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Workplace Mediation: The First-Phase, Private Caucus in Individual Discrimination Disputes

Emily M. Calhoun†

Mediation processes are sufficiently well-established\(^1\) that we have moved away from categorical opinions about the wisdom of using mediation in civil rights disputes to more strategic discussions. We no longer dwell on an all-or-nothing choice reflected in the long-running debate about whether civil rights conflicts should be mediated or whether, as Justice Marshall once pronounced, they "belong in court."\(^2\) Instead the relevant question is "When is it appropriate to

\(^{†}\) Emily M. Calhoun, Professor of Law, University of Colorado. I am indebted to my colleague, Professor Scott Peppet, for his astute suggestions, and to my research assistant, Marci Meier, for her exceptionally thorough and insightful recent work. I also especially thank Mary Margaret Golten, founding partner of CDR Associates, for the many useful discussions we have had about the propriety of mediating civil rights disputes and for her willingness to read and comment on this Article.


mediate a given civil rights dispute and under what specific procedural understandings?" We attempt to figure out how to "fit the forum to the fuss." This Article proposes that a first-phase, private caucus is an essential procedural element when individual, workplace discrimination disputes are presented for mediation, and that the caucus should be used for the quite specific purpose of cultivating the gender or racial group presence inherent in a discrimination dispute.


4. Menkel-Meadow, When Dispute Resolution Begets, supra note 2, at 1901 (expanding on a phrase first used by Frank E.A. Sander and Stephen B. Goldberg).

5. This Article focuses on race and gender discrimination in the workplace, although its thesis is relevant to other groups affected by discrimination and to other settings. The use of generalized references to racial and gender groups to present the thesis should not obscure the complexity of cross-group or multi-racial identities.
The first-phase, private caucus recommended in this Article is a private meeting between mediator and complainant in a discrimination dispute. It is part of the mediation but occurs before negotiation takes place between the parties to a workplace discrimination dispute. In mere procedural terms, one might think of the first-phase, private caucus as an adaptation and expansion of the brief, early private meetings commonly used by mediators to familiarize each disputant with the mediation process, and to gather preliminary facts. The first-phase, private caucus, however, serves the qualitatively distinct objective of self-determination in the mediation process and its outcomes.

This Article focuses on workplace discrimination disputes that emerge as individual complaints of discriminatory treatment, but it takes into account the fact that all racial or gender discrimination is inherently group-based. By definition, an employer accused of intentional discrimination is alleged to have imposed his conception of race or gender and the stereotyped roles deemed proper for members of racial or gender groups in making decisions about an individual. Disparate impact discrimination, by definition, occurs when the adverse impacts of facially neutral employer practices are disproportionately borne by discrete racial or gender groups; the employer tolerates adverse group impacts reflecting racial or gender stigma. In either event, the individual will naturally identify herself and her predication with the relevant racial or gender group.

The group that defines (in the employer's mind) the individual—and (in the employee's mind) the discriminatory event—is a figuraiive or "virtual" presence with which to be contended in mediation, even though that group never becomes a formal party to the individual dispute. Clarifying the meaning of the group presence for each individual disputant is a necessary part of understanding the stakes

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6. For an excellent discussion of the nature of racial discrimination, which explains these concepts in more depth, see Glenn C. Loury, The Anatomy of Racial Inequality (2002) 9, 18, 59-60, 111, 161-62, 167-68 (discussing the way in which racial identity is imputed to others through racial stereotyping and stigma). Loury also emphasizes the central role that "race indifference"—i.e., acts taken "with no concern as to what impact that [act] might have upon" a racial group—plays in producing inequities. Id. at 133-54. Cf. Kenneth L. Karst, Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation, 43 UCLA L. Rev. 263, 283-84 (1995) (discussing social identity, i.e., an identity ascribed to persons based on "categories of identity informed by the roles and scripts provided by myth").

