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# Stories of Experience: Economic Inequality in Mediation

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# STORIES OF EXPERIENCE: ECONOMIC INEQUALITY IN MEDIATION

Robert Rubinson\*

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## I. INTRODUCTION

Mediation Type: Child access

Place: Powell County Courthouse

Date: July 5, 2017

Mediator: John Harris

Participants: Amber Collins and David Williams

Children: Jade (age 9) and Diana (age 3)

Referral: By the Court

### Dialogue at Mediation Session

Mediator: It looks like we’re making progress. You’ve now agreed about a schedule when the kids will be with Amber and when they’ll be with David. We’ve been focusing on the school year, though. What about vacations?

Amber: I’m not sure we need to talk much about that. We can just see.

Mediator: David?

David: Yes, I think that’s right. We’ve got the important stuff down. We can work it out over the summer on our own.

Mediator: You can certainly do that—it’s up to both of you—but I can say in my experience issues can crop up over the summer. Let’s say, for example, that one of you is going away for a while to the beach. The other one of you won’t see the kids then.

Amber: I guess.

Mediator: Like I said, it’s completely up to you, just as I mentioned when we started the mediation. I’m still concerned, however, that the

agreement you've both worked so hard on can become a problem during a vacation. That trip to the beach won't be much fun if you disagree about where you're going, how long, who's going, stuff like that.

David: I guess we can talk about it.

Mediator [to Amber]: Is that OK?

Amber: Sure.

Mediator: OK. So when do you typically go on vacation?

#### Finances of Participants

##### Amber's Income:

Part-time convenience store clerk: \$9.25/hour<sup>1</sup> for 20 hours/week, or \$750/month; and

Part-time home health aide: \$8.45/hour for 25 hours/week, or \$845/month

##### Amber's Expenses:

Rent: \$900/month

Food: \$100/month (with food stamps<sup>2</sup>)

Child care: \$300

Utilities: \$100

Transportation (bus) (four trips to jobs): \$100

Other expenses (medical, clothing, personal items): \$100

Money remaining: -\$5

Number of vacations in last three years: 0

##### David's Income:

Home Improvement (intermittent): variable

Landscaping (seasonal): variable

1. This is \$2.00 over the current federal minimum wage as of 2018 of \$7.25/hour. Fair Labor Standards Act of 1938, 29 U.S.C. § 206(a)(1)(c) (2018). While some states provide for a minimum wage higher than the federal limit, Amber's \$9.25 hourly wage is still higher than half of the states. See generally NAT'L CONFERENCE OF STATE LEGISLATURES, 2018 MINIMUM WAGE BY STATE, <http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx> (last visited Sep. 18, 2018).

2. "Food stamps" is the common term for the Supplemental Nutrition Assistance Program ("SNAP"). See 7 U.S.C. §§ 2011–2036 (2018).

Mover (intermittent): variable

David's expenses:

Rent: \$400/month (with roommate)

Food: \$50/month (with food stamps)

Utilities: \$100

Transportation: variable

Other expenses (medical, clothing, personal items): \$100

Money remaining: Impossible to say

Number of vacations in the last three years: 0

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Amber and David are poor. They have little income to cover basic necessities, let alone vacations. The mediator does not understand this, and it is not surprising that he does not. After all, it is likely that he and everyone he knows take vacations. The mediator is not callous or indifferent; his experience simply does not enable him to understand how Amber and David live on the edge of subsistence and the daily struggles that go along with that kind of life.<sup>3</sup> And for Amber and David, their struggles are far greater than being deprived of vacations. They juggle multiple jobs with uncertain hours, have little job security, and have no "personal days." They rely on an unreliable transit system to get to and from work and to get their daughters to and from school and day care. Utility bills come due, food needs to be purchased, medical appointments need to be made and kept, and a myriad other daily commitments must be managed. It is far more difficult to do these tasks when you are poor.

This disconnect is pervasive yet little studied in the literature on mediation, even though a great deal of work has explored a range of differences among distinct types of mediation in other respects.<sup>4</sup> These studies include the cultural background of the participants,<sup>5</sup> whether the mediation is part of a program integrated within a large organization,<sup>6</sup> whether mediation

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3. See *infra* text accompanying notes 37–70.

4. See James A. Wall & Timothy C. Dunne, *Mediation Research: A Current Review*, 28 NEGOT. J. 217, 220 (2012).

5. See Cynthia R. Mabry, *African Americans "Are Not Carbon Copies" of White Americans—The Role of African American Culture in Mediation of Family Disputes*, 13 OHIO ST. J. ON DISP. RESOL. 405, 419 (1998).

6. See Kenneth Kressel & Howard Gadlin, *Mediating Among Scientists: A Mental Model of Expert Practice*, 2 NEG. & CONF. MGMT. RES. 308, 319 (2009) (examining mediations within the National Institutes of Health).

participants will maintain relationships post-dispute,<sup>7</sup> the amount of money at issue,<sup>8</sup> the race and gender of participants,<sup>9</sup> the religious affiliation of the participants,<sup>10</sup> and whether the mediation is private or court-annexed.<sup>11</sup> None of these, however, addresses when one or more mediation participants is poor and the mediator is not.<sup>12</sup>

This dynamic is a crucial issue. After all, the very purpose of mediation is to empower participants<sup>13</sup> and thereby facilitate participant-centered

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7. This issue is important in a number of different types of disputes. See, e.g., Howard J. Aibel, *Mediation Works . . . Opting for Interest-Based Solutions to a Range of Business Needs*, 51 DISP. RESOL. J. 24, 27 (1996) (noting how mediation is "able to maintain business relationships"); Janet Weinstein, *And Never the Twain Shall Meet: The Best Interest of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 88 (1997) (noting how adversarial mediation makes little sense when the goal is to "strengthen the family in order to safely maintain . . . relationship[s]").

8. Wall & Dunne, *supra* note 4, at 225.

9. See Trina Grillo, *The Mediation Alternative: The Process Dangers for Women*, 100 YALE L.J. 1545, 1578 (1991); Penelope Ann Bryan, *Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation*, 28 FAM. L.Q. 177, 196 (1994).

10. See Harold Abramson, *Crossing Borders into New Ethical Territory: Ethical Challenges When Mediating Cross-Culturally*, 49 S. TEX. L. REV. 921, 923-24 (2008) (describing a mediator's challenges when mediating a divorce when the couple's religious affiliation leads the wife to enter into an agreement that would not be granted by a court and, in the mediator's view, is unfair to the wife).

11. See Yishai Boyarin, *Court-Connected ADR—A Time of Crisis, a Time of Change*, 95 MARQ. L. REV. 993, 1039-41 (2012). Court-annexed programs have experienced explosive growth, and now all fifty states have such programs. See generally *Court ADR Across the U.S.*, RSI'S COURT ADR RES. CTR., <https://www.aboutrsi.org/resource-center> (last visited Aug. 25, 2018); Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-658; Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Reshaping Our Legal System*, 108 PENN. ST. L. REV. 165, 185-88 (2003) (discussing the growth of mediation programs in the United States).

12. There is some literature that explores mediation in the context of poverty, although not in terms of socioeconomic differences between the mediator and the mediation participants. See, e.g., Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2007-09 (1999). See also text accompanying notes 103-10.

13. This Article assumes the mediators have adopted the "styles" of mediation called "facilitative" or "transformative" and not "evaluative" mediation. See generally Leonard Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO HIGH COST LITIG. 111, 112 (1994) (setting forth a "grid" of mediator orientations, including "facilitative" and "evaluative"); Leonard Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEG. L. REV. 7, 23-25 (1996) (discussing the "facilitative-evaluative continuum"). In order to promote settlement, "evaluative" mediators tend to take a more active role in predicting what a court would do. See L. Randolph Lowry, *Evaluative Mediation*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS*, 72 (Jay Folberg et al. eds., 2004). "Evaluative" mediators, however, are not as concerned with empowerment and facilitation, and, as a result, have come under heavy criticism.

problem-solving.<sup>14</sup> This is hard to do when the lives of participants are alien to a mediator's own experiences. This is true even when mediators wholeheartedly subscribe to the value of empowerment and are fully versed in the techniques of "good" mediation.<sup>15</sup>

Moreover, mediators typically encounter poor people in court-annexed programs that are overcrowded and under-resourced.<sup>16</sup> Such programs tend to be located within courts of "mass justice," where there are many poor people, little legal process as traditionally understood,<sup>17</sup> and, inevitably, limited time to mediate. Such time restrictions and pressures to settle one's case within such courts intensify the risk that poor people—and the lives they lead—will not be heard in mediation.<sup>18</sup>

This Article examines these issues in five parts. First, it describes the basic psychological principles that lead us to believe that other people's lives are like our own. The second part focuses on the day-to-day lives of those in poverty. The third part focuses on literature that addresses the norms of experience and judging—an area that has received some attention and is a springboard for thinking about analogous issues in mediation. The fourth part applies this learning to mediation. The final part develops specific proposals which, in combination or individually, can improve the effectiveness of mediators when mediating matters with low-income participants.

## II. NORMS OF EXPERIENCE

Humans extrapolate their own experience as the norm—what can be called "the norms of experience."<sup>19</sup> This straightforward concept helps

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See Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 938–48 (1997) (criticizing evaluative mediation as not actual mediation).

14. A core norm of mediation is for a mediator to facilitate and encourage participant "autonomy." See Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 776 (1999) (referring to "autonomy" and "self-determination" as "longstanding values" in mediation).

15. Unfortunately, "bad" mediators do exist. See Robert Rubinson, *Indigency, Secrecy, and Questions of Quality: Minimizing the Risk of "Bad" Mediation in Court-Annexed Programs*, 100 MARQ. L. REV. 1353 (2017). Nevertheless, a goal of this Article is to demonstrate that even mediators who are well-intentioned and skilled can still go astray due to their lack of knowledge about what poverty entails. The mediator in the dialogue that begins this Article is an example of such a mediator.

16. See *infra* text accompanying notes 113–19.

17. See *infra* text accompanying notes 116–22.

18. See *supra* text accompanying notes 4–12.

19. Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists*, 23 OHIO ST. J. ON DISP. RESOL. 437, 543 (2008) (noting that humans tend to "assume that others see the world the same way they do"); Dale W. Griffin & Lee Ross, *Subject*

explain why those who have not and do not live in poverty make assumptions about those who do.

