

THE PROMISE AND PERILS  
OF “OUR” JUSTICE: PSYCHOLOGICAL,  
CRITICAL AND ECONOMIC PERSPECTIVES  
ON COMMUNITIES AND PREJUDICES  
IN MEDIATION

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Looking for justice in mediation often depends on the lens. Critics of mediation often measure mediation against an idealized court system and find mediation lacking.<sup>1</sup> Many proponents of mediation, including many contributors to the Cardozo Symposium on Mediation and Justice, argue mediation promotes justice by promoting different values from alternatives like the courts: it may promote the autonomy of the parties by letting them make choices, it may lead to more creative settlements; it may lead to greater satisfaction; it might be less expensive.<sup>2</sup>

This essay examines a less familiar potential: may mediation promote justice by paying more attention to the importance of different communities, including communities disadvantaged by vari-

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<sup>1</sup> See Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1172-73 (1995) (suggesting that inaccurate baselines are often used by opponents of ADR in comparing litigation to mediation as a result of “litigation romanticism”); see generally Clark Freshman, *Privatizing Same-Sex “Marriage” Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687, 1766 (1997).

<sup>2</sup> See, e.g., James Coben, *Gollum Meet Smeagol: A Schizophrenic Ruminations on Mediator Values Beyond Self-Determination and Neutrality*, (2004); Robert A. Baruch Bush, *What Do We Need a Mediator For? Mediation’s “Value-Added” For Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 6 (1996).

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ous -isms (like racism and/or sexism) or just general isolation from larger groups? We can find some version of this appeal to community in at least three variations. First, in the most explicit variety, many otherwise different groups think justice comes from mediation through a particular community. Historically, this has meant Jews might seek mediation from Jewish mediation services, some of which exist even today; so, too, some lesbians and gays, as well as Muslims, have set up mediation services designed for “their” communities.<sup>3</sup> Second, some advocate that existing mediations match some characteristics of mediators and parties, such as ensuring that claims brought by Hispanics have Hispanic mediators.<sup>4</sup> Third, others advocate that mediators become culturally “sensitive” or “competent.”<sup>5</sup>

Elsewhere, I examined some of the potential promises and perils of such community justice from a variety of theories and empirical perspectives.<sup>6</sup> This essay revisits some of those points with the aid of some additional perspectives from other social science studies of bias. The first section surveys the different potential roles of community, including different theoretical and philosophical assumptions. But the debate over community, culture, and mediation is not merely philosophical. The second section suggests some social science perspectives and research that my earlier theoretical publications did not consider.

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<sup>3</sup> See Freshman, *supra* note 1.

<sup>4</sup> See, e.g., Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 L. & SOC'Y REV. 767 (1996) (comparing outcomes when parties mediate before mediators with similar characteristics). In a familiar criticism, one critic notes that exclusive focus on identity may exclude qualified persons otherwise empathetic:

The narrowing of relevance around race creates artificial barriers so as to exclude individuals who do not share a common experience of race but who would still bring an empathetic perspective based on other shared experiences. For example, at a recent ACR chapter conference, a government environmental mediator told the story of deciding not to join a conflict resolution project because of his fear of adding too much “whiteness” to the team.

Susan Dearborn and Wallace Warfield, *Ethnic, Racial and Gender Profiling in Conflict Resolution: Threat or Opportunity?* ACR RESOLUTION 20, 23 (Fall 2003).

<sup>5</sup> See Allan Barsky et al., *Cultural Competence in Family Mediation*, 13 MEDIATION Q. 167 (1996).

<sup>6</sup> Freshman, *supra* note 1.

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In whichever form, appeals to community (or culture) offer several possible advantages. First, mediation involving community mediators, or those sensitive to a given community, may insulate parties from bias in its many forms. This includes the potential bias of courts and that of court "alternatives" with an unsympathetic or insensitive ear.<sup>7</sup> One mediator familiar with a long-standing New York mediation project for lesbian and gay couples argues, "[M]ediation agreements may be more subject to the good faith of the parties, strong personal and community values, and considerations of the best needs of the child than a court imposed settlement would be."<sup>8</sup> Second, even when the community is not necessary to avoid outright bias, the greater familiarity of the mediators will make the mediation swifter. If true, this might be a real appeal of community mediation since some studies suggest generic, court-administered mediation may not shave costs as much as claimed.<sup>9</sup> An Orthodox Jewish mediator, for example, will know not to suggest that divorcing parents switch custody on weekends if they have to drive on Saturday, the Jewish Sabbath. Third, community mediation will be more comfortable, and such therapeutic benefits may

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<sup>7</sup> See, e.g., Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 630 (1996); Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 15-16 (1996) (suggesting that in a postmodern and multicultural world, truth is not fixed and that those who "find" truth, such as judges and juries, see it through a lens that is influenced by their own interests, be they social, economic or otherwise); Judith Resnik, *Asking About Gender in Courts*, 21 SIGNS 952, 975 (1996); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator From Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275 (1999); for an earlier survey, see Freshman, *supra* note 1, at 1724-26; see generally *Smith v. Am. Arbitration Ass'n*, 233 F.3d 502 (7th Cir. 2000) (rejecting the claim that an arbitration panel may disadvantage women even though the roster of arbitrators included only one woman, and the adverse parties vetoed that one woman).

