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# Implicit Bias and Prejudice in Mediation

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# IMPLICIT BIAS AND PREJUDICE IN MEDIATION

Carol Izumi\*

## ABSTRACT

*Mediators aspire and endeavor to meet their ethical duty of “neutrality” in mediation. Yet their ability to actually conduct mediations without bias, prejudice, or favoritism toward any party is extraordinarily difficult, if not impossible. Research shows that unconscious mental processes involving stereotypes and attitudes affect our judgments, perceptions, and behavior toward others. Implicit bias, the automatic association of stereotypes and attitudes with social groups, may produce discriminatory responses toward parties despite a mediator’s best efforts at creating an outwardly even-handed process. Even the most well-intentioned and egalitarian mediators must actively engage in bias reduction strategies to mitigate prejudice in mediation.*

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## I. INTRODUCTION<sup>1</sup>

FIRST, I want to thank Michael Green, Richard Delgado, the symposium organizers, the SMU Dedman School of Law community, and other panelists. I am very honored and pleased to be participating in this symposium and particularly in this Prejudice in Mediation session. The issues raised in Professor Delgado’s article<sup>2</sup> are as important today as they were thirty years ago.

I would like to spend my limited time on recent social science research, the third theory of prejudice referred to in the article,<sup>3</sup> and apply those

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1. This presentation distills and updates an earlier article on the effect of implicit bias in mediation. For a much deeper analysis of this topic, see Carol Izumi, *Implicit Bias and the Illusion of the Mediator Neutrality*, 34 WASH. UNIV. J.L. & POL’Y 71 (2010).

2. Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee & David Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985).

3. *Id.* at 1380-91 (Section 3: Social Psychological Theories of Prejudice).

discoveries to mediation. My commentary today centers on the research findings related to implicit bias, or unconscious bias. While we cannot address all facets of prejudice in alternative dispute resolution<sup>4</sup> on an individual mediator level, reducing mediator bias should be one strategy in the larger reformation. Structural and institutional challenges require commitment from many motivated stakeholders. Without robust mediator self-monitoring, external process maneuvers and programmatic changes will not be as effective. Given what we know in 2017, I would argue that we should be even *more* concerned about prejudice in mediation. I say that for three reasons: the past 20-plus years have yielded new scientific revelations about prejudice,<sup>5</sup> the use of mediation has proliferated,<sup>6</sup> and little has changed in terms of mediator training, the practice of

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4. Alternative dispute resolution as used in this article includes negotiation, mediation, arbitration, and other consensual dispute resolution processes. The acronym "ADR" will be used hereafter.

5. See Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Stereotyping and Prejudice*, in 7 THE PSYCHOLOGY OF PREJUDICE: THE ONTARIO SYMPOSIUM 55, 56 (Mark P. Zanna & James M. Olson eds., 1994); Jennifer S. Hunt, *Implicit Bias and Hate Crimes: A Psychological Framework and Critical Race Theory Analysis*, in SOCIAL CONSCIOUSNESS IN LEGAL DECISION MAKING: PSYCHOLOGICAL PERSPECTIVES 247, 255 (Richard L. Wiener et al. eds., 2007) (implicit stereotypes may trigger hate crimes); *Moving Beyond Prejudice Reduction: Pathways to Positive Intergroup Relations*, in CHARTING NEW PATHWAYS TO POSITIVE INTERGROUP, 6-8 (Linda R. Tropp & Robin K. Mallett, eds., 2011); Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 771 (1995); Hon. Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1030 (2008); Mahzarin R. Banaji, Curtis Hardin & Alexander J. Rothman, *Implicit Stereotyping in Person Judgment*, 65 J. PERSONALITY & SOC. PSYCHOL. 272 n.2 (1993); Sara R. Benson, *Reviving the Disparate Impact Doctrine to Combat Unconscious Discrimination: A Study of Chin v. Runnels*, 31 T. MARSHALL L. REV. 43, 58-59 (2005) (disparate impact doctrine should be reinstated in Equal Protection cases to combat implicit discrimination); David L. Faigman et al., *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389, 1434 (2008); Elayne E. Greenberg, *Fitting the Forum to the Pernicious Fuss: A Dispute System Design to Address Implicit Bias and 'Isms in the Workplace*, 17 CARDOZO J. CONFLICT RESOL. 75, 112 (2015) (workplace discrimination caused by implicit prejudice); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 947 (2006); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 473 (2010); Jerry Kang, Nilanjana Dasgupta, Kumar Yogeewaran & Gary Blasi, *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUDIES 886, 887 (2010); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1128-32 (2012); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1061-62 (2006); Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 428, 431 (2007); Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 191-92 (2005) (recent psychological research identifies the impact of implicit bias on peremptory challenges); L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 296 (2012); see generally CHERYL STAATS, KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2014 (2014).

6. See DONNA STIENSTRA, ADR IN THE FED. DIST. COURTS: AN INITIAL REPORT 3 (2011) and OFFICE OF DISPUTE RES., FY 2011 BUDGET REQUEST AT A GLANCE 1 (2011); Robert A. Baruch Bush & Joseph P. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO ST. J. ON DISP. RESOL. 1, 2 (2012) (asserting that ADR programs have expanded over the past several years). See also Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 166-67 (2003) (citing internet references to mediation, arbitra-

mediation, and the lack of diversity within mediator ranks.<sup>7</sup>

Let me preface my remarks with a disclaimer. I am not a social scientist, just a curious lawyer with a little bit of knowledge. My convictions about mediation stem from thirty years in the trenches directing law school mediation clinics and mediating cases in a variety of contexts on a pro bono basis.<sup>8</sup> This presentation will unfold as follows. First, I discredit the notion of mediator neutrality in practice. Second, I describe implicit bias and conditions that allow discrimination to occur in mediation. Lastly, I offer thoughts on how mediation can be practiced with more attention to bias reduction.