### A. *Cognitive Conservatism*

A large volume of literature in social psychology—grouped under the term “cognitive conservatism”<sup>20</sup>—draws upon an insight that is both basic and intuitive: humans have limited cognitive resources.<sup>21</sup> As a result, it would take simply too much brain power to process every experience anew.<sup>22</sup> Therefore, the brain relies, as it must, on a range of cognitive shortcuts called “heuristics.”<sup>23</sup> These shortcuts are largely invisible and unconscious.<sup>24</sup> Two examples are interpreting facts to confirm pre-existing conclusions<sup>25</sup> and mistakenly assuming that certain events happen more often than they actually do.<sup>26</sup> Other examples abound, some with profound consequences for mediation.

*Construal, Social Inference, and Human Misunderstanding*, in 24 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 337–38 (Mark P. Zann ed., 1991) (discussing how humans assume the “normativity” of our beliefs).

20. Anthony G. Greenwald, *The Totalitarian Ego: Fabrication and Revision of Personal History*, 35 *AM. PSYCHOLOGIST* 603, 606 (1980).

21. For some general discussions about the idea in both a legal and non-legal context, see Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 *WASH. L. REV.* 526, 544–48 (1994); Lee Ross, *The Intuitive Psychologist and His Shortcomings*, in 10 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 174, 184 (Leonard Berkowitz ed., 1977).

22. Greenwald, *supra* note 20, at 606 (the brain “manage[s] knowledge in a variety of ways to promote the selective availability of information”).

23. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty, Heuristics and Biases*, 185 *SCI.* 1124 (1974) and RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 17 (1980) for the two most influential and oft-cited works on these issues.

24. LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* 85 (1991) (“[P]eople fail to recognize the degree to which their interpretations of the situation are just that—constructions and inferences rather than faithful reflections of some objective and invariant reality.”).

25. Jonathan P. Feingold & Evelyn R. Carter, *Eyes Wide Open: What Social Science Can Tell Us About the Supreme Court’s Use of Social Science*, 112 *NW. U. L. REV.* 236, 263 (2018) (discussing “confirmation bias” which is “the human tendency to overemphasize information that supports an initial hypothesis and discount or ignore countervailing evidence”); Jeffrey Z. Rubin & Frank E. A. Sander, *Culture, Negotiation, and the Eye of the Beholder*, 7 *NEG. J.* 249, 252 (1991); Mark Snyder & William B. Swann, Jr., *Hypothesis Testing Processes in Social Interaction*, 36 *J. PERSONALITY & SOC. PSYCHOL.* 1202, 1203 (1978) (exploring “hypothesis testing” through which humans preferentially search for information confirming a hypothesis based on preexisting beliefs).

26. Nancy Levit, *Confronting Conventional Thinking: The Heuristics Problem in Feminist Legal Theory*, 28 *CARDOZO L. REV.* 391, 396 (2006) (“People overestimate the



B. "Implicit Bias" and "Stereotyping"

Some aspects of cognitive conservatism are deeply troubling. Stereotyping and implicit bias are two examples. Both have been particularly important in the context of anti-discrimination law,<sup>27</sup> and policing.<sup>28</sup> These issues have enormously important consequences, including—in the case of law enforcement—life and death. As a result, ways to overcome implicit bias in these contexts have become the subject of a substantial and important literature.<sup>29</sup>

There is, however, scant literature that explores the cognitive challenges mediators face when participants are from lower socioeconomic backgrounds than their own. Indeed, there is little discussion of the cognitive models employed by experienced mediators more generally.<sup>30</sup> One exception is a study conducted at the National Institutes of Health which involved mediations that were, on average, almost 30 hours long—hardly typical of those in which low-income people participate.<sup>31</sup> Another study examined the impact of mediator race and gender on how satisfied mediation participants were with the mediation process. The study, however, focused on employment discrimination in the United States Postal Service without taking socioeconomic differences into account.<sup>32</sup>

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frequency of an event's happening based on its salience—how dramatic, sensational or otherwise memorable the event is.”)

27. See Erik J. Gervin, *On Using the Psychological Science of Implicit Bias to Advance Anti-Discrimination Law*, 26 GEO. MASON U. C.R. L.J. 1, 1 (2015), and Annika L. Jones, *Implicit Bias as Social-Framework Evidence in Employment Discrimination*, 165 U. PA. L. REV. 1221, 1222–24 (2017), for recent examples.

28. Andre Douglas Pond Cummings, "Lord Forgive Me, But He Tried To Kill Me": *Proposing Solutions to the United States' Most Vexing Racial Challenges*, 23 WASH. & LEE J. C.R. & SOC. JUST. 3, 10–13, 36–38 (2016) (discussing the killing of unarmed black men and the value of training on implicit bias as one means to address the problem).

29. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987), for the most famous discussion of implicit bias in the context of discrimination and means to combat it.

30. See Kressel & Gadlin, *supra* note 6, at 309 (research "largely neglects how experienced mediators think").

31. *Id.* The study focused on how mediators employ different "scripts" in mediating. "Scripts" are one way of conceptualizing how "mental models" interpret situations. *Id.* at 319. The study did note the importance of "social context," albeit not in the sense of socioeconomic differences. *Id.* at 337–38.

32. Lisa Blomgren Amsler, et al., *Dispute System Design and Bias in Dispute Resolution*, 70 SMU L. REV. 913 (2017). Interestingly, the study found that "women complainants are equally satisfied with the mediation process, mediators, and overall outcome in sex discrimination cases regardless of mediator gender." *Id.* at 939. The findings for race were more mixed, with equal levels of satisfaction with the mediator and process "regardless of race or ethnicity, in race discrimination cases," although African-Americans were less satisfied with

There is also a small but important body of literature on the role of cognitive bias in mediation.<sup>33</sup> Some of this literature argues that “neutrality” in mediation is illusory<sup>34</sup> or explores the impact of implicit bias among and between employees in the workplace.<sup>35</sup> Again, none of this literature focuses on socioeconomics.

C. “Norms of Experience”

While drawing upon the same principles underlying “implicit bias,” the term “norms of experience” reflects a simple fact about how people think, even people of good faith who want to “do good” through a process characterized by empowerment and respect. It is not bias per se. Rather, it reflects how we make assumptions about what, on its surface, are the more quotidian aspects of our lives: how to get to places, how much money we have for basic necessities, our ability to enjoy leisure time, and the norms of the workplace. The following section traces the reality behind such assumptions for those who live in poverty.<sup>36</sup>

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mediator *outcome* with an African-American mediator. *Id.* As the researchers noted, there is much more research to be done to explore these issues. *Id.* at 941.

33. See generally Carol Izumi, *Implicit Bias and Prejudice in Mediation*, 70 SMU L. REV. 681 (2017) (discussing cognitive bias in mediation and the difficulty in conducting mediations without bias, prejudice, or favoritism due to unconscious mental processes); Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J.L. & POL’Y 71 (2010) (discussing challenges of a mediator’s ethical duty to mediate disputes in a neutral manner against the behavioral realities of mediator thought processes, motivations, and decisions).

34. See Izumi, *Implicit Bias and the Illusion of Mediation Neutrality*, *supra* note 33, at 101–02.

35. See Elayne E. Greenberg, *Fitting the Forum to the Pernicious Fuss: A Dispute System to Address Implicit Bias and ‘Isms in the Workplace*, 17 CARDOZO J. CONFLICT RESOL. 75, 75 (2015) (proposing a dispute system designed to address workplace discrimination caused by implicit biases).

36. There are more pernicious examples of this tendency. One is to categorize the poor as either “undeserving”—those who are personally responsible for their own predicament, such as through laziness or addiction—or as “deserving”—those who are victims of circumstances beyond their control, such as natural disasters, aging, or disability. See Khiara M. Bridges, *The Deserving Poor, The Undeserving Poor, and Class-Based Affirmative Action*, 66 EMORY L.J. 1049, 1049 (2017); Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1501–02 (1991). This Article assumes that mediators do not engage in such damaging and misleading stereotyping.

## III. THE LIVES OF THOSE IN POVERTY

The daily challenges of living in poverty are often invisible. Sometimes negative stereotypes fill the void,<sup>37</sup> but often there are assumptions that are neither negative nor positive, but simply wrong—the result of a lack of experience.<sup>38</sup> This section describes some of the ways poverty shapes lives on a granular level.

A. *Day to Day in Poverty*

Assumptions about poverty often reflect what is visible and identifiable. Homelessness is an example; crumbling or abandoned buildings are another. Other markers are crime, alcoholism, and drug use.<sup>39</sup> All of these defining characteristics, of course, are all too real and profoundly disturbing aspects of poverty.

However, many poor people do not fit these and other stereotypes: they are not homeless, jobless, substance abusers, or incarcerated. Many low-income individuals have jobs, albeit, as shown below, low-wage jobs with the uncertainties and challenges that go along with them.<sup>40</sup> Others are pursuing an education, whether it be a GED, community college degree, or four year college degree.<sup>41</sup> Moreover, while poverty is undeniably and heavily racialized,<sup>42</sup> poverty afflicts all racial and ethnic groups.<sup>43</sup> This is *not* to say

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37. See MARTIN GILENS, *WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY* 60–79 (1999). Such stereotypes often are drawn from the media. See Gordon Hannah & Thomas P. Cafferty, *Attribute and Responsibility Framing Effects in Television News Coverage of Poverty*, 36 J. APPLIED SOC. PSYCHOL. 2993, 2994–96 (2006).

38. See Hannah & Cafferty, *supra* note 37, at 2994–96.

39. *Id.*

40. See *infra* text accompanying notes 54–59.

41. NAT'L CTR. FOR PUB. POL'Y & HIGHER EDUC., *AFFORDABILITY AND TRANSFER: CRITICAL TO INCREASING BACCALAUREATE DEGREE COMPLETION 2* (2011) ("The most recent national data on college enrollment and income show that 44 percent of low-income students (those with family incomes of less than \$25,000 per year) attend community colleges as their first college after high school.")

