KNOW JUSTICE, KNOW PEACE: FURTHER REFLECTIONS ON JUSTICE, EQUALITY AND IMPARTIALITY IN SETTLEMENT ORIENTED AND TRANSFORMATIVE MEDIATIONS

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In the conversation (or debate) on mediator responsibilities and justice, this Article argues that as mediators we should have a concern for the justness of the outcome of the mediations in which we serve. I have high hopes and expectations for mediation as one important aspect of what I see as a larger and increasingly essential project of peacemaking. But last summer, when I was teaching a basic mediation training course, and I asked my students if they understood themselves to be “peacemakers,” they were almost uniformly resistant to the notion. They saw peacemakers as almost “spineless,” certainly “wishy-washy,” and people who would do anything merely to stop an immediate conflict. The idea of “peace” seems to be much more easily understood in its most narrow, “no bullets-flying” form and most easily connected with “order” rather than “justice.”

I have a long interest in mediation, and I realized, as I was reflecting on the fiftieth anniversary of the landmark desegregation case Brown v. Board of Education,¹ that my attachment to the process stems from its social justice roots as exemplified by the community justice movement of the 1960’s and 1970’s.² This movement was very much about substantive justice; about getting justice outside of the courthouse; about the transformation of power rela-

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² For an overview of the history of mediation with a focus on the place of the community justice movement see Deborah Hensler, Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System, 108 PENN. ST. L. REV. 165, 168-90 (2003). For one of the most complete discussions on the most prominent community justice programs see SALLY MERRY & NEAL MILNER, EDS., THE POSSIBILITY OF POPULAR JUSTICE (1993).
tions between heretofore unequal classes in our society. Specifically, it was very much about disempowered African-Americans and other peoples of color and in poverty who were not able to get justice in the courts, not merely because of lack of money, but precisely because the law itself was not designed for us to get justice. Separate but equal was “the law,” but it was not justice.

While this movement, the desire of at least portions of disenfranchised communities to seize control over the resolution of conflict and the creation of justice in their communities is not dead, much of it has been subsumed by court-connected mediation or a less “each one-teach one” and a more professional, credentialed private mediator model. Some of the changes that have occurred inside and outside the community justice mediation movement have been positive. On the one hand, the interests of colored and poor communities are no longer almost totally antithetical to the current law and court system. There are areas of the law that protect the rights of disadvantaged and less powerful people and individuals. These are legal doctrines involving fundamental rights and freedoms, e.g., Equal Employment Opportunity Commission cases wherein current civil rights laws and norms can be invoked to provide the boundaries within which mediation participants can negotiate but not cross.3 The law, in this area, has edged much closer to “justice.” Not surprisingly though, I remain critical towards the general notion that “the law,” in the guise of the Patriot Act4 for example, is somehow automatically consistent with justice.

On the other hand, outside of areas where the law is easily identifiable with fundamental rights and freedoms, there remains a huge arena for mediation where parties are free to make all kinds of choices. That is one of the beauties of mediation. But as the seminal works of Professors Richard Delgado5 and Trina Grillo,6 along with the empirical work that provides some support to their claims7 reveal, it is in these areas when “minority” group members

7 See Gary LaFree and Christine Rack, The Effects of Participants’ Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases, 30 LAW & SOC’N REV. 767 (1996).
interact with “majority” group members in mediation where the results that minority members get are arguably less just than if they went to court. I use the term “arguably” because the empirical studies make clear that if you compare monetary outcomes between mediation and small claims court, minority participants were worse off in mediation. However, minority parties were often quite satisfied with the process and the ability to tell their own story in their own voice. The chance to speak for oneself, and to, or with the party with whom one is in conflict, is a key aspect of self determination, and a core and essential value of mediation. Still I cannot be satisfied to leave all as is if it means that white people get both a sense of dignity and self-determination along with the deserved financial resources that support a meaningful and actual self-determination, while Black and Brown people just get a sense of dignity and self-determination. As an analogy, I am less concerned—not unconcerned, but less concerned with a sense of Dr. Martin Luther King’s dream of peace, justice, and equality through the naming of streets in the “hood” after him and more concerned with something closer to the manifestation of his dream which would involve both names and numbers—numbers in the form of economic resources to impoverished communities.