7. See Loury, supra note 6, at 98, 143-45 (discussing how persons turn to "internal institution building, mutual affirmation, and selective association" with the racial group to which they have been assigned by others).
in and remedial options for a mediated solution to the problem of discrimination. It also serves to protect party self-determination, the "most fundamental principle" of mediation.\(^8\) By cultivating the group presence, a mediator will ensure that an individual disputant has the knowledge and capacity to make truly autonomous choices about mediation processes and outcomes in a discrimination dispute. Ignoring the group presence, however, puts both the problem-solving potential and self-determination principle of mediation at risk. Just as an ideological commitment to "color-blindness" will undermine the legitimacy and effectiveness of judicial responses to the problem of racial discrimination,\(^9\) so effacement of the group presence will fundamentally compromise mediation. The first-phase, private caucus is where connections between the individual and his or her racial or gender group can be constructively explored.

Section I begins with Susan Sturm's suggestion that a "deep understanding" of the nature of civil rights disputes is required if one is to make useful and specific suggestions about how dispute resolution processes should look.\(^10\) It contains a brief reminder of the central role of awareness in civil rights disputes and of the way in which traditional legal processes have sustained oppression by denying new awarenesses. Section I can be read as a cautionary tale, drawn from judicial processes and illustrating the way in which justice goes awry when otherwise perfectly valid processes neglect awareness.


9. See, e.g., Karst, supra note 6, at 334 (if harm is racial, remedies must take race into account); Darren Lenard Hutchinson, Progressive Race Blindness?: Individual Identity, Group Politics, and Reform, 49 UCLA L. Rev. 1455 (2002) (discussing the contemporary debate over colorblindness doctrine and concluding that race has a tangible and real quality that must be accounted for in disputes).

10. Sturm, supra note 3, at 556.
Section II discusses why gender and racial groups are a significant—albeit only intangible—corollary to awareness and an inevitable presence in individual discrimination disputes. It begins to develop the reasons why the group presence should be important to mediators committed to self-determination.

Section III recommends conscious and focused use of first-phase, private caucuses to cultivate (i.e., to enhance awareness of) the group presence in the workplace in individual discrimination disputes. Mediation processes described in the professional literature typically conform to generally agreed-upon standards, but mediators understand that the conventional format may require adaptation to meet the needs of given parties.11 Mediators anticipate creativity in process design; indeed, flexibility and adaptability give mediation its appeal.12 Adapting the private caucus to cultivate the group presence in an individual discrimination dispute will enhance the quality of problem-solving that occurs in mediation and will also fulfill mediator ethical obligations to preserve self-determination within mediation. The proposal for first-phase, private caucuses embodies the following paradox: by taking advantage of a very early opportunity to enhance the individual awareness and group presence that drives a discrimination dispute, just resolutions of the conflict will more likely be secured through mediation.


The possibility of using first-phase caucuses for these purposes should interest both civil rights advocates and mediators. Civil rights advocates are undoubtedly familiar with the role played by awareness and the group presence in workplace discrimination conflicts but perhaps do not realize that mediation offers a procedural opportunity for cultivating the group presence. On the other hand, although experienced mediators of discrimination disputes undoubtedly use caucuses for a variety of purposes, the specific purpose recommended in this Article is not discussed in the readily-accessible literature on discrimination disputes. The lack of discussion may reflect a less-than-optimal understanding of the significance of the group presence for problem-solving and self-determination in individual discrimination disputes. If so, the first-phase caucus will be under-utilized even by experienced mediators. The lack of discussion also makes it very likely that less-experienced mediators involved in seemingly run-of-the-mill individual disputes are unaware of an important obligation and procedure.

Responses to the first-phase caucus proposal are invited from both mediators and civil rights advocates. What dynamics of the group presence have been misunderstood or omitted from discussion? What modifications should be made to the proposal? What procedural alternatives might serve problem-solving and self-determination objectives more effectively than the first-phase caucus? What specific techniques would mediators recommend to implement the proposal? This Article is intended to provoke a dialogue about how an important practical problem might be approached when individual workplace discrimination disputes are mediated, not to adamantly insist on an unforgiving procedural mandate.

I. AWARENESS: THE HEART OF DISCRIMINATION CONFLICTS

Frederick Douglass once cautioned that slavery "... has been called by a great many names, and it will call itself by yet another..."
name; and you and I and all of us had better wait and see what new form this old monster will assume, in what new skin this old snake will come forth.” Similarly, problems of gender and race discrimination recur in different forms and circumstances. As women and minorities learn to see these new forms and circumstances clearly – as a new manifestation of discrimination – a civil rights conflict arises.