42. While race is not a precise proxy for poverty, far more African-Americans are in poverty than whites. See S. Jay Oshansky et al., *Differences in Life Expectancy Due to Race and Educational Differences Are Widening, and Many May Not Catch Up*, 31 HEALTH AFF. 1803, 1803 (2012).

43. See Mark J. Van Ryzin, Diana Fishbein & Anthony Biglan, *The Promise of Prevention Science for Addressing Intergenerational Poverty*, 24 PSYCHOL. PUB. POL'Y & L. 128, 128 (2018) ("[T]he poverty rates for White children have varied between 10% and 15%, but rates for Black and Hispanic children have ranged from 25% to 50%.") (citing T. R. Shanks & S.K. Danziger, *Anti-Poverty Policies and Programs for Children and Families*, in SOCIAL

that many poor people are not homeless, jobless, suffering from addiction, or without a high school education. Many are. However, there are also many poor people who neither have the visible markers of poverty nor represent common stereotypes about who is poor. The non-poor do not see these lives as different from their own.<sup>44</sup> The problem is that there are aspects of daily living that are not available to those in poverty. Consider a few examples.<sup>45</sup>

### 1. *Child Care*

Child care is a struggle for many low-income families, especially for low-wage workers.<sup>46</sup> It is expensive, and while some states do provide for subsidized child care, there are not remotely enough funds to accommodate the many families who need it.<sup>47</sup> Moreover, the challenges of finding child care are exacerbated given the ever-shifting hours which are typical of low-wage work.<sup>48</sup>

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POLICY FOR CHILDREN AND FAMILIES: A RISK AND RESILIENCE PERSPECTIVE 27 (J. Jenson & M. Fraser eds., 2d ed. 2010)).

44. While conceptions of poverty are often based on urban poverty, a distinct set of challenges face the poor who live in rural areas. See, e.g., Lisa R. Pruitt, *Missing the Mark: Welfare Reform and Rural Poverty*, 10 J. GENDER RACE & JUST. 439, 452–63 (2007) (discussing “the most common day-to-day worries faced by rural residents”); Debra Lyn Bassett, *Distancing Rural Poverty*, 13 GEO. J. ON POVERTY L. & POL’Y 3, 5–6 (2006) (describing the characteristics of rural poverty); Patrice H. Kunesh, *A Call for an Assessment of the Welfare on Indian Children in South Dakota*, 52 S.D. L. REV. 247, 248 (2007) (discussing poverty on Native American Reservations).

45. See Rhonda Smith, *Work and Family: Workers with Nonstandard Hours Face Child Care, Transit Obstacles*, BLOOMBERG BNA (Aug. 13, 2013), <http://www.bna.com/workers-nonstandard-hours-n17179875800/> (addressing some of the issues that follow).

46. See Gregory Acs, *A Good Employee or a Good Parent? Challenges Facing Low-Income Working Families*, 4 U. ST. THOMAS L.J. 489, 495 (2007).

47. Shannon Weeks McCormack, *Postpartum Taxation and the Squeezed out Mom*, 105 GEO. L.J. 1323, 1336 (2017) (discussing how “some women . . . cannot find work that would even cover childcare costs” and thus need to put themselves into debt to pay for childcare) (citing Katie Bugbee, *How Much Does Child Care Cost?*, CARE.COM, <https://www.care.com/c/stories/2423/how-much-does-child-care-cost/> [<https://perma.cc/C83M-NL8K>] (last visited Aug. 18, 2018)). Other women are forced to pay a substantial amount of their income—sometimes 50%—to cover child care costs. *Id.* at 1336–37 (citing MICHAEL MADOWITZ ET AL., CTR. FOR PROGRESS, *CALCULATING THE HIDDEN COST OF INTERRUPTING A CAREER FOR CHILD CARE* 2 (2016), <https://cdn.americanprogress.org/wp-content/uploads/2016/06/17091517/ChildCareCalculator-methodology.pdf> [<https://perma.cc/V7HY-VU5K>]). See also Clare Huntington, *Welfare Reform and Child Care: A Proposal for State Legislation*, 6 CORNELL J.L. & PUB. POL’Y 95, 95 (1996) (“[T]he vast majority of children who need subsidized child care do not receive it.”).

48. Acs, *supra* note 46, at 495.

## 2. Food and Health

The availability of nutritious food is limited in many low-income neighborhoods. So-called “food deserts”<sup>49</sup> have numerous “corner” groceries, fast food,<sup>50</sup> and liquor stores,<sup>51</sup> but little in the way of fresh produce or other healthy options.<sup>52</sup> This lack of nutritious food options leads to a range of poor health outcomes, including obesity, which can generate more doctor visits and sick days.<sup>53</sup>

## 3. Work

Low-wage work in the United States is hard to imagine unless one relies on one (or more) of such jobs for income. Many low-income workers must contend with constantly changing shifts during which they must work or get fired.<sup>54</sup> It is rare to have flexible work hours; such flexibility is far more likely to be available in higher-paid work.<sup>55</sup>

Most low-wage workers are also paid hourly.<sup>56</sup> Unlike salaried workers, low-wage jobs often do not have paid personal days or the flexibility to work

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49. Sonje Hawkins, *Desert in the City: The Effects of Food Deserts on Healthcare Disparities of Low-Income Individuals*, 19 ANNALS HEALTH L. ADVANCE DIRECTIVE 116, 116 (2009).

50. Sheila Fleschhacker & Joel Gillesohn, *Carrots or Candy in Corner Stores?: Federal Facilitators and Barriers to Stocking Healthier Options*, 7 IND. HEALTH L. REV. 23, 28 (2010) (“Fasts [sic] food restaurants are . . . more prevalent in low-income neighborhoods.”).

51. See Shelley Ross Saxon, “Down with Demon Drink!”: *Strategies for Resolving Liquor Outlet Overconcentration in Urban Areas*, 35 SANTA CLARA L. REV. 123, 124–25 (1995) (noting how “the overabundance of liquor stores” generates “attendant problems such as loitering, littering, graffiti, and prostitution, as well as the visual impact of alcohol abuse on inner city children”).

52. Christine Fry et al., *Healthy Reform, Healthy Cities: Using Law and Policy to Reduce Obesity Rates in Underserved Communities*, 40 FORDHAM URB. L.J. 1265, 1284 (2012) (describing the relationship between obesity, poverty, “limited healthy food outlets, and many fast-food restaurants”).

53. *Id.* at 1286.

54. Trina Jones, *A Different Class of Care: The Benefits Crisis and Low-Wage Workers*, 66 AM. U. L. REV. 691, 716 (2017) (noting how low wage workers often confront “mandatory and unscheduled overtime,” “temporary or informal layoffs,” and “nonstandard hours”); see also Robin R. Runge, *Redefining Leave from Work*, 19 GEO. J. ON POVERTY L. & POL’Y 445, 450 (2012) (describing how little flexibility many low-wage workers have over their work schedules).

55. Jones, *supra* note 54, at 710 (noting how few low-wage workers are offered “flectime” as compared to higher wage earners).

56. Nantiya Ruan, *Corporate Masters & Low-Wage Servants: The Social Control of Workers in Poverty*, 24 WASH. & LEE J. C.R. & SOC. JUST. 103, 135 (2017).

off-site without losing pay. Moreover, taking time off from work has an obvious consequence: hours not worked are hours not paid.

More generally, low-wage jobs can easily disappear through no fault of the worker. Missing even a single day of work risks the loss of a job, even if it is due to an illness of the worker or his child, or going to medical appointments, school conferences, or funerals—circumstances that can and often do arise for everyone.<sup>57</sup> This sad reality has potentially catastrophic consequences for low wage-earners' ability to provide for themselves or their families. These issues multiply, literally, when low-wage workers must work two or more part-time or even full-time jobs to make ends meet.<sup>58</sup>

On top of all of these barriers, some low-wage workers are "subcontractors" and "day laborers." These workers are often hired through wage "brokers" or "temp agencies," many of which do not adhere to basic worker regulations such as minimum and overtime wages, required breaks, and occupational safety requirements.<sup>59</sup>

#### 4. Public Assistance

An enduring stereotype is that of a "welfare queen" who games the system in order to receive public benefits to fund a lavish lifestyle.<sup>60</sup> Welfare fraud no doubt exists, although fraud, such as tax fraud or fraudulently drawing from other government benefit programs, is rampant among the non-poor or even the rich.<sup>61</sup> In any event, welfare fraud would hardly be lucrative enough to support lavishness. Consider the amount of benefits under two primary cash assistance programs:

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57. Runge, *supra* note 54, at 450 (describing how even "missing a single day of work for any reason" could lead to termination for low-wage workers).

58. Ruan, *supra* note 56, at 135 (noting that many low-wage earners work part-time).

59. See Annette Bernhardt et al., *An Introduction to the "Gloves-Off Economy,"* in *THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOR MARKET I*, 1–9 (Annette Bernhardt et al. eds., 2008); Catherine K. Ruckelshaus, *Labor's Wage War*, 35 *FORDHAM URB. L.J.* 373, 375–77 (2008) (discussing the challenges of enforcing wage and hour standards).

60. Michele Estrin Gilman, *The Return of the Welfare Queen*, 22 *AM. U. J. GENDER & SOC. POL'Y & L.* 247, 247 (2014) (describing how the image of the "welfare queen" has persisted into the 2010s).