<sup>8</sup> Jorge Irizarry-Vizcarrondo, *Community Mediation After Lawrence and Garner v. Texas: A Reflection*, ACR RESOLUTION 29, 29-30 (Fall 2003).

<sup>9</sup> See JAMES S. KAKALIK ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 87, 93 (1996); see also Clark Freshman, *Tweaking the Market for Autonomy: A Problem-Solving Perspective to Informed Consent in Arbitration*, 56 U. MIAMI L. REV. 909, 916 (2002).

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be an end in itself.<sup>10</sup> Fourth, apart from the direct benefit of individual parties, community mediation may benefit communities in a variety of ways, including better preserving the values and practices of a particular community.<sup>11</sup>

At the same time, the focus on community also raises several perils. First and foremost, mediation focused or “sensitive” to one community, such as Orthodox Jews or Muslims, may escape one bias but reinforce another, such as sexism.<sup>12</sup> Sometimes this bias will clearly advantage one or more parties in mediation at the expense of another.<sup>13</sup> At other times, however, the mediation may disadvantage all individuals involved in the mediation because the mediation itself focuses instead on some interest identified with a community. In traditional communities, for example, emphasis on continued relationships may lead a mediator to coach parties to “work out their differences” even when both individuals might prefer to end their relationship.<sup>14</sup>

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<sup>10</sup> See, e.g., Bruce Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1707-15 (1992) (describing therapeutic values as one value by which legal processes may be assessed).

<sup>11</sup> See Freshman, *supra* note 1, at 1756-58.

[C]ommunity-enhancing mediation means that a particular body of principles, such as Jewish or Islamic law, or some less formal set of community practices, should determine the outcome of a particular dispute. This would mean that how a couple divides property and child care should reflect the norms or practices of the community. In a less obvious way, a second aspect is that the process of mediation reinforces the individuals' sense of connection to a particular community and may make the individuals, at some level of consciousness, think of themselves as members of that community so thoroughly that they themselves order their lives according to the norms of the community without any additional process.

*Id.* at 1693.

<sup>12</sup> Elsewhere I suggested:

[S]ome—including mediators and organizers of community mediation projects—may see mediation as an occasion to advance some notion of community interests. Sometimes this may be overt, as in those who offer things such as lesbian feminist mediation or Islamic mediation, but sometimes it may be less clear, as in “cultural sensitivity.” At a minimum, I suggest that parties should be aware of how mediators see the role of community and community values. Of course, mediators themselves may not always be clear on how much they just want to help individuals engage in private ordering and how much they want to serve (what they see as) community interests. To help clarify the possible roles of community, I offer examples of community-enhancing notions in other practices and traces of it that may occur in mediation involving same-sex couples. Moreover, I argue that community-enhancing is often problematic because it enhances one kind of community at the expense of other communities that individuals might value.

*Id.* at 1770.

<sup>13</sup> See, e.g., Barsky, *supra* note 5, at 169, 173.

<sup>14</sup> This is, of course, a danger that Martha Fineman identified with the professional interests of mediators even apart from any community interests. See Martha Fineman,

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So, too, the perils of community justice may also harm or stifle the community itself. A community cocooned in its own mediation may feel comfortable, but lack exposure to ideas that might let the community and its members develop in other ways. This isolation may also harm the community and its members in dealings with others and other communities. Will such isolation, or perceived isolation, perpetuate stereotypes and prejudice outside the community? When divorcing Jews seek shelter in Jewish mediation, will this hinder Jews in seeking jobs with non-Jews? Or, to frame the question in positive terms, would involvement of more Jews in courts promote greater sympathy and understanding of Jews in other dealings? For example, jurors who heard a case involving parents both making sincere arguments for custody for their children might have deeper respect for Jews as parents.

The tension between the promise of community mediation and its perils depend on different values and assumptions about the world. I explored this theoretical tension at greater length elsewhere, but it can be summarized simply enough. To one side, those committed to preserving different cultures find greater value in mediation that emphasizes particular communities and cultures. Critical Race Theory, for example, notes that dominant cultural values, often associated with whiteness, may make parties in seemingly unbiased mediations “choose” white values over values associated with other communities. In a traditional mediation, parties may choose to emphasize the rights of parents without acknowledging the interests of grandparents or other caretakers who play such a vital role in many African-American and other families.<sup>15</sup> So, too, gay couples in mediation might choose to penalize parties who had sex outside the relationship based on dominant social emphasis on monogamy even though many studies suggest relatively few male couples practice this.<sup>16</sup> In short, mediation that instead emphasizes community and culture, these critics say, will involve more real choice, not merely acting out on an impulse to assimilate.

Some critics take a larger philosophical step away from the individualism and “autonomy” that so many mediation advocates emphasize. These critics suggest it is not enough even if parties “choose” values different from the communities that claim them.

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*Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision-making*, 101 HARV. L. REV. 727, 761 (1988).

<sup>15</sup> See, e.g., *Moore v. East Cleveland*, 431 U.S. 194 (1977) (recounting the history of the “extended family”).

<sup>16</sup> Freshman, *supra* note 1.

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Some suggest instead that traditional communities themselves, and their traditional practices, should be preserved.<sup>17</sup> Seemingly unbiased mediation, a Critical Race Theory perspective would suggest, would simply confine traditional practices of, say, African-American families to the proverbial dump heap of history.