Law plays a secondary, supporting role in this view of discrimination conflicts. Conflicts do not arise because some person identifies an occasion on which rights clearly granted by the Constitution or laws of the United States have unquestionably been denied. Rather, discrimination disputes tend to exist precisely because a person or group persists in addressing a problem as a discrimination problem despite the refusal of prevailing legal institutions to see and address the problem. Unless individuals are willing and able to fit their claims within prevailing legal norms, courts may deem a dispute nonexistent despite the fact that, in the real world, the conflict continues to unfold.

It is no secret that law is frequently at odds with the awareness of women and minorities. One might illustrate the point with any transferring awareness. The property of weak transference is relevant to whether certain goals of mediation are realistic, but that is a subject for another article.


16. JUDITH N. SHKLAR, THE FACES OF INJUSTICE 107 (1990) (noting one can date the argument that formal principles of justice frequently omit the perspective of excluded groups to Montaigne).
number of examples. Consider contemporary workplace discrimination. It is frequently neither overt nor implemented through rules or practices that obviously exclude or disadvantage women or minorities. It may stem from cumulative acts of unconscious prejudice or careless conduct. Under prevailing constitutional doctrine, the Fourteenth Amendment prohibits only intentional discrimination and thus may not protect against these forms of discrimination. Even federal statutes prohibiting disparate impact discrimination may not provide redress against such discrimination, given narrow judicial interpretations of the statutes and employers' increasing sophistication in anticipating and minimizing the ability of employees to prove discrimination. Individuals resist contemporary workplace discrimination because they are aware that a racial or gender group is disadvantaged, not because they have been denied rights clearly granted by law.

For another illustration, think about the Supreme Court's response to a desire for increased and more equal allocation of state resources to historically Black universities in Mississippi in United States v. Fordice. The desire apparently reflected an awareness on the part of at least some African Americans that the problem of segregation in higher education was, for the foreseeable future, intractable and incapable of being eradicated under prevailing equal

17. See, e.g., NIKOLE V. BENOKRAITIS & JOE R. FEAGIN, MODERN SEXISM: BLATANT, SUBTLE, AND COVERT DISCRIMINATION, chs. 5-6 (1986); B. RESKIN & H. HARTMANN, WOMEN'S WORK, MEN'S WORK: SEX SEGREGATION ON THE JOB 37-87 (1986); Sturm, supra note 3; Randall L. Kennedy, Racial Critiques of Legal Academia, 102 Harv. L. Rev. 1745 (1989).

18. For discussions illustrating the potentially limiting effects of the intent requirement, see Sheila Foster, Intent and Incoherence, 72 Tul. L. Rev. 1065 (1998); and Michael Selmi, Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric, 86 Geo. L.J. 279 (1997).


20. Only after years of advocacy, for example, did courts fully accept the idea that workplace sexual harassment is class-based sex discrimination and not an act of inappropriate personal social behavior. See, e.g., Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993). Nonetheless, the Supreme Court occasionally still incorporates into the sexual harassment debate concepts that are at odds with women's awareness. The Court suggests, for example, that workplace sexual harassment is inappropriate because it constitutes "fighting words," R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992), an astonishing proposition for women who see harassing speech not as an irresistible provocation to a physical fight, but as an integral part of a pervasive threat of retaliation against any woman who acts against accepted norms of behavior. For an excellent discussion of the concept of awareness and sexual harassment, see Anna-Marie Marshall, Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment, 28 L. & Soc. Inq. 659 (2003).

protection principles, and that African Americans might be better served by a substantial allocation of more state resources to historically Black (and largely segregated) institutions than by increased integration efforts of historically white (and largely segregated) institutions. The Supreme Court deemed the desire incompatible with the law's rejection of separate but equal arguments in Brown v. Board of Education. Yet the desire and thus the conflict—premised on an awareness of Brown's insufficient answer to the problem of racial segregation in higher education—persisted. Eventually the African American community prevailed, not by virtue of a reinterpretation of constitutional mandate, but through a negotiated consent agreement promising substantial additional resources for historically Black institutions.