61. Justice William O. Douglas described this contradiction in his dissent in *Wyman v. James*, which upheld warrantless "home visits" in order to verify eligibility for public assistance. Douglas said that "over half a billion dollars are expended annually for administration in connection with [public assistance]," yet "[n]o such sums are spent policing the government subsidies granted to farmers, airlines, steamship companies, and junk mail dealers." *Wyman v. James*, 400 U.S. 309, 331–32 (1971) (Douglas, J., dissenting). Justice Douglas concluded that public assistance "has an aura of suspicion" that other government programs do not have. *Id.*

- Supplemental Security Income<sup>62</sup> for an individual: \$750/month or \$9,007.46/year.<sup>63</sup>
- Temporary Assistance to Needy Families<sup>64</sup> for a single parent family of three: most states fall between \$200 and \$500/month.<sup>65</sup> The amount of this assistance in terms of real purchasing power has fallen by more than 20% in most states from 1996 until 2017.<sup>66</sup>

### 5. *Transportation*

Most low-income people must rely on mass transportation, often buses, to travel to work or elsewhere<sup>67</sup> because few poor people can afford to buy and maintain a car.<sup>68</sup> Bus passengers cannot get in a car at a time of their choosing; they have no choice but to leave when a bus arrives, however infrequent or unpredictable that time may be. Moreover, bus schedules can be illusory when there are breakdowns, traffic congestion, and bad weather. Public transportation is also not free, and thus yet another expense low-income wage earners can ill afford. All of these factors are additional challenges in finding and keeping a job.<sup>69</sup>

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62. Supplemental Security Income provides income for the elderly, blind or disabled people who usually have no other source of income. 42 U.S.C. §§ 1381–1385 (2000).

63. SOC. SEC. ADMIN., SSI FEDERAL PAYMENT AMOUNTS FOR 2018 (last visited Sept. 21, 2018), <https://www.ssa.gov/oact/cola/SSI.html>.

64. Temporary Assistance to Needy Families (“TANF”) is a benefit partially funded by federal block grants. 42 U.S.C. §§ 601–619 (1997).

65. ASHLEY BURNSIDE & IFE FLOYD, CTR. ON BUDGET & POL’Y PRIORITIES, TANF BENEFITS REMAIN LOW DESPITE RECENT INCREASES IN SOME STATES (2018).

66. *Id.*

67. Steven J. Knox, *Reconstructing an End to Concentrated Poverty*, 18 J. L. SOC’Y 223, 242 (2015) (noting how good public transportation is crucial to “ameliorate one of the deficits of concentrated poverty”); Bonnie P. Tucker, *The Americans with Disabilities Act of 1990: An Overview*, 22 N.M. L. REV. 13, 49 (1992) (“[g]enerally, public bus transportation is the only travel available to poor . . . Americans.”).

68. Ansell Fernandez, *Prisoners of the Zip Code: How Single Zip Code Rate-Making Hurts the Public Interest*, 30 ST. THOMAS L. REV. 117, 134–35 (2017) (noting that “the average cost of owning a car is \$9,500” which “for a person living in poverty . . . can make car ownership impossible”); see Pruitt, *supra* note 44, at 455 (“94% of all public assistance recipients in the United States do not have a car.”).

69. Fernandez, *supra* note 68, at 135.

## 6. Literacy

Literacy is not an automatically learned skill in the United States. Some adults who cannot read are easily identifiable, such as those who have limited English skills or discernable cognitive deficits. There are, however, a substantial number of people with limited or no literacy skills who do not fall into either of these categories. These individuals are simply poor people who have had minimal or low-quality education.<sup>70</sup>

### B. Day-to-Day Life of Everyone Else

A corollary of the prior discussion is that many conveniences are often taken for granted by the non-poor. Examples are plentiful. They usually own a car and thus have some measure of freedom about when to travel. If they have children, they send them to “good” schools, whether public or private, and, usually, to college; they themselves usually have a college education, and perhaps a graduate degree; they take vacations away from where they live, whether by car or air; they may have freedom to choose their doctors; they tend to be salaried or owners of businesses, with a greater flexibility of work hours.

These conveniences offer freedom and flexibility, yet even modest disruptions to them lead to controversy. Speed cameras, for example, have been the subject of a constitutional challenge,<sup>71</sup> and the United States Department of Transportation has adopted a “tarmac delay rule.”<sup>72</sup> Speed cameras and tarmac delays only affect car owners and air travelers. In contrast, there is no effort, at least through public discourse, to remedy the far worse challenges faced by bus riders.<sup>73</sup>

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70. IRWIN S. KIRSCH ET AL., U.S. DEP'T EDUC., ADULT LITERACY IN AMERICA: A FIRST LOOK AT THE FINDING OF THE NATIONAL ADULT LITERACY SURVEY xvi (3d ed. 2002), <https://nces.ed.gov/pubs93/93275.pdf/> (reporting that “some 40 to 44 million” adults have “limited” literacy skills, 62% of whom “terminated their education before completing high school”). See Kary Moss, *The Right to Read*, 15 J.L. SOC'Y 187 (2014), for an overview of legal and social issues surrounding literacy in poor communities.

71. *Mendenhall v. City of Akron*, 374 F. App'x 598, 599–600 (6th Cir. 2010). The Court rejected the challenge. *Id.*

72. Jennifer Henry & Mary Gardner, *New Tarmac Delay Rule and the Volcanic Ash Cloud over European Air Space: One Year Later*, 76 J. AIR L. & COM. 633, 634–50 (2011).

73. See, e.g., Todd Litman, *Lessons from Katrina and Rita: What Major Disasters Can Teach Transportation Planners*, 132 J. TRANSP. ENG'G 11, 12 (2006) (noting that, in “most North American cities,” the “[s]ervice quality” of public transportation is “minimal,” leading to “a huge difference in convenience, comfort, and safety between motorists and non-motorists (and therefore between wealthy and poor”). Litman cites a particularly striking example of this difference: Hurricane Katrina. *Id.* at 11. As the storm approached, car owners left New Orleans,



## IV. MEDIATOR "POWER" AND SOCIOECONOMICS

Given that many mediators have not experienced poverty, questions arise as to what impact this has on the quality of mediation. One way to start answering these questions is to examine two core goals of mediators: (1) to avoid imposing a mediator's own values and opinions; and (2) to be sensitive to "power differentials" in mediation. These ideas are useful in conceptualizing the role of a mediator, and while they do not directly address the socioeconomic differences between mediator and participants, they are helpful in exploring those issues.

*A. Mediator "Neutrality"*

Like judges, a mediator is not supposed to favor one participant over another.<sup>74</sup> This concept can be referred to in different ways—"neutrality," "lack of bias or favoritism," or "impartiality"—and reflects a core quality that characterizes an effective mediator.<sup>75</sup>

Some mediators recognize that identifying and eliminating "bias" is no easy task and offer strategies to attempt to do so.<sup>76</sup> One strategy is for a mediator to tell participants that she is not aware of conflicts of interest that would impair her neutrality, and then ask the participants if they agree. Even if the mediator asks this question or engages in more general self-reflection, a

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while those without cars could only take buses that went to the Superdome, which was unsanitary and dangerous. *Id.* See also L. Darnell Weeden, *The Black Eye of Hurricane Katrina's Post Jim Crow Syndrome is a Basic Human Dignity Challenge for America*, 37 CAP. U. L. REV. 93, 106 (2008) (noting that the victims of Hurricane Katrina who suffered most from the poor execution of evacuation plans were lower-class African Americans).

74. Existing ethical standards for mediators all make this point. For example, an entire section of the Model Standards of Conduct for Mediators is on "neutrality." MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard II (AM. ARBITRATION ASS'N, AM. BAR ASS'N ET AL., 2005). Similarly, The Uniform Mediation Act requires that a mediator "be impartial." UNIF. MEDIATION ACT § 9(g) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2003).

75. The terms "bias," "neutrality," "impartiality," and "lack of bias" are often used interchangeably in the mediation literature. See, e.g., MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard II (AM. ARBITRATION ASS'N ET AL., 2005) (defining impartiality as "freedom from favoritism, bias or prejudice"). *But see* CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 15 (1st ed. 1982) (distinguishing impartiality from neutrality). For purposes of this Article the terms are synonymous.

76. See Robert A. deMayo, *Practical and Ethical Concerns in Divorce Mediation: Attending to Emotional Factors Affecting Mediation Judgment*, 13 MEDIATION Q. 217, 226 (1996), for an overview of how mediator sympathy for one participant can lead to subconscious bias. Professor deMayo offers six recommendations to enable mediators to identify and minimize the risk of such partiality. *Id.* at 224-26.

far more challenging issue remains: how can even well-intentioned mediators identify subconscious forms of bias?<sup>77</sup> Some argue that they cannot, given the nature of human cognition, including the blind spots imposed by the norms of experience.<sup>78</sup>

### B. Power Differentials

One particular challenge that mediators face in maintaining neutrality relates to "power differentials" and the role, if any, that a mediator has in equalizing them. This problem arises when one participant can exert power over the other participant, thus rendering the mediation process unfair. Some cite examples such as when women are mediating with men,<sup>79</sup> when low-income participants are mediating with well-resourced individuals or entities such as landlords or banks,<sup>80</sup> or when a pro se participant is mediating with a represented participant.<sup>81</sup> A particularly stark power differential exists when a victim of domestic violence is mediating with her abuser, although whether such a case is ever appropriate for mediation is a contested issue.<sup>82</sup>

There is also a broader critique that, to a certain extent, draws upon issues related to poverty. This critique claims that the growth of mediation has exerted social control over the impoverished by, among other things, inhibiting concerted action for social change.<sup>83</sup> Mediation thus further

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77. See, e.g., *id.* at 224–26 (offering a series of six recommendations that mediators can follow to identify and minimize the risk of subconscious bias).

78. See *id.* at 226 ("[E]ach of us has limitations that prevent us from being the right mediator for every situation even with 'good intentions.'").

79. See Bryan, *supra* note 9, at 195; Grillo, *supra* note 9, at 1592. *But see* Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467, 492–93 (1991).

80. See Lydia Nussbaum, *ADR's Place in Foreclosure: Remedying the Flaws of a Securitized Housing Market*, 34 CARDOZO L. REV. 1889, 1889 (2013) (discussing the growth of mediation involving homeowners and mortgagees).

81. Michael M. Pettersen et al., *Representing Disparities and Impartiality: An Empirical Analysis of Party Perception of Fear, Preparation, and Satisfaction in Divorce Mediation When Only One Party Is Represented*, 48 FAM. CT. REV. 663, 670 (2010) (describing an empirical study which found that mediations in which only one party is represented have "more pre-mediation concerns and fears, and lower post-mediation satisfaction with mediation").

82. See Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 184–86 (2003), for an article that gathers different perspectives on this question.