From these theoretical debates three positions emerge. At one extreme, there is the traditional mediation view that emphasizes individual choice. I earlier called this *private-ordering mediation* and suggested it left relatively little room for either community or culture.

In a private-ordering understanding of mediation, a mediator simply teases out the parties' values and helps them craft a resolution that reflects their values. The implicit notion of such mediators is that parties can (and perhaps should) discover their own values and how they apply to problems; the values of law or other parts of a community are relevant only if a party wants to bring up such values.<sup>18</sup>

Re-reading what I wrote, this version bears too much resemblance to a scarecrow caricature. Instead, there is probably room within the traditional mediation view for a healthy measure of cultural sensitivity and even some attention to different values of community. Indeed, the private ordering view might even include attention to various sources of prejudice in a myriad of ways. Exactly how much room the traditional practice of mediation leaves for community values is a matter of some debate: James Coben's contribution to the symposium sharply contrasts, as I did in my earlier work, the passive neutrality of traditional mediators with my emphasis on the mediator's active neutrality in presenting many sources of values.<sup>19</sup> At the live symposium, Lela Love's comments seemed to me to suggest that traditional mediation techniques left room for much of what I have called for. As she elaborated in later correspondence: "I can see the mediator exploring a variety of norms with parties but would want to ensure that the mediator wasn't imposing a single norm (or his or her understanding of a norm.)"<sup>20</sup>

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<sup>17</sup> See John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129 (1992).

<sup>18</sup> Freshman, *supra* note 1, at 1692.

<sup>19</sup> See Coben, *supra* note 2.

<sup>20</sup> Email from Lela Love, Professor, Benjamin N. Cardozo School of Law to Clark Freshman, Professor, University of Miami School of Law (Apr. 28, 2004) (on file with author) (hereinafter Lela Love Email).

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Still, this private-ordering view puts the parties at the center. Philosophically, the conventional mediator asks two party-centered questions: How do these *individuals* value community, often based solely on what information these *individuals* volunteer? And how will these *individuals* suffer from various forms of prejudice? In practice, such mediations will involve training, organization, and administration by groups like courts or organizations larger than any particular community. This is the core of much court administered mediation or general mediation providers, be they large organizations or private mediators.

In marked contrast, some mediation puts community at the center. Traditional mediators ask questions about what parties want, and sometimes what courts or legal principles might suggest. *Community-enhancing* mediation asks parties to look back at what their parents, grandparents, or friends in the community might have done.<sup>21</sup> Practices of such community enhancing mediation include religious versions, like the long-standing religious mediation practiced by traditional Jewish communities<sup>22</sup> and advocated more recently by Muslims in the United States.<sup>23</sup> More recent variations include lesbian and gay mediation services through gay community centers and other organizations.<sup>24</sup>

As I have suggested, *community-enabling mediation* might suggest a third view.<sup>25</sup> Here, the mediators pay more attention to community and culture than traditional party-centered mediation. This distinction involves philosophy and practice. At the philosophical level, community-enhancing mediation accepts that *many* individuals themselves value many kinds of communities. It therefore bears less resemblance to the automatized individualism that

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<sup>21</sup> Clark Freshman, *Privatizing Same-Sex "Marriage" Through Alternative Dispute Resolution: Community Enhancing Versus Community Enabling Mediation*, 44 UCLA L. REV. 1687, 1692-93 ("A community-enhancing understanding of mediation regards mediation instead as a means of helping individuals order their activities and resolve their disputes consistent with the values of some relevant community.").

<sup>22</sup> See, e.g., *id.* at 1750-51.

<sup>23</sup> See *id.* at 1752-53.

<sup>24</sup> *Id.* at 1754-56

<sup>25</sup> *Freshman, supra* note 21, at 1695 ("Such a process enables individuals to make informed choices about the kinds of communities they value and what weight, if any, to give to the norms such individuals may associate with that community."); *Id.* at 1762 ("A community-enabling mediation would encourage parties to consider the range of possible values and practices that could affect how they resolve a dispute or structure an agreement. This would include active consideration of the ways that others, including communities that the parties find valuable, have resolved similar disputes or reached similar agreements. It would also try to consider various other ways that individuals could resolve disputes.").

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many have associated with traditional (philosophical) liberalism and stereotypically male thinking, and resonates more with feminism and other philosophies. Unlike community-enhancing mediation, however, community-enabling mediation does not value community for the sake of the community itself. Rather, community-enhancing mediation treats attention to many different cultures as just one of many sources of generating options to help parties make creative and informed choices. And the purpose is not to enhance the values of community over other sources of problem-solving; mediators might also share information about social science studies, their own experiences, court decisions, the practices of other parties, and so on.<sup>26</sup>

Apart from this substance, community-enabling mediation differs in process from traditional mediation. Traditional mediation, particularly of the more facilitative kind, often puts the parties at center stage – largely alone. The traditional mediator is *relatively* passive, and lets the parties bring up concerns, values, and solutions on their own.<sup>27</sup> Community-enabling mediation lets the mediator bring up values as well. But the mediator brings up many values, not the single set of values that, say, an Orthodox rabbi might introduce into a Jewish version of community enabling medi-

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<sup>26</sup> See Freshman, *supra* note 1, at 1762-64. Lela Love raises two separate concerns about the role of social science. First, she notes that “the danger is that parties will be unduly influenced by what one individual mediator happens to read, know, believe at one given moment.” (see Lela Love Email, *supra* note 20). Second, if mediators really are expected to know more about social science, this may be a “tough qualification for service.” *Id.* These are both valid concerns. While a mediator’s express views may be given undue weight, it’s also true that a mediator’s silence may also be given undue weight. Lela Love recalled that she was concerned when parents fought in front of children, and then referred to “studies” she had read. Had she not raised the issue at all, this might have legitimated the behavior. In a similar way, asking the parties for their own views and values might also tend to legitimate and thereby entrench the parties’ views. In short, the mediator’s silence or comments each raise the danger of entrenching one potential view at the expense of another.

