisfaction,[10] parties' improved interpersonal interaction[11]

---

as China, Japan, Korea and Ceylon (Sri Lanka). Some religions have relied upon mediation historically, in particular Judaism. Scholars have noted that some African groups used a "moot" court which also relied upon mediation. The roots of mediation in the United States stem from a variety of immigrant ancestors, Jews and Chinese to name two, who brought models of cooperative resolution of disputes to this country. *See* HOWARD H. IRVING & MICHAEL BENJAMIN, FAMILY MEDIATION: THEORY AND PRACTICE OF DISPUTE RESOLUTION 46-47 (1987).

5. *See* Bush, *supra* note 2, at 254 n.1; Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 11-14 (1987).

6. *See, e.g.,* Nancy Thoennes & Jessica Pearson, *Predicting Outcomes in Divorce Mediation: The Influence of People and Process*, 41 J. SOC. ISSUES 115 (1985); E. Lyon, et al., *A Case Study: The Custody Mediation Services of the Family Division, Connecticut Superior Court*, 23 CONCILIATION CTS. REV. 15 (1985). Some research studies have suggested that studies measuring the attainment of agreement show no consistent results. *See* Kenneth Kressel & Dean G. Pruitt, *Themes in the Mediation of Social Conflict*, 41 J. SOC. ISSUES 179, 182 (1985).

7. *See, e.g.*, Jessica Pearson & Nancy Thoennes, *Divorce Mediation Research Results, in* DIVORCE MEDIATION: THEORY AND PRACTICE, (Jay Folberg & Ann Milne eds. 1988) (studying Denver custody mediation project and finding cost savings for mediation participants compared with litigation even if mediation unsuccessful); Joan B. Kelly, *Is Mediation Less Expensive? Comparison of Mediated and Adversarial Divorce Costs*, MEDIATION Q., Fall 1990 at 15 (finding significant cost savings in divorce mediation versus adversarial means). *But see*, Kressel & Pruit, *supra* note 6 (finding conservative savings to the city of Los Angeles from mandatory custody mediation); Craig A. McEwen & Richard J. Maiman, *Arbitration and Mediation as Alternatives to Court*, 10 POL'Y STUD. J. 712 (1982) (using comparison with small claims court and finding no useful savings from mediation).

8. *See, e.g.*, Robert E. Emery & Melissa J. Wyer, *Child Custody Mediation and Litigation: An Experimental Evaluation of the Experience of Parents*, 55 J. CONSULTING & CLINICAL PSYCHOL. 179 (1987) (arguing that mediation led to 67 per cent reduction in court case loads). *But see* Kressel & Pruitt, *supra* note 6, at 182.

9. *See, e.g.*, JOAN BLADES, FAMILY MEDIATION: COOPERATIVE DIVORCE SETTLEMENT (1985) (reporting that mediated agreements are more frequently honored than adjudicated judgments); McEwen & Maiman, *supra* note 7 (reporting full payment rates of 71% in mediated settlements compared to 34% for small claims judgments); Neil Vidmar, *An Assessment of Mediation in Small Claims Court*, 41 J. SOC. ISSUES 127 (1985); Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, LAW & SOC'Y REV. 1984, at 18 (1) 20 (failure to pay anything is four times as likely in adjudicated as in mediated cases); Craig A. McEwen & Richard J. Maiman, *The Relative Significance of Disputing Forum and Dispute Characteristics for Outcome and Compliance*, 20 LAW & SOC'Y REV. 439, 439-47 (1986) (showing partial compliance rates of 95 and 93 per cent for mediated agreements as opposed to 61 and 67 in small claims adjudication); Kressel & Pruitt, *supra* note 6 (finding compliance rate of 67 to 87 per cent in neighborhood justice centers and no evidence for greater compliance in criminal court cases); W. Richard Evarts, *Comparative Costs and Benefits of Divorce Adjudication and Mediation*, MEDIATION

and parties' improved psychological states.[12] However, critics and some concerned supporters have expressed concern with mediation on grounds that it disserves parties who are members of powerless and disadvantaged members of society.[13] This article (by a concerned supporter) explores this criticism of mediation. Part II surveys the critics who argue that mediation's informality and

---

Q., Spring 1988, at 69 (finding compliance rates of 71 per cent versus 34 per cent in divorce settlement support payments after first year). Pearson & Thoennes, *supra* note 7. The authors studied long term differences between mediated divorce settlements and adjudicated agreements. This research revealed full compliance in 79 per cent of the mediated agreements versus 67 per cent in adjudicated agreements after a two year follow-up. Other long term compliance or stability of agreement studies include Robert E. Emery & Melissa J. Wyer, *Divorce Mediation*, AM. PSYCHOL., May 1987, at 472; Richard Mandell, *Use of Mediation in Child Support Disputes*, MEDIATION Q., Fall 1987, at 33; Hughes & Scheider, *Victim - Offender Mediation: A Survey of Program Characteristics and Perceptions of Effectiveness*, 35 CONCILIATION CTS. REV. 217-233 (1989) (showing less likelihood of recidivism in juvenile delinquents going through mediation); Margaret L. Shaw, *Parent-Child Mediation: A Challenge and a Promise*, MEDIATION Q., March 1985, at 23.

10. *See, e.g.*, Pearson & Thoennes, *supra* note 7 (77 per cent of respondents satisfied with mediation process versus less than 40 per cent satisfied with adversarial process); Joan B. Kelly & Lynn L. Gigy, *Divorce Mediation: Characteristics of Clients and Outcomes*, MEDIATION RES. 263 (1989) (finding 78 per cent of men and 72 per cent of women at least somewhat satisfied with divorce mediation); Emery & Wyer, *supra* note 9, at 179-86 (finding gender differences in satisfaction with divorce mediation; mediation fathers more satisfied than adversarial fathers but the reverse for the mothers); Raymond Albert & Dorthy A. Howard, *Informal Dispute Resolution Through Mediation*, MEDIATION Q., December 1985, at 99 (studying neighborhood dispute resolution and finding only 42 per cent of parties involved satisfied); McEwen & Maiman, *supra* note 7 (finding positive neighborhood mediation satisfaction results with 77-90 per cent satisfied with the process and 73-87 percent satisfied with the agreement); Janice A. Roehl & Roger F. Cook, *Mediation in Interpersonal Disputes: Effectiveness and Limitation*, MEDIATION RES. 31 (1986) (finding evidence that high satisfaction rates in mediation are only short term).

11. *See, e.g.*, Jessica Pearson & Nancy Thoennes, *A Preliminary Portrait of Client Reaction to Three Court Mediation Programs*, MEDIATION Q., March 1984, at 21 (crediting mediation with improvement of relations between spouses); Lyons et al., *supra* note 6 (finding no improvement in spousal relationships fifteen months after divorce); Pearson & Thoennes, *supra* note 7 (finding modest power of mediation to improve relationships); Joan B. Kelly et al., *Mediated and Adversarial Divorce: Initial Findings from a Longitudinal Study*, DIVORCE MEDIATION: THEORY AND PRACTICE (1988) (finding mediation improves cooperation and communication); Emery & Wyer, *supra* note 9 (finding that whether or not agreement is reached cooperation improves).

12. Psychological effects refers to some improvement in stress, depression, hostility, anxiety or anger. Examples of studies of psychological impact of mediation include Emery & Weyer, *supra* note 9 (finding mediation group mothers more depressed than litigation group mothers); Jessica Pearson and Nancy Thoennes, *Divorce Mediation: Reflections on a Decade of Research*, MEDIATION RES. (1989) (finding limited capacity of mediation to produce psychological changes); Kelly et al., *supra* note 11, at 465 (finding mediation respondents less positive about divorce than adversarial respondents and finding no support for "the hypothesis that mediation is significantly more effective in reducing psychological distress and disfunction."); Pearson & Thoennes, *supra* note 7 (finding psychological distress may be alleviated in so far as 70 and 90 per cent of respondents feel they were able to vent their grievances); Albert & Howard, *supra* note 10, at 104 (finding 92 per cent of respondents in neighborhood mediation feeling they had opportunity to explain).

13. Recently other forms of ADR, like arbitration, have also been criticized for favoring big businesses to the detriment of less powerful consumers. *See, e.g.*, Richard C. Reuben, *Are We Creating a Monster? The Dark Side of Alternative Dispute Resolution*, CAL. LAW., Feb. 1994 at 53.

lack of procedure disadvantages members of minority groups and women. Part II then takes the next step that the critics have not taken, explaining how mediation could affect adversely disadvantaged groups. Part III suggests solutions to the problem which involve a greater level of mediator intervention than is generally accepted and defends these solutions.

II. THE CRITICISMS OF MEDIATION

Mediation has been criticized by scholars from a variety of perspectives. Two major themes emerge from those critics who argue that mediation disserves disadvantaged groups: 1) that the psychological theories of prejudice suggest that mediation will disserve disadvantaged people and 2) that a "pro rights" approach suggest that mediation will disserve disadvantaged people.

The critique based upon psychological theories of prejudice has been done most extensively in the area of racial prejudice. Professor Richard Delgado, a prominent critical race scholar,[14] and several of his colleagues have criticized mediation and other forms of ADR from this perspective.[15] Delgado reviews the psychological literature on the origins of prejudice.[16] In all, he finds that the

---

14. Critical race scholars have approached many aspects of the law by analyzing and unearthing unspoken racial assumptions and identifying and charting the racial impact of ostensibly neutral legal categories and ideas. For a review of some of the many critical race scholars in print *see* Richard Delgado & Jean Stefancic, *Essay: Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993). *See generally* DERRICK BELL, AND WE ARE NOT SAVED (1987); Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539 (1989); Kimberle Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law*, 101 HARV. L. REV. 1331 (1988); Harlon Dalton, *AIDS in Blackface*, 1989 DEAEDALUS 205 (1985); Richard Delgado, *When is a Story Just a Story:Does Voice Really Matter*, 76 VA. L. REV. 95 (1990); Charles R. Lawrence, *The Id, The Ego and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Gerald P. Lopez, *The Work We Know So Little About*, 42 STAN. L. REV. 1 (1989); Gerald Torres, *Local Knowledge, Local Color: Critical Legal Studies and the Law of Race Relations*, 25 SAN DIEGO L. REV. 1043 (1988); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987); Taunya Lowell Banks, *The Americans With Disabilities Act and the Reproductive Rights of HIV-Infected Women*, 3 TEX. J. WOMEN & L. 57 (1993); Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1 (1991).

15. Delgado et al., *supra* note 3.

16. *Id.* at 1375-82. Delgado identifies three main theories. Psychodynamic theories analyze personality traits and have identified a particular psychological profile, "the authoritarian personality" which they believe are most susceptible to racial prejudice. *See also*, Lawrence, *supra* note 14; GEORGE EATON SIMPSON & J. MILTON YINGER, RACIAL AND CULTURAL MINORITIES: AN ANALYSIS OF PREJUDICE AND DISCRIMINATION 78 (4th ed. 1972); T. ADORNO ET AL., THE AUTHORITARIAN PERSONALITY (1969). Social-psychological theories of prejudice focus on the natural and necessary human tendency to categorize experiences as a way of simplifying and understanding reality. This need is bolstered by humans' need to form identity through group membership which, itself, is often accompanied by a necessity to distance oneself or dislike persons who are not members of the group. Economic theories of prejudice augment both the psychodynamic and, especially, the social psychological theories. These theories focus on the history of oppressed groups in American history

targeted "out" groups tend to be marked because of their high visibility and their limited power to retaliate.[17] Most importantly, he and his co-authors note that the social-psychological theories suggest that racism resides so deeply within the American culture and psyche that it can survive with much vitality even unconsciously.[18] Delgado and his colleagues recognize that these conscious and unconscious negative racial attitudes co-exist with the American Creed which supports the ideals of liberty and equality and is, thus, antithetical to the legacy of racism and prejudice.[19] A conflict develops in each American individual between these two competing notions. Delgado and his co-authors review prejudice reduction theories and determine that the informal atmosphere of mediation is precisely the kind of atmosphere which these theories posit as the most fertile for prejudice.[20] The conflict is most likely to be resolved away from the ideals of the American Creed and towards the deep seated negative attitudes of prejudice.

Prejudice reduction theories suggest that for prejudice to be reduced when members of "majority" and "minority" groups meet the contact must be intimate, on equal terms and perceived to be rewarding as opposed to antagonistic. In the alternative, there must be some intervention that allows the prejudiced person to be confronted with the inconsistency of her prejudice with the American Creed ideals. Although not described in detail, the Delgado argument appears to be that mediation can rarely provide either of the two required atmospheres. The informal and private structure of the mediation makes it likely to be intimate. But, either

---

and posit that rapid and dramatic economic and social change and disruption cause anger, fear and guilt. These intense feelings are purged through racism and the identification of "out" groups as scapegoats.

17. Delgado et al., *supra* note 3, at 1377, 1379 & 1382; *see also* Fairchild & Gurin, *Traditions in the Social-Psychological Analysis of Race Relations*, 21 AM. BEHAV. SCI. 757, 766 (1978); Seth Liebowitz & John P. Lombardo, *Effects of Race Belief and Level of Prejudice on Responses to Black and White Strangers*, 110 J. SOC. PSYCHOL. 293 (1980).

18. The theories agree that once an "out" group is targeted the negative attitudes are taught to children at a young "pre transition" period in their lives when they are so in awe of the source of "truth," normally their parents, that they are incapable of distinguishing the information as points of view as opposed to facts. Delgado et al., *supra* note 3, at 1380.

19. *Id.* at 1383.