83. Richard Abel argues that "informal justice," including mediation, acts as a mechanism for the state to further oppress the oppressed. See Richard L. Abel, *The Contradictions of Informal Justice*, in 1 THE POLITICS OF INFORMAL JUSTICE 267, 277–78 (Richard Abel ed., 1981) [hereinafter Abel, *Contradictions*]; Richard L. Abel, *Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice*, 9 INT'L J. SOC. LAW 245, 256–57 (1981). Abel offers a nuanced analysis, but suffice it to say he sees "informal

disempowers the already disempowered,<sup>84</sup> such as people of color.<sup>85</sup> This critique, however, addresses the impact of socioeconomics on a macro, systemic level, not on an individual level.<sup>86</sup>

### C. Socioeconomic Differences and Its Impact on Mediation

The difficulties of how a mediator can maintain neutrality and eliminate the impact of power differentials strikes at the core of mediation. The consequences of socioeconomic differences between participants and the mediator do as well, albeit in less obvious ways.

The first way has to do with the challenges of being empathic—a crucial characteristic for mediators. A leading mediation text defines empathy as “the ability to understand the experience of another.”<sup>87</sup> This process “let[s] people know that they have been heard.”<sup>88</sup> However, a good faith *intent* to be empathic—an effort that is clear in the story of Amber and David—does not mean that the “experiences of another” have been heard. Empathy, at least in a nuanced way, can be difficult in the face of socioeconomic differences.

The second way relates to another core norm of mediation: ensuring that problem-solving rests with the participants, not the mediator.<sup>89</sup> This can never be absolute: a mediator must have *some* impact on how the parties approach a dispute,<sup>90</sup> and this impact can play out in particularly significant ways when there are socioeconomic differences. The story of Amber and David illustrates this point. As to summer vacations, the mediator says “it’s up to both of you.” This is a good faith attempt to place the power to decide in the hands of the

justice” as a systemic means to expand “state control” over low-income communities and individuals. Abel, *Contradictions*, *supra*, at 270. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1984), for a famous example of a comparable argument, albeit not specifically in the context of mediation.

84. See Fiss, *supra* note 83, at 1076.

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

86. Commentators often claim that litigation, unlike mediation, can act as such an equalizer. See *id.* at 1391–99; Fiss, *supra* note 83, at 1077 (arguing how a court-rendered judgment “lessen[s] the impact of distributional inequalities”); Grillo, *supra* note 9, at 1557–58. Whether this is the case is debatable, especially in courts of “mass justice” as described *infra* text accompanying notes 113–119.

87. KIMBERLEE KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 65 (3d ed. 2000).

88. *Id.*

89. LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 150 (2d ed. 1998) (parties are more “capable of understanding their situations better than either their lawyers or themselves”).

90. See Omer Shapira, *Exploring the Concept of Power in Mediation: Mediators’ Sources of Power and Influence Tactics*, 24 OHIO ST. J. ON DISP. RESOL. 535, 562 (2009), for a powerful argument regarding the inevitability of mediator power.

participants. But even asking this question puts the participants in an uncomfortable spot given that they never take vacations. The mediator also states that "I can say in my experience issues can crop up over the summer." The mediator, again in good faith, is sharing his experience as a means to resolve a topic he sees as important and inevitable. The problem is that his experience is not one that Amber or David have or realistically will share any time soon. The mediator does not know that, and therein lies the problem.

#### V. THE SOCIOECONOMICS OF JUDICIAL DECISION-MAKING: THURGOOD MARSHALL

While there is little attention paid in the existing mediation literature to socioeconomic differences between a mediator and participants, there has been some attention paid to these differences when it comes to judges and judging.<sup>91</sup> One such area is the impact that elite education and the lack of professional experience have on the jurisprudence of Supreme Court Justices.<sup>92</sup> Such literature can furnish an important template for how to approach similar issues in mediation.

The life of Thurgood Marshall represents an instructive example of how experiences with poverty influence judicial decision-making. Justice Marshall was the son of a Baltimore railroad porter who could not read or write.<sup>93</sup> His life experience was defined by the scourges of racism and poverty, both of which were related given that socioeconomic exploitation was an integral part of Jim Crow.<sup>94</sup> Justice Marshall's understanding of poverty, however, also stood independent of race. For example, in *United States v. Kras*, the Court was faced with an appellee who, as a result of a series of unfortunate circumstances, could not afford a fee of \$50 to file a petition to declare bankruptcy.<sup>95</sup> Justice Blackmun found that installment payments of \$1.92

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91. Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 137 (2013).

92. Benjamin H. Barton, *An Empirical Study of Supreme Court Justice Pre-Appointment Experience*, 64 FLA. L. REV. 1137, 1137 (2012) (compiling the background of all Supreme Court justices and concluding that increasingly justices have received education at elite schools, served as appellate judges or in academia, and have been employed in prestigious law firms).

93. JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 21 (1998).

94. Some examples of the linkage between economic exploitation and race are well known, such as sharecropping. There are, however, other less understood examples—for instance, the use of partition law to facilitate the massive loss of property ownership among African-American farmers. See Thomas W. Mitchell, *New Legal Realism and Inequality*, in THE NEW LEGAL REALISM: TRANSLATING LAW-AND-SOCIETY FOR TODAY'S LEGAL PRACTICE 203 (Elizabeth Mertz et al. eds., 2016).

95. 409 U.S. 434, 438 (1973).

were "less than the price of a movie and little more than the cost of a pack or two of cigarettes."<sup>96</sup> Justice Marshall's response is worth quoting at length:

I cannot agree with the majority that it is so easy for the desperately poor to save \$1.92 each week over the course of six months. The 1970 Census found that over 800,000 families in the Nation had annual incomes of less than \$1,000 or \$19.23 a week. I see no reason to require that families in such straits sacrifice over 5% of their annual income as a prerequisite to getting a discharge in bankruptcy.

It may be easy for some people to think that weekly savings of less than \$2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are. A sudden illness, for example, may destroy whatever savings they may have accumulated, and by eliminating a sense of security may destroy the incentive to save in the future. A pack or two of cigarettes may be, for them, not a routine purchase but a luxury indulged in only rarely. The desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity. They have more important things to do with what little money they have—like attempting to provide some comforts for a gravely ill child, as Kras must do.

It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.<sup>97</sup>

In another case, Justice Marshall similarly noted how poverty represents "another world 'out there,'" and one that his colleagues simply do not understand.<sup>98</sup>

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96. *Id.* at 449. The examples of movie-going and smoking suggest the indigent are irresponsible by not willing to forego indulgences even in the face of financial necessity. This idea draws from stereotypes that the poor have brought poverty on themselves—what is often characterized in the literature as assumptions that the poor are "undeserving." Bridges, *supra* note 36, at 1078. See *supra* text accompanying notes 39–44.

97. *Kras*, 409 U.S. at 459–60 (Marshall, J., dissenting). It is noteworthy that the amounts at issue in 1973 are not as trivial as they might appear. The filing fee of \$50 is the equivalent of approximately \$284 in 2018 dollars, and even the \$1.93 is the equivalent of almost \$11 in today's dollars. U.S. INFLATION CALCULATOR (Aug. 26, 2018), <http://www.usinflationcalculator.com>.

98. *Beal v. Doe*, 432 U.S. 454, 463 (1977) (Marshall, J., dissenting).

Justice Marshall's perspectives apparently had an impact on other Justices. Justice Sandra Day O'Connor, for one, noted that Justice Marshall's description of his experiences "would, by and by, perhaps change the way I see the world."<sup>99</sup> Nevertheless, the lack of understanding and experience identified by Justice Marshall might well have had profound consequences on substantive decisions, including the long-standing view of the Supreme Court that poverty is not a suspect classification.<sup>100</sup>

Some interesting proposals have been made over the years to remedy judicial isolation from the experiences of litigants—proposals that the Article will subsequently address.<sup>101</sup>

## VI. THE BACKGROUND OF MEDIATORS

Unlike Supreme Court Justices,<sup>102</sup> there has been no empirical study of the background of mediators. This is not surprising. Conducting such a study would be a tall order. There is no uniform licensing authority for mediators within most states, and in many states, anyone can mediate.<sup>103</sup> While certifications for court-annexed mediation tend to be more widespread, it would be virtually impossible to compile the socioeconomic backgrounds of mediators, and even compiling imprecise markers of such backgrounds, such as level of education, would be difficult to accomplish. There is also the challenge of sheer numbers. There are few Supreme Court Justices to research.<sup>104</sup> In contrast, the number of mediators is vast.

Despite these challenges, there are hints that few mediators come from poverty. One example is education. Mediator qualifications for court-annexed programs, while variable, often require a substantial number of hours of training, a college degree, and sometimes even graduate degrees.<sup>105</sup>

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99. Gerald F. Uelman, *Justice Thurgood Marshall and the Death Penalty: A Former Criminal Defense Lawyer on the Supreme Court*, 26 ARIZ. ST. L.J. 403, 406 (1994).

100. See *Harris v. McRae*, 448 U.S. 297, 323 (1980) ("[T]his Court has held repeatedly that poverty, standing alone is not a suspect classification.").

101. See *infra* text accompanying notes 132–72.

102. See *supra* text accompanying notes 91–92.

103. See generally Art Hinshaw, *Regulating Mediators*, 21 HARV. NEGOT. L. REV. 163 (2016) (providing an overview of these issues).

104. See *supra* text accompanying notes 91–101.

105. Bobby Marzine Harges, *Mediator Qualifications: The Trend Toward Professionalization*, 1997 BYU L. REV. 687, 693 (while "[m]ediator qualifications vary from state to state, frequently," they "include[] advanced degrees and/or specialized mediation training"); see also MO. SUP. CT. R. 88.05(a)(1) (family mediators have to be "an attorney or a person who possesses a graduate degree in a field that includes the study of psychiatry, psychology, social work, counseling or other behavioral science substantially related to marriage and family interpersonal relationships").