## II. MEDIATOR NEUTRALITY

A core value of mediation is the notion of mediator neutrality.<sup>9</sup> I identify four elements of what is commonly thought of as mediator neutrality:

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tion and conflict resolution); Heather Scheiwe Kulp, *Increasing Referrals to Small Claims Mediation Programs: Models to Improve Access to Justice*, 14 CARDOZO J. CONFLICT RESOL. 361, 364 (2013) (identifying an increase in the need for ADR programs after the 2008 economic crisis led to an increase in self-represented litigants); Thomas J. Stipanowich, *ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution,”* 1 J. EMPIRICAL LEGAL STUDIES 843, 844 (2004) (citing growth and impact of ADR and decreasing number of trials); Floyd D. Weatherspoon, *The Impact of the Growth and Use of ADR Processes on Minority Communities, Individual Rights, and Neutrals*, 39 CAP. U. L. REV. 789, 791–93 (2011) (impact of ADR processes on minority communities and individual rights); Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 642 (2002) (empirical study of civil case mediations in Ohio).

7. Bush & Folger, *supra* note 6, at 26–27 (asserting that there is a lack of diversity among mediators and barriers to encouraging more diversity in mediation); Leah Wing, *Whither Neutrality? Mediation in the 21st Century*, in RE-CENTERING CULTURE AND KNOWLEDGE IN CONFLICT RESOLUTION PRACTICE 93–107 (2008) (study of 100 individuals from various minority groups who felt shut out of the “gated mediator community”); Weatherspoon, *supra* note 6, at 800–01 (noting “lack of diversity in the pool of potential neutrals” that “stems from a system of exclusion and invisibility.”).

8. From 1986–2010, I directed the Consumer Mediation Clinic at George Washington University Law School and the Community Dispute Resolution Center Project at GW Law from 1999–2010. In 2010, I joined the UC Hastings law faculty to direct the Mediation Clinic and ADR Externship Program. Since 1986, I have mediated hundreds of civil, criminal, and juvenile cases, community disputes, consumer-business disputes, human rights complaints, educational and school-based matters, and employment-related grievances in Washington D.C., Virginia, Michigan, and California.

9. See *Model Standards of Conduct for Mediators* 2005 A.B.A. SEC. DISP. RESOL., Preamble, [http://www.abanet.org/dispute/documents/model\\_standards\\_conduct\\_april2007.pdf](http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf) [https://perma.cc/CN99-SL83]; Hilary Astor, *Rethinking Neutrality: A Theory to Inform Practice—Part I & Part II*, 11 AUSTRALASIAN DISP. RESOL. J. 73, 73, 145–46 (2000); Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 LAW & SOC. INQUIRY 35, 35 (1991); Wing, *supra* note 7, at 93–94; see also JAMES J. ALFINI ET AL., *MEDIATION THEORY AND PRACTICE* 418 (3d ed. 2013); SUSAN NAUSS EXON, *ADVANCED GUIDE FOR MEDIATORS* 153 (2014); DEBORAH M. KOLB, *THE MEDIATORS* (1983); and Linda Mulcahy, *The Possibilities and Desirability of Mediator Neutrality—Towards an Ethic of Partiality?*, 10 SOC. & LEGAL STUD. 505, 510–11 (2001).

no conflict of interest;<sup>10</sup> procedural equality;<sup>11</sup> outcome-neutrality;<sup>12</sup> and lack of bias, prejudice, or favoritism toward any party.<sup>13</sup> The fourth element is often stated as the mediator's duty to avoid actual bias or the appearance of bias.<sup>14</sup> Another common definition is "freedom from favoritism and bias in word, action and appearance."<sup>15</sup>

The neutrality requirement, however, is neither practicable nor attainable in real life.<sup>16</sup> Studies reveal a disconnect between the aspiration of neutrality and actual techniques and strategies of mediators.<sup>17</sup> It is undeniable that mediators influence parties, using various degrees of persuasion and even outright manipulation to obtain results.<sup>18</sup> They push and "sell" proposals and selectively facilitate or manage the process toward favored outcomes.<sup>19</sup>

Moreover, conducting a mediation without bias or favoritism requires that mediators be conscious of their assumptions, biases, and judgments about the participants. Necessarily, mediators would have to have a high degree of self-awareness about their impact on the parties and the pro-

10. Susan Douglas, *Questions of Mediator Neutrality and Researcher Objectivity: Examining Reflexivity as a Response*, 20 AUSTRALASIAN DISP. RESOL. J. 56, 57 (2009) (finding four themes regarding neutrality). See Alfini, *supra* note 9, at 418; *Model Standards of Conduct for Mediators*, *supra* note 9, at III(A).

11. Hilary Astor, *Mediator Neutrality: Making Sense of Theory and Practice*, 16 SOC. & LEGAL STUD. 221, 223 (2007); William Lucy, *The Possibility of Impartiality*, 25 OXFORD J. LEGAL STUD. 3, 8, 11 (2005); *Model Standards of Conduct for Mediators*, *supra* note 9, at VI(A). See also Alfini, *supra* note 9, at 418.

12. See JOHN W. COOLEY, *THE MEDIATOR'S HANDBOOK: ADVANCED PRACTICE GUIDE FOR CIVIL LITIGATION* 2, 23 (2d ed. 2006); CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 449 (3rd ed. 2003); EXON, *supra* note 9, at 154. See also Lucy, *supra* note 11, at 8; *Model Standards of Conduct for Mediators*, *supra* note 9, at II; Alison Taylor, *Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence, and Transformative Process*, 14 MEDIATION Q. 215, 218 (1997).