20. *Id.* at 1384-86. Delgado and his colleagues identify four ways to resolve the resultant conflict which range along a continuum: 1) repression - denial of racial prejudice; 2) defense or rationalization - the blatant devaluation of "out" group members; 3) compromise or partial resolution - the attempt to conceal the conflict through ambivalent behavior or situational specificity; and 4) the successful attempt to rid oneself of racial animus. Delgado and his co-authors note that the various psychological theories of prejudice suggest that few succeed at true integration.

Delgado and his colleagues identify three theories of prejudice reduction: 1) social contact theory - this theory posits that social contact can reduce prejudice if the members of the majority and minority groups are of equal status, anticipate the contact to be rewarding as opposed to threatening or antagonistic and if the contact is intimate; 2) social distance theory - this theory posits that any close contacts between the races will increase prejudice so prejudice reduction comes from maintaining a certain distance; and 3) confrontation theory - this theory posits that contact can reduce prejudice if the prejudiced person is encouraged to confront the underlying inconsistencies between her prejudiced beliefs and the values of the American Creed.

the parties will come with their own racial differences that translate to socioeconomic differences which undermine the requirement for equal status or the parties come upset, they participate because they have a conflict, and they anticipate that the encounter will be threatening or antagonistic. If either one or both of these two situations occur, mediation can not transform the encounter into one where prejudice is reduced because the mediator lacks the necessary power to intervene and confront the prejudiced person with the internal inconsistency. While the concerns described by Delgado are analyzed specifically regarding race, he and his colleagues suggest that the analysis may well be applicable to other "out" groups as well "women, religious minorities, foreigners and the poor."[21] And at least one noted feminist and critical race scholar, Professor Trina Grillo, has suggested the same applicability.[22] Delgado and his co-authors conclude that the courtroom or litigation with formality and protective procedures are best for disadvantaged groups in most situations.[23] The various mechanisms for weeding out or minimizing prejudice in judges and jurors,[24] and for controlling the kinds of evidence and the procedures for placing the parties on an equal footing,[25] provide disadvantaged groups with a more suitable environment for the just resolution of their conflicts.

Those scholars who criticize mediation from a "pro rights" perspective also exhibit a preference for the formality, procedure, publicity and adversarial nature of courtroom litigation when it comes to determining the best forum for the just resolution of disputes involving disadvantaged people.[26] In part, these critics

---

21. *Id.* at 1361 n.8.

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

23. Delgado et al., *supra* note 3, at 1369-473.

24. *Id.* at 1369 (citing professional codes of conduct, long term appointments, repetitive caseloads, recusal rules, voir dire and peremptory challenges).

25. *Id.* at 1370-473 (citing rules of civil procedure and evidence).

26. Many of the scholars who critique mediation from the "pro rights" perspective are associated with the Critical Legal Studies school of legal thought. *See, e.g.*, Richard L. Abel, *Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice*, 9 INT'L. J. SOC. L. 245, 256 (1981). *See also* Richard Hofrichter, *Neighborhood Justice and the Social Control Problems of American Capitalism: A Perspective*, 1 THE POLITICS OF INFORMAL JUSTICE 207 (1982); Richard Hofrichter, *Justice Centers Raise Basic Questions*, NEIGHBORHOOD JUSTICE; ASSESSMENT OF AN EMERGING IDEA 193 (1982).

It should be noted that the CLS school is not monolithic on this point. Other CLS scholars have criticized the notion of the intrinsic value of legal rights arguing instead that rights "talk" perpetuates dichotomies like individual and community and encourages the "reification" of rights. This last suggests that by encouraging people to believe that rights are real one also encourages them to believe and accept all other aspects of the existing social order as inevitable. Thus they turn alienated and passive. *See, e.g.*, Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984); Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1982-83); Frances Olsen, *The Family and the Market: A Study of Idealogy and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984); Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981); Duncan Kennedy, *The Structure of Blackstones*

view mediation suspiciously based upon the timing of the rise in its popularity. Some Critical Legal Studies (CLS) scholars have argued that mediation and other forms of informal adjudication became popular at a time when disadvantaged groups were using the court system extensively and posit that ADR effectively controls and undermines this "rights explosion."[27] Some feminist scholars have argued, similarly, that the increasing use of mediation in the context of family law has come at a time when feminists had just begun to make progress within the

---

Commentaries, 28 BUFF. L. REV. 209 (1979); Ed Sparer, *Fundamental Human Rights, Legal Entitlements and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509 (1984).

Critical Race scholars have challenged this connection between belief in rights and the belief in the inevitability of the existing social order. Rather they look at the historical experience of minority groups and see belief in rights as empowering, unifying and motivating the belief in one's ability, individually and collectively, to change the social order. *See, e.g.*, Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?* 22 HARV. C.R.-C.L. L. REV. 301 (1987); Williams, *supra* note 14; Crenshaw, *supra* note 14; Robert A. Williams, Jr., *Taking Rights Aggressively: The Perils and Promise of Critical Theory for Peoples of Color*, 5 LAW & INEQ. J. 103 (1987).

Other scholars who have criticized mediation from a "pro rights" perspective have included a large number of feminist scholars. *See, e.g.*, Grace Marie Ange, *Mediation: Panacea or Placebo?* N.Y. ST. B.J., May 1985, at 6; Bailey, *Unpacking the "Rational Alternative": A Critical Review of Family Mediation Movement Claims*, 8 CANADIAN J. FAM. L. 61 (1989); Anne Bottomley, *What is Happening to Family Law? A Feminist Critique of Conciliation*, ROUTLEDGE KEGAN PAUL, WOMEN-IN-LAW: EXPLORATIONS IN LAW FAMILY AND SEXUALITY (1985); Carol S. Bruch, *And How Are the Children? The Effects of Idealogy and Mediation on Child Custody Law and Children's Well-Being in the United States*, 2 IN'L J. FAM. L. 106-126 (1988); Ruth R. Budd, *Divorce Mediation: Some Reservations*, 28 BOSTON B. J. 33 (1984); Ann L. Diamond & Madeleine Simborg, *Divorce Mediation's Weaknesses*, CAL. LAW., July 1983, at 37-39; Linda K. Girdner, *A Critique of Family Mediators: Myths, Themes and Alliances*, MEDIATION Q., Winter 1987, at 3; Linda K. Girdner, *Custody Mediation in the United States: Empowerment or Social Control?* 3 CANADIAN J. WOMEN & L. 138 (1987); B.J. HART, MEDIATION FOR BATTERED WOMEN: SAME SONG SECOND VERSE-A LITTLE BIT LOUDER A LITTLE BIT WORSE, NAT'L CENTER ON WOMEN & FAM. L. (1983); Barbara Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, MEDIATION Q., Summer 1990, at 317; Eve Hill, *Alternative Dispute Resolution in a Feminist Voice*, 1990 J. DISP. RESOL. 337; Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984); Diana Majury, *Unconscionability in an Equality Context*, CANADIAN FAM. L.Q., February 1991, at 123; Martha Shaffer, *Divorce Mediation: A Feminist Perspective*, 46 U. TORONTO FAC. L. REV. 162 (1988); Joanne Shulman & Laurie Woods, *Legal Advocacy vs. Mediation in Family Law*, 4 WOMEN'S ADVOC. 3 (1983); Donald Summers, *The Case Against Lay Divorce Mediation*, N.Y. ST. B.J., May 1985, at 7, 13; Laurie Woods, *Mediation: A Backlash to Women's Progress on Family law Issues*, 19 CLEARINGHOUSE REV. 431 (1985). *But see*, Advisory Committee on Mediation in Family Law. Report to the Attorney's General Advisory Committee on Mediation in Family Law. Toronto; Ministry of the Attorney General. 1989; Kathleen O'Connell Corcoran & James C. Melamed, *From Coercion to Empowerment: Spousal Abuse and Mediation*, MEDIATION Q., Summer 1990, at 303; Gwynn Davis, *Mediation and the Battle of the Sexes*, 19 FAM. L. 305 (1989); Gale, *Periodical Review: Martha Shaffer, Divorce Mediation: A Feminist Perspective*, 8 CANADIAN J. FAM. L. 212 (1989); Diane Neuman, *How Mediation Can Effectively Address the Male and Female Power Imbalance in Divorce*, MEDIATION Q., Spring 1992, at 227; and Janet Rifkin, *Mediation from a Feminist Perspective: Promise and Problems*, 2 L. & INEQ. J. 21 (1984).

27. *See, e.g.*, Abel, *supra* note 26, at 256.

court system to treat women's rights as public matters not private ones; mediation, in this view, is viewed as a way of putting women's rights back in the privacy closet.[28]

The core of the "pro rights" argument is that for those who have less power in the larger society the notion of rights is important. "The essential notion of rights [is] that the interests of the self can be considered legitimate."[29] Carol Gilligan described this positive aspect of the concept of rights in the context of its benefits for women, but the CLS scholars who adopt the "pro rights" critique of mediation employ the same analysis. Part of the "informal law" of mediation, as Grillo described, is to avoid most discussions of principle, values, blame and rights in order to maximize the possibilities for reaching some compromise or agreement.[30] For the CLS "pro rights" scholars, this emphasis on informality and compromise in mediation encourages parties to mistakenly believe that there is consensus on social and political values. The values that will be presumed shared will be those values reflected most strongly within the larger society; i.e. the values of the most politically and economically powerful. However, these scholars note that the conflict between the haves and the have-nots is fundamentally adversarial precisely because the two sides do not share common social and political values. A focus on rights, in contrast to a focus on compromise, allows and encourages the disadvantaged to focus on their own definitions of self interest as a legitimate endeavor. The courtroom provides the better battleground for an adversarial fight.[31]

---

28. *See* Woods, *supra* note 26.

29. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 149 (1982).

30. Grillo, *supra* note 22, at 1558. Grillo identifies several reasons for the avoidance of blame and values: because of the goal of reaching agreement through the give and take of compromise, because in a multi-cultural world or society of diverse cultures, religions and family structures it can be difficult of find one external moral code, and because even the formal legal system has shifted towards a "no-fault" model in the context of family law.

31. *See* Abel, *supra* note 26, at 257. For example, Mark Lazerson, in his studies of landlord-tenant disputes focuses on the fact that in the formal court system formal rules and procedure recognize the inequality between landlords and tenants and provide some compensation for this inequality through the equal application of rules. Without the rules the weaker parties, the tenants, have no chance of having their grievances and perspectives heard. He bases this conclusion on his experience in the Bronx Tenant Court. When the Tenant Court functioned in a traditional and formal matter, tenant lawyers could press their clients' procedural rights to the point where landlords were willing to work out agreements involving flexible rent payment terms or outright forgiveness to avoid lengthy court trials. When the Tenant Court became the Housing Court and emphasized conciliation and de-emphasized procedural rights tenant lawyers were far less successful in developing agreements which included their clients' interests and perspective. Mark Lazerson, *In the Halls of Justice the Only Justice is in the Hall*, 1 THE POLITICS OF INFORMAL JUSTICE 119, 159 (1982).

The CLS critique also has a broader social view aspect to it. Disadvantaged groups lose power within the process of informal adjudication but they also lose power and control in the larger society. Part of the argument is that all institutionalized mechanisms, formal and informal, involve regulation on the part of the state. The addition of informal mechanisms then expands the regulatory capacity of the state: formal institutions do not decrease their workload they just attract other cases that would otherwise not be regulated by the state and informal institutions handle not only those cases diverted

For the feminist critics, the "pro rights" approach which legitimatizes ones concern with the interests of the self is an important lesson for women to learn. Women, in contrast to men, are socialized to care for others and so must consciously learn to care for themselves. This socialization is reflected in the tendency for women to employ a relational ethic of care in dealing with other people which leads to a negation of any focus on the self.[32] This ethic of care causes women to see their value in terms of relationships. On the surface then, mediation should seem a perfect medium. But if the two parties have unequal attitudes towards being relational, the person who is more relational, the woman, will likely overcompromise. If both parties are not relational then the mediation takes on the character of a negotiation which requires that each party be clear about their separate interests and the priorities to which they attach to those interests. The party who is more relational will have trouble doing that and will tend to give up more than if both parties were equally relational. For the "pro rights" feminists critics, the formal public adversarial nature of the courtroom is preferable for the just resolution of disputes involving women.[33]

The critics ultimately identify in "out" or marginalized groups a fundamental need, i.e., to identify a positive and independent sense of self and self-interest. That development is often done, and perhaps most easily done, in the context of oppositional struggle with members of "in" groups. The courtroom and an adversarial "fighting" method of resolving disputes supports the needs for distance, independence and self-interest. Still, the question remains how good is formality and procedure in the courtroom at reducing prejudice? The critics' analyses argue that various procedural rules in court will exclude those judges and jurors with racial animus; that the rules establishing the formal equality of the parties involved in any matter create the necessary "equal status" or equalization that disadvantaged group members need; and that the emphasis on the American Creed values provides an indirect confrontation between equality values and racial animus for prejudiced parties which, if the exposed inconsistency does not lead to an actual

---

by the formal system but also attract other conflicts that would also have been resolved outside of any institutional forum. Thus, more conflicts that might otherwise erupt into fundamental struggles over political and social values are now neutralized by going through safe and regulated channels, both formal and informal. The other part of the broad social critique argues that informal adjudication processes attract parties as individuals and so discourages collective action. Individuals are encouraged to see their particular conflict as an aspect of the particular relationship involved thus impeding their ability to recognize the existence of other similar cases and conflicts and to acknowledge wider social and economic class interests.

32. Grillo, *supra* note 22, at 1601.

33. Other feminists scholars have criticized the reliance on some notions of "rights" as being detrimental to women because they see rights claims as patriarchal, i.e. formal and hierarchical which can lead to alienation and passivity in women. *See, e.g.*, CATHERINE MACKINNON, TOWARD A FEMINIST THEORY 47 (1989); Catherine MacKinnon, *Feminism, Marxism, Method and the State: Toward a Feminist Jurisprudence*, 8 SIGNS 635, 644 (1983); Polan, *Toward A Theory of Law and Patriarchy*, THE POLITICS OF LAW, 294, 300 (1982); Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L. J. 83, 86 (1980).

resolution of the conflict towards equality values, at least it discourages the prejudiced party from acting out their racial hostilities.