The qualification of the mediator is also a complex point. Mediators bring a variety of skills and sources of information to the table. Lawyers may have an advantage helping parties consider their alternatives in court, accountants may have advantages in thinking of alternate financial arrangements, therapists may have advantages in discussing therapeutic consequences of child raising. It is not a requirement that a mediator be skilled in all these, let alone other, sources of values and norms. Indeed, by recognizing that mediators with different backgrounds may have different sources of skill, my approach to mediation may level the playing field, at least when compared to approaches to mediation that place a special premium only on some professional backgrounds.

<sup>27</sup> The key is “relatively.” Mediators may well be active in attempting to get parties to articulate their own values or views, but relatively passive in not introducing other sources of values that the parties might freely accept or reject.

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ation. In community-enhancing mediation, a mediator might educate a Jewish couple about some traditional Jewish principles. In community enabling mediation, the mediator might share this and cultural traditions associated more with other communities, like the role of extended families.<sup>28</sup>

It is easy to leave off here, as I did in earlier work, and characterize this as yet another clash of competing values, but there is more to consider. Social science theories and research shed more light on the potential pitfalls and promises of community and culture in mediation.

## II. SOCIAL SCIENCE INSIGHTS

The core problem community mediation poses is how it defines the relevant community. For example, if you set up a Jewish mediation to ward off anti-Semitism, some women may find sexism. Similarly, with gay and lesbian mediation to keep homophobia at bay critical race theorists might fear mediation enshrines the values of relatively white and relatively privileged gays and lesbians.<sup>29</sup>

Economic theory, so useful in other areas of law, gives one way to frame this tension. In the economic view, the question for mediation remains the same as for any procedure: What are the risks that there will be some kind of "error"?<sup>30</sup> In principle, one might ask what are the comparative risks that one type of community mediation will identify the wrong community? The "costs" might be as simple as wasting the parties' time going over values they don't share. However, the costs, may involve far more. Though many mediators aspire to let parties determine their own fate in mediation, many critics note that participants may *feel* various kinds of pressure within mediation. Focus on the wrong com-

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<sup>28</sup> Types of extended families may exist in many different groups at different times, but extended family care today may be more associated with African-American than many contemporary Jewish family practices. Clark Freshman, *Re-Visioning the Dependency Crisis and the Negotiator's Dilemma: Reflections on the Sexual Family and the Mother-Child Dyad*, 22 *LAW & SOC. INQUIRY* 97, 106 (1997). The point is merely that parties would be exposed to many cultural practices, whether they are those associated with what might look like "their" tradition or that of some "other."

<sup>29</sup> See, e.g., Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 *CONN. L. REV.* 561 (1997).

<sup>30</sup> See, e.g., Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 *STAN. L. REV.* 1477, 1484 (1999).

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munity, or the wrong prejudice, and parties may feel they “should” make certain choices. Using conventional techniques of “reality testing,” mediators may undermine choices outside the range of acceptable community choices as if they were “unrealistic.”<sup>31</sup>

It’s not easy to get at this question of identifying the “wrong” community directly, but psychological research gives some additional perspectives. From one viewpoint, bias often involves quite generalized discrimination.<sup>32</sup> In particular, discrimination may take the form of the way many of “us” will like those who seem more like “us”,<sup>33</sup> and understand “our” subtleties better, but pay relatively little attention to “others” who, if we notice them at all, seem remarkably similar.<sup>34</sup> In mediation, such subtle bias by mediators may make the voices of those “like” the mediator heard more carefully, and parties “like” the mediator may feed off such attention to stick to their interests more and more skillfully.<sup>35</sup>

At first blush, the solution may seem like matching parties with mediators who are “like” them, but this raises several problems. First, psychologists have found it notoriously difficult to predict precisely how individuals, be they mediators or not, will see some as “we” and others as “they.”<sup>36</sup> And sometimes the way

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<sup>31</sup> See Coben, *supra* note 2 (describing how mediators may distort a mediation through conventionally accepted techniques of “reality testing”).

<sup>32</sup> See Clark Freshman, *Whatever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between “Different” Minorities*, 85 CORNELL L. REV. 313 (2000).