13. DOUGLAS N. FRENKEL & JAMES H. STARK, *THE PRACTICE OF MEDIATION: A VIDEO-INTEGRATED TEXT* 86 (4th ed. 2012); Astor, *supra* note 9, at 77; *Model Standards of Conduct for Mediators*, *supra* note 9, at I; Susan Oberman, *Mediation Theory vs. Practice: What Are We Really Doing? Re-Solving a Professional Conundrum*, 20 OHIO ST. J. ON DISP. RESOL. 775, 819–20 (2000).

14. Astor, *supra* note 9, at 77.

15. Susan Nauss Exon, *The Effects That Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation*, 42 U.S.F. L. REV. 577, 581 (2008) (quoting *DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE* 68 (Phyllis Bernard & Bryant Garth eds., 2002)).

16. BERNARD S. MAYER, *BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION* 83 (2004); Astor, *supra* note 9, at 79–80; Cobb & Rifkin, *supra* note 9, at 36–37; Scott R. Peppet, *Contractarian Economics and Mediation Ethics: The Case for Customizing Neutrality Through Contingent Fee Mediation*, 82 TEX. L. REV. 227, 253–54 (2003).

17. David Greatbatch & Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 LAW & SOC'Y REV. 613 (1989); Mulcahy, *supra* note 9, at 513.

18. Astor, *supra* note 9, at 73, 74; James R. Coben, *Mediation's Dirty Little Secret: Straight Talk About Mediator Manipulation and Deception*, 2 J. ALT. DISP. RESOL. 4 (2004); James H. Stark & Douglas N. Frenkel, *Changing Minds: The Work of Mediators and Empirical Studies of Persuasion*, 28 OHIO ST. J. ON DISP. RESOL. 263 (2013).

19. See Greatbatch & Dingwall, *supra* note 17. See also Coben, *supra* note 18; Mulcahy, *supra* note 9, at 512.

cess. Neutrality in practice is illusory because of the operation of implicit, or unconscious, bias.<sup>20</sup> Let us move now to a discussion of implicit bias and how it might operate in the mediation context.

### III. IMPLICIT BIAS IN MEDIATION

No doubt many of you know about implicit bias, but I will briefly summarize some basic findings so we share a common understanding. Just as our brains help us categorize objects based on characteristics, our brains use schemas to sort people into groups, such as male or female, young or old.<sup>21</sup> Mental processes that operate outside our conscious awareness are implicit, or unconscious.<sup>22</sup> The big reveal of this research is that we do not always have conscious, intentional control over our mental associations, perceptions, and impressions.<sup>23</sup>

Simply stated, implicit bias refers to automatic associations of stereotypes and attitudes with social groups.<sup>24</sup> Implicit stereotypes and attitudes that result from repeated exposure to cultural stereotypes in our society form the basis for implicit racial, gender, ethnic, and other biases.<sup>25</sup> Research shows that stereotypes are automatically activated merely by encountering a member of a social group.<sup>26</sup> This “automaticity” of

20. Greenwald & Banaji, *supra* note 5, at 4; Greenwald & Krieger, *supra* note 5, at 946; Lane, Kang & Banaji, *supra* note 5, at 427, 428, 431.

21. Becca R. Levy & Mahzarin R. Banaji, *Implicit Ageism, in AGEISM STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS* 49, 51–52 (Todd D. Nelson ed., 2002); Rachel Godsil & John Powell, *Implicit Bias Insights as Preconditions to Structural Change, POVERTY & RACE*, (Sept./Oct. 2011); Kang et al., *supra* note 5, at 1160–61; Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action”*, 94 CALIF. L. REV. 1063, 1064–65 (2006); Kang, Dasgupta, Yogeeswaran & Blasi, *supra* note 5, at 888; Kang & Lane, *supra* note 5, at 468–69; Richardson & Goff, *supra* note 5, at 297; Tropp & Mallett, *supra* note 5, at 6. *See generally* Kirwan Institute, *supra* note 5, at 51.

22. Godsil & Powell, *supra* note 21; Kang, Dasgupta, Yogeeswaran & Blasi, *supra* note 5, at 887; Kang & Banaji, *supra* note 21, at 1064; Kang & Lane, *supra* note 5, at 467–468, 469–70; Kang et al., *supra* note 5, at 1126; Richardson & Goff, *supra* note 5, at 295, 297; Tropp & Mallett, *supra* note 5, at 6–7; *see* Banaji & Greenwald, *supra* note 5, at 56–58; Banaji, Hardin & Rothman, *supra* note 5, at 272; Greenwald & Krieger, *supra* note 5, at 945–46; Lane, Kang & Banaji, *supra* note 5, at 428; Krieger & Fiske, *supra* note 5, at 1032–33; *see generally* Kirwan Institute, *supra* note 5, at 16.

23. Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Stereotyping and Prejudice*, in 7 *PSYCHOLOGY OF PREJUDICE: THE ONTARIO SYMPOSIUM* 55, 56 (Mark P. Zanna & James M. Olson eds., 1994); Banaji, Hardin & Rothman, *supra* note 5, at 272 n. 2; Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 *PSYCHOL. REV.* 4, 4 (1995); Greenwald & Krieger, *supra* note 5, at 946; Kang, Dasgupta, Yogeeswaran & Blasi, *supra* note 5, at 887; Kang & Lane *supra* note 5, at 469; Lane, Kang & Banaji, *supra* note 5, at 428, 431; Richardson & Goff, *supra* note 5, at 297.

24. Rachel D. Godsil, *Why Race Matters in Physics Class*, 64 *UCLA L. REV.* 40, 51–52 (2016); Kang, Dasgupta, Yogeeswaran & Blasi, *supra* note 5, at 1; Kang & Lane, *supra* note 5, at 469–70; Kirwan Institute, *supra* note 5, at 16; Richardson & Goff, *supra* note 5, at 301–02.