However, the psychological theories of prejudice that reveal the depth and intractability of prejudice, especially unconscious racism,[34] suggest that formal procedures cannot eradicate prejudice in the courtroom. Indeed, empirical evidence suggests continuing discrimination against marginalized groups within the formal legal system at all levels.[35] Formal rules of procedure, like recusal motions, cause motions or preemptory challenges, can now combat some forms of blatant prejudice.[36] But biased attitudes can be masked by codewords, using

---

34. For a discussion about unconscious racism in particular *see* Lawrence, *supra* note 14.

35. Grillo recognizes, but does not emphasize, this problem in her article when she briefly mentions concerns over the continuing intrusion of prejudice against women in the formal justice system by citing Judith Resnick, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1903 (1988). Grillo, *supra* note 22, at 1588.

The judiciary continues to underrepresent women and minorities. For example only 10 per cent of federal judgeships are held by women and only 9 per cent are held by Blacks or Latinos. Barbara Bradley, *With Diversity Pledge President May Give New Look to U.S. Courts*, CHRISTIAN SCI. MONITOR, May 19, 1993, at 6. The African American community has had a continuing concern with racial disparity in sentencing. This concern has been documented in an analysis of the federal sentencing guidelines. UNITED STATES SENTENCING COMMISSION SPECIAL REPORT TO CONGRESS, MANDATORY MINIMUM PENALTIES IN THE FEDERAL JUSTICE SYSTEM (August 1991). This concern has recently taken on an even greater urgency with regard to the pending federal Anti-Crime bill which, among other things, would expand the categories of federal offenses that warrant the death penalty. Elizabeth Schwinn, *Black Caucus Threatens to Delay Anti-Crime Bill*, S.F. EXAMINER, July 25, 1994, at A8. Concerns expressed by Black congressional leaders rest upon the disproportionate numbers of criminals who are sentenced to death if they kill whites as compared with killing Blacks. *Id.* Their concerns are further heightened by the fact that even though 75 per cent of the people the Justice Department has charged under the 1988 Drug Kingpin law are white, 33 of the 37 people it sought to execute were Black or Latino. *Make Death Penalty Fairer*, BUFF. NEWS, May 16, 1994, at 2. The racial disparity in sentencing affects both Black men and women. Myrna Raeder, *Gender and Sentencing: Single Moms, Battered Women and Other Sex-Based Anomalies in the Gender Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905, 920 n.63 (collecting research articles showing racial disparities).

The numbers of minority lawyers continue to be below their respective representations in the general population. *See, e.g.*, Vance Knapp & Bonnie Kae Grover, *Can the Corporate Law Firm Achieve Diversity*, NATIONAL BAR ASSOCIATION MAGAZINE, March/April 1994, 8 (citing statistics on Blacks, Latinos and native Americans in corporate law firms). While white women are entering law schools in increasing numbers, minority law students are still underrepresented. Women and minorities remain underrepresented in the law teaching profession, and empirical evidence shows that their is continuing discrimination against minorities in legal academic hiring, especially against minority women. Deborah Merritt & Barbara Reskin, *The Double Minority: Empirical Evidence of a Double Standard in Law School Hiring of Minority Women*, 65 SO. CAL. L. REV. 2299 (1992).

36. The rules and procedures now routinely used to protect women and people of color , of course, were not always in place. Historically, such rules were used to exclude men and women of color as well as white women from full participation in the adjudicative process. *See, e.g.*, THE HONORABLE A. LEON HIGGENBOTHAM, IN THE MATTER OF COLOR (1991); JOAN HOFF, LAW, GENDER AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN (1991).

Moreover, even today the rules and formality do not always protect participants from blatant bias. For example, in October of 1990, a Mississippi judge affirmed his ruling that a white mother, Tammy Brown was no longer fit to raise her own two sons because she had chosen to live with and eventually

residential addresses or language skills as substitutes for race, which may be less easily identified but as powerfully negative towards disadvantaged group members as more obvious language.[37] The formal equality of the courtroom can put parties on an equal footing, giving them equal procedural weapons, but it does so largely by requiring the parties to battle through surrogates, i.e. their lawyers, and to use legal arguments and language that does not reflect their authentic voices or perspectives.[38]

One example of the continuing presence of racial attitudes in the litigation context is the case of *Hernandez v. New York*.[39] This case confronted the Supreme Court with the ramifications of the prohibition of the use of race in the exercise of peremptory challenges. The Court had already ruled that for a prosecutor to use race to exclude deliberately venirepersons who were members of any particular race violated the Equal Protection Clause of the Constitution.[40] In *Hernandez*, the Court was asked to determine whether the prosecutor's exclusion of all venirepersons who were Latino violated the Equal Protection Clause. The defense argued that to exclude all jurors who spoke Spanish was a pretext for excluding jurors of a particular race. The majority of the Supreme Court was able to find no violation of the Constitution because the prosecutor had articulated a race-neutral explanation for his exclusions: he felt that their conduct, their hesitancy when he asked if they could listen to the translator's version of what the witnesses said in Spanish as opposed to their own understanding of what the witnesses said, provided him with a legitimate non-racial concern that they would be unable to abide by the translator's version of events.[41] While the Court was not oblivious to the notion that code words could be used as a pretext for

---

marry an African American man. Eric Harris, *Her Dream Became A Nightmare*, L.A. TIMES, September 21, 1993, at A1; Keith A. Owens, *In '94 the President Needs to Stand Up for Civil Rights*, DET. FREE PRESS, December 26, 1993 (noting that trial judge considered leaving the children with their mother and Black step-father a form of "child abuse" and that the decision was upheld by the Mississippi Supreme Court). In a similar vein, when it comes to homophobia, there is less of a perceived need to be at all embarrassed or ashamed at ones ignorance or hatred. In 1993, Sharon Bottoms was deprived of her son, Tyler Doustou, because she lived, openly, in a lesbian relationship. Her mother, who initiated the action, was granted custody. However, in 1994, the Virginia Court of Appeals reversed the decision and reunited the mother with her son. Peter Baker, *Virginia Court Returns Son to Lesbian*, WASH. POST, June 22, 1994, at A1; *see generally* Abby R. Rubenfeld, *Sexual Orientation and Custody*, HUM. RTS., Winter 1994, at 14.

37. United States v. Bishop, 959 F.2d. 820 (9th Cir. 1992) (rejecting the use of residential or geographic area as a race-neutral basis for excluding African-American jurors).

38. *See, e.g.*, Lucie White, *Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs G.*, 38 BUFF. L. REV. 1 (1990). Of course some times surrogates are important. For some parties, for example women going through traumatic divorce proceedings, lawyers can act as insulators at a time when they are unprepared to engage in face-to-face combat. *See* Grillo, *supra* note 22, at 1597.

39. 500 U.S. 352 (1991)

40. Batson v. Kentucky, 476 U.S. 79 (1986).

41. *Hernandez*, 500 U.S. at 359.

race,[42] the focus of the majority was on the sincerity or "credibility" of the prosecutor.[43] For the majority, the fact that a rationale would have a disparate impact upon a particular group is not enough to establish a violation; there must also be "purposeful discrimination."[44]

The dissent in *Hernandez* was more attuned to the ramifications of the theories of prejudice which suggest that prejudice is deep and unconscious in the American psyche. Justice Stevens noted that there is no true bright line between discriminatory impact and discriminatory purpose because "discriminatory purpose [can] sometimes be established by objective evidence that is consistent with a decisionmaker's honest belief that his motive was entirely benign."[45] The dissent was far less focussed on the sincerity of the prosecutor out of a concern for the use of code language even in an unconscious manner. It determined that, among other points, if the prosecutor's reason was "valid and substantiated by the record, it would have supported a challenge for cause."[46]

The *Hernandez* case reveals the continuing struggle to eradicate racism from the litigation context. While in other situations courts have been willing to confront the use of code words as a pretext for race,[47] here the majority was unwilling to question what unconscious racial images might have prompted the prosecutor to question the actions of the Latino jurors. While it is an example of the way formal procedures can be used as mediation's critics suggest, to ferret out prejudice, it may arguably be an example of how such procedures can fail. Interestingly, *Hernandez* is also an example of the way in which the courtroom requires participants to speak through surrogates. In this case the principal witnesses would speak in Spanish. The majority noted that language is significant in the expression of personal identity and membership in community.[48] Nonetheless, both majority and minority opinions accept the notion that witnesses and defendants are not entitled to be heard in their authentic voices. All on the court agree that there must be some mechanism to encourage jurors to listen to the translator as opposed to the witness in the determination of the facts.

The *Hernandez* case suggests that even with procedural safeguards, the eradication of racial bias and other biases in the litigation context is still a struggle. But even if the procedures correctly filter out prejudice in the presentation of evidence, an adversarial contest is still ultimately decided by a fact-finder, typically the jury. Here again, despite the use of the voir dire as a

42. *Id.* at 371 ("In holding that a race-neutral reason for a preemptory challenge means a reason other than race, we do not resolve the more difficult question of the breadth with which the concept of race should be defined for equal protection purposes.")

43. *Id.* at 365.

44. *Id.* at 362.

45. *Id.* at 377.

46. *Id.* at 379.

47. *See, e.g., Bishop*, 959 F.2d at 820.

48. *Hernandez*, 500 U.S. at 370.

procedural safeguard against biased jurors, studies show that jurors, once left on their own to decide the case, exhibit a number of prejudices.[49]

The formal, adversarial system of dispute resolution still does not protect disadvantaged people from prejudice and discrimination. In an imperfect world, mediation with its own imperfections begins to look better, especially when one considers that while disadvantaged group members sometimes need to "fight" for their rights, they also, like advantaged people, need connection and conciliation in resolving disputes. And they need, perhaps even more so than advantaged group members, a forum in which their authentic voices and experiences can be expressed.[50] Once the critics have analyzed why there is a high probability that mediation will disserve disadvantaged group members, perhaps the next step is not to avoid using mediation. The next step may be how to provide mechanisms, as we do in formal dispute resolution, that can solve or ameliorate the problem of bias.

But, before we can discuss methods that might solve the problem, we need to know exactly how the problem occurs. The empirical evidence supporting the critics claim is still in a nascent phase.[51] Though often anecdotal or in the

---

49. Nancy J. King, *Post-Conviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 75 (1993). The article describes, briefly, that negative stereotypes can affect jurors decision-making process and then reviews studies which "demonstrate that jury discrimination can and does affect jury decisions." *Id.* at 100. *See generally* Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273 (1989) (discussing, without relating to prejudice, dominant cognitive psychological theories on how people process information by using "schemas" which can cause jurors to filter out relevant evidence at trial).

50. Michelle Herman, Gary Lafree, Christine Rack and Mary Beth West, *Report Summary: An Empirical Study of the Effects of Race and Gender on Small Claims Adjudication and Mediation*, (January, 1993) (Institute of Public Law, University of New Mexico and on file with author) (hereinafter "Institute of Public Law Study"). This study, one of the few empirical research pieces done on the impact of race and gender on mediation, found that despite the evidence that minority parties get a "worse deal" through mediation than in small claims court than did white parties, the minority parties responded with higher levels of satisfaction with the mediation process than did white participants. The authors refrain from explaining the discrepancy but one explanation may well be that the minority parties were especially pleased to be in a forum in which they could feel they were heard and spoke in their own voices.

51. The Institute of Public Law Study is one of the few that attempts to test Delgado's theory. *Id.* Their results are still preliminary but support Delgado's contention on racial prejudice but are not consistent with Grillo's observation about women, or at least white women. Grillo's article provides support by describing the stories of actual female participants in divorce mediation.

Professor Ian Ayres has written a recent article on racial and gender discrimination in the context of a different ADR forum negotiations. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991). His findings of persistent race and gender discrimination on the part of car dealerships during negotiations while significant are not directly relevant to the mediation context. Ayres focused on retail car sales as one major market area left unregulated by civil rights laws. Housing and employment had long been perceived as appropriate arenas to regulate because they involve significant interpersonal contact. Areas like car retail sales were understood to be self-regulating because they were dominated by impersonal market forces which would undermine racial and gender attitudes. *Id.* at 821-22. The intimacy of mediation makes it more analogous to the protected areas, housing and employment, which were not his focus. One can see, though, that Congress' logic in focusing on housing and employment, that interpersonal interaction

preliminary phases, there is some empirical support that mediation and other informal adjudicative procedures do disserve disadvantaged groups. Still more work needs to be done on the mechanics of how mediation could provide such a fertile ground for prejudice. The next section will explore how mediation might do so.

III. CULTURAL MYTHS AND BIAS IN MEDIATION

What is often noted as unique and even magical about mediation is the opportunity for parties to tell their own stories and have them be heard. But the process of story-telling or narratives, while it has its positive aspects, may also be at the heart of the problem of bias in mediation. Narratives must interact or compete for legitimacy or primacy in a mediation. In doing this, parties will understand and craft their stories in relation to other pre-existing stories and cultural myths with which all the participants, parties and mediators are familiar.[52] Disadvantaged group members will have more negative cultural myths uniquely related to them, i.e. stereotypes, that undermine the ability of their narratives to compete effectively .