<sup>33</sup> See Patricia W. Linville & Gregory W. Fischer, *Group Variability and Covariation: Effects on Intergroup Judgment and Behavior*, in INTERGROUP COGNITION AND INTERGROUP BEHAVIOR, 123, 132 (Constantine Sedikides et al. eds., 1998); Diane M. Mackie, *Integrating Social and Cognitive Processes Underlying the Out-Group Homogeneity Effect: The Homogeneity of Homogeneity*, in ATTRIBUTION AND SOCIAL INTERACTION: THE LEGACY OF EDWARD E. JONES 471, 472-73 (John M. Darley & Joel Cooper eds., 1998) (noting that “a full explanation of the [out-group homogeneity effect] remains intriguingly illusive”); See generally Marilyn B. Brewer & Rupert J. Brown, *Intergroup Relations*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 558 (Daniel T. Gilbert et al. eds., 4th ed. 1998).

<sup>34</sup> Freshman, *supra* note 32, at 392; see also Brewer & Brown, *supra* note 33; Mackie, *supra* note 33; Linville & Fischer, *supra* note 32; Marilyn B. Brewer, *Social Identity, Distinctiveness, and In-Group Homogeneity*, 11 SOC. COGNITION 150, 150-51 (1993).

<sup>35</sup> Trina Grillo, *Mediation, Process Dangers For Women*, 100 YALE L.J. 1545 (1991).

<sup>36</sup> Freshman, *supra* note 32, at 406-08; see, e.g., GORDON W. ALLPORT, THE NATURE OF PREJUDICE 259 (1954) (“While psychological principles help us to understand the process of prejudice, they cannot by themselves fully explain why one group and not another should be selected as objects of hate.”); R. Richard Banks & Jennifer L. Eberhardt, *Social Psychological Processes and the Legal Bases of Racial Categorization*, in CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 54, 56-58 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998) (discussing the “probabilistic view of category formation”); Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in 2 THE HANDBOOK OF SOCIAL PSY-

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some “we’s” see some “thems” is not so bad: men’s stereotypes of women may include the relatively benign “mother” stereotype or the despicable “Iron Maiden.”<sup>37</sup> The more pernicious the stereotype, the more sense refuge in community mediation may make.

Seeking refuge within community mediation also poses a second set of problems due to biases within individual communities.<sup>38</sup> Leading psychologists of discrimination suggest that, as much as we think we know how others see themselves, individuals may divide the world in many different ways. From the outside, we may often think we “know” how someone else will identify themselves, such as assuming that one African-American may favor another African-American, or that one woman may favor another woman. Recently, on a plane ride, I heard a flight attendant say, “Mr. \_\_\_berg, now you won’t be wanting any bacon with that Caesar salad, will you?” In one sense, the flight attendant showed “sensitivity” to a person she assumed was Jewish by his “berg” surname and perhaps certain facial features.<sup>39</sup> She could have been wrong in many ways. Perhaps Mr. \_\_\_berg came from German ancestry.

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CHOLOGY 377 (Daniel T. Gilbert et al. eds., 4th ed. 1998) (noting that people “use multiple social features to create subtypes”).

<sup>37</sup> For a classic introduction to the different stereotypes individuals may have of women, see ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 233-36 (1977). Individuals seen as different in other ways, such as older persons, may get pigeonholed into their own distinct stereotypes. See, e.g., Amy J.C. Cuddy, *Doddering but Dear*, in *AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS* 1, 13 (Todd D. Nelson ed. 2002) (describing the many subtypes of elder people including the “elder statesman [who] is agentic but socially insensitive (e.g., aggressive and intolerant), reflecting feelings of respect and mirroring the content but not warm category”). For an account of how such stereotypes may disadvantage even otherwise powerful persons, like renowned constitutional scholar John Hart Ely, see Clark Freshman, *Behind The Process: Remembering John Ely’s Compassion*, 58 U. MIAMI L. REV. 955 (2004).

<sup>38</sup> “But what does it mean to refer to “the gay community” rather than “gay Americans” or “gays living in [a certain locale]?” The value, of course, rooted in the earlier formulations “community” and “the community,” is to suggest some harmonious collective sense of identification; the danger is that this value is not present or provable, but only rhetorically pleaded for, or question-begged, in the formulation. Hence it can mask fundamental ambiguities of group definition (is “the Jewish community” one of religion, ethnicity, culture?) or serious political conflicts within what otherwise seems a determinate group (i.e., liberal vs. conservative African-Americans or gays).”

Robert Weisberg, *Restorative Justice and The Danger of Community*, 2003 UT. L. REV. 343, 348-49 (2003).

<sup>39</sup> Some may also read this as an example of the masked role of class as well. Many readers will realize that the Caesar salad came not on a Southwest Airlines bus with wings, but a first class flight. In a future dispute, one might wonder whether the mediator’s attitudes about class and/or wealth might matter more than those about religion. See generally Hutchinson, *supra* note 29 (criticizing much gay rights scholarship and litigation for its

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Or perhaps he was indeed born Jewish, but, like many American Jews, came to eat foods like their neighbors just as many Catholics say prayers in the local language, not Latin.

So what? If Mr. \_\_berg did not keep kosher, he could speak up, and if he didn't, what's the beef – or pork? Follow the same habits in mediation. The mediator might say to Mr. \_\_berg in a divorce, “So your wife’s financial statement lists the costs of preparing for a Bar Mitzvah for your son, how could any Jew object to something like that?” And yet perhaps Mr. \_\_berg would have issues. Perhaps, like many born of Jewish parents, he does not practice Judaism at all, or perhaps he practices a form quite different from what his ex-wife does.