Finally, consider the Supreme Court's description of demonstrations outside abortion clinics—a description that so completely refuses to acknowledge the awareness of women that it fails even to designate women as primary parties to or objects of those demonstrations. According to the Court in Bray v. Alexandria Women's Health Clinic, anti-abortion demonstrations arise when anti-abortion activists attempt to intervene between the "innocent victim" and the abortionist. Women do not figure in the Court's picture of demonstrations, although legal definitions of intent would lead to the conclusion that the demonstrations are intended to prevent women from

22. One advocate for historically Black institutions is reported to have stated that the key to remedying racial discrimination in higher education is equity rather than integration. Molly L. Mitchell, Comment, A Settlement of Ayers v. Musgrove: Is Mississippi Moving Towards Desegregation in Higher Education or Merely a Separate but 'More Equal' System?, 71 Miss. L.J. 1011, 1012 (2002). Whether equity was the primary goal of the original plaintiffs remains to be seen, but at least by the time the Supreme Court heard arguments in the case, a number of groups representing the African American community were clearly advocating for an equal resources solution to the problem of racial discrimination and segregation. See, e.g., Motion of Jackson State University for Leave to File Brief Amicus Curiae in Support of Plaintiffs-Petitioners and Brief, U.S. v. Fordice, 505 U.S. 717 (1992) (Nos. 90-1205 and 90-6588) (focusing on funding inequalities and resource deprivations of historically Black institutions); and Motion for Leave to File Brief and Brief of the Alcorn State University National Alumni Association as Amicus Curiae in Support of Petitioners, U.S. v. Fordice, 505 U.S. 717 (1992) (Nos. 90-1205 and 90-6588) (focusing on the separate, unequal funding of land grant institutions).

23. The Court did leave open a very small window for arguing for more resources. 505 U.S. at 743 (citing Brown v. Board of Education, 347 U.S. 483 (1954)).


26. Id. at 270.
exercising their constitutional rights. In Bray, the mismatch between awareness and law is stark. And, the Bray decision did not, of course, eliminate the conflict or the awareness of the problem for women. Legal strategies simply shifted.

Those who would maintain disadvantages for gender or racial groups certainly understand the importance of awareness. Devices used to maintain the status quo are typically directed at obstructing awareness. For example, slaveholders knew that their ability to maintain the institution of slavery depended on their success in isolating individual slaves from each other and from their history. We conventionally think of slavery as depending largely on enforced barriers to some relationships with more privileged or more "human" others. But in creating conditions under which slaves can "be no party to . . . the association of those possessing free will, power, [and] discretion," slavery also was structured to deprive slaves of the ability to enter into and participate in relationships with other slaves. In the United States, family members were not only physically separated from each other, but education was also restricted; slaves were not permitted to engage in or even to speak of collective action; opportunities to develop a collective sense of history were taken away; and the ability of slaves to develop a sense of cultural identity was repressed. In other words, the institution of slavery was maintained,

27. See, e.g., Restatement (Second) of Torts §8A (1965) ("The word intent . . . denote[s] that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it").

28. The law at issue in Bray was 42 U.S.C. § 1985(3) (2000), and the Court determined that the defendants did not have the class-based animus required for liability under the law (even assuming that the law extended protection to women as a group). Bray, 506 U.S. at 269. Legal strategies for women then shifted to make use of other statutes. See, e.g., National Organization for Women v. Scheidler, 510 U.S. 249 (1994) (discussing RICO claims).