Two mediation scholars, Sara Cobb and Janet Rifkin, have described narratives as "re-representations of the past in the present, through which identities, moral orders and relational patterns are constructed and negotiated," and the mediation process itself as the interaction of narratives.[53] The first story told, the "primary narrative," describes the conflict by relating, generally, a sequential series of events, the plot, with characters and their roles and an overall theme or moral

---

creates a dangerous situation that requires intervention, is consistent with the position of mediation's critics. Moreover, unlike regulated areas like housing and employment, mediation is viewed as involving very minimal intervention by the mediator which is precisely the concern of mediation's critics. However, Ayres does explore some explanations for the discrimination that are similar to the process discussed later that occurs in mediation. He posits, at one point, that the observed "revenue based statistical discrimination might be based on an inference by dealers that some consumer groups are averse to the process of bargaining." *Id.* at 850. In essence he describes that the dealers may rely upon some "cultural myth" about certain groups which may be "irrational or stereotypical" or "rational statistical."

52. This is an example of a broader and fundamental cognitive process as described in psychological literature. *See, e.g.*, JEROME S. BRUNER, BEYOND THE INFORMATION GIVEN: STUDIES IN THE PSYCHOLOGY OF KNOWING, (Jeremy M. Anglin ed. 1973). Human beings never get all the information about understanding a thing solely from their sensory perceptions. We always rely upon inferences and interpretations that are derived from the categorization of prior experiences.

This fundamental cognitive process of using prior existing knowledge, stories or cultural myths has been explored in the context of jurors and litigation. Jurors of necessity must use "schemas" to understand and organize the often contradictory evidence presented to them and in doing so can end up ignoring important pieces of evidence which are presented at trial. Moore, *supra* note 49.

53. Sara Cobb & Janet Rifkin, *Neutrality As a Discursive Practice: The Construction and Transformation of Narratives in Community Mediation*, 11 STUD. LAW POL. & SOC'Y 69, 70 (1991); *see also* Sally Engle Merry, *Culture, Power and the Discourse of Law*," 37 N.Y.L. SCH. L. REV. 209, 216 (1992).

code.[54] Subsequent speakers generally employ the same series of events and moral code or interpretive framework. In part they do this because it is a conversational practice that requires speakers to connect or relate their stories to the primary narrative.[55] In part, they do this because the primary narrative in identifying a moral code will determine what behavior constitutes "goodness" and "badness" and will generally assign subsequent speakers a "bad" character role or a "negative position." People assigned a negative position will act to reposition themselves in a more positive light and, in doing so, they will connect to the primary narrative and employ stories of "justification, denial or excuse."[56] By repositioning themselves through the use of the primary narrative events and moral codes, subsequent speakers, unwittingly, strengthen the legitimacy of the primary narrative. The narrative and accompanying interpretive framework which is repeated the most, generally the primary narrative, becomes the strongest and will most likely provide the framework for any resultant agreement.[57] To actually transform a narrative, one must change its context, i.e. the moral code and characters must be altered.

Cobb and Rifkin provide an example of the process by relating a case study involving a school bus driver in conflict with a nine year old boy passenger. The bus driver provides the primary narrative which relates a series of events involving the boy's increasingly disruptive behavior culminating in his pushing her.[58] Her story assigns the boy a negative position as an unruly child and gives herself a positive position as the good adult who has tried everything to help him. The boy's response reconstitutes the bus driver's primary narrative by accessing her story at the point where she accused him of pushing her and stating that her description is not true. The boy's mother successfully articulates an alternative narrative, although it is ultimately not incorporated in the final agreement, by adding new events and characters to the plot, the school bureaucrats who fail to inform her of her son's problems on a regular basis, and thereby creates a new moral code or new bad guy: the school bureaucrats.[59]

Cobb and Rifkin do not fully explore why the boy and his mother are unable to reposition themselves in a more positive light, but their description and analysis of the sources of the interpretive framework which participants employ is instructive.[60] The primary narrative regulates the interpretation of the events by

---

54. Cobbs & Rifkin, *supra* note 53, at 72.

55. *Id.*

56. *Id.* at 76. This phenomenon, the authors note, is apparent not just in mediation but in social life generally.

57. *Id.* at 80-81.

58. *Id.* at 76-77.

59. *Id.* at 83-85.

60. *Id.* at 81. Their hypothesis suggests that any primary narrative will exert a powerful influence on the interpretive framework ultimately employed in the mediation. However, they do point out that the fact that one of the parties is a child may have been a significant factor in the colonization and marginalization of his story. First because as a child his story will always tend to be dominated by the stories of adults and second, as a young person his story was told in a far less coherent fashion

employing an interpretive framework. In this framework the speaker is generally positively positioned and her adversary negatively positioned. The negatively positioned second speaker then moves to reposition himself and the narrative process becomes a "war of position" or "a struggle over competing definitions and descriptions of social relations."[61] These interpretive frameworks or competing definitions are drawn from the history and norms of the larger society. This interpretive framework is itself constructed by bits and pieces of larger cultural myths about (in this case) children; myths that are themselves cultural and historical artifacts. "There are, in any given culture, stocks of stories that actors may draw on to 'nest' their narratives inside of pre-existing narratives that are already legitimized in the wider culture."[62]

All of the participants must juggle these "bits and pieces of larger cultural myths" during the process of the mediation. The parties bring whatever bits and pieces most legitimate their view of the conflict. The mediator, too, has lived in the wider culture and does not have a "teflon" mind. So she, too, will bring in her own bits and pieces of larger cultural myths which provide her with the ability to even recognize that there is a conflict and understand what the parties are arguing about.

When speakers or participants draw on bits and pieces of larger cultural myths, they must choose some relevant socially constructed category for themselves and others. They will choose one or more categories from a variety of "identity groups",[63] i.e., groups based on common biological characteristics, common or equivalent histories and similar world views, for example, groups based on race, ethnicity, family, gender and age; or "organizational groups", which are based on the assignment of similar primary work tasks or on the participation

---

than the adult's. The force of these factors flow from the cultural myths and norms (adults are more trustworthy than children, articulate people are more believable than inarticulate ones) upon which parties interpretive norms rest.

61. *Id.* at 76.

62. *Id.* at 73 n.10.

63. The terms "identity groups" and "organizational groups" are from the organizational psychological theory known as "intergroup theory." Professors Clayton Alderfer and David Thomas have used intergroup theory to describe that all individuals are "shaped by at least three sets of forces: their own unique personalities, the groups with whom they personally identify to a significant degree, and the groups with whom others associate them - whether or not they wish that association." Clayton P. Alderfer & David A. Thomas, *The Significance of Race and Ethnicity for Understanding Organizational Behavior*, 1 INT'L REV. INDUS. & ORGANIZATIONAL PSYCHOL. 7 (1988). Identity group characteristics and differences persist over time in a manner that organizational characteristics do not. Identity group characteristics retain their power because they are often formed during the "pretransition" period of one's childhood or "begun by events over which no one has a choice." *Id.* at 13. Organizational group membership characteristics generally start at a more adult age and change as individuals move in and out of and upwards and downwards in organizations. David A. Thomas & Clayton P. Alderfer, *The Influence of Race on Career Dynamics: Theory and Research on Minority Carer Experiences*, HANDBOOK OF CAREER THEORY 133, 145 (M. Arthur, D.T. Hall & B. Lawrence, eds., 1989). Intergroup theory posits that individuals are constantly attempting consciously and unconsciously "to manage potential conflicts arising from the interface between identity and organizational group memberships." *Id.*

in comparable work experiences and on the sharing of common organizational views. So, in our bus driver-school boy example, it is significant that the woman is located in the organizational category "school bus driver" as opposed to merely woman driver in understanding her story. It also is significant that the school boy is in the identity category of "child" as opposed to "adult." Her location in the "bus driver" category allows us to access those bits and pieces of cultural myths that relate to what the job of a bus driver is like and by extension what the job of adults who have authority over and responsibility for our young people is like. The school boy 's location in the category "child" reminds us of bits and pieces of cultural myths about how children should behave in school and on their way to school as well as how young boys may behave in quite contrary fashion. To be sure some of these images or myths will be drawn from personal experiences - what was I like at age nine or what is my own nine year old like on the school bus. But one does not have to have been a school bus driver to access larger cultural myths that inform one of what the job and circumstances might be like.

The larger cultural myths evoked by the relevant identity or group categories provide the participants with a series of preexisting possible stories within which the parties' narratives may fit. The myths can be positive or negative.[64] And whether they are positive or negative will affect the ability of the party who draws upon that myth to legitimate her own narrative. So, for the school bus driver, we have a lot of positive myths about school bus drivers[65] and other adults whose jobs involve responsibility for children and the bus driver party was able to draw upon this in positively positioning herself, her narrative and its interpretive framework. In contrast, the school boy is faced with a more mixed bag of cultural myths about children. While we love our kids, we can all access cultural myths and personal experiences involving children who misbehave and lie about it afterwards. The strength of those negative cultural myths "disadvantages" the boy in his bid to legitimate his narrative and interpretive framework.

---

64. I use the term "negative cultural myth" largely to refer to prior notions about the behavior of categories of people which is negative. I mean this to be close to what is understood as a stereotype, but I want to avoid the use of the term "stereotype" because I believe that it suggests a deliberate and conscious decision to view the "other" as one dimensional. By the term "cultural myth" I hope to capture those aspects of the prejudice that thrive in our society which are unconscious. I also mean to include prior ideas about categories of people which, though in and of themselves do not put the group's members in a bad light, still under the circumstances limit any individual group member from being different than the characterization portrayed in the myth.

There are disadvantages that may occur in mediation that, while related to some cultural myths concerns, are in fact not grounded there. For example, some of the concern around how women may be disadvantaged can involve cultural myths about women. But some of that concern stems from the training women get such that they end up being more relational than men. The behavior or attitude of being relational oriented is itself a disadvantage since society privileges a more competitive method of interpersonal interaction.

65. This is not to say that there are not negative ones. For example, the ability of the bus driver to legitimate her narrative would change if there was some suggestion that she was an unrecovering alcoholic who drank on the job. But in the absence of such other facts, most of our myths are fairly to very positive.

In the bus driver-school boy example, the fact that the cultural myths "disadvantage" the boy's ability to legitimate his narrative may not be troubling. After all the myths are based upon personal experiences and truth. But the cultural myths surrounding identity groups involving disadvantaged group members are often both negative and purely based upon derogatory conjecture and assumptions about group members.[66] Yet these negative cultural myths are deep and strong and can lead to irrational and damaging behavior.[67] These deep fears are fairly characterized as "taboos."[68] They are taboos because the term indicates not only that the fears are unconscious or subconscious attitudes from the "pretransition" period of childhood, but to underscore as well that these are attitudes which forbid action and reflection upon that which is forbidden.[69]

Let me give a non-mediation example of the power of intertwined race/gender taboos or cultural myths. In the Spring of 1993, President Clinton nominated Professor Lani Guinier, long time civil rights lawyer, noted University of Pennsylvania law professor and African-American woman to a position in the Department of Justice.[70] A political controversy ensued over her academic exploration of the applicability of certain voting rights strategies to minority electoral jurisdictions.[71] Any discussion of the merits of her proposal and beliefs

---

66. *See* Lawrence, *supra* note 14 (discussing the need for recognizing unconscious stereotypes in the context of constitutional analysis precisely because they are so deep and unconscious and foundationless yet powerful); *see also* Lisa Ikemoto, *Traces of the Master Narrative in the Story of African-American/Korean-American Conflict: How We Constructed Los Angeles*, 66 S. CAL. L. REV. 1581 (1993).

67. For example the intergroup theorists look at how racial attitudes can negatively and irrationally affect career paths for minority group members. On the one hand, one sees increased opportunities for entry and upward mobility for minorities in private and public organizations. But on the other hand, statistics and personal experience indicate continuing discriminatory treatment. *See* Thomas & Alderfer, *supra* note 63, at 145. Similar problems have been documented for women, especially minority women in legal academe. Merritt & Reskin, *supra* note 35. Intergroup theory suggests that while individuals in organizations display organizational membership characteristics which are rational - they collaborate to achieve certain ends - they also exhibit irrational behavior because individual's unconscious hopes and fears, dreams and myths and history all influence them as well. *See* David Thomas, *Mentoring and Irrationality: The Role of Racial Taboo*, 28 HUM. RESOURCE MGMT. 279, 280 (1989). Thomas focusses on racial fears, in particular intertwined racial and gender fears, as the source of much irrational and damaging behavior in affecting the normal mentoring process within organizations.

68. Thomas, *supra* note 67, at 281.

69. *Id.*

70. Ronald J. Ostrow, *Clinton Praises Reno's Waco Testimony*, L.A. TIMES, April 30, 1993 at A20 (citing list of seven Department of Justice nominees including Professor Guinier).

71. Guinier has written on her concerns that our "winner-take-all" form of democracy can become majority tyranny where minority interests are wholly ignored or intentionally injured. Her position was and is not an anti-democratic or anti-majoritarian one as her political opponents have charged. Her endorsement of cumulative voting which gives each voter a number of votes equal to the total number of representatives to be elected and allows voters to spread their votes among candidates as they wish focuses on voter collaboration around viewpoints and interests rather than geography. The method is used in some local at-large election systems and in corporate board elections. Indeed, it was proposed as a remedy for violations of the Voting Rights Act by both the

was undermined when she was characterized as a "quota queen."[72] Guinier's opponents were able to "nest" their narrative opposing her, she supports quotas, in several historical and cultural myths. The first is invoked by the mere mention of the word "quota" which not only reminds the American listener that quotas are used by incompetents to gain positions for which they are not deserving, but it also invokes specifically racialized myths on how African-Americans in particular employ quotas to reap undeserved benefits.[73] In addition, the use of the superficially positive term "queen" in fact accesses a particularly negative cultural myth about African American women, the "welfare queen" the lazy, unkept black women with thousands of children who refuse to work and just exploit the "good" (read white) people by living off the tax payer provided welfare.[74] Guinier and her supporters argued that in a sober and intellectual discussion about the specific facts, in a hearing in front of the Senate, the truth and complexity of Guinier's positions and beliefs would be apparent. However, they had few cultural or historical myths about the brilliance of black women, their reputation for sobriety and fairness, in which to "nest" their presentation of her as a public figure. In the end the interpretive framework with the stronger cultural and historical myth to support it won out and President Clinton withdrew Guinier's nomination before she even had a chance to present her case before the Senate.[75]

Reagan and Bush administrations. David Kairys, *Book Review of The Tyranny of the Majority: Fundamental Fairness in Representative Democracy by Lani Guinier*, PHILA. INQUIRER, March 27, 1994, at M1.