Psychologists use several concepts to capture these ideas. In many cases, there may be tensions between those closest to inclusion in some mainstream group – on the periphery in psychological terms – and those more steadfastly distinguished. Those who may readily “pass” for insiders, like relatively assimilated Jews or African-Americans, may often express more negative views about those not assimilated than even the most inside group. Indeed, research finds this holds true even for relatively loose groups, such as fraternity pledges who may have more negative views of other fraternities than even established members.<sup>40</sup> A reciprocal problem may arise when some who identify strongly with a community have negative views of those who they feel have betrayed their “true” identity by trying to assimilate or fit some other community instead. Conservative Jews, research shows, may have more negative views of relatively nonreligious Jews and prefer, instead, Orthodox Jews, who are even more religious than the conservatives themselves.<sup>41</sup>

Refuge in particularized community mediation may also pose problems in prolonging patterns of discrimination outside the community. This may work in at least two ways. First, many suggest that positive contact (at least in certain circumstances) with those

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emphasis on what he saw as desires of relatively wealthy, often white same-sex couples for extravagant honeymoons when poorer persons of color might need more basic rights).

<sup>40</sup> See Jeffrey G. Noel et al., *Peripheral Ingroup Membership Status and Public Negativity Toward Outgroups*, 68 *J. PERSONALITY & SOC. PSYCHOL.* 127 (1995). In other work on the psychology of discrimination, I termed this “top-down” or “wanna-be” discrimination. Freshman, *supra* note 26, at 435.

<sup>41</sup> See Judith B. White & Ellen J. Langer, *Horizontal Hostility: Relations Between Similar Minority Groups*, 55 *J. SOC. ISSUES* 537, 549-50 (1999). Elsewhere, I have called this “bottom-up” or “anti-wanna-be” discrimination. Freshman, *supra* note 26, at 438.

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unlike us often reduces prejudice.<sup>42</sup> Refuge in community mediation may reduce these circumstances. Jews who resort to mediation in Jewish communities may reduce the chances that non-Jews see just how similar, or otherwise respectable, Jews are. In a second more subtle way, publicity about Jewish mediation may make non-Jews more aware of "Jewishness."<sup>43</sup> This awareness, in turn, may make unconscious bias in favor of Jews all the more prevalent. As we saw earlier, research found that the relatively simple statement that men and women negotiate differently was associated with women doing worse in negotiation.<sup>44</sup> (To some extent, separate mediation by communities may trigger the often unconscious stereotype that "they" are clannish.<sup>45</sup>) This danger arises even if one adopts the less separatist notion of teaching cultural "sensitivity" to mediators. Here, too, the "sensitivity" may harden the way mediators automatically divide the world into group terms in other areas of their life. A lawyer-mediator may learn to be sensitive to how, say, Latinos or African-Americans, may have strong family ties and apply this to be attentive in a family mediation; that same perceived "knowledge," however, may make the lawyer as a hiring partner fearful of hiring someone with a Latino background for fear the person will not bill enough hours!

For both individuals and communities, my emphasis on the active neutrality of community-enabling mediation avoids many of these problems. For individuals, the mediator respectfully introduces many sources of values and many potential solutions.<sup>46</sup> This liberates individuals to "try on" values based on information

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<sup>42</sup> See Thomas F. Pettigrew & Linda R. Tropp, *Does Intergroup Contact Reduce Prejudice? Recent Meta-Analytic Findings*, in CLAREMONT SYMPOSIUM ON APPLIED SOCIAL PSYCHOLOGY 93, 107 (1999) (stating that one of the conditions when contact reduces prejudice may be when authority figures indicate tolerance and acceptance is valued and prejudice not valued).

<sup>43</sup> Clark Freshman, *Prevention Perspectives on "Different" Kinds of Discrimination: From Attacking Different "Isms" to Promoting Acceptance in Critical Race Theory, Law and Economics, and Empirical Research*, 55 STAN. L. REV. 2293, 2317-20 (2003).

<sup>44</sup> See, e.g., Laura J. Kray, Leigh Thompson & Adam Galinsky, *Battle of the Sexes: Gender Stereotype Confirmation and Reactance in Negotiations*, 80 J. PERSONALITY & SOC. PSYCHOL. 942, 947 (2001).

<sup>45</sup> Freshman, *supra* note 26, at 348 (describing how a common pattern of unfair stereotyping is to think people we like "stick together," but "they" are "clannish") and 372 (discussing psychological research on clannish stereotype).

<sup>46</sup> Lela Love notes that many mediators may not want to suggest solutions, except in rare instances to get the ball rolling." See Lela Love Email, *supra* note 20. At least to some extent, this is an independent distinction: some mediators will want to propose solutions, and some will not; of each group, some may draw only on values the parties make explicit, and others may draw on other sources of value.

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about many values and to consider solutions drawing from many different traditions and methods. By its nature, community-enabling mediation will *often* bring together individuals, parties and mediators alike, who might otherwise not have interacted. (I say “often” because the identity of mediators and the style of mediation might diverge – one might match parties with those with similar characteristics, but practice active neutrality; one might find mediators in court-administered or general private mediations who strain to show “sensitivity” to particular cultures.) Mediator and parties alike may then leave the encounter with more respect and understanding for those who might earlier have seemed too different.