25. Jerry Kang, *Bits of Bias*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 1, 3–7 (Justin Levinson & Robert Smith eds. 2012); Godsil, *supra* note 24, at 52–53; Greenwald & Krieger, *supra* note 5.

26. Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 *PERSONALITY AND SOC. PSYCHOL. REV.* 242, 242–43 (2002); Greenwald & Banaji, *supra* note 23, at 15; Krieger & Fiske, *supra* note 5, at 1033; Tropp & Mallett, *supra* note 5, at 7.

stereotype activation influences our judgments, actions, and decisions.<sup>27</sup> Despite our best intentions and explicit beliefs, implicit biases can produce behavior that diverges from our endorsed principles.<sup>28</sup> So, a mediator may espouse egalitarian beliefs, but her implicit biases produce discriminatory responses toward the parties.

You probably know about the Implicit Association Test (IAT). By measuring the strength of associations based on response speeds in categorization tasks, the IAT produces an implicit measure.<sup>29</sup> Millions of people have taken the IAT;<sup>30</sup> you can go to the Harvard Implicit website and select from a menu of IATs.<sup>31</sup> The Race IAT is the most widely used.<sup>32</sup> Most Americans, around 75%, exhibit a strong and automatic positive evaluation of white Americans and a relatively negative evaluation of African Americans.<sup>33</sup> Similarly, 68% of heterosexuals manifest implicit bias in favor of straights over gays and lesbians.<sup>34</sup> Implicit ageism measures are quite strong; both older and younger subjects tend to have negative implicit attitudes toward the elderly and positive implicit attitudes toward the young.<sup>35</sup> These results contrast sharply with self-reported attitudes.<sup>36</sup>

Four main conclusions are drawn from implicit social cognition research: (1) there is variance, sometimes wide, between implicit and explicit cognition; (2) we show a pervasive and strong favoritism for our own social group, as well as for socially valued groups; (3) implicit cogni-

27. Blair, *supra* note 26, at 242–43; Kang, Dasgupta, Yogeewaran & Blasi, *supra* note 5, at 1; Kang & Lane, *supra* note 5, at 467; Richardson & Goff, *supra* note 5, at 301–02; L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 *YALE L.J.* 2626, 2629 (2013).

28. Godsil, *supra* note 24, at 52; Greenwald & Krieger, *supra* note 5, at 951; Kang & Lane, *supra* note 5, at 469; Richardson & Goff, *supra* note 5, at 295.

29. Jack Glaser & Curtis D. Hardin, *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 *RESEARCH IN ORGANIZATIONAL BEHAVIOR* 39, 41 (2009); Anthony G. Greenwald, Mahzarin R. Banaji & Brian A. Nosek, *Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm*, 85 *J. PERSONALITY & SOC. PSYCHOL.* 197 (2003); Greenwald & Krieger, *supra* note 5, at 952–53; John T. Jost, Laurie A. Rudman, Irene V. Blair, Dana R. Carney, Nilanjana Dasgupta, Kang & Lane, *supra* note 5, at 472–73.

30. “The test’s architects reported that, by October 2015, more than 17 million individual test sessions had been completed on the [IAT] website.” See Jesse Singal, *Psychology’s Favorite Tool for Measuring Racism Isn’t up to the Job*, *NYMAG.COM* (Jan. 11, 2017, 12:18 PM), <http://nymag.com/scienceofus/2017/01/psychologys-racism-measuring-tool-isnt-up-to-the-job.html> [Perma link unavailable]; see also Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 *UC IRVINE L. REV.* 843, 860 (2015).

31. *Project Implicit*, HARVARD U., <https://implicit.harvard.edu/implicit/> [<https://perma.cc/DUE5-Q336>] (last visited April 12, 2017).

32. Kang & Lane, *supra* note 5, at 474 n. 33 (citing Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 *EUR. REV. SOC. PSYCHOL.* 1, 3–4 (2007)).

33. Lee, *supra* note 30, at 861.

34. Lee, *supra* note 30, at 860–61 n. 140 (citing Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 *EUR. REV. SOC. PSYCHOL.* 1, 19 (2007)).

35. Becca R. Levy & Mahzarin R. Banaji, *supra* note 21, at 50–52, 54–55, 64; see Greenwald & Krieger, *supra* note 5, at 949.

36. Kang & Lane, *supra* note 5, at 488.

tions predict behavior; and (4) implicit cognitions can be changed.<sup>37</sup>

Significantly, implicit bias often predicts individually discriminatory behaviors more than explicit attitudes.<sup>38</sup> Here are a couple of research examples. Doctors with stronger anti-black attitudes and stereotypes were less likely to prescribe a medical procedure for African Americans compared with white Americans with the same medical profiles.<sup>39</sup> In another study, white subjects with stronger levels of implicit racial bias found a facial expression happy or neutral if the face was white, but angry or neutral if the face was black.<sup>40</sup> Nonverbal behaviors are also shaped by unconscious attitudes and stereotypes.<sup>41</sup>

In mediation, well-meaning practitioners who hold explicit egalitarian attitudes and views experience automatic stereotype activation upon encountering parties.<sup>42</sup> Mediators are highly likely to favor their own in-group and be biased against out-group members, especially less socially valued ones.<sup>43</sup> This bias can play out in spontaneous behaviors such as eye contact, seating distance, blinking, and smiling.<sup>44</sup> White male mediators, the predominant racial and gender group in the field, may unconsciously ascribe negative traits to parties of color relating to work ethic, honesty, criminal propensity, and competence.<sup>45</sup> A study about lawyers is instructive here. Partners at a law firm were given an identical memorandum written by “Thomas Meyer,” identified as an associate who