31. FOGEL, supra note 29. See also HANNAH CRAFTS, THE BONDWOMAN'S NARRATIVE (Henry Louis Gates, Jr. ed., 2002) (emphasizing that marriage was impossible for a slave to contemplate); PETER CHARLES HOFFER, THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA 3 (1990) (arguing slavery's essential evil inhered in its refusal to permit African Americans to shape their children's lives for generation after generation).
in substantial part, through denials of awareness to African Americans.32

Over the years, scholars have taken note of the centrality of awareness to civil rights disputes. Consciousness-raising, for example, has been an important approach to changing law and political systems.33 Arguments that courts should take the perceptions of members of racial or gender groups into account in resolving particular disputes bring awareness into legal debate.34 Recognition of the power inherent in the ability to name a problem consistently with one's awareness has been an important theme of those who study social and political change.35 The Nobel Prize-winning economist Kenneth Boulding suggested some time ago that one might find a cross-disciplinary theory of all conflicts on the concept of awareness.36 He defined conflict as "a situation of competition in which the parties are aware of the incompatibility of potential future positions and in

32. The South American educator Paulo Freire has a special word – conscientização – for the state of awareness denied by dominant groups. PAULO FREIRE, THE PEDAGOGY OF THE OPPRESSED 19 (1986). Freire argues that denial dehumanizes oppressed groups, id. at 28, 36, 76-77, and incapacitates them from demanding change. Id. at 19, 54. Freire thinks of members of oppressed groups as ultimate "insiders," buried so far in the depths of the prevailing wisdoms and society that they cannot be seen as individuals. Id. at 61. Many minority writers explore the invisibility that results from gaps in awareness of dominant groups, and of how that invisibility affects a sense of time. Ralph Ellison, for example, says that invisibility "gives one a slightly different sense of time ... Sometimes you're ahead and sometimes behind ... slipp[ing] into the breaks and look[ing] around." RALPH ELLISON, INVISIBLE MAN 8 (1990). Patricia Williams draws a similar connection between invisibility and a sense of history: "There are days when I feel so invisible that I can't remember what day of the week it is." PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 228 (1991).


35. See, e.g., SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING CLASS AMERICANS (1990); FREIRE, supra note 32; BUMILLER, supra note 15; John Stone, Power, Ethnicity, and Conflict, 12A STUD. IN L., POL. & SOC’Y. 89 (1992); J. HOCKER & W. WILMOT, INTERPERSONAL CONFLICT (1985); PAUL WEHR, CONFLICT REGULATION (1979); Yngvesson, supra note 15.

36. Boulding, supra note 13, at 2 ("It is my contention that there is a general theory of conflict that can be derived from many different sources and disciplines").
which each party wishes to occupy a position that is incompatible with the wishes of the other." 37

Fundamental disagreements about whether a problem should be seen and labeled as a problem of race or gender discrimination are essential features of civil rights struggles. If one carefully assesses any discrimination dispute, one will see at its heart a disagreement about awareness, about how a particular problem ought to be defined, about what should be perceived as "natural" or "normal" and what should be perceived as a problem that needs to be addressed. 38 Some degree of power will necessarily be yielded whenever a new awareness is incorporated into society's legal or other institutions. 39 Dominant groups naturally will tend to resist relinquishing power in this manner. They will have an interest in remaining color-blind or gender-blind 40 - in the most negative sense - clinging obliviously to their own stereotyped view of the world, despite the validity of the competing awareness of race or gender discrimination. Therein lies the discrimination conflict.

II. THE GROUP PRESENCE IN AWARENESS AND ITS SIGNIFICANCE FOR MEDIATION

No discrimination dispute is merely an individual dispute. An awareness of a problem of race or gender discrimination necessarily brings the race or gender group into the conflict in ways that cannot be ignored.

Awareness of discrimination almost inevitably commences as an awareness of personal injustice, which provides the anger and energy that cause an individual to refuse to be resigned to a particular situation. 41 This is the type of anger that causes an African-American law

37. Id. at 5.

38. MERRY, supra note 35, at 5. See also William L.F. Felstiner, et al., The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . . , 15 LAW & SOC'Y REV. 631, 633-35 (1980) (disputes arise when an experience is perceived as injurious and is transformed by naming it as such); Yngvesson, supra note 15, at 1691 (discussing the power of being in a position to "contrive[reality]").

39. Domination is "inherent in the ability of some to construct authoritative pictures of the way things are." MERRY, supra note 35, at ix. See also Sally Engle Merry, The Discourses of Mediation and the Power of Naming, 2 YALE J.L. & HUMAN. 1 (1990).