Individuals from low-income families graduate college at a far lower rate than those from higher income families.<sup>106</sup> Moreover, most mediators come to mediation from other fields which require advanced degrees, particularly law and mental health.<sup>107</sup> Given that a lower percentage of those with poor backgrounds graduate college, it must be, by implication, that even fewer achieve advanced degrees—and this is, in fact, the case.<sup>108</sup> While, to be sure, escaping poverty does happen, statistics demonstrate that it is rare, and by some measures, becoming rarer over time.<sup>109</sup>

In the end, it is fair to conclude that at least a majority of mediators have not lived in poverty, and, as a result, poverty has never been the norm of many mediators' experiences.<sup>110</sup>

## VII. MEDIATING WITH THE POOR: COURT ANNEXED MEDIATION

"Court-annexed mediation" are programs through which cases are referred to mediation in the hope that matters will be resolved without litigation.<sup>111</sup> While there is substantial variation within such programs, one feature remains consistent: those who are referred to court-annexed mediation are almost always poor.<sup>112</sup> Given the probability that most mediators in these

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106. Jones, *supra* note 54, at 705 (noting that 61% of low-wage workers have a high school education or less as opposed to 28% of high-wage workers).

107. David C. Hesser & Elizabeth Jarrell Craig, *Team Mediation: An Interdisciplinary Model Balancing Mediation in the "Matrix,"* 7 PEPP. DISP. RESOL. L.J. 113, 116 (2007) ("Mediators are generally either attorneys or mental health professionals."); Brian Jarrett, *Exploring and Practising Integral Mediation,* 6 DISP. RESOL. INT'L 37, 43 (2012) (mediators are from "divergent disciplines of origin, such as law, social work, psychology, counseling, sociology[,] and business").

108. Eli Wald, *Serfdom without Overlords: Lawyers and the Fight Against Class Inequality,* 54 U. LOUISVILLE L. REV. 269, 279 (2016) ("Poor kids are increasingly less likely to graduate from ever more segregated high schools, less likely to go to college, and therefore less likely to attend law schools . . . which value the very extra-curricular activities poor kids are less likely to be exposed to."); Abiel Wong, "Boalt-ing" Opportunity?: *Deconstructing Elite Norms in Law School Admissions,* 6 GEO. J. ON POVERTY L. & POL'Y 199, 231-33 (1999) (discussing the LSAT as unfairly diminishing the chances of poor applicants being admitted to law school).

109. Jared Bernstein, *Economic Mobility in the United States: How Much Is There and Why Does It Matter?*, in ENDING POVERTY IN AMERICA: HOW TO RESTORE THE AMERICAN DREAM 23, 36 (John Edwards et al. eds., 2007) (data shows either that "Americans have become less mobile over time" or suggests "little change").

110. See *supra* text accompanying notes 37-71.

111. Tina Drake Zimmerman, *Representation in ADR and Access to Justice for Legal Services Clients,* 10 GEO. J. ON POVERTY L. & POL'Y 181, 185 (2003).

112. *Id.*

programs will not be poor, it is crucial to examine what it means for mediators and litigants to participate in these types of programs.

In fact, court-annexed programs have characteristics that intensify the challenges for mediators in understanding the experiences of litigants. Indeed, a cascading series of circumstances demonstrate the significant constraints under which even the most well-intentioned mediators must operate in these settings.

### A. Courts of Mass Justice

Court-annexed mediation programs often operate in courts of mass justice. Such courts are where many cases involving poor people are adjudicated. Some cases involve two low-income parties, particularly family law matters.<sup>113</sup> Others involve situations where one party is low-income while the other party is higher-resourced, such as in landlord-tenant,<sup>114</sup> debt collection,<sup>115</sup> and foreclosure cases.<sup>116</sup>

Many thousands of cases fill the dockets of such courts—sometimes over a thousand on a single judge's daily docket.<sup>117</sup> There are only a limited number of methods to adjudicate such massive amounts of cases, especially given the limited judicial resources almost always accorded to such courts.<sup>118</sup>

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113. Carol J. King, *Burdening Access to Justice: The Cost of Divorce Mediation on the Cheap*, 73 ST. JOHN'S L. REV. 375, 397 (1999). The number of family cases is immense. Indeed, by some measures, the volume of family law cases in some jurisdictions approach or exceed the number of all other civil and criminal cases combined. Barbara A. Babb, *Another Look at the Need for Family Law Education Reform: One Law School's Innovations*, 55 FAM. CT. REV. 59, 61 (2017) (noting that in Maryland for the 2015 fiscal year, "forty-three percent of the state's trial court filings consisted of family law cases, exceeding the proportion of criminal and other civil cases").

114. Zimmerman, *supra* note 111, at 181.

115. Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 27 LOY. CONSUMER L. REV. 179, 188 (2014).

116. Nussbaum, *supra* note 80, at 1915.

117. See, e.g., Abell Found., *A System in Collapse: Baltimore City Suffers from an Overwhelmingly High Caseload of Tenant Evictions. Hurt in the Process are Tenants, Landlords, the City of Baltimore and its Neighborhoods*, ABELL REP. (The Abell Found., Baltimore, Md.), Mar. 2003, at 2. Indeed, sometimes there are hundreds of cases on a single docket. See, e.g., Zimmerman, *supra* note 111, at 195 (Boston's Housing Court typically has over 200 cases set for trial in a single day). See Robert Rubinson, *A Theory of Access to Justice*, 29 J. LEGAL PROF. 89, 108–09 (2004–2005), for an overview of the operation of these courts.

118. For a discussion of how judicial resources are allocated based on the resources of litigants, see Rubinson, *supra* note 117, at 90.



One method is for courts to accord minimal process to low-income litigants.<sup>119</sup> Another method is to settle cases through mediation.

*B. An Overview of Court-Annexed Mediation*

All fifty states now have court-annexed mediation programs.<sup>120</sup> The primary reason for the popularity of these programs is that they can help control dockets.<sup>121</sup> Indeed, empirical studies have assessed the value of court-annexed programs solely in terms of the number of mediated agreements as opposed to the quality of the process itself.<sup>122</sup>

The problem with requiring so many cases to be mediated is that there are only a limited number of mediators available to do the mediating. The results are not surprising: on one day in Boston's Housing Court, there were seventy people waiting to mediate in five available rooms.<sup>123</sup> The only way to manage such a bottleneck is to formally or informally limit the time available to mediate. Unfortunately, this has become the norm.<sup>124</sup>

It is difficult, if not impossible, to engage in the full, creative process that is the hallmark of good mediation under such circumstances.<sup>125</sup> For purposes of this Article, however, there is another, related consequence: speed impedes

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119. For a compelling description of Baltimore "Rent Court," see Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 578-82 (1992). See also Robert Rubinson, *There is No Such Thing as Litigation: Access to Justice and the Realities of Adjudication*, 18 J. RACE GENDER & JUST. 185, 197-207 (2015) (describing the minimal process low-income litigants receive).

120. Deborah H. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Reshaping Our Legal System*, 108 PENN. ST. L. REV. 165, 185-99 (2003). There are many federal programs as well. 28 U.S.C. § 651(b) (2012) ("[E]ach United States District Court shall authorize . . . the use of alternative dispute resolution processes in all civil actions.").

121. Boyarin, *supra* note 11, at 1004-05; Louise Phipps Senft & Cynthia A. Savage, *ADR in the Courts: Progress, Problems, and Possibilities*, 108 PENN. ST. L. REV. 327, 335 (2003) ("[C]ourts have embraced mediation . . . based on the . . . promise that mediation would reduce court dockets, increase settlement rates, and speed up case processing."); Will Pryor, *What's Wrong with Mediation These Days, and How Can We Fix It*, 32 ALTERNATIVES TO HIGH COST LITIG. 69, 71 (May 2014) ("[S]ome courts have become addicted to mediation referral as a means of docket control.").

122. E.g., Charles E. Clawson, *The Use of Mediation in the 20th District*, 40 ARK. LAW. 27, 28 (2005) (concluding that "mediation assisted settlement" freed "12 days" of court time); see also Engler, *supra* note 12, at 2031 ("[H]igh settlement rates . . . provide justification for . . . the call for more court-connected mediation.").

123. See Zimmerman, *supra* note 111, at 196.

124. Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?*, 47 FAM. CT. REV. 371, 378 (2009) (quoting a court-annexed mediator that the "expectations of their workplace" is to settle cases in a "fraction of the time required to effectively do so").

125. See *id.*; Boyarin, *supra* note 11, at 1004-05; Pryor, *supra* note 121, at 71.

reflection. With other parties waiting at the door and the clock counting down to when the court closes, mediators must increasingly rely on assumptions about litigants' lives.<sup>126</sup> The challenge mediators face when mediating with poor people becomes all the more difficult.

### VIII. SOLUTIONS

This section discusses both why the problems identified in this Article are so difficult to solve and then offers proposals that, individually or in combination, might enable mediators to better understand the lives of low-income litigants and thereby become better mediators.

#### A. *Twin Challenges: Resources and Recognition*

There are at least two impediments in making headway in overcoming the lack of mediator understanding of poverty. The first is lack of resources. If there were unlimited budgets, courts of mass justice could be transformed into ones that accord actual due process to litigants, thereby liberating mediation programs from their current imperative to process cases as quickly as possible. This transformation would, in turn, open up more room for mediators to listen to participants and, perhaps, better recognize the realities of poverty. After all, as one leading mediation scholar has put it, parties are "capable of understanding their situations better than the mediator."<sup>127</sup> Drawing out and building upon that understanding, however, takes time. The problem, of course, is that such a massive reallocation of resources will not happen anytime soon, if at all,<sup>128</sup> despite how crucial supplying adequate resources is to the fair administration of justice.<sup>129</sup>

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126. See *supra* text accompanying note 36.

127. Riskin, *supra* note 13, at 24.

128. One manifestation of the lack of resources is the problem of large numbers of unrepresented litigants. The political and professional desire to address this issue has never been there. See, e.g., DEBORAH L. RHODE, ACCESS TO JUSTICE 9 (2004) ("[T]he need for legal assistance has not been entirely lost on judicial and legislative decision makers, but neither have they taken steps necessary to insure it."). Indeed, remedying this problem constitutes the professional responsibility of lawyers, albeit, again, with little actual progress in remedying the problem. See MODEL RULES OF PROF'L CONDUCT pmb1. cmt. 6 (AM. BAR ASS'N 2017) ("[A]ll lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.")

129. MODEL RULES OF PROF'L CONDUCT pmb1. cmt. 6 (AM. BAR ASS'N 2017) (recognizing the "deficiencies in the administration of justice").