Moreover, active neutrality may allow mediators to tap into ideas of community that promote justice and fairness. Sometimes this means emphasizing a common identity because this helps parties see common interests. Divorce mediators sometimes ask parties to put pictures of their children (if any) on the mediation table to anchor the parties in their common interests as parents of the same children. As we saw, even subtle statements may have profound effects: tell negotiators men and women negotiate differently, and women do worse; tell them they are all sophisticated business people, and women do just as well.<sup>47</sup> This suggests that the fluidity of identity and community is not simply something to bemoan, as critics of what they see as excesses of “identity politics” and “postmodernism” may sometimes suggest. Perhaps, then, the mediator who tells parties they are capable of learning how to negotiate effectively may sometimes enable autonomy and self-determination.<sup>48</sup>

Despite these problems with structuring mediation around community, several empirical perspectives may point the other way. In particular, not all discrimination follows generalized patterns. Instead, there really may be relatively distinct risks of bias at different times. Ian Ayres, for example, found distinct patterns of prejudice that disadvantaged African-Americans, but not women.<sup>49</sup> And Ayres even found distinct patterns that disadvantaged Afri-

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<sup>47</sup> See Kray, *supra* note 44.

<sup>48</sup> I say sometimes advisedly for the polly-annaish claim that *confidence* will enable *competence* will not always work, such as with some marred by domestic violence. See generally, e.g., Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1 (1999) (discussing the potential, and limitations, of helping the abilities of persons affected by domestic violence).

<sup>49</sup> Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 MICH. L. REV. 109, 135 (1995).

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can-American men (who seemed to face prolonged but futile negotiations as if car salespeople meant to put "them" in "their" place) versus African-American women (who faced briefer negotiation as if car salespeople felt African-American women simply didn't like bargaining).<sup>50</sup>

Mediations involving same-sex relationships may pose a particularly strong case for some form of community mediation. Although attitudes remain in flux, when I wrote a draft of this in March of 2004, surveys suggested that majorities of many groups disapprove of gay and lesbian sexual relations. Many believed that same-sex marriage should be outlawed – even outlawed in state and federal Constitutions. As I am revising this now, shortly after the November, 2004, elections, many states in fact did adopt such bans, and some survey data suggested that many voters chose Bush and Republicans because of their stance on "moral values." It is hard to believe that a same-sex couple would not find it helpful in such circumstances to pick mediation by gay and lesbian community mediation, gay and lesbian mediators, or mediators with a reputation for sensitivity to such couples.

Some psychological perspectives would go even further. Even if parties do not face bias in mediation, the comfort that parties feel in community mediation may translate into multiple benefits. In part, the comfort is itself a value, a criteria, for the success of a mediation.<sup>51</sup> The comfort may also translate into other benefits. More comfort may mean better moods, and better moods may translate into better results. Hosts of psychological studies suggest that those in slightly better moods tend to be more cooperative and more creative;<sup>52</sup> those in worse moods – and surely even the *perception* of prejudice might trigger such moods – tend to be more competitive and more likely to overlook opportunities for win-win solutions.<sup>53</sup>

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<sup>50</sup> IAN AYRES, *PERVASIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION* 21, 85 n.4 (2001).

<sup>51</sup> This perspective is generally associated with therapeutic jurisprudence which treats such comfort and psychological benefits – albeit acknowledging such considerations co-exist with others such as cost. See, e.g., Winick, *supra* note 10.

<sup>52</sup> See Alice M. Isen, *On The Relationship Between Affect and Creative Problem Solving*, in *AFFECT, CREATIVE EXPERIENCE, AND PSYCHOLOGICAL ADJUSTMENT* 3, 3 (1999) ("A growing body of research indicates that positive affect is associated with greater cognitive flexibility and improved creative problem solving across a broad range of settings."); see also Alice M. Isen, Andrew S. Rosenzweig & Mark J. Young, *The Influence of Positive Affect on Clinical Problem Solving*, 11 *MED. DEC. MAKING* 221 (1991).

<sup>53</sup> See Keith G. Allred et al., *The Influence of Anger and Compassion on Negotiation Performance*, 70 *ORG. BEHAV. & HUM. DEC. PROC.* 175, 181 n.2 (1997); Joseph P. Forgas,

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Finally, social science may also complicate the case for the kind of mediations I earlier suggested. As discussed, community-enabling mediation exposes parties to many different community values so they can make choices informed by many alternatives.<sup>54</sup> In principle, such choices may be more valuable even if they cost more. (Of course, there might not be too much risk of error if some alternatives were excluded: mediators might pause to suggest most Jewish couples see Mel Gibson's *The Passion of the Christ* to get some critical takes on discussions of how to raise their child!).

Such exposure to additional choices may have many costs, but the additional benefits still might make such a process more efficient. As with any process, there may be additional costs to exposing parties to additional choices. But this alone does not tell us anything about the overall costs of such mediation, let alone the overall efficiency of such mediation. If more choices and options lead to more agreements, and more agreements may reduce the costs of litigation, the more elaborate process may save money. So, too, apart from costs, the ability to select from more choices may enhance the sense of freedom and autonomy that many find so valuable in mediation.