37. Lane, Kang & Banaji, *supra* note 5, at 431–38.

38. Greenwald & Krieger, *supra* note 5, at 954–55; Lane, Kang & Banaji, *supra* note 5, at 430, 436. See, e.g., Mahzarin R. Banaji & R. Bhaskar, *Implicit Stereotypes and Memory: The Bounded Rationality of Social Beliefs*, in MEMORY, BRAIN, AND BELIEF 139, 167 (Daniel L. Schacter & Elaine Scarry eds., 2000); Mahzarin R. Banaji & Nilanjana Dasgupta, *The Consciousness of Social Beliefs: A Program of Research on Stereotyping and Prejudice*, in METACOGNITION: COGNITIVE AND SOCIAL DIMENSIONS 157, 167 (Vincent Y. Yzerbyt et al. eds., 1998); Krieger & Fiske, *supra* note 5, at 997.

39. Lane, Kang & Banaji, *supra* note 5, at 430.

40. Rachel Godsil, Linda Tropp, Phillip Goff & John Powell, *The Science of Equality, Volume I: Addressing Implicit Bias, Racial Anxiety, and Stereotype Threat in Education and Health Care*, PERCEPTION INSTITUTE 1, 25 (citing Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCHOL. SCI. 640 (2003)).

41. *Id.* at 26 (citing Carl O. Word et al., *The Non-Verbal Mediation of Self-Fulfilling Prophecies in Interracial Interactions*, 10 J. EXPERIMENTAL SOC. PSYCHOL. 109, 113–119 (1974)).

42. Blair, *supra* note 26, at 242–43.

43. Lane, Kang & Banaji, *supra* note 5, at 431–438.

44. Greenwald & Krieger, *supra* note 5, at 955, 961–62 (citing Word et al., *supra* note 41, at 113–119); Lane, Kang & Banaji, *supra* note 5, at 436; Evan M. Rock, *Mindfulness Mediation, the Cultivation of Awareness Mediator Neutrality, and the Possibility of Justice*, 6 CARDOZO J. CONFLICT RESOL. 347, 358 (2005).

45. Cynthia Lee, *Race, Policing, and Lethal Force: Remedying Shooter Bias with Martial Arts Training*, 79 LAW AND CONTEMPORARY PROBLEMS 145, 151 (2016) (citing Jennifer Eberhard et al., *Seeing Black: Race Crime, and Visual Processing*, 87 J. PERSONALITY AND SOC. PSYCHOL. 876, 876 (2004)); Rachel Godsil, *supra* note 24, at 53; L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2052 (2011); see also Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 595 (1976); H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 J. PERSONALITY & SOC. PSYCHOL. 590, 596 (1980).



graduated from NYU Law School.<sup>46</sup> Half of the partners were told Meyer was white; on average, they found 2.9 of the 7 spelling/grammar errors in the memo.<sup>47</sup> The partners who were told that Meyer was black found 5.8 of the 7 errors.<sup>48</sup> Qualitative evaluations of the memos were equally striking.<sup>49</sup>

In-group bias or preference may not seem as pernicious as out-group discrimination, but the effect can be the same.<sup>50</sup> Treating a favored group more positively still results in a discriminatory outcome.<sup>51</sup> We might think of hiring practices that result in predominantly male work forces. In Silicon Valley, for example, Google is overwhelmingly male.<sup>52</sup> A few years ago the company began requiring implicit bias training, and by 2015, more than half of its 49,000 employees had attended.<sup>53</sup>

In addition, bias can cause racial anxiety.<sup>54</sup> Social scientists have observed that we may feel more anxious when we interact with out-group members than with our in-group members.<sup>55</sup> Research on racial anxiety shows that for some people interracial interactions may trigger physical and cognitive indicators of anxiety.<sup>56</sup> People of color often fear discrimination and hostile treatment; white individuals may fear being perceived as racist and being treated with distrust.<sup>57</sup> This can result in unsatisfactory

46. Godsil et al., *supra* note 40, at 36–37 (citing Dr. Arin N. Reeves, *Written in Black and White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills*, NEX-TIONS 1, 3–8 (2014)).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 23 (citing M.B. Brewer, *The Psychology of Prejudice: Ingroup Love or Out-group Hate?*, 55 J. SOC. ISSUES 405, 429–444 (1999)).

51. *Id.* at 23.

52. Farhad Manjoo, *Exposing Hidden Bias at Google*, N.Y. TIMES (Sept. 24, 2014) (“Seven out of 10 people who work at Google are male. Men make up 83 percent of Google’s engineering employees and 79 percent of its managers. In a report to the Equal Employment Opportunity Commission last year, Google said that of its 36 executives and top-ranking managers, just three are women.”), <https://www.nytimes.com/2014/09/25/technology/exposing-hidden-biases-at-google-to-improve-diversity.html> [<https://perma.cc/2CLJ-353F>].

53. *Id.*

54. Godsil et al., *supra* note 40, at 28 (citing Elizabeth Page-Gould et al., *With a Little Help from My Cross-Group Friend: Reducing Anxiety in Intergroup Contexts Through Cross-Group Friendship*, 95 J. PERSONALITY AND SOC. PSYCHOL. 1080, 1080–1094 (2008); W.G. Stephan & C.W. Stephan, *Intergroup Anxiety*, 41 J. SOC. ISSUES 157, 157–175 (1985)).

55. Godsil et al., *supra* note 40, at 27 (citing Stephan & Stephan, *supra* note 54; Linda R. Tropp & Elizabeth Page-Gould, *Intergroup Contact*, in APA HANDBOOK OF PERSONALITY AND SOC. PSYCHOL. 535, 535–560 (J. Dovidio, J. Simpson, eds. 2014)).