The second problem is the lack of recognition that the lives of those in poverty are not like the lives of the non-poor.<sup>130</sup> While improper discrimination based on gender, ethnic, racial, religious, and increasingly sexual identity is well recognized in law, socioeconomic differences are, typically, not part of that list.<sup>131</sup> For purposes of mediation, even recognizing that this is a problem is crucial to solving it.

The following proposals seek to both confront and move beyond the dual impediments of resources and recognition.

### B. *Educating Mediators*

There is no shortage of mediation training programs. Indeed, virtually every state requires mediators who participate in court-annexed programs to attend a certain number of hours of training.<sup>132</sup> Statutes often specify the content of these trainings, which typically include mediation skills and ethics.<sup>133</sup> Statutes will also usually specify additional training in specific substantive areas, such as psychology, for certain types of mediation.<sup>134</sup> Some

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130. See *supra* text accompanying notes 37–71.

131. The “classic” categories of anti-discrimination statutes are, as in Title VI of the Civil Rights Act of 1964, “race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1) (2018). Although sexual orientation or gender identity is not a protected class under federal law, there are a range of state and local laws that do include these categories. Luke A. Boso, *Acting Gay, Acting Straight: Sexual Orientation Stereotyping*, 83 TENN. L. REV. 575, 641 (2016) (noting how increasing numbers of “states and localities” are passing “anti-discrimination laws that include sexual orientation as a protected trait”). The recognition of discrimination based on socioeconomic status, however, is rare. One set of rules that does so is the ABA Rules of Professional Conduct, which now prohibits “harassment or discrimination on the basis” of a range of categories including “socioeconomic status.” MODEL RULES OF PROF’L CONDUCT r. 8.4(g) (AM. BAR ASS’N 2017). The legal profession likely has particular sensitivity to socioeconomic status because of its recognition that large numbers of civil litigants cannot afford attorneys. See Zimmerman, *supra* note 111, at 185.

132. Norma Jeanne Hill, *Qualification Requirements of Mediators*, 1998 J. DISP. RESOL. 37, 40 (noting that training is a “somewhat universal requirement before one can mediate”).

133. See, e.g., MD. RULE 17-104(b)-(c) (2018) (trainings must include, *inter alia*, “mediation skills and techniques, including information-gathering skills; communication skills; problem-solving skills; interaction skills; conflict management skills; negotiation techniques; [and] caucusing,” as well as “ethics”).

134. E.g., MD. RULE 9-205(c)(2)(B)-(C) (in order to mediate child custody cases, court mediators must complete twenty hours of training that includes “the emotional aspects of separation and divorce on adults and children” and “an introduction to family systems and child development theory”). Missouri requires degrees for family mediators that would, in addition to a law degree, include advanced degrees in “behavioral science.” MO. SUP. CT. R. 88.05(a)(1).

statutes also require training to address cultural or gender differences.<sup>135</sup> Maryland, for example, mandates that the forty hours of required mediator training include “cultural, ethnic, and gender issues.”<sup>136</sup> Unfortunately, no state requires training which educates the mediator about (1) the time and resource constraints of court-annexed mediation and (2) the impact of low socioeconomic status on mediation participants.<sup>137</sup>

A straightforward proposal is that mediation training include education about both of these issues. This proposal holds particular promise because it is not likely to require additional resources; there are, after all, training programs in every state, and simply adding another element to what needs to be covered is not particularly burdensome.

This proposal, however, must get past the “recognition” challenge described above—that is, recognizing that there is a problem to begin with.<sup>138</sup> There is an additional complication: simply listing a topic as something to be covered in a training session does not mean that it will be covered or, if it is covered, that it will be done by someone who is knowledgeable about the topic. Indeed, few jurisdictions even set forth the qualifications of trainers or assess the quality of a training program as a whole.<sup>139</sup>

Thus, adding an element of “poverty education” to existing trainings can be valuable *if* (1) there are assurances that the trainers know something about a topic that is not particularly well addressed in currently available mediation literature; and (2) the amount of time afforded to the topic is extensive enough

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135. For an interesting discussion of how mediation training can help ameliorate biases in legal representation, see Douglas N. Frenkel & James H. Stark, *Improving Lawyers' Judgment: Is Mediation Training De-Biasing?*, 21 HARV. NEGOT. L. REV. 1 (2016).

136. MD. RULE 17-104(b). There have also been efforts to develop such training for judges, particularly in the area of gender discrimination. See Kathleen E. Mahoney, *The Myth of Judicial Neutrality: The Role of Judicial Education in the Fair Administration of Justice*, 32 WILLAMETTE L. REV. 785, 786 n.2 (1996) (discussing the importance of education in Canada so that judges can better understand the experiences of women); Connie Lee, *Gender Bias in the Courtroom: Combating Implicit Bias against Women Trial Attorneys and Litigators*, 22 CARDOZO J.L. & GENDER 229, 241–42 (2016) (discussing ways for judges and others in the legal process and profession to minimize bias against female attorneys).

137. There have been some efforts to educate judges about poverty, although it would be the advocates who would be doing the educating—something that would not work in the mediation context. Joel Handelsman Shugerman, *A Six-Three Rule: Revising Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 1005 (2003) (“[In order] to inform the federal judges about the realities of working conditions and poverty in America and the need for social welfare legislation[,] . . . [p]rogressive lawyers turned to the Brandeis Brief, the method pioneered by progressive lawyer and future Justice Louis Brandeis. Brandeis used statistics and social science to inform the Court of laborers’ day-to-day challenges, and the Court responded favorably.”).

138. See *supra* text accompanying notes 133–34.

139. See Rubinson, *supra* note 15, at 1376.

to furnish meaningful treatment. Nevertheless, a slight amount of education on this topic is better than none at all. Even listing "poverty education" as a matter to be addressed would be an extraordinary achievement in itself, even if, in the end, it is not taught particularly well.

*C. Individual Initiative by Mediators*

Another promising effort would be something less systemic and based more on individual initiative. There is literature, to be discussed shortly, about how judges can get out of a "bubble" to see how others live, even if one does not have the privilege of having Thurgood Marshall in the chambers next door.<sup>140</sup> This might appear less important for mediators to do given that, in theory, they merely facilitate collaboration between parties and do not impose their own judgments in the process. As this Article has demonstrated, however, it is not quite so simple.<sup>141</sup>

There have been efforts by mediators to face their own assumptions about the world so that they can become more effective mediators. Harold Abramson is an example. He has written about his personal struggle when he mediated a family dispute during which the parties based an agreement upon religious norms that he viewed as inconsistent with law and patently unfair to the wife.<sup>142</sup> Abramson recommends that mediators "understand" their own culture and research the culture of the mediation participants.<sup>143</sup>

Robert deMayo confronted a different problem: the impact of emotional connections that a mediator might have with an individual participant.<sup>144</sup> In order to minimize this risk, he recommends acknowledging both "the emotional vulnerabilities that he or she brings to the mediation process" and how "despite our best efforts, some mediations may be too emotionally provocative" for a mediator to mediate.<sup>145</sup>

There are other ideas that primarily arise from literature on judicial decision-making. Some are hardly realistic. For example, Jerome Frank suggested that all judges engage in psychotherapy in order to have greater self-awareness.<sup>146</sup> Others, however, have gotten closer to the mark by

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140. See *supra* text accompanying notes 91-101.

141. See *supra* text accompanying notes 74-78.

142. Abramson, *supra* note 10, at 923-24.

143. *Id.* at 925.

144. deMayo, *supra* note 76, at 222-26.

145. *Id.* at 225-26.

146. JEROME FRANK, *LAW AND THE MODERN MIND* 158 n.27, 163 (Anchor Books 1963) (1930) (stating that through psychology-based scrutiny, judges should "observe their own processes" and "scrutinize . . . his own personality so that he might become keenly aware of his own prejudices, biases, antipathies, and the like").

recommending that judges *experience*—albeit vicariously—what it means to be poor. This can be done in a number of ways.

*Traveling:* Louis Brandeis once suggested to Oliver Wendell Holmes that he travel to Lawrence, Massachusetts—the site of large textile factories with a workforce of largely poor, immigrant women<sup>147</sup>—to “get a human notion of how it really is.”<sup>148</sup> Actually going to low-income areas is a potentially effective idea, but not in the sense of a gawker looking out of a car window. While well-intentioned, such trips reaffirm a one-dimensional view of poverty that omits the energy and commitment that many low-income people display.<sup>149</sup> “To get a human notion of how it really is” requires learning *from* as much as learning *about* the other. Such effective learning might entail attending community meetings, shopping at stores that cater to those on food stamps, or, especially, working with or for neighborhood associations.<sup>150</sup>

*Budgeting:* The realities of budgeting on a limited income are hard to imagine without having to actually do it. A lack of knowledge about the typical incomes for the working poor and those on public assistance is part of the challenge.<sup>151</sup> Once these are learned, the next step is to calculate the cost of buying basic necessities. Participating in this exercise is not particularly difficult. There are readily available ways to determine the cost of living in different areas of the country<sup>152</sup> and/or the cost of goods for those in poverty.<sup>153</sup> Even taking a few minutes calculating how much lower the working poor income is as a percentage of one’s own income would be enlightening.

*A Reading List:* Richard Delgado and Jean Stefancic have argued that if judges read narratives about oppressed and marginalized groups they would

147. The notorious conditions in Lawrence factories led to the “Bread and Roses Strike”—a notable event in the history of the labor movement that happened a few years before Justice Brandeis’ suggestion to Justice Holmes. WILLIAM CAHN, *LAWRENCE 1912: THE BREAD AND ROSES STRIKE* (1980).

148. Letter from Frederick Pollock to Oliver Wendell Holmes, Jr., in 2 HOLMES-POLLACK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLACK, 1874–1932, at 13–14 (Mark DeWolfe Howe ed., 1946). As described *supra*, Justice Marshall had a similar idea when he noted “no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are,” which necessarily implies there is a lot to learn from such “close contact.” *United States v. Kras*, 409 U.S. 434, 460 (1973).