72. Clint Bolick, *Clinton's Quota Queens*, WALL ST. J., April 30, 1993 at A12; *see also Crowning a Quota Queen?*, NEWSWEEK, May 24, 1993 at 67.

73. Knapp & Grover, *supra* note 35, at 16 (quoting Lino Graglia, a professor at the University of Texas, who has alleged that afffirmative action has resulted in a lowering of standards); Paula Dressell, Bernadette Weston Hartfield & Ruby L. Gooley, *The Dynamics of Homosocial Reproduction in Academic Institutions*, 2 AM. U. J. GENDER & L., (Spring 1994); Lawrence, *supra* note 14.

74. *See* White, *supra* note 38, at 37-39; Monica J. Evans, *Stealing Away: Black Women, Outlaw Culture and the Rhetoric of Rights*, 20 HARV. C.R.-C.L. L. REV. 263, 274 (1993). Both authors note that welfare recipients' image in society is almost always one of a woman who is a cheat or a fraud. *See also* Mariana Moore, *Commentary: Proposition 165: We Won the Battle, But Are We Losing the War?* 8 BERKELEY WOMEN'S L. J. 6, 14 (1993). The author explicitly notes that one misconception about welfare recipients is that they are Black women when in fact the statistics show that most recipients are white.

75. Frank J. Murray & Jerry Seper, *Clinton Withdraws Nomination, Renounces Guinier's Writings*, THE WASHINGTON TIMES, June 4, 1993, at A1. In another example, Deborah Tannen, the author of YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION, a book about the different "cultures" in which men and women grow up, discusses some observations she made while attending an academic conference. She found herself, during one of those moments when one "zones out" of the continuous talking, scrutinizing the dress of the women participants. As she mused on first one speaker- the cross between the Plain Jane and Cleopatra with the severe and straight haircut wearing man-tailored suits -- and then another - the speaker with the wild, frosted often-tossed hair wearing sexy jumpsuits -- until she wondered why she only focussed on the women. When she looked at the men she realized it was because, as she characterizes it, they were "unmarked." She borrows the term "marked" from linguistic theory: "[t]he unmarked form of a word carries the meaning that goes without saying -- what you think of when you're not thinking anything special." Marked words are those which with the addition of an otherwise meaningless linguistic participle alters the base

One way to explore the impact of cultural myths regarding disadvantaged group members in the mediation context is to employ the process of "race-switching" in the mediation case study.[76] To race switch, the case study involves making specific the race of the participants who are likely presumed to be white and almost assuredly presumed to be of the same race. Once the racial groups are made clear then one can identify what kinds of cultural myths may interfere with the participants understanding of the parties' narrative. For example: what if the young boy was Black and the bus driver not only female but white? This does not change the outcome of the mediation, i.e., that the boy's narrative is subordinated, but it does now suggest that he would have a particularly difficult time trying to reposition himself. With the prevalence of mechanisms like gang profiles[77] and the dominance in the media on the alleged violent nature of young Black males[78] it is hard to see how this young boy could access whatever societal notions exist about the harried, cranky impatient bus driver who looks for any scapegoat when she is trying to figure out who to hold responsible for some infraction that has occurred behind her back. In this raced case study, the marginalization of the mother's alternative narrative may now lie in the negative interpretive framework about Black mothers. The mother appears at the

---

meaning. Her example is that the unmarked tense of verbs in English is the present tense, with the addition of the letters "-ed" the base meaning is changed. More importantly she notes the unmarked form of most English words connote male, hence the use of the linguistic participles "-ess" and"-ette." Even clothing, Tannen observes, picks up this "gender mark," that extra meaning that connotes female and generally suggests frivolity. So women when dressing must always think about what their clothing or make-up or hair style "says" about them while men have the option to make a statement about themselves through their hair or clothing or not. Men can dress and appear in an "unmarked" fashion. In essence Tannen is discussing the historical and cultural myths that surround the interpretive frameworks used to assess women and men based upon appearances. For women the myths are limited and generally demeaning or belittling. It is not a surprise that some women who want to be taken seriously then "borrow" from myths on men and so wear "man-tailored" suits. The myths for a man are so numerous and varied that a man has choices of making positive or negative or different statements including the option to "say" nothing through his appearance and to force the viewer to use some more substantive measure, the sober and intellectual presentation of his ideas, to assess him as a person. Deborah Tannen, *Wears Jumpsuit, Uses Husband's Last Name*, N.Y. TIMES MAG., June 20, 1993, at 18.

76. The term "race-switching" is one coined by Professor Patricia Williams in analyzing the racial contextuality of the Bernard Goetz case. PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 73-78 (1991). Professors Margaret Russell and Kendall Thomas use the terms "race" and "de-race". Margaret M. Russell, *Entering the Great America: Reflections on Race and the Convergence of Progressive Legal Theory and Practice*, 43 HASTINGS L.J. 749, 762 n.54 (1992). I prefer the term "race switching" since the concept of "de-racing" really means to make all the players "white", not to give them no race.

77. Russell, *supra* note 76, at 759-67 (describing how violence is associated with males of color leading to use of "gang profiles" by police which use clothing descriptions of young men that would otherwise be innocuous but for race).

78. *See, e.g.*, David G. Savage, *Minority Journalists Assail Crime Stories*, L.A. TIMES, July 29, 1994, at A19. This article describes the concerns of minority journalists gathered at "Unity 94" conference over the negative portrayals of their respective racial groups. Black journalists, particularly, noted that "African Americans are too often portrayed in the media with a 'criminal face'." *Id.*

mediation without a man, the father, which could easily feed into a notion that this is the mythological single head of household who either through her own fault or the fault of her poverty and singleness is just ill equipped to do anything positive and active on behalf of her child.[79] Her story of her attempts to fight with the educated school bureaucracy gets dismissed because it can not "nest" comfortably in the interpretive framework drawn from the history and norms of the larger society. It does not comport with the more dominant cultural myth of the ineffectual single Black mother, so it is ignored.

Another example involves keeping or making the boy white and making the bus driver Black and male. Here the dominant cultural myth on the dangerousness of Black men works in the favor of the boy and against the bus driver. It is not that the Black bus driver has no opportunity to draw upon the positive myths surrounding the organizational category bus driver, but in the narrative struggle over competing definitions of social relations it does seem that the child who articulates some inchoate sense of fear of the bus driver will have a much better chance of repositioning himself than had the bus driver been his same race.

A third raced example might be where the child is again white but the bus driver is Asian. Here the bus driver can again access the positive cultural myths about the organizational category bus driver but must also contend with myths about Asian-Americans. Some parts of the pre-existing narrative legitimized by the larger society, the myth that they are the "model minority", will help but others may not.[80] Specifically, Asian-Americans of various national origins face the cultural myth of immutable foreignness.[81] The first generation immigrant Asian-American may have her "foreignness" or "strangeness" marked by an accent to which American society attaches low status.[82] But even Asian-Americans whose families have been in the United States for generations will confront the "Gosh you speak English so well!"[83] phenomenon. There is always the question with "foreigners" that they don't really understand "our ways". The bus driver's interpretation of the events may be subject to much more scrutiny than that of someone who was not perceived to be "foreign".[84]

---

79. Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and the Right of Privacy*, 104 HARV. L. REV. 1419, 1436-44 (1991) (describing historical and contemporary devaluation of Black motherhood).

80. Note, *Racial Violence Against Asian-Americans*, 106 HARV. L. REV. 1926, 1930 (1993) (describing five main stereotypes about Asian Americans: (1) submissive (2) model minority (3) unfair competitors, (4) foreigners and (5) fungible).

81. *Id.*

82. Mari Matsuda, *Voices of America: Accent, Anti-Discrimination, Law and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1355, 1362-66 (1991).

83. *See, e.g.*, Angela E. Oh, *Windows: Foreigners in Their Midst*, ESSENCE, Sept. 1994, at 52.

84. In addition to the "foreignness" stereotypes, Korean-Americans and other Asian-Americans have, in some areas of the country, acquired a cultural myth of being bad drivers. When I mentioned this stereotype at a presentation in New York City, most of the audience seemed surprised. But, in Los Angeles, one can see bumper stickers which state "Oriental Driver -- DO NOT FOLLOW!"

When race switching the case study you cannot really know what would happen in the real life situation. I do think that even if the outcomes remained the same, that it is hard to imagine that in the narrative struggle of competing social definitions and frameworks the existence of negative, foundationless cultural myths about "out" groups would have no impact in the process. They might not, in any given situation, become overriding but I would argue that they do have a negative impact which could easily skew the outcome. My argument on this flows from experiences that I have collected about actual mediations.

Ms. Marcia Choo, the executive director of the Asian and Pacific American Dispute Resolution Center, related a story to me involving (not their real names) a Mr. Oh, a Korean-American fast food stand owner, and Mr. Johnson an African-American car repair shop owner.[85] Oh called Ms. Choo because he was having a conflict with Johnson over the limited number of parking spaces that Oh had for his fast food stand, which Johnson had commandeered for the use of the various cars he was keeping as they awaited repairs. When Oh had complained to Johnson about the parking spaces which Oh needed for his customers, since he had limited seating in his small restaurant, Johnson threatened to organize a boycott of his store. Mr. Oh called Ms. Choo for help.

The negative impact of cultural myths relating to the identity groups of the parties developed even before the mediation had begun. Ms. Choo called in a white mediator to help her mediate the dispute. The white mediator immediately assumed the worst by accessing the negative cultural myths about African American men discussed above. Unbeknownst to Ms. Choo, she called the police and asked them to be present during the Saturday morning mediation. What should have and ultimately became a relatively calm and successful mediation could have erupted into a minor (or even major) racial incident. Had Mr. Johnson encountered the police and inferred that his neighbor had decided to try to have him arrested under the pretext of inviting him to a mediation, his threats of organizing a neighborhood boycott against Mr. Oh (or worse) might have become a reality. Fortunately, Ms. Oh was able to intercept the police officers before the parties gathered and persuaded them to leave.

During the mediation, it became clear that Johnson had succumbed to a number of the cultural myths about Asian-Americans. It became clear that his real concern was with his painful knowledge that he had been disadvantaged by whites for his entire life. This incident, which had been created because the city had apparently blocked off the on street parking that he normally would use for some kinds of street repairs, felt like just another instance of this injustice. He aligned his Korean-American neighbor with the white power structure. That alignment flows from the analysis that has been done on the impact of the cultural myth of the "model minority".[86] While designed, arguably, to be complimentary to

85. Interview with Ms. Marcia Choo at the Asian and Pacific American Dispute Resolution Center in Los Angeles (Sept. 30, 1993).

86. *Racial Violence Against Asian-Americans, supra* note 80.

Asian-Americans, the myth serves to pit Asian-Americans in opposition to other racial minorities. It says, "these people of color are 'good' why can't you be that way." Not surprisingly it breeds resentment in those other racial minorities against Asian-Americans as representatives of the white power system. In addition, Johnson did have a particular grievance against Korean-Americans, or rather a particular Korean-American. It was just that the Korean-American he was angry at was not Oh. Johnson was angry at a Korean-American liquor store owner across the street because he felt that owner sold liquor to young Black men that he, Johnson, was trying to help get off drugs and alcohol and learn a positive trade, such as car repair. Here too, Johnson succumbed to another cultural myth about Asian-Americans, i.e., that they are all fungible. This is the conveniently dehumanizing notion that is often applied to African-Americans ("they all look alike") but has other aspects for Asian-Americans. Here the cultural myths of fungibility often merge a number of Asian cultures: Japanese, Chinese, and Korean to name a few, all together. The results of such fungibility have been deadly, for example, the Vincent Chin case where two white men beat a young Chinese-American man to death believing that he was Japanese and that they had lost their jobs in car manufacturing to Japanese competition.[87]

Another mediation case example in which I was involved was a complex and difficult case involving friction between the homeowner residents of a middle class residential neighborhood and blue collar laborers who came to the neighborhood during the day to look for work. Conflicts between residents and day laborers who congregate on street corners seeking work are a not uncommon problem in Los Angeles county. In this case the neighborhood was mixed race largely Black and white and though largely residential had several small businesses and a large "fix-it yourself" type store called Home Club. The Home Club attracted a good number of Mexican immigrant and Mexican American day laborers who congregated on the sidewalks in front of gas stations, churches and homes in hopes of being hired by Home Club customers or "patrons" (bosses). While congregating on street corners has been and can be a successful way to obtain fairly continuous employment, the practice was an unusual one for the residents of this neighborhood. In this particular west side neighborhood, since the day laborers did not live in or apparently near the neighborhood,workers would be driven in by truck or bus. Men who were not hired for the day often milled around the neighborhood with little to do for the entire day.[88] Residents were concerned that some of the day laborers urinated on peoples' lawns, drank alcohol, gambled and insulted residents. Workers were concerned with continuing to secure employment to support their families.

The residents clearly had some legitimate concerns: unruly and uncouth behavior occurring in front of their homes, churches and families. Moreover,

---

87. Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory. Post-Structrualism and Narrative Space,* 81 CAL. L. REV. 1241, 1252-55 (1993) (describing the Chin case and other less well known act of violence against Asian Americans).