56. Godsil et al., *supra* note 40, at 27 (citing David M. Amodio, *Intergroup Anxiety Effects on the Control of Racial Stereotypes: A Psychoneuroendocrine Analysis*, 45 J. EXPERIMENTAL AND SOC. PSYCHOL. 45, 60–67 (2009); Wendy B. Mendes et al., *Why Egalitarianism Might Be Good for Your Health: Physiological Thriving During Stressful Intergroup Encounters*, 18 J. PSYCHOL. SCI. 991, 991–998 (2007); Page-Gould et al., *supra* note 54).

57. Godsil et al., *supra* note 40, at 28 (citing David M. Amodio, *supra* note 56; L. Tropp & E. Page-Gould, *supra* note 55, at 1081; Elizabeth Page-Gould et al., *supra* note 54; Sophie Trawalter, Jennifer A. Richeson, J. Nicole Shelton, *Predicting Behavior During Interracial Interactions: A Stress and Coping Approach*, 13 PERS. AND SOC. PSYCHOL. REV. 243, 243–268 (2009); Jacquie D. Vorauer, *An Information Search Model of Evaluative Concerns in Intergroup Interaction*, 113 PSYCHOL. REV. 862, 862–886 (2006); Jacquie D. Vo-

interaction and a negative feedback loop—their respective fears seem to be confirmed by each other's behavior.<sup>58</sup> People experiencing racial anxiety have shorter interactions, maintain less eye contact, use a less friendly tone, and feel more awkward.<sup>59</sup> A 2014 report by The Perception Institute, a consortium of leading social scientists, documents the adverse effects of implicit bias and racial anxiety in education and health care.<sup>60</sup> For example, patients of color may perceive discrimination on the part of white health care professionals, which leads to distrust and avoidance of health services.<sup>61</sup>

Combined with implicit bias and racial anxiety, other phenomena may foster discrimination in mediation. Confirmation bias reinforces mediator judgments formed by implicit attitudes and stereotypes.<sup>62</sup> By seeking and over-relying on evidence that merely confirms our beliefs, contradictory information is ignored.<sup>63</sup> In other words, mediators may see more stereotype-congruent than counter-stereotypical evidence.<sup>64</sup>

Also, the lack of normative certainty in mediation may play a role.<sup>65</sup> Studies show that “situations that include clear indications of right and wrong behavior . . . tend to lessen the likelihood of discrimination.”<sup>66</sup> Normative ambiguity arises when appropriate behavior is not clearly defined in a particular context and where negative behavior can be justified on a basis other than race.<sup>67</sup> With scant normative consensus in the ADR field regarding appropriate mediator behavior, mediators can rationalize

rauer & Sandra M. Kumhyr, *Is This About You or Me? Self-Versus Other-Directed Judgments and Feelings in Response to Intergroup Interactions*, 27 *PERS. AND SOC. PSYCHOL.* 706, 706–719 (2001)).

58. Godsil et al., *supra* note 40, at 29 (citing Paolini et al., *Intergroup Contact and the Promotion of Intergroup Harmony: The Influence of Intergroup Emotions*, in *SOCIAL IDENTITIES: MOTIVATIONAL, EMOTIONAL, AND CULTURAL INFLUENCES* 209–238 (R. Brown & D. Capozza eds. 2006); L. Tropp & E. Page-Gould, *supra* note 55).

59. Godsil et al., *supra* note 40, at 29 (citing Jim Blascovich et al., *Perceiver Threat in Interactions with Stigmatized Others*, 80 *J. PERSONALITY & SOC. PSYCHOL.* 253, 253–267 (2001)).

60. Godsil et al., *supra* note 40, at 34 (Education), 40 (Healthcare).

61. Godsil et al., *supra* note 40, at 43 (citing L.A. Siminoff et al., *Cancer Communication Patterns and the Influence of Patient Characteristics: Disparities in Information-Giving and Affective Behaviors*, 62 *PATIENT EDUC. COUNS.* 355, 360 (2006)).

62. Robert S. Adler, *Flawed Thinking: Addressing Decision Biases in Negotiation*, 20 *OHIO STS J. DISP. RESOL.* 683, 715 (2005); see Godsil et al., *supra* note 40, at 36–37 (“The ‘Meyer’ study seems to be a case of ‘confirmation bias’ in which reviewers saw what they expected to see based upon stereotypes and then drew conclusions that confirmed those stereotypes.”); Arin N. Reeves, *Written in Black and White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills*, *NEXTIONS* 1 (2014).

63. Reeves, *supra* note 62.

64. Lee, *supra* note 45, at 165 (stereotype-congruent and stereotype-incongruent errors in shooter bias).

65. See Izumi, *supra* note 1, at 107–108 (citing Lu-in Wang, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 *DEPAUL L. REV.* 1013 (2004) (applying normative ambiguity to mediation setting)).

66. Wang, *supra* note 65, at 1038.

67. Wang, *supra* note 65, at 1038–39 (citing Samuel L. Gaertner & John F. Dovidio, *Aversive Racism*, *Advances*, in 36 *EXPERIMENTAL SOC. PSYCHOL.* 67–68 (2004) (defining normative ambiguity; describing helpful behavior in ambiguous situations as “prosocial”)).

discriminatory actions on neutrality or other grounds.<sup>68</sup>

#### IV. BIAS REDUCTION STRATEGIES

The good news is that implicit biases are amenable to change.<sup>69</sup> Suppression of stereotyped associations and engagement of non-prejudiced responses requires “intention, attention, and effort.”<sup>70</sup> What might this look like for mediators?