149. See *supra* text accompanying notes 37–71.

150. The formal name for food stamps is the “Supplemental Nutrition Assistance Program,” or “SNAP.” 7 U.S.C. §§ 2011–2036 (2018).

151. For a discussion of these amounts, see *supra* text accompanying notes 62–66.

152. *Family Budget Calculator*, ECON. POL’Y INST., <https://www.epi.org/resources/budget/> (last visited Aug. 23, 2018).

153. *Poverty Line Price\$*, TIPPING POINT CMTY., <https://tippingpoint.org/povertylineprices/index.html#2> (last visited Aug. 23, 2018).

not have reached the decisions they did in notorious cases such as *Plessy v. Ferguson* and *Korematsu v. United States*.<sup>154</sup> There is no question that narratives about the marginalized can be powerful and influential, whether they be fiction<sup>155</sup> or non-fiction.<sup>156</sup> Indeed, the publication of Michael Harrington's *The Other America*<sup>157</sup> and the attention it brought to poverty had a substantial influence on public policy in the 1960s.<sup>158</sup> There are examples of narratives about the poor of more recent vintage. A prominent example is Barbara Ehrenreich's *Nickel and Dimed*, which compellingly describes the day-to-day lives of the working poor.<sup>159</sup> There are other books<sup>160</sup> and articles<sup>161</sup> discussing the plight of the poor.

The most effective sources would not be theoretical or about the *causes* or *history* of poverty—or even about how best to reduce poverty, important as such work may be. Rather, these sources would consist of an *understanding* of poverty through storytelling, which is something very different.

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154. Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929, 1931, 1934 (1991).

155. E.g., HARRIET BEECHER STOWE, UNCLE TOM'S CABIN (Woodsworth Editions Limited 1995) (1852).

156. E.g., JAMES ALBERT UKAWSAW GRONNOSAW ET AL., SLAVE NARRATIVES (William L. Andrews & Henry Louis Gates eds., 2000).

157. MICHAEL HARRINGTON, THE OTHER AMERICA: POVERTY IN THE UNITED STATES (First Touchstone ed. 1997).

158. Of particular note was a review of Harrington's book by Dwight McDonald in the New Yorker. Dwight McDonald, *Our Invisible Poor*, NEW YORKER (Jan. 19, 1963), <https://www.newyorker.com/magazine/1963/01/19/our-invisible-poor>.

159. BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA (2001). The book has not been without its critics. See Steven Malanga, *The Myth of the Working Poor*, CITY J., Autumn 2004, <https://www.city-journal.org/html/myth-working-poor-12818.html>.

160. E.g., D. STANLEY EITZEN & KELLY EITZEN SMITH, EXPERIENCING POVERTY: VOICES FROM THE BOTTOM (2d ed. 2009); SHARON HAYES, FLAT BROKE WITH CHILDREN: WOMEN IN THE AGE OF WELFARE REFORM (2004); TRACIE MCMILLAN, THE AMERICAN WAY OF EATING: UNDERCOVER AT WALMART, APPLEBEE'S, FARM FIELDS, AND THE DINNER TABLE (2012); DAVID K. SHIPLER, THE WORKING POOR: INVISIBLE IN AMERICA (2004).

161. E.g., Jason DeParle, *Getting Opal Caples to Work*, N.Y. TIMES, Aug. 24, 1997, (Magazine); David K. Shipler, *A Poor Cousin of the Middle Class*, N.Y. TIMES (Jan. 18, 2004), <https://www.nytimes.com/2004/01/18/magazine/a-poor-cousin-of-the-middle-class.htm>

1. Articles like these explore stereotypes about the poor, particularly as it relates to race, education, ambition, public assistance, and home ownership, while still portraying the many interrelated challenges of living in poverty.

*D. Expanding the Pool of Mediators: Addressing the “Supply Side” Problem*

The racial diversity of mediators is, as one commentator has put it, “dismal.”<sup>162</sup> There is no reason to believe that socioeconomic diversity is much better.<sup>163</sup> It is thus important to support mediators who come from impoverished backgrounds, or, even better, attract more low-income individuals to become mediators.

Such a solution faces substantial obstacles. First, it is difficult to identify potential or current mediators who have the appropriate life experience. Second, as noted above, the supply of potential mediators with the requisite background might be small given the level of education most programs mandate.<sup>164</sup> They usually require a college or professional degree,<sup>165</sup> as well as a designated number of hours of training.<sup>166</sup> While such requirements are designed to help ensure that aspiring mediators have the appropriate knowledge and sophistication to be effective in their new role, such requirements have another, less positive consequence: they act as barriers to entry. Most trainings are expensive: they are run by private mediators or organizations that rarely waive or reduce tuition for those who lack the resources to pay for them.<sup>167</sup> Moreover, obtaining a college degree is of enormous importance to rising out of poverty, yet graduating high school—let alone obtaining a four-year degree<sup>168</sup>—is immensely difficult for poor people.<sup>169</sup>

Thus, it is extremely important, if not essential, to engage in a range of initiatives to attract more people with low socioeconomic backgrounds to

162. Izumi, *supra* note 33, at 692.

163. *See supra* text accompanying notes 105–10.

164. *See supra* text accompanying notes 103–10.

165. Hill, *supra* note 132, at 41–42 (noting that degree “prerequisites still exist in the context of many state mediation statutes and court rules”).

166. *See supra* text accompanying note 105.

167. *See* Hill, *supra* note 132, at 41.

168. While improving recently, there remains a substantial gap in graduation rates between students from high and low socioeconomic status. PELL INST., INDICATORS OF HIGHER EDUCATION EQUITY IN THE UNITED STATES—2018 HISTORICAL TRENDS REPORT 99 (2018), [http://pellinstitute.org/downloads/publications-Indicators\\_of\\_Higher\\_Education\\_Equity\\_in\\_the\\_US\\_2018\\_Historical\\_Trend\\_Report.pdf](http://pellinstitute.org/downloads/publications-Indicators_of_Higher_Education_Equity_in_the_US_2018_Historical_Trend_Report.pdf) (finding “high persisting inequality” in college graduation rates between high and low socioeconomic groups). Even should those in poverty enroll in college, a substantial percentage do not obtain a degree. Jeff Guo, *Why Poor Kids Don’t Stay in College*, WASH. POST (Oct. 20, 2014), [https://www.washingtonpost.com/news/storyline/wp/2014/10/20/why-poor-kids-dont-stay-in-college/?noredirect=on&utm\\_term=.fa5b870bb536](https://www.washingtonpost.com/news/storyline/wp/2014/10/20/why-poor-kids-dont-stay-in-college/?noredirect=on&utm_term=.fa5b870bb536).

169. Bernstein, *supra* note 109, at 33.



mediation. The degree requirement for becoming a mediator has been roundly criticized<sup>170</sup> and should be revisited where it exists. A performance exam would be a much more effective means to assess competency regardless of the educational attainment of an aspiring mediator. There should be scholarships or discounts available for private training programs with governmental support (it would not be fair for private trainers to bear the burden of financing such discounts), and trainings could be offered by non-profit groups in return for trainees agreeing to mediate a certain number of matters under the auspices of the group.<sup>171</sup> There are also a range of degrees that are now related to conflict resolution, including undergraduate degrees, some of which can be taken online.<sup>172</sup> The many organizations and groups that promote mediation might also offer need-based scholarships. Perhaps through these and other initiatives, the socioeconomic diversity of mediation rosters might, step by step, increase.

#### *E. More Time to Mediate*

Good mediation takes time. Participants need to have an opportunity to conceptualize their own problems and craft ways to solve them. This is not a quick process, nor is it meant to be. As two influential mediation scholars have noted, it takes “great patience” to do it well.<sup>173</sup> In addition, mediators, or at least academics and practitioners who write about mediation, draw upon the particularity of disputes as an element of what makes it effective: there are no cookie-cutter mediations, and to view them as such subverts what mediation is supposed to be about.<sup>174</sup>

Thus, mediators need more time in which to mediate. This allows for greater facilitation, less imposition of assumptions about litigants’ lives, and a richer, more productive result for litigants. The goal of mediation should not

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170. Norma Jeanne Hill notes that many have observed that degree requirements “serve to unduly restrict entrance into the mediation field” and their relationship to helping to ensure competency among mediators is “dubious.” Hill, *supra* note 132, at 41.

171. See, e.g., COMMUNITY MEDIATION MARYLAND, <http://www.mdmediation.org/> (last visited Aug. 26, 2018) for an example of an organization providing mediation services.

172. E.g., *Which Schools Offer Conflict Resolution Degree Programs Online?*, LEARN.ORG, [https://learn.org/articles/Which\\_Schools\\_Offer\\_Conflict\\_Resolution\\_Degree\\_Programs\\_Online.html](https://learn.org/articles/Which_Schools_Offer_Conflict_Resolution_Degree_Programs_Online.html) (last visited Aug. 26, 2018).

173. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 68 (rev. ed. 2004).

174. See JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 10 (1984) (noting that the content of mediation is “a comprehensive mix of [participants’] needs, interests, and whatever else they deem relevant regardless of rules of evidence or strict adherence to substantive law.”).

be docket control. The real—if not only goal—of mediation should be to empower participants. Empowerment for low-income people means to recognize their day-to-day lives, and not doing so means that mediation becomes just another form of “mass justice” to which courts repeatedly subject low-income litigants.

#### IX. CONCLUSION

Mediation offers a remarkable opportunity to resolve disputes outside the uncertainty and disempowerment inherent in many judicial processes. A core value of the process is to empower participants, yet empowerment is something that low-income people often lack. This is manifested in their day-to-day lives.

There are many committed, sophisticated mediators in court-annexed programs who devote substantial time with little or no compensation to work with the poor. As this Article has shown, however, blind spots still remain, even with the best of intentions. Those blind spots are due to a simple lack of knowledge about what it means to be poor in America. Learning, understanding, and acknowledging the realities of that life are crucial. As this Article suggests, the most effective means to achieve this goal is through not only enhancing the resources available for court-annexed programs, but acknowledging that the day-to-day lives of the poor are a crucial aspect of being a competent mediator. Armed with this knowledge, mediators will be better able to empower low-income participants to resolve their own disputes, and thus better vindicate the promise of mediation.