To be complete, more choices alone may not lead to more satisfaction for everyone. Consider new research on choice overload. At least among people who tend to be perfectionists, more choices may lead to *less* satisfaction.<sup>55</sup> This may be bad enough, but lesser satisfaction, in principle, might lead to worse emotions, which – as the research I just described suggests— in turn might lead to still worse negotiations! Remember, the more systematic research finds this problem applies to those personalities that feel the need to make the most perfect choice. And Further, when mediators face such parties, the answer may not be fewer possibilities, but rather a different spin on many possibilities: “We’re looking at

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*On Feeling Good and Getting Your Way: Mood Effects on Negotiator Cognition and Bargaining Strategies*, 74 J. PERS. & SOC. PSYCHOL. 565 (1998); see also Clark Freshman et al., *The Lawyer-Negotiator As Mood Scientist: What We Know and Don't Know About How Mood Relates to Successful Negotiation*, 2002 J. DISP. RESOL. 1, 22-23 (2002).

<sup>54</sup> See *supra* note 11 and accompanying quote.

<sup>55</sup> See generally Sheena S. Iyengar & Mark R. Lepper, *When Choice is Demotivating: Can One Desire Too Much of a Good Thing?*, 79 J. PERS. & SOC. PSYCHOL. 995 (2000) (noting that some people experience anxiety and decrease in satisfaction when they have many choices); BARRY SCHWARTZ, *THE PARADOX OF CHOICE* (2004) (asserting that American society's heightened emphasis on choice may leave consumers stressed and less satisfied).

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many choices to find ones that meet the needs of those affected by this negotiation as best as possible; there may be several that work quite well and no need to worry too much about the very best solution."<sup>56</sup>

## II. CONCLUSION: PROBLEMS, PROBLEMATICS, AND SOME CONSIDERATIONS FOR COMMUNITY IN MEDIATION

Ultimately, there is no simple answer to the most just way to handle community and mediation. At the philosophical level, there is simply a gulf. To one side, the traditional liberal view suggests community only matters if parties to mediation care about community. On the other side, advocates for some communities suggest that mediation should prod parties closer to the community.

At the empirical level, it is difficult to compare the competing dangers of identifying the wrong form of bias or the wrong community. Psychological research suggests that attempts to match parties with those "like them," or to be sensitive to "their" values will *often* rest on dubious assumptions. Still, there remain important considerations for those drafting mediation agreements, parties participating in mediation, and mediators themselves.

Those drafting agreements to mediate should pay particular attention to the ties that various mediation providers may have to certain communities. This is especially important when parties may commit to mediation well in advance of an actual dispute. Sometimes, parties themselves may evolve and change, so even a couple wed by an Orthodox rabbi might not be best suited for mediation by an Orthodox Jewish mediation service.<sup>57</sup> In other times, social circumstances may change: fears of anti-Semitism may decline over time.

In principle, parties themselves may have an important role in identifying the relevant communities. Even where parties agreed to mediation before a particular community program, the volun-

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<sup>56</sup> For an excellent survey of the psychological complications of generating options and some concrete suggestions for how lawyers may help clients manage them, see Chris Guthrie, *The Cost of Options in Negotiation*, 88 IOWA L. REV. 601 (2003).

<sup>57</sup> See Richard A. Posner, *Are We One Self or Multiple Selves?*, 3 LEGAL THEORY 23, 26-7 (1997); George Loewenstein, *Projection Bias In Predicting Future Utility*, 118 Q.J. ECON. 1209 (Nov. 2003) (showing how often people overestimate how well they can predict what they will want in the future).

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tary nature of mediation in principle lets parties walk away from that kind of mediation and try another type of mediation. Practice may lag behind. Parties may *feel* bound to remain consistent with their initial agreement, even if a court would not formally compel them (and, at times, community pressures of various kinds may also pressure parties.).<sup>58</sup>

Sometimes mediators may have the greatest psychological autonomy to help community serve justice. Mediators need to balance several competing considerations. First and foremost, mediators should step back from first impressions and see the many potential communities and prejudices in any given situation. Take a conflict between two Asian parents over the better treatment of a male child. A mediator merely “sensitive” to Asian culture might remain passive when a father favors a male child – or even “remind” the mother of Asian culture.<sup>59</sup> Mediators sensitive to the many different kinds of culture, and many sources of justice, might be sensitive to potential sexism as well.

Mediators also face a second challenge in thinking about how they themselves might introduce community values. Those committed to a truly facilitative model may decide that they will never raise values parties do not bring up: they will not mention what courts do, or what social scientists suggest, or what other communities do. Those with more hybrid approaches, however, must decide how much to probe potential community values just as they might sometimes introduce legal values as *one* source.<sup>60</sup>

In short, there is no single relationship between community and justice in mediation. Rather, the sibling values of promoting community and avoiding prejudice remain just some values in mediation among many others. Like autonomy and other values, they remain both conceptually difficult and difficult to implement. Also, like other values, they remain key to much of the special potential of mediation as a path of justice.

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<sup>58</sup> See, e.g., SOL ROTH, HALAKHAH AND POLITICS: THE JEWISH IDEA OF THE STATE 2 (1988); see also Maureen Anne Bell, *Autonomous Lawmaking: The Case of the “Gypsies”*, 103 YALE L.J. 323 (1993) (explaining that many communities may shun those who seek justice in the courts of the larger nation-state).

<sup>59</sup> Barsky, *supra* note 5.

<sup>60</sup> See Freshman, *supra* note 1, at 1738-39.