Consequently, I continue to support the notion that as mediators we need to be concerned with justice in terms of both process and substance. I have used the term “activist mediation”8 in the past to capture my position—which is to defend the use of intervention techniques to equalize power imbalances and enable, if not ensure, justice in form and outcome. The very use of the word “activist” with “mediation” already marks me as one who names and claims as “mediation” the broad range of practices that we typically label as facilitative, evaluative, and transformative. I view choosing a “kind” of mediation in much the way I view choosing mediation over some other form of conflict resolution. While I am increasingly preferring mediation over other forms of conflict resolution, especially litigation, I do not think all conflicts belong in mediation. Some contests over the meaning of our society’s core values need to be fought quite publicly and, to some degree, adversarially.9 Similarly, I think it is fair for mediators to choose differ-

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9 While I have written elsewhere on the positive aspects of gay and lesbian families using mediation and avoiding court, see Isabelle R. Gunning, Mediation as an Alternative to Court for Lesbian and Gay Families: Some Thoughts on Douglas McIntyre’s Article, 13 Mediation Q. 47 (Fall 1995). The most recent cases in the courts, such as Lawrence v.
ent kinds of mediation to suit the parties and their desires and needs. Settlement-oriented mediation, whether facilitative or evaluative, will be well suited for some parties in some circumstances. And transformative mediation will be more suitable in other situations.

Still, I am very attracted to transformative mediation with its focus on self-determination and responsiveness to others. As an inheritor of the community justice movement and a proponent of justice in mediation, I appreciate an approach that does not limit the goals of mediation to settlement alone. But even the transformative mediation proponents are loath to encourage any mediator responsibility for a just outcome lest, they argue, party self-determination be compromised. However, I am far less comfortable watching men bully women or majority group members using their greater social capital over minority group members to get agreements that are unjust, than transformative mediation proponents are.

The goals of transformative mediation are quite similar to the original goals of the community justice mediation movement; at least insofar as both approaches take an “optimistic view of parties’ competence and motives.” Transformative mediation proponents assert this as an aspect of promoting party self-determination and recognition. The community mediation justice movement rested upon similar beliefs in order to assert the achievability of its initial purpose: empowering individuals through their collective community involvement to change larger social power structures. However, transformative mediation proponents, like settlement-

Texas, 539 U.S. 558 (2003), at the Supreme Court level and the Massachusetts case on gay marriages reveal the importance, as Brown v. Board of Education did, of very public discourse on how the society understands equality of persons.

10 See Jospeh P. Folger & Robert A. Baruch Bush, Transformative Mediation and Third Party Intervention: Ten Hallmarks of a Transformative Approach to Practice, 13 Mediation Q. 263 (1996). Their focus is on valuable individual shifts, e.g., “if new insights are reached, if choices are clarified or if new understandings of each others views are achieved.” Id. at 266. These are important goals that could have larger societal impacts if the view of the mediator is that clarifications and new understandings could lead to changes in relationships and social structures as well. The expansion of goals for mediation into the larger societal structure within which it operates is a way to preserve the promise of the community justice mediation movement and avoid the more conservative and status quo upholder position that too much of current mediation practice can fall into. See Nancy Welsh & Peter Coleman, The Paradoxical Tension Between Short-Term and Long-Term Needs and Solutions, 18 Negot. J. 345, 391 (2002).


12 Bush & Folger, supra note 10, at 269.
oriented mediation advocates, are unwilling to take seriously the impact of the larger social forces on the individuals involved in the mediation. Transformative mediation proponents argue that the mediator must resist the impulse to “defend or assist” when faced with a situation where “there seems to be a clear power advantage on one side.” The argument is that to do so involves several assumptions—that there really is a power imbalance, that the more powerful party does not want to change the imbalance, and that the less powerful does want to change the imbalance—and since the mediator knows far too little about these parties, their conflict and their larger lives, he cannot make these assumptions. A mediator must wait for signals from either disputant.

Caution is a good thing. But the posture that the mediator must wait for signals of distress begs a question. If the mediator knows so little about the parties, will he recognize signals of distress short of a clear verbal statement on the part of a disputant? Will mediation thus favor those who are more articulate or whose power imbalances are not “that great”? If a mediator, through self-education and appropriate training, is aware of the kinds of power relationships that are a typical and complicated part of the larger society in which all mediation participants operate, it seems appropriate for the mediator, on her own accord, to raise the possibility of these factors. One such method of doing so is through the inclusion of equality and justice as a part of the process and outcome of the mediation.