88. Robert J. Lopez, *Whose Sidewalks Are These Anyway*, L.A. TIMES, Feb. 27, 1994, at 13.

these concerns were exacerbated by the fact that many of the most vocal and organized residents were women. While the residents' apparent fear of the Latino day laborers was characterized as racial animus before and during the mediation, [89] some portion of the female residents' fear of strange men congregating around their doorsteps went beyond negative cultural myths regarding certain racial groups or nationalities. That part of their fear was the result of the actual dangerousness of men of any race or class in women's lives. Still, the fact that these strange men were a different color and spoke a different language made the problem of separating real and false fears in order to create solutions particularly difficult.

The residents, as represented through the area homeowners' association, decided that the solution to the problem lay in encouraging their county supervisor to have the county Board of Supervisors pass an ordinance that would outlaw "loitering."[90] Negative cultural myths surrounding the identity and organizational categories by which the residents defined the day laborers contributed to the residents unwillingness to pursue vigorously the option of creating a specific area in the neighborhood for job hiring which had been used with some success in other areas.[91] During one of the mediation sessions a resident described the workers as being "herded" into our neighborhoods. This was a distancing characterization, a dehumanizing stance that separated the impliedly hard-working "people" of the neighborhood from the "animals" coming in. Such a dehumanizing characterization flows easily from the cultural myths about the dangers of undocumented people generally described as "illegals." Undocumented people and, to some extent immigrant Americans generally, have come to represent inchoate fears relating to economic and personal insecurity: many Americans believe that undocumented and immigrant people are largely responsible for their unemployment and for the general high crime rate. These negative cultural myths regarding "illegals" are bolstered by the fact that the term is largely identified with Latino or Asian immigrants. The typical news article on "illegals" working at low wages or engaged in criminal activity rarely mention an undocumented Irish or Canadian individual. The larger negative cultural myth or interpretive framework on "illegals" is fed by long-standing historical American negative racial notions about non-white Americans.[92]

Consequently, it was more difficult for residents to find the positive cultural myths that connected them with people with brown skin who speak Spanish.[93] At one mediation session, one of the day laborers spoke passionately and proudly,

---

89. Joe Hicks et al., *California Commentaries: A Case of Overkill to Curb Day Laborers*, L.A. TIMES, Jan. 25, 1994, at B7.

90. Lopez, *supra* note 88.

91. *Id.* at 13, 20.

92. Lawrence, *supra* note 14, at 322.

93. *See, e.g.*, Kevin R. Johnson, *"Los Olvidados": Images of the Immigrant, Political Power of Noncitizens and Immigration Law and Enforcement*, B.Y.U. L. REV. 1139, 1168, 1227-32 (1993). The author describes economic and racial fears of "in group" citizens against immigrants and argues that language barriers contribute to the inability of immigrants to relate the more typical and more sympathetic story of their lives to their fellow Americans.

through an interpreter, about his family and his desire to support and provide for them by performing hard labor daily as he had done for many years. A few residents appeared moved. Others looked almost determinedly unmoved. It was a session that started the process of allowing the residents to redefine the workers. The residents themselves, both Blacks and whites, were not rich people but themselves working people with families. Most residents were perhaps now "white-collar" working people, small business people, small apartment owners. But many, it seemed, must have or have had blue collar parents, grand-parents, aunts or uncles.[94] Unfortunately, whatever small progress that was made in that meeting was never nurtured. The conflict was returned to the public, political arena prematurely. An ordinance criminalizing loitering was passed.[95]

In the mediation process, parties will always identify relevant identity and organizational categories and draw upon the cultural myths which relate to those categories which most help to legitimate their narratives. When minority or disadvantaged group members participate in mediation, the cultural myths that will be accessed are largely negative and often wholly reliant, not upon personal experience or truth, but upon taboos inculcated during childhood and reaffirmed through the media and other cultural mediums.[96] For these taboos to be reflected upon and diminished, they must be confronted and contrasted with American Creed values and beliefs. But, unlike the Hernandez case and the courtroom context where procedural mechanisms provide a method and forum for some kind of confrontation and reflection, the mediation context lacks those procedures. The classic and apparently neutral language that mediators are admonished to use - "How would you like to see this resolved" or "What did the other party say"- can unintentionally contribute to the repetition of whatever is the primary narrative and its interpretive framework.[97] For a primary narrative, the one which nests most comfortably within the larger cultural myths, to be transformed, the context and moral codes must be changed. Different and perhaps new cultural myths must be

---

94. I do not know the exact background of every homeowner and resident in the area but several of the homeowner representatives did appear to have such roots. One of the more vocal and prominent residents, the only identified resident of Mexican heritage (his characterization), was a small businessman in a firm his parents had founded and passed on to him. George Ramos, *A Matter Not of Race but of Right and Wrong*, L.A. TIMES, March 21, 1994, at B3. The designated spokesperson for the Homeowners' Association relied upon the rent she collected from her small apartment building in which she herself lived.

95. *Supervisor Defends Vote to Restrict Day Laborers*, L.A. TIMES, May 26, 1994, at B1. Day laborers still stand on the street corners. The ordinance solution was criticized as being of questionable effectiveness which a few residents acknowledged at one caucus session. It is really too expensive to patrol the streets to chase away or arrest people seeking jobs. Worse, any resources put into that are diverted from more serious crime.

96. Telephone interview with Ms. Avis Ridley-Thomas, Administrative Coordinator of the Consumer Protection Dispute Resolution Program of the Los Angeles City Attorney's Office, in Los Angeles, California. (Oct. 20, 1993) (describing training program which asks trainees about the source of their information about different identity groups of people; participants find, much to their surprise, that little of their information comes from personal experience but from newspapers, television and family members).

97. Cobb & Rifkin, *supra* note 53, at 80.

accessed, created and injected into the narrative interaction process. The mediator not only has to recognize that some of the cultural myths at work in the mediation process are drawn from negative taboos relating to disadvantaged groups but she may also need to flag for the parties that that is what is occurring. She may need particular training to accomplish the first and she may need permission to intervene to accomplish the second. This last may be the most difficult. The American model of mediation emphasizes "neutrality" in a mediator and generally defines neutrality as requiring non-intervention on the part of the mediator.

IV. INTERVENTION IN MEDIATION

Given the problem of the influence of negative cultural myths in the mediation process, some intervention during the mediation is appropriate under certain circumstances. Intervention would be designed to act in much the way that procedural mechanisms function in the litigation context, i.e., to provide a method for confronting the participants with the tension between American Creed values and prejudicial attitudes. Intervention techniques or "activist mediation"[98] have been proposed and applied. Feminist mediators have grappled with the introduction of values in order to identify and equalize power imbalances and negative interpretive framework issues in the family mediation context.[99] Other mediation experts have advocated that activism be employed in community mediations where public policy issues are implicated, for example, where different groups of people such as homeowners and homeless activists or minority group members and their local police have conflicts.[100] Several professional standards for mediators include a duty to ensure the "fairness" of an agreement.[101] Here too the concerns which lead to such proposals reflect concerns for power imbalances among the participants which are supported by the interpretive

98. John Forester & Doug Stitzel, *Beyond Neutrality: The Possibilities of Activist Mediation in Public Sector Conflict*, 5 NEGOTIATION J. 251 (1989).

99. *See, e.g.*, JOHN M. HAYNES, DIVORCE MEDIATION: A PRACTICAL GUIDE FOR THERAPISTS AND COUNSELORS, 49-53 (1981) (discussing the use of techniques to "balance the power" on divorce mediations); Sydney F. Bernard et al., *The Neutral Mediator: Value Dilemmas in Divorce Mediation*, MEDIATION Q., Summer 1984, at 61; JOHN HAYNES, DIVORCE MEDIATION, THEORY AND PRACTICE 277 (1988).

100. *See, e.g.*, Forester & Stitzel, *supra* note 98; JAMES LAUE & GERALD MCCORMICK, THE ETHICS OF SOCIAL INTERVENTION 205 (1978).

101. *See, e.g.*, ETHICAL STANDARDS OF PROFESSIONAL RESPONSIBILITY, DISP. RESOL. F., Mar. 1987, at 3; MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, MEDIATION Q., Summer 1985, at 75; STANDARDS OF PRACTICE FOR PRIVATE AND PUBLIC MEDIATORS IN HAWAII (State of Hawaii Judiciary Program on Alternative Dispute Resolution 1986); PROFESSIONAL STANDARD OF PRACTICE FOR MEDIATORS (Mediation Council of Illinois 1985) MEDIATION Q., Summer 1985, at 89; STANDARDS OF PRACTICE FOR LAWYERS-MEDIATORS IN FAMILY DISPUTES, 18 FAM. L.Q. 363 (1984); JAY FOLBERG & ALLISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION, 349 (1984).

frameworks which accord certain groups fewer legitimating cultural myths than others.[102]

Intervention techniques have been criticized. Two main criticisms are generally raised. The first involves the concern that if mediators intervene and parties spend time confronting and, ideally, resolving negative cultural myth issues, agreements will be less likely to be reached and even if they are, the process will become more costly.[103] This argument is logically possible; but this article is concerned with the social justice questions that mediation critics have raised. If intervention techniques can increase the possibility of mediation being of benefit to all members of society, then the fact that they may make the process more costly is an acceptable risk. Additionally, if intervention techniques do discourage agreements that would be disproportionately harmful to members of disadvantaged groups, then arguably mediation was not the appropriate conflict resolution for that particular conflict. While mediation is a good conflict resolution technique, that does not mean that it is appropriate for every conflict.

A. Neutrality

The second major criticism of the use of intervention techniques in mediation involve undermining the neutrality of the mediator. The mediator needs to be neutral so that the parties can arrive at their own agreement; their self-determination must be preserved.[104]

Robert A. Baruch Bush has surveyed the problem of introducing values in various kinds of mediations in studying a variety of ethical dilemmas facing mediators in Florida.[105] He explores a range of situations including those where a mediator might be inclined to intervene or terminate a mediation because of an unfair solution, or to interject specialized information or to persuade one party from employing deception. For example, he recounts divorce mediations where the husband believes that the family home counts as his legal property and is bullying his wife into accepting his interpretation even though under the law of the state he is incorrect and even though this clearly disadvantages the wife,[106] or where a housewife is succumbing to her husbands superior business acumen into accepting a financially disadvantageous settlement.[107] Although he recognizes the power imbalance and the injustice of the proposed result, Bush argues that to go beyond "the normal steps of questioning the parties regarding their understanding of the terms and consequences of the settlement..." risks

---

102. Forester & Stitzel, *supra* note 98.

103. *See, e.g.*, Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DIS. RESOL. 1, 18 (describing among other problems with intervention the risk of "scuttling an agreement").

104. *Id.*

105. *Id.*

106. *Id.* at 17.

107. *Id.*

compromising the mediator's neutrality or impartiality and infringing on both parties' self-determination.[108] Similarly, in situations where there are no power imbalances, but the mediator believes that the outcome is unfair, for example, when a mediator sees a landlord agreeing to subject herself to a Child Protective Services investigation in a last ditch effort to get her tenant to stop harassing her, even to suggest that the parties take some time to think or "cool off" or see a lawyer is seen as "...deny[ing] self-determination, impos[ing] the mediator's values on the parties, compromising impartiality ..."[109]

Even providing information is not neutral and unproblematic. In an example, again a divorce, where a wife believes that her husband has a dangerous mental condition and the mediator knows that family therapy literature identifies the husband's condition as a normal "post-divorce trauma", Bush is concerned that providing the information is "inherently directive or controlling."[110] Again self-determination is undermined and the mediator's neutrality or impartiality may also be compromised as the information is likely to help one side only.[111] Even when a mediator knows that one party is concealing relevant information or lying, Bush believes that for the mediator to in anyway police this abuse intrudes on "decision-making autonomy and ...self-determination" in part because it is his view that "...even if there is a nondisclosure, all parties know that this is a risk of negotiation. . . ."[112]

While Bush raises some important points, he seems to go too far. In focussing on the preservation of that aspect of self-determination which involves the parties' self-reliance in their decision-making, he violates other aspects of self-determination. It is difficult to imagine an authentic type of self-determination without informed decision-making or consent.[113] Yet when the wife is not told of property law or business law, the landlord not informed of the reach of Protective Services, the husband and wife are not told of his syndrome and the open and honest party is not told of the nondisclosure or lie, the parties cannot make an informed decision. Similarly, informed consent involves making volitional decisions,[114] but if a wife is being bullied then a serious question about the voluntariness of her agreement is raised.

Moreover, as discussed earlier, the "normal steps of questioning the parties" about their understanding of the terms and consequences is not neutral. In the narrative struggle over social definitions and relations, the party with the primary narrative and the party with the greater number of positive historical and cultural myths within which to nest his story will be advantaged by "neutral" questioning. He will, in essence, be encouraged to reconstitute his interpretive framework and

---

108. *Id.* at 18.
109. *Id.* at 19.
110. *Id.* at 20.
111. *Id.*
112. *Id.* at 24.
113. *Id.* at 13.
114. *Id.* at 13.

the weaker party will too often be left doing the same reconstituting or repeating and strengthening that interpretive framework.