*Intention* requires *Awareness and Motivation*.<sup>71</sup> Acknowledging one’s own biases is a necessary first step.<sup>72</sup> Court programs and service providers should require mediators to take the IAT and engage in other bias reduction efforts to receive case referrals. Once mediators become aware of their biases, they are more likely to muster the two kinds of motivation necessary to reduce their biases: external (appearing non-prejudiced to others) and internal (appearing non-prejudiced to oneself). Studies show that both types of motivation are important for bias reduction success.<sup>73</sup>

*Attention* entails *Salience and Cognitive Resources*.<sup>74</sup> While stereotypes are automatically activated, the *application* of those stereotypes in our

68. Izumi, *supra* note 1, at 108 (applying normative ambiguity theory to mediation).

69. Jerry Kang, *Implicit Bias: A Primer for the Courts: Prepared for the National Campaign to Ensure the Racial and Ethnic Fairness of America’s State Courts*, NATIONAL CENTER FOR STATE COURTS (2009); Laurie A. Rudman et al., “Unlearning” Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes, 81 J. PERS. & SOC. PSYCHOL. 856, 866 (2001) (citing Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, PSYCHOL. BULL. 117, 117–42 (1994)); Blair, *supra* note 26; N. Dasgupta & A.G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERS. & SOC. PSYCHOL. 800, 802, 807 (2001); P.G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERS. & SOC. PSYCHOL. 8 (1989); Kang & Banaji, *supra* note 21, at 1106–07 (citing Irene V. Blair et al., *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERS. & SOC. PSYCHOL. 828, 828–29 (2001)); Kang & Lane, *supra* note 5, at 501.

70. Armour, *supra* note 5, at 741 (quoting Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERS. AND SOC. PSYCHOL. 5, 16 (1989)).

71. Irene V. Blair & Mahzarin R. Banaji, *Automatic and Controlled Processes in Stereotype Priming*, 70 J. PERS. & SOC. PSYCHOL. 1142, 1159 (1996); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1493 (2005); E. Ashby Plant & Patricia B. Devine, *Internal and External Motivation to Respond Without Prejudice*, 75 J. PERS. AND SOC. PSYCHOL. 811, 826 (1998).

72. Kang, *supra* note 71, at 1529.

73. Plant & Devine, *supra* note 71, at 825–27 (citing David P. Ausubel, *Relationships Between Shame and Guilt in the Socializing Process*, 62 PSYCHOL. REV. 378, 378–90 (1955)). Later studies determined the importance of internal motivation, finding that the measure of implicit bias was lowest among individuals with high levels of internal motivation and low levels of external motivation. See Patricia G. Devine et al., *The Regulation of Explicit and Implicit Race Bias: The Role of Motivations to Respond Without Prejudice*, 82 J. PERS. & SOC. PSYCHOL. 835 (2002).

74. Bruce D. Bartholow et al., *Stereotype Activation and Control of Race Bias: Cognitive Control of Inhibition and Its Impairment by Alcohol*, 90 J. PERS. & SOC. PSYCHOL. 272 (2006); Blair, *supra* note 26, at 243; Blair & Banaji, *supra* note 71, at 1159; Lee, *supra* note 30, at 861–63; Wang, *supra* note 65, at 1038, 1043.

judgments, decisions, and interactions may be moderated.<sup>75</sup> By confronting their implicit biases, rather than ignoring them, mediators can actively monitor and inhibit stereotype-consistent responses. On this point, in August 2016, 250 immigration judges attended mandatory anti-bias training, and the United States Department of Justice announced that 28,000 more employees would take the training.<sup>76</sup> Mediators should be required to undergo rigorous anti-bias training, much more than a one-hour Elimination of Bias class.

For example, mediators could be taught two effective debiasing strategies: (1) using discrepancy experiences to enhance motivation and inhibit prejudiced responses;<sup>77</sup> and (2) goal-directed behavior.<sup>78</sup> A discrepancy experience is when you become aware of a response or reaction that runs counter to your explicit beliefs and attitudes.<sup>79</sup> Developing an “implementation-intention” plan for bias reduction is expressed as follows: “If I encounter X, I will do Y.”<sup>80</sup> Also, mediators can suppress stereotype application more effectively with sufficient cognitive resources. This means eliminating distractions, stress, fatigue, time-pressures, and other circumstances that lead to decision-making shortcuts and less thoughtful, deliberate responses.<sup>81</sup>

*Effort involves Exposure and Enhanced Practices.* Implicit social cognition research shows that bias and racial anxiety can be attenuated through interpersonal interactions with people of different social groups.<sup>82</sup> A meta-analysis of studies found that intergroup contact correlates negatively with prejudice.<sup>83</sup> Also, exposure to counter-stereotypical exemplars decreases implicit bias.<sup>84</sup> People who increased their exposure to positive examples of social groups showed decreased implicit bias to-

75. Blair & Banaji, *supra* note 71, at 1142–43, 1159 (1996). See also Blair et al., *supra* note 69, at 837; Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642 (2004).

76. Caitlin Dickerson, *How U.S. Immigration Judges Battle Their Own Prejudice*, N.Y. TIMES (Oct. 4, 2016), [https://www.nytimes.com/2016/10/05/us/us-immigration-judges-bias.html?\\_r=0](https://www.nytimes.com/2016/10/05/us/us-immigration-judges-bias.html?_r=0) [https://perma.cc/TS3E-BK3P].

77. Patricia G. Devine, Patrick S. Forscher, Anthony J. Austin & William T.L. Cox, *Long-term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention* 48 J. EXP. SOC. PSYCHOL. (2012); Margo J. Monteith, *Self-Regulation of Prejudiced Responses: Implications for Progress in Prejudice-Reduction Efforts*, 65 J. PERS. & SOC. PSYCHOL. 469, 469 (1993).