An activist mediator is probably not as “active” as the name might suggest. I mean to suggest by the name and the idea that power imbalances can be addressed, that the mediator will openly discuss issues of “equality” and “justice” with the parties, and encourage them to define and abide by these principles in creating any agreement that might result. If a mediator does this—does that violate her impartiality or neutrality?

A recent Supreme Court case, *White v. Minnesota Republican Party* had a discussion on “impartiality” and the judiciary.

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13 *Id.* at 268.
14 See *id.* at 269.
16 It is interesting for my critics to note that the justice who wrote the majority position in that case on what did not constitute a violation of judicial impartiality, Justice Antonin Scalia, is also the same justice whose judicial impartiality has recently been questioned by reporters noting that he gave a keynote address at an anti-gay organization’s fundraiser during the time when the Court was considering the landmark case of Lawrence v. Texas, where the Court overturned Texas’ sodomy laws. See Richard A. Serrano and David Sav-
While the decision was not a unanimous one, the definitions of “impartiality” which were employed by the majority opinion were not actually challenged by the dissents; their criticism was of the majority’s application in the context of judicial versus political elections.

Justice Antonin Scalia, who wrote the majority decision, defined three meanings for impartiality: (1) having no bias against or favor towards any party; (2) the impossible—having no preconception in favor of or against any particular legal view; and (3) open-mindedness—a willingness to be open to being persuaded in spite of your preconceived notions.

Justice Ginsberg’s dissent—which focused on Due Process Clause requirements—added another aspect to “impartiality” (which some might call “neutrality”): (4) having no interest in the outcome of the dispute.

These definitions have a lot of resonance for us as mediators and raise important questions when applied to mediators. It seems that a mediator’s concern for a just outcome, as well as process, does not make a mediator impartial in the sense of being biased towards one party or another. Nor does it affect her open-mindedness. However, using an intervention technique could certainly create the appearance of bias to one party or another. This is not a concern that I take lightly, but I do think it important to note that mediators can be viewed as biased through silence and non-intervention as well. Openly discussing the importance of values like equality and justice as part of the mediation process should work as some mitigation of this.

age, Scalia Addressed Advocacy Group Before Key Decision, L.A. TIMES, Mar. 8, 2004, at A1, A13. Justice Scalia addressed the Urban Family Council. The group’s founder, William Devlin, claims it is a Christian group, and the organization is backing a lawsuit to overturn a Philadelphia city ordinance that grants equal rights in pension and health benefits to gay and lesbian couples. The dinner was to be a fundraiser for the suits although Scalia’s acceptance was apparently conditioned on the dinner not making a profit. See id. Scalia has also been implicated in two other hunting trips with Vice President Dick Cheney during the time the Court was to hear a legal challenge to Cheney’s refusal to divulge information about his energy policy task force, which also raise issues of judicial impartiality.

17 See, e.g., Angela Cora Garcia et al., Disputing Neutrality: A Case Study of a Bias Complaint During Mediation, 20 CONFLICT RESOL. Q. 205 (2002) (formerly MEDIATION Q.) (analyzing a mediator who, in attempting to correct for a perceived power imbalance, was charged with bias and determining that part of the problem may have been not the correction itself but that overall the mediator appeared more sympathetic to the feelings of one party as compared to the other).
On the other hand, a mediator’s concern for a just outcome does affect mediator “neutrality” as defined as having an interest in the outcome of the conflict. This kind of mediator “interest” is not the kind of impermissible interest to which Ginsberg referred to in *White* when she cited a case where a judge had a personal interest in a particular outcome. But the issue remains—is this a problem? The real issue is how does the mediator’s concern for justice in the outcome interact and intersect with the mediator’s concern for the parties’ self-determination? When a mediator considers intervening to prevent bullying, stop lying or provide information in order to increase the chances of a just outcome, it is not at all clear that such interventions violate party self-determination. If self-determination is divorced from informed decision-making or voluntary consent, it cannot claim to constitute authentic self-determination.