41. See, e.g., SHKLAR, supra note 16, at 90 (noting that "[u]npredicted, sudden injustices are resented far more intensely than those one has learned to endure as a member of a group. They tear away the emotional protection created by resignation
professor, jostled and pushed from the sidewalk by adolescent whites, to:

Snatch[,] off my brown silk headrag, my flag of African femininity and propriety, my sign of meek and supplicatory place and presentation...[to] release[,] the armored rage of my short nappy hair (the scalp gleaming bare between the angry wire spikes) and [to] hiss[:]: "Don't I exist for you? See me! And deflect, godammit!"

It is anger against a specific injustice, like the imprisonment that produced Martin Luther King, Jr.'s "Letter From Birmingham Jail."43

That awareness commences as a personal injustice, however, should not obscure the intrinsic group nature of the injustice. Of course, a racial or gender group frequently becomes directly and formally involved in discrimination disputes. Its involvement may result from widespread, community-based civil rights organizing or because a particular incident of discrimination makes it impossible for the group to ignore a pattern of behavior.44 Retaliatory reactions of others to individual complaints of discrimination also may pull the group into a conflict.45 If a discriminatory event occurs in a workplace, groups representing race or gender interests may quickly become involved in the dispute.46 Especially when an individual is represented by a sophisticated or public interest attorney, the group

and allow distress to burst from its confines."); id. at 38, 111 (discrimination is first experienced as a personal fraud, an assault on personal truth).

42. Williams, supra note 32, at 235.

43. See David Benjamin Oppenheimer, Martin Luther King, Walker v. City of Birmingham, and Letter from Birmingham Jail, 26 U.C. Davis L. Rev. 835 (1993). For personal accounts of discrimination, especially the Rosa Parks story, see also Bumiller, supra note 15 passim, and at 48.

44. See Interview by Heidi Burgess et al. with Efrain Martinez, Mediator, Community Relations Service, in Civil Rights Mediation: Oral History Project, at http://www.colorado.edu/conflict/civil_rights/mediations/Efrain_Martinez.html; Interview by Heidi Burgess et al. with Bob Hughes, Mediator, Community Relations Service, in Civil Rights Mediation: Oral History Project, at http://www.colorado.edu/conflict/civil_rights/mediations/Bob_Hughes.html (describing the reaction of the African American community to the shooting of a young Black man in Anchorage). See also Ricigliano et al., supra note 3 (describing Springfield, Massachusetts, and the way in which a specific incident served as a tipping point to bring festering concerns to the surface); Warfield, supra note 3 (discussing triggering incidents).

45. Stephen L. Longenecker, Selma's Peacemaker: Ralph Smeltzer and Civil Rights Mediation 35 (1987) (describing a threat to fire all black employees regardless of whether they were involved in civil rights demonstrations).

46. Garcia, supra note 11; Sturm, supra note 3; Yelnosky, supra note 3.
may formally enter the picture. But it is not inappropriate to think about all discrimination disputes – even those in which the group is not a formal party – as involving a "social enterprise" because of the inherent group presence.

The more familiar links between individual and group in discrimination conflicts are straightforward. For one thing, race or gender discrimination poses a risk to all members of the group, although in a given instance, it might affect only a single member. Individual acts of discrimination are arbitrary and unpredictable. For example, any given victim of gender discrimination is frequently a single woman – among all women exposed to the pervasive risk of discrimination – who happens to have been at the wrong place at the wrong time. Thus, even one act of discrimination against a single individual affects all members of the group; it reminds every member of the group that the risk of discrimination is pervasive and that each is a potential target of discrimination. Although a discriminatory act may inflict personal injustice, it also resonates in awareness as a problem with group dimensions.