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

79. Monteith, *supra* note 77, at 469.

80. Gollwitzer et al., *supra* note 78, at 486–87.

81. Richardson & Goff, *supra* note 5, 304–05; see also Pamela M. Casey, et al., *Addressing Implicit Bias in the Courts*, 49 J. AM. JUDGES ASS'N 64, 67 (2013) (Published by the National Center for State Courts).

82. Tropp & Mallett, *supra* note 5, at 3, 5; Kang & Banaji, *supra* note 21, at 1101; Page-Gould, *supra* note 40, at 1081.

83. Kang & Banaji, *supra* note 21, at 1102–03.

84. Godsil et al., *supra* note 40, at 12, 45–46; Dasgupta & Greenwald, *supra* note 69, at 802, 807; Kang & Banaji, *supra* note 21, at 1103 (citing Christopher L. Aberson et al., *Implicit Bias and Contact: The Role of Interethnic Friendships*, 144 J. SOC. PSYCHOL. 335, 340, 343 (2004)); Kang & Lane, *supra* note 5, at 501.

ward blacks, women, gays, and Asian Americans in various studies.<sup>85</sup>

To this end, I urge use of a co-mediation model. Given the dismal level of mediator diversity, I would go so far as to require mixed race and gender mediator teams. I am rethinking my initial aversion to race matching in mediation because we need a way to mentor and employ more mediators of color. Studies show that minority mediators are under-represented in the field and encounter significant barriers to gaining access.<sup>86</sup> In an implicit bias presentation to the International Academy of Mediators last year, the co-presenter and I showed statistics obtained from seven mediation service providers.<sup>87</sup> The percentage of mediators of color within these organizations ranged from a low of 3% to a high of 14%.<sup>88</sup> Even when they are on lists, mediators of color report difficulty receiving appointments.<sup>89</sup> While the use of mediation has increased, the use of minority mediators has not.<sup>90</sup> At a minimum, if every court-connected mediation<sup>91</sup> included at least one mediator of color on a two-person team, the diversity picture would change.

Having diverse mediators matters to participants. A recent study by the State Justice Institute of Maryland surveyed ADR participants in district court day-of-trial mediation.<sup>92</sup> Of note, having at least one ADR practitioner's race match the race of the reporting participant was positively associated with: (1) parties feeling that they listened and understood each other and jointly controlled the outcome; (2) an increase in a sense of self-efficacy (i.e., ability to speak and make a difference) and an increase in the sense that the court cares.<sup>93</sup>

I would also require regular observations and evaluations of mediators. Having periodic oversight would offer some review of interactions with the parties. Official oversight of spontaneous actions and decisions has been shown to reduce implicit bias.<sup>94</sup>

And finally, effective bias reduction practices include using protocols

85. Godsil et al., *supra* note 40, at 45 (referencing Margaret J. Shih, Rebecca Stotzer & Angelica S. Gutierrez, *Perspective-Taking and Empathy: Generalizing the Reduction of Group Bias Towards Asian Americans to General Outgroups*, 4 ASIAN AM. J. OF PSYCHOL. 79 (2013) (watching *The Joy Luck Club* reduced implicit bias toward Asian Americans)).

86. Bush & Folger, *supra* note 6, at 1, 26–28; Weatherspoon, *supra* note 6, at 800–01.

87. Carol L. Izumi, Presentation at the International Academy of Mediators Conference in San Francisco, CA (May 7, 2016) (data on file with author).

88. *Id.*

89. Bush & Folger, *supra* note 6, at 1, 26–28; Weatherspoon, *supra* note 6, at 800–01.

90. *See* note 89 and accompanying text.

91. I suggest court-connected mediation programs due to public funding and required anti-discrimination policies.

92. STATE JUSTICE INSTITUTE AND MARYLAND JUDICIARY, *What Works in District Court Day of Trial Mediation: Effectiveness of Various Mediation Strategies on Short- and Long-Term Outcomes* (2016).

93. *Id.* at 34.

94. Alan Schwarz, *A Finding of Umpire Bias Is Small but Still Striking*, N.Y. TIMES (Aug. 19, 2007), <http://www.nytimes.com/2007/08/19/sports/baseball/19score.html> [https://perma.cc/J7VY-FAQG].

and tools to track evaluations, decisions, and outcomes.<sup>95</sup> Data collection, checklists, rubrics, and the like are ways to detect and reduce discrimination.<sup>96</sup> More consistent and granular data collection and analysis by courts, service providers, and mediators could reveal troublesome patterns or practices in mediation. As seen in the Maryland Court report and the New Mexico MetroCourt studies from the late 1990s, information on the race of the mediator and the participants can yield important information and help us see if racial disparities are evident.<sup>97</sup>

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95. Casey, *supra* note 81, at 70; Richardson & Goff, *supra* note 27, at 2645 (citing Carol Isaac, Barbara Lee & Molly Carnes, *Interventions That Affect Gender Bias in Hiring: A Systematic Review*, 84 *ACAD. MED.* 1440, 1444 (2009); Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 *PSYCHOL. SCI.* 474 (2005)).

96. Casey, *supra* note 81, at 70; Richardson & Goff, *supra* note 27, at 2645.

97. See STATE JUSTICE INSTITUTE AND MARYLAND JUDICIARY, *supra* note 92; see also Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 *LAW & SOC'Y REV.* 767 (1996) (revealing outcome disparities for minority parties in mediated and adjudicated cases); Christine Rack, *Negotiated Justice: Gender & Ethnic Minority Bargaining Patterns in the MetroCourt Study*, 20 *HAMLIN J. PUB. L. & POL'Y* 211, 212 (1999) (concluding that mediators showed "Anglo-protective bias" in this study).