When one understands the ways that narratives interact in mediation, the difficulty is even clearer. When people tell their stories in mediation, the narratives must compete for legitimacy and primacy. Narratives acquire legitimacy, in part, through nesting in already existing larger cultural myths with which all the participants—parties and mediators—are familiar. “Out” groups, women and minorities tend to have fewer positive cultural myths within which to nest their stories. Consequently some conscious effort to examine the shallowness of common myths and to create new moral codes must be made, or disadvantaged groups will remain disadvantaged in the mediation process. Thus, when mediators do nothing or “remain neutral,” the outcome will tend to conform with the dominant and familiar cultural myths. In many ways, we as mediators are damned if we do and damned if we don’t.

I still say “let’s do,” though not without caution, care and a significant amount of self reflection to resist merely substituting our own notion of justice for the parties’ equally legitimate notions.

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18 Justice Ginsberg cites Aetna Life Insurance v. Lavoie, 475 U.S. 813 (1986) where a judge wrote the opinion for the Alabama Supreme Court at the same time he had his own case pending in the Alabama lower courts and the Alabama high court’s decision had the clear and immediate effect of enhancing both the legal status and the settlement value of his separate suit.

19 See Bush, *supra* note 11, at 19-24. It may be that to stop bullying would be agreed upon by all mediators but the transformative mediators do not, since it might be seen as a procedural aspect of mediation and not a substantive justice issue.

of justice. Many, if not most of us, often provide certain minimal rules or instructions to mediation parties such as, “not interrupting.”21 Some go slightly beyond this to include “employing good faith” and “no name-calling.” The peacemaker model gets more explicit to specify, “you promise to speak the truth as you understand it” and “the process has to be fair to all at all times,”22 and goes beyond even that to include “help others to understand you and work to understand others;” “expect the best possible outcome for yourself and the others here;” “before making a criticism of someone, make a positive statement about him or her,” and “affirm that we all have the same need for self-respect, autonomy and pride.”23 Transformative mediators also underscore in opening statements the specific goals of self-determination and recognition.24 We all are talking substantive values when we do this. If we can talk about these values why not discuss the values of “equality” and “justice” and “fairness?”

It would be surprising to find a party who would openly state that they do not want a fair or just outcome, but those rare cases are worth discovering at the very start so that all concerned—parties and mediator—could decide whether to move forward in mediation or not. I suspect that most people want equality, fairness and justness—if only for themselves. They are open to giving the same to another if that is how they can get those values for themselves. Once these values are recognized as part and parcel of how mediation operates and what it intends to provide, when a mediator intervenes in some way, it is no surprise.

The mediator could include in her opening statement a phrase from the more “value explicit” peacemaker model like, “affirm that we all have the same need for self-respect, autonomy and pride,” as an example of the shared value of equality along with an explicit statement on the shared values of justice and fairness such as, “the process has to be fair to all at all times, and if you all should decide to come to an agreement as a result of the process, the agreement must be fair to all of you as well.” As with all such rules or opening instructions, these would constitute some of the first agreements between the parties. If later in the mediation, the

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21 Joseph P. Stulberg, Taking Charge/Managing Conflict 64-65 (1987) (describing a typical opening statement for a settlement oriented mediation where the mediator advises the parties not to interrupt).


23 Id.

24 See Folger & Bush, supra note 10, at 266.
mediator senses a power imbalance, she need not announce it as such or hope for one of the parties to make an explicit complaint. One method of managing this would be to explore the possibility of imbalance and any negative implications through a “check-in” with the parties on the agreed-upon process and outcome values. As proposals are placed on the table, the mediator makes it a practice to remind the parties of their earlier promises and to encourage the parties to further explain their views on fairness or justness as they relate to any particular proposal—including the exploration of whether any particular term that one party proposes for the other would still be perceived as “fair” if applied to the proposing party himself. Now the parties are available for a more complete discussion of the meaning of the shared values of equality, fairness and justice in the context of their conflict and relationship. “Equality” and “justice” continue to be contested concepts in their particularity. Mediation then becomes another forum in American political, legal and social life within which these important principles are redefined.

Mediators and mediation are generally talked about in the context of “conflict resolution” or “dispute resolution.” We are not and should not be mere “conflict stoppers.” Even “resolution” suggests something more than just conflict stopped or even problem solved. For me it is about Peace. We do not have to look very far to see the foolishness and even dangerousness of thinking about peace as a mere cessation of the immediate hostilities. Lasting peace is always about the presence of Justice. And both must be our charge as mediators as well.

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25 See, e.g., Gunning, supra note 8, at 90 n.141.