More problematic than Bush's concerns are those expressed by Trina Grillo. Grillo, like Bush, is concerned with taking the process away from the parties. But Grillo is not as indifferent to the issue of "fairness" in an agreement or to the problem of power imbalances working against disadvantaged groups. She has two concerns: 1) while the mediator may be filled with good intentions, he may lack the skill and knowledge in psychological issues or even sufficient time to achieve his ultimate goal;[115] and 2) the mediator may be just as likely to share historical myths and assumptions about the role of women and men and thus intentionally maintain the power differential between husband and wife.[116]

In part, Grillo's concerns involve the issue of the kind of training mediators ought to have in order to combat negative interpretive frameworks which disadvantage some parties.[117] In part, her concern raises the issue of the mediator imposing her values upon the parties. As other scholars have noted, no decision-maker or authority figure is ever truly neutral; she or he will always carry pre-existing stories and interpretive frameworks on how reality usually functions.[118] If the mediator is allowed to intervene actively, the likelihood is that he will intrude his own interpretive framework and thus benefit whichever narrative is in accordance with his own interpretive framework. However, if the mediator does nothing and the parties enter the mediation with societal power imbalances, with uneven collections of cultural myths from which to use in their narrative struggle, the mediator's "neutrality" or silence will benefit the more powerful party. The thorny issue of whether a mediator prefers one side over another is not resolved by the notion of neutrality. Rather, it raises the questions of whether there are shared values in the American community or if such shared values can be created such that all parties, including the mediator, could agree upon them as the standard to use in a mediation.[119]

B. Shared Values

Mediation, as a method of resolving disputes, has a long tradition that is not exclusively American.[120] The American emphasis on non-intervention as the

---

115. *Id.*

116. Grillo, *supra* note 22, at 1592 n.227.

117. Grillo herself provides a good analysis of the drawbacks involved in mediations performed under severe time constraints. *See* Grillo, *supra* note 22.

118. Moore, *supra* note 49; JEANETTE LAWRENCE, THE NATURE OF EXPERTISE 229, 230 (1988); DEAN G. PRUITT & PETER J. CARNEVALE, NEGOTIATION IN SOCIAL CONFLICT 179 (Open Univ. Press, 1993) (noting that mediators are subject to using the same kinds of cognitive shortcuts - heuristic or schemas - that negotiators have been found to use).

119. *See, e.g.*, Martha Minow's observation that "you cannot find a solution in neutrality" so one must seek to "create community." MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 374-76 (1990).

120. Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 30 (1982).

mark of neutrality is a product of the culture. Other cultures have made different choices on the "activism" of mediators. For example in both the Navajo Peacemaker Court and the Filipino Katarungang Pambarangay system, traditional methods of non-adversarial dispute resolution are kept alive which involve "mediators," called peacemakers or barangay captains, who intervene much more actively than their American counterparts even though they too are not decision-makers for the parties.[121] In both these kinds of mediations, the mediators have confidence in their own knowledge of the community values which all participants are assumed to share. Two aspects of these mediations mark them especially: 1) the mediators openly inject concerns larger than the participants themselves; for example, community harmony and even spiritual guidance which they understand the parties share; and 2) the mediators are rarely ever strangers or unknown volunteers or professionals even though they are not to be biased towards one side or the other.

The Navajo peacemaker does not make American style claims of neutrality. He will often be a relative of the disputing parties and his role will involve teaching and even "lecturing" the parties on Navajo values and "how their behavior comports with shared values."[122] The ground rules for a peace making session are steeped in ceremony and tradition, beginning and ending with prayers. Filipino mediators, somewhat like Navajo peacemakers, are comfortable making strong recommendations to the participants on how they should resolve their disputes.[123] Like Navajo peacemakers, Filipino mediators often know the parties. The mediator is not likely to be a relative, but as the local barangay captain (or precinct captain) they will often be familiar with the parties or their situation.[124] Also similar to the Navajo peacemaker, the Filipino mediator, with his familiarity with the community, will have an interest in maintaining the peace within the larger community. The attitude is reflected in the practice of the mediator getting personally involved with helping the disputants achieving agreement.[125] The session does include a spiritual component, like the Navajo Peacemaker Court, and often begins with prayer.[126]

---

121. Robert Yazzie & Lucy Moore, A Dialogue About Making Peace (unpublished manuscript on file with author). Robert Yazzie is the Chief Justice of the Navajo Nation Supreme Court and Lucy Moore is a mediator of environmental disputes in New Mexico; Ted Becker & Christa Daryl Slaton, *Cross-Cultural Mediation Training,* MEDIATION Q. Spring 1987, at 55-56 (describing the revival of the Katarungang Pambarangay in 1978 as a form of mandatory mediation and conciliation).

122. Yazzie & Moore, *supra* note 121, at 2.

123. Becker & Slanton, *supra* note 121, at 56.

124. *Id.* at 65.

125. For example, if the parties agreed that one party owed the other money but the debtor could not afford to pay, the mediator might offer to lend the debtor funds to provide the repayment. *Id.*

126. *Id.* at 64. The ground rules or atmosphere of the Filipino mediation are different from the Navajo peacemaker court. It is neither ceremonial or formal, but rather informal and neighborly. The informal atmosphere is even more relaxed than some American community mediations in that refreshments including beer may be served. *Id.* at 64-65.

American mediation, in contrast, is more individualistically oriented since American culture is more individualistic than the cultures described (or indeed most cultures). But Americans cannot be said to be without concerns for the larger community and connections amongst its varied members. The non-interventionist model leaves to the parties the decision whether to discuss openly any conflicting feelings between one's individual concerns and one's communal concerns. The parties ability to make individual, isolated decisions is augmented by the fact that in American mediation the mediator and the parties are generally unfamiliar with each other and so all are unaware of anyone's personal values or community status. However, the notion that the mediator should be a stranger to the parties is not one that is necessarily universally shared. It is an interesting comment on the amount of distance and distrust among Americans that we think that we will be more fairly treated by strangers of unknown quantities than by people we know.[127] One can imagine that there are people who find it difficult and unnatural to discuss painful and personal matters in front of strangers; who might well prefer a mediator about whom they have some knowledge or respect or with whom they have had some contact. These aspects of American culture suggest that, as in Navajo or Filipino culture, a more interventionist style of mediation which responds more directly to needs for connectedness and community may be appropriate. On the other hand, the comparatively heavy influence of religion in these other societies' mediation forms underscore the problem of intervention. While many Americans practice some form of religion or nurture a spiritual life and increasingly feel that a religious belief system is important,[128] not all Americans will practice their spiritual beliefs in the same way. Indeed conflicting spiritual beliefs have been and continue to be the source of much conflict between different segments of American society.[129]

The value of respect for the individual reflected in the structure of American mediation is appropriate for our culture and its shared values on individual rights. But it is important to keep sight of the fact that connectedness and community are also values shared in American culture and that the mediation process, in other ways, very consciously nurtures and encourages those values. In a typical, even non-interventionist mediation, certain values of community are assumed to be shared; for example, connection, the ability to agree, mutual respect and peaceful resolution of conflict. Opening statements typically include remarks encouraging the parties to think in terms of their ability to agree and flagging for the parties

---

127. An episode of the popular television show "Roseanne" made the point. In it the title character's mother has decided to move into a senior citizen home. Roseanne is distraught over her mother's decision and ultimately suggests that her mother come live with her and her family. Her mother tells her that she had thought of that idea but decided that "strangers would take better care of me." The problem is that it is a "running gag" and acknowledged in the show that Roseanne's family is dysfunctional.

128. STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 4 (1993).

129. *See, e.g.*, Note, *Constitutional Limits on Anti-Gay Rights Initiatives*, 106 HARVARD L. REV. 1905, 1907-10 (1993) (describing role of religious right in anti-lesbian and gay rights initiatives).

that treating each other with respect (no name calling or interrupting) constitutes one of the few "rules" of mediation.

Shared values around community are already a part of American non-interventionist style mediation. The issue activist mediation raises involves accepting that the American Creed values of equality are in fact a shared value that consequently is as appropriately injected into a mediation as mutual respect is. Equality as a core American Creed value dates back to the birth of the United States as a separate nation. We really can all agree that equality is a shared American value. But the concern that the mediator will just impose her values upon the parties still arises as we struggle with the questions of what "equality" means under any particular set of circumstances. The history of the notion of equality in American culture shows that it is a concept that has expanded over time. For example, "All men are created equal" moved from meaning only propertied white men to adult human beings, both male and female and of all races. But while the fluidity of the definition of equality historically can show how difficult it is to define, it also reveals that defining and redefining core values is an essential aspect of American political and legal life. Constitutional law, in particular, reveals through appellate cases the history of the adversarial legal system in defining and redefining core concepts like equality as various "out" groups - racial minorities, religious minorities, women and gays and lesbians - raise challenges to old definitions and become the catalysts for the entire society to craft new definitions.

While the identification of shared values in a homogeneous society can be daunting enough, it perhaps seems impossible to do so in a heterogeneous society like the United States. While the political and legal history of the United States reveals that it is difficult to define and redefine shared values, it also shows that it can and must be done. Some array of articulated or unarticulated shared values will be applied in social life. Without the conflict of definition and redefinition one is only assured that the status quo, the values of the most economically powerful minority will be imposed not that shared values will result.

In order to structure mediation so that it can work most of the time in favor of everybody, the value of equality must be introduced, injected when necessary. Mediation, then, becomes another locus in American political, social and legal life where ideas about equality are defined and redefined. When parties' conflicts are stymied by the presence of negative cultural myths and interpretive frameworks about disadvantaged identity groups, then the injection of equality values is appropriate so that the parties can try to either identify shared positive cultural myths and interpretive frameworks or to create them.

C. Training and Intervening to Combat Negative Cultural Myths

If equality as a shared value can be injected into the mediation to combat negative cultural myths, the next question is what sorts of things can mediators do and under what circumstances. Initially, mediators need to be trained to think about power imbalances that result from negative cultural myths and interpretive

frameworks. Scholars involved in cross-cultural mediation training, like John Paul Lederach, have focussed concerns in an international context on the creation or uncovering of shared values.[130] Out of his concern for imposing his own cultural values in teaching mediation training in foreign countries, he defines a distinction between prescriptive approaches to training, based on transferring pre-packaged conflict resolution technology, and elective approaches to training, based upon uncovering and building upon the cultural knowledge of the participants.[131] In mediation training for American mediators, participants too could share their own knowledge and misperceptions of different identity groups as part of the mediation training. These discussions and explorations would and should be a part of the basic mediation training not relegated as it too often is to some advanced form of training on "cross-cultural mediation" or "how to deal with power-imbalances". For example, Ms. Avis F. Ridley-Thomas, the administrative coordinator of the Consumer Protection Dispute Resolution Program of the Los Angeles City Attorney's Office, includes in her training program an exercise in which participants are asked to list specific identity group categories, specifically various racial minority groups who make up the population of Los Angeles. Trainees are then asked to describe the first thing that comes to their mind upon thinking about the different groups and then to reflect upon the sources of their knowledge.[132] Participants typically discover that their most negative attitudes about groups unlike themselves come not from personal experience but from the media or comments made by others, typically family members: they discover that some of their "knowledge" is in fact nothing more than a negative cultural myth. Another exercise Ridley-Thomas employs she calls "star-power". The exercise involves the creation of a low mobility social system among the participants where people are arbitrarily assigned low, middle, or high "scores." The high scorers then set all the rules; typically to suit themselves. Low scorers learn to hate the game and all trainees begin to open themselves up to the perspectives and perceptions of disadvantaged groups members - if they themselves are not already such identity group members.[133] Along a similar line, hypotheticals which are routinely employed in mediation training should avoid being entirely "race-neutral." For example, Marcia Choo in her training sessions uses hypotheticals that involve racial tension, typically conflicts between Korean-Americans and African-Americans, in which she has been involved and has the participants

130. John Paul Lederach, Beyond Prescription: New Lenses for Conflict Resolution Training Across Cultures, (unpublished article prepared for Interaction '92 Sharing Common Ground: Culture in Canada, May 1992, on file with the author); *see also* PRUITT & CARNEVALE, *supra* note 118, at 197-98 (describing research on cultural content of negotiation and mediation including research that showed negotiators from a collectivist culture, Hong Kong, were more sensitive to ingroup/outgroup differences than those for individualist cultures like the United States).

131. Lederach, *supra* note 130, at 1.

132. Telephone interview with Ms. Avis F. Ridley-Thomas, Administrative Coordinator of the Consumer Protection Dispute Resolution Program of the Los Angeles City Attorney's Office, in Los Angeles, California (October 20, 1993).

133. *Id.*

discuss or role-play how they would mediate the conflict.[134] These approaches to mediation training teach mediators to explore their own reliance upon negative cultural myths, to learn to identify when such myths are being relied upon in a mediation and to create ways to talk about the effect of such negative interpretive frameworks in ways that may help the parties to create new interpretive frameworks.

Once mediators are sensitized there are a variety of methods by which they can articulate the shared value of equality in a mediation. It is not uncommon now for groups or organizations who provide mediation services to express their concerns for negative cultural myths or power imbalances by using teams of mediators. In heterosexual family divorce cases, two mediators would always be used, one male and one female. In many of the interpersonal conflicts which erupt between African-Americans and Korean-Americans in Los Angeles attempts are made to include both Korean-American and African-American mediators: if the Martin Luther King Dispute Resolution Center (MLKDRC) confronts a yellow-black conflict it contacts the Asian and Pacific American Dispute Resolution Center (APADRC) and vice versa.[135] For example, Mr. Dennis Westbrook, the executive director of the MLKDRC, described one such joint project between himself and Ms. Marcia Choo, the executive director of the APADRC. Ms. Choo was called by a Korean-American building contractor to the street site of the building he was contracted to rebuild after the uprising.[136] He was surrounded at the site by a group of angry, unemployed Black men who lived in the neighborhood and were angry that few Blacks were being hired to do any of the rebuilding jobs. Ms. Choo appeared on the scene, a lone woman among very angry larger men, and convinced the group to regather at the MLKDRC that afternoon. Later, off the street and joined by Mr. Westbrook, an African-American, the two were able to get tempers calmed and mediate a discussion

134. Choo, *supra* note 85. Choo's favorite hypothetical is actually not one in which she openly flags the race of the parties. She does not say this party is Korean-American and the other party is African-American. However, she describes the conflict between a construction contractor and unemployed resident workers in such detail that for Los Angeles audiences the races seem obvious and participants feel compelled to address the larger racial and community tensions that underlie the conflict.

135. Interview with Dennis Westbrook, Executive Director, Martin Luther King Dispute Resolution Services, in Los Angeles, California (Nov. 4, 1993).

136. The "uprising" refers to the four days of upheaval that started on April 29, 1992 in Los Angeles (and spread around the nation) after the acquittal of four white policemen who beat a Black motorist, Rodney King. The outpouring of anger, frustration and despair left many sections of Los Angeles, not just majority Black areas, in ruins. Clarence Jones, *A City In Turmoil*, S.F. CHRON., July 6, 1992, at A1. Work site protests like the one Westbrook and Choo mediated were not, unfortunately that rare in Los Angeles. They would often reflect conflicts between Black and Latino workers over a shrinking number of jobs. *See, e.g.*, Stephen Brown, *Fight Over Jobs Divides Interests of Blacks, Latinos*, L.A. TIMES, Aug. 9, 1992, at A1.

which involved providing the Korean-American contractor with contacts to Black construction workers and companies that satisfied both sides.[137]

Matching parties and mediators based upon gender or race or sexual orientation does not assure that those individuals who happen to be members of the same identity groups will have the same perspectives. But the concern for providing a broad range of interpretive frameworks that such teams symbolize can make the parties feel that they are or will be treated fairly and be heard accurately. In the joint MLKDRC-APADRC example the parties felt, had the perception, that their chances of being treated fairly increased by having at least one mediator be from their own identity group. The diverse mediation team does have the advantage of conveying to the parties that there is at least an opportunity or possibility that one's circumstances and experiences can be understood. In essence the diverse mediation team by having mediators who have shared some personal experiences increase the likelihood that the mediators will possess a broader range of both negative and, more importantly, positive interpretive frameworks about the identity groups involved from which to choose in understanding the parties' narratives.[138] The diverse mediation team also conveys to the party that the team does take equality amongst various identity group members who may not be treated in a socially equal manner in the larger society in a serious manner. Such a team conveys the sense that the team respects differences and values equality and expects the participants to focus on American Creed values of equality rather than to assume that because the setting is private and informal that prejudice and negative cultural myths will prevail. Diverse teams can play a valuable role in injecting equality values in a subtle way into the mediation process.[139]

Diverse mediation teams may well be able to provide symbolic and practical advantages to a mediation. But creating such teams, given the myriad of identity

---

137. The success of the APADRC and MLKDRC in collaborative efforts have led the two organizations to create a permanent joint mediation team.

138. The day laborer - residential homeowner conflict described earlier represents an interesting example of the diverse mediation team. When the conflict was brought to the county supervisor's attention and she decided to try mediation, she, apparently did understand that there were racial overtones that largely involved Black and brown Los Angelenos. Rather than approach a community mediation group identified with the Black or Latino community, she approached Marcia Choo of the APADRC. That in and of itself was an interesting choice. She could easily have contacted any number of groups or individuals who are competent mediators but associated largely with the Anglo community. Choosing Choo clearly represented a desire on the supervisor's part to find a mediator who would have experienced some very similar discrimination and oppression experiences based upon race without having the person be a member of the exact identity groups of the parties involved. It was Choo who, after accepting the invitation to mediate, proceeded to create her mediation team which included three African-Americans (including Dennis Westbrook, executive director of MLKDRC and myself) and one Latino, Mr. Gerald Rodriguez, a mediator with the Los Angeles Department of Community and Senior Services who works extensively in the Latino community.

139. The little empirical evidence that has been gathered in the mediation context only partly supports this. In the Institute Public Law's study diverse teams i.e. mixed race teams actually did not make enough of a difference to offset the negative outcomes for minority (Latino) participants. In order for minority participants to attain results as beneficial as those whites received they needed to have both mediators be minority group members. Institute of Public Law Study, *supra* note 50.

groups and combinations that can exist, may not be practical.[140] Training, as described above, for all mediators to negate negative cultural myths and expand the range of interpretive frameworks employed is necessary. The value of diverse teams in setting a certain tone or atmosphere for a mediation suggests that the injection of equality values should be carefully done. The diverse team can cause the parties to confront the conflict between their American Creed values of equality and their prejudicial notions without a blunt statement that accuses any particular party of harboring prejudicial or discriminatory intent which could cause the accused party to become defensive. Regardless of whether the mediation team is diverse or not, the manner of injecting equality values needs to employ a similar approach. When conflicts appear to be floundering over differing interpretive frameworks, mediators can encourage the parties to explore whether their equality notions have a common ground. For example, in a co-mediated session in which I participated which involved a couple who had broken off their romantic relationship but were forced to continue living together in the house that they had bought together during happier times, my co-mediator was able to move the parties toward some agreement when she said, "It sounds like you both see fairness or equality as dividing chores fifty-fifty." Another approach to encouraging parties to confront their value conflicts could involve questioning a party on whether they would find the solution they suggest for the other party would be acceptable if applied to themselves.[141]

Part of mediators' understanding the impact of negative cultural myths in diverse mediation sessions involves accepting that not all conflicts in which parties have diverse interpretive frameworks can be resolved within any particular mediation. Some conflicts may be resolved when parties are given an opportunity to choose who will mediate.[142] The rise of particular identity group mediation projects, for example, gay and lesbian mediation projects and Christian mediation projects indicate that, while Americans may be comfortable with "strangers" as

---

140. Cynthia Savage, Culture and Mediation: A Red Herring (unpublished manuscript on file with author). Professor Savage describes an actual mediation conducted by the University of Denver College of Law Mediation Clinic which involved two white male Russian-Jewish immigrant participants, a white American female student mediator, a Black English male student mediator and a white American born Jewish female supervising attorney. Beyond these obvious diverse categories of race, gender, religion and national origin, Savage notes that language skills, length of time in the United States, employment or lack thereof and age were all also significant factors in understanding the identities of the parties.

141. I heard this suggestion at a panel during the National Conference on Peacemaking and Conflict Resolution held May 27-June 2, 1993 in Portland, Oregon. The conflict described involved two female co-workers, one white and one Black. The mediators, both white, suspected racism on the part of the white woman. Rather than directly confront her, the question of whether it would be appropriate for her to be required to control the volume of her voice, the solution she was suggesting for her Black co-worker, caused the woman to more clearly see the inequality of the request that she was making.

142. Grillo, *supra* note 22, at 1585 (arguing that in general, parties ought to have the right to choose mediators and exercise consumer choice and analyzing the detrimental impact of the lack of choice in mandatory divorce mediations which involve some of the same concerns discussed here on the negative impact on women especially women of color).

mediators, some require some knowledge of the mediators' values, the knowledge that the mediator's interpretive framework includes similar notions of how equality values might be defined.

Some conflicts may not be suitable for mediation at all. The use of negative cultural myths can reveal a larger political and power struggle that envelopes the larger social and economic community. The homeowner-day laborer conflict could be resolved when both sides are willing to redefine their respective interpretive frameworks about each other and about what good neighbors and good neighborhoods can mean. But it can also be a reflection, as it was, of larger political struggles between minority groups that ultimately was resolved in the larger political arena. Parties to a mediation need to have some similar ideas of what the shared values of equality means. Both sides must be able either to recognize what that shared definition is or to be willing to create a shared definition. And in recognizing or creating such a definition be willing to accept it to resolve the dispute at an individual level.

Mediators, then, in conducting mediations where negative cultural myths arise, need to be able to analyze whether the conflict will be appropriate for mediation. One mediation scholar, Beryl Blaustone, has analyzed and described the kinds of questions that a lawyer should ask herself in determining whether her client should participate in a mediation.[143] She describes three questions that an attorney should explore in analyzing whether the client should participate:

> 1) whether the client can articulate his needs without fear or intimidation and explore alternatives fairly;
>
> 2) what the mediator's theoretical perspectives are on the values of mediation; and
>
> 3) what other options does the client have.[144]

The mediator concerned with intervening to combat negative cultural myths must ask similar questions. First, the mediator must examine her own negative cultural myths regarding the parties both as members of particular identity or organizational groups and as individuals in order to determine whether she possesses or can create a broad range of interpretive frameworks within which to understand the conflict being described. Secondly, the mediator must assess the parties. She must include Blaustone's inquiries on the parties abilities to speak for themselves and articulate their needs and values without fear or intimidation, but also analyze what the parties are seeking in the mediation. Are the parties seeking an individually workable solution that rests upon maintaining a connectedness with each other? Or are the parties seeking a public determination of the underlying

143. Beryl Blaustone, *Training the Modern Lawyer: Incorporating the Study of Mediation Into Required Law School Courses*, 21 SW. U. L. Rev. 1317 (1992).

144. *Id.* at 1346-48.

value choices? Additionally, the mediator needs to explore whether the parties do share values or understandings of shared values. What definitions of social relations do the parties have of each other? Is there as less conflicted definition, a contextualized understanding of equality, that both parties can imagine or create in redefining themselves and their relationship? Are they willing to accept and apply such a redefinition?

The problem of the imposition of the mediator's values does lurk here, too. There may be a redefinition, a new interpretive framework, that the mediator sees that the parties either do not see or see, but reject. At that level the problem is not acute. If the parties fail to agree, that is their right. For example, in the day laborer-homeowner conflict, the multi-cultural team of mediators envisioned an interpretive framework wherein the parties identified with each other as members of disadvantaged racial groups who both shared oppressive conditions in the larger society and, consequently had more in common than opposed. The parties were unwilling to recognize the commonalities and the conflict moved on to the political level. More difficult is where the parties agree but employ an interpretive framework which disadvantages one of the parties.[145] An interventionist approach sanctions providing information or time to regroup and think, even going into more than one session precisely so that the parties can confer with others. Still, parties may return willing to agree to terms that the mediator still views as imbalanced.

I do not have a magical solution. The problem of determining whether another individual truly understands his own needs and interests or is being dominated or overly influenced by the professionals involved has plagued mediation and, indeed, litigation in the past.[146] Mediators, like other professionals, must follow their consciences and their understanding of the still

---

145. It can be difficult to analyze whether the choices others outside your culture or value framework make are in fact "false consciousness." For example, in the Institute of Public Law Study it may not be false consciousness after all for minority parties to feel satisfied even when the objective outcome is "worse". Institute of Public Law Study, *supra* note 50. Minority participants may feel it unlikely that they will be treated justly generally and if they can at least tell their own stories and be heard that is a plus. For a broader discussion on difficulties with cross-cultural understanding *see* Isabelle R. Gunning, *Arrogant Perception, World-Travelling And Multi-cultural Feminism: the Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189 (1992).

146. *See, e.g.*, Derrick Bell Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L. J. 470, 490-491 at n. 63 (1976) (describing the tensions between civil rights attorneys and parent-clients and noting similar tensions in poverty law-public interest cases). For more contemporary articles exploring the problems related to undue lawyer control and power in the attorney-client relationship, *see generally* Anthony V. Alfieri, *Practicing Community*, 107 HARV. L. REV. 1747, 1754 (1994) (book review) ("progressive lawyers only want to carry out their own agenda, and in doing so, they give them [clients] rights and take their voice and action."); Ruth Buchman & Louise G. Trubek, *Resistance and Possibilities: A Critical and Practical Look at Public Interest Lawyering*, 19 N.Y.U. REV. L. & SOC. CHANGE 687 (1992); Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103 (1992); GERALD LOPEZ, PROGRESSIVE LAWYERING: ONE CHICANO'S VIEW OF PROGRESSIVE LEGAL PRACTICE, (1993); William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones' Case*, 50 MD. L. REV. 213 (1991).

developing ethics of mediation to determine whether in any particular case "fairness" issues or "self-determination" issues ought to prevail. But if they have analyzed the impact of negative cultural myths in the context of the particular mediation and employed intervention techniques to allow the parties to create more equitable interpretive frameworks within which to resolve their conflicts, whichever choices they make under the circumstances should be closer to providing justice and equality for all who participate in mediation than if negative cultural myths are allowed to prevail.

Training and intervening in mediation needs to emphasize several things in order to combat negative cultural myths. Basic mediation training needs to include the exploration of negative cultural myths and interpretive frameworks and methods to expand the range of frameworks to be employed for all parties regardless of their particular identity or organizational category. Intervention techniques should be employed after the mediator has determined that the parties are interested in personal, connecting solutions and not a public resolution of social or economic power struggles and should be used in a manner that encourages the parties to confront internally the conflict between their American Creed values of equality and negative cultural myths so that all can participate in redefining equality within an interpretive framework which allows them to connect with those who are different.

V. CONCLUSION

Mediation as a form of conflict resolution has deservedly gained increasing popularity in the United States. Its advantage over adversarial litigation lies in its ability to encourage peace, connectedness and community between and amongst parties. Its informality and lack of procedure do provide a fertile ground within which prejudice of negative cultural myths can flourish thereby disadvantaging members of "out" identity groups. However, with careful analysis of the parties needs and goals, and the use of intervention techniques to encourage parties to confront, internally, their value conflicts between equality and prejudice, the benefits of mediation can be made available to all on a more equal basis. Intervention may make mediation more time consuming, more costly and even reduce the number of conflicts that can be resolved through the method, but "[t]he ideal of equality before the law is too insistent a value to be compromised in the name of more mundane advantages."[147] The shared value of equality must be included in the mediation process to ensure justice for disadvantaged identity groups.

147. Delgado et al., *supra* note 3, at 1404.