Furthermore, the typical ways of resolving individual discrimination disputes bring the racial or gender group into the picture. The


48. Rubenstein, supra note 47, at 1632.


50. See MACKINNON, FEMINISM UNMODIFIED, supra note 33; cf. SHKLAR, supra note 16, at 49 (much of the power of injustice stems from its arbitrariness).
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51. For examples of specific ways in which mediated solutions may not properly respond to group interests and the consequences of neglecting to take a group into account, see Dwight G. Golann, Mediating Legal Disputes: Effective Strategies for Lawyers and Mediators 130-32 (1996) (discussing how affected outsiders can sabotage a mediation); Gourlay & Soderquist, supra note 1, at 280; Linda Stamato, Sexual Harassment in the Workplace: Is Mediation an Appropriate Forum?, 10 Med. Q. 167 (1991); and Interview by Heidi Burgess et al. with Silke Hansen, Mediator, Community Relations Service, in Civil Rights Mediation: Oral History Project, at http://www.colorado.edu/conflict/civil_rights/interviews/Silke_Hansen.html [hereinafter Hansen Interview] (“My concern wasn't to advocate for the community, but if those issues weren't brought to the table, that would undermine the effectiveness of any agreement”).

52. Yngvesson, supra note 15; Sturm, supra note 3.

53. Lauren B. Edelman et al., Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace, 27 L. & Soc'y Rev. 497, 530 (1993) (the way complaints are handled will affect the climate for all).

changes in legal doctrine or legal remedies, which will affect the
group.\textsuperscript{55} Although the legal literature explores the difficulties of rec-
conciling intra-group interests when a group is a formal party to a
dispute,\textsuperscript{56} there is little if any recognition of this issue as it pertains
to the mediation of individual discrimination disputes.\textsuperscript{57} The gap in
the literature is unfortunate, for the group presence in an individual
discrimination dispute is sufficiently strong that an individual can
actually be said to be involved in more than one negotiation, as she
tries to find an appropriate response to discrimination.

In the workplace, for example, an individual disputant must find
a way of successfully renegotiating her relationship with the immedi-
ate agent of discrimination and those persons whose conduct – collec-
tively, formally or informally – sets workplace norms that trigger or
permit discriminatory events. The relationship with the larger work-
place community is probably of central importance, for the immediate
agent is rarely a workplace pariah or a rogue actor at the fringes of
accepted workplace norms. The agent likely enjoys some status and
protection within the larger workplace community, and a person who
has suffered discrimination cannot afford to ignore this reality. To do
so will invite informal retaliation and isolation. Mediation with the
immediate agent of discrimination is frequently, in the modern work-
place and with respect to "second generation" discrimination,\textsuperscript{58}
merely a proxy for mediation with the larger workplace community.

In addition, the individual disputant will need to find a way of
successfully sustaining a relationship with the racial or gender

\textsuperscript{55} See Yngvesson, supra note 15, at 1693 (local practice and popular conscious-
ness foster the development of law); Burt Neuborne & Frederick A. O. Schwarz, Jr., A
Prelude to the Settlement of Wilder, 1987 U. CHI. LEGAL F. 177 (settlements can have
some precedential value, especially if they are not secret).

\textsuperscript{56} See generally Rubenstein, supra note 47. See also Tomiko Brown-Nagin, Race
as Identity Caricature: A Local Legal History Lesson in the Salience of Intraracial
Conflict, 151 U. PA. L. REV. 1913 (2003) (discussing differences within the African-
American community regarding the Atlanta desegregation litigation); Menkel-
Meadow, Dismantling the Master's House, supra note 3, at 1424 (recognizing differ-
ences between women of different racial or ethnic groups); Leti Volpp,
(Mis)Identifying Culture: Asian Women and the "Cultural Defense" 17 HARV. WO-
MEN'S L.J. 57 (1994) (the local group of women affected by a single employer differs
from the abstract, global group of all women); Longenecker, supra note 45 (African
Americans have different ideas about optimal solutions).

\textsuperscript{57} See, e.g., Delgado, supra note 3, at 753 (pointing out that a criminal defense
attorney might advance a cultural defense in mitigation of punishment that stigma-
tizes the defendant's group as "subcultural, violent, or bizarre"), discussing Peter
Margulies, Identity on Trial: Subordination, Social Science Evidence, and Criminal

\textsuperscript{58} Sturm, supra note 3.
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An individual who raises a complaint of discrimination has identified herself with a racial or gender group, and her relationship with the group will not be of merely intellectual interest. She will likely be consulting informally with friends and family about her predicament or, perhaps, she will be consciously aware of the real-world implications of being formally associated with a given identity group.

The individual disputant's need to bring into balance these two relationships— with a racial or gender group and with the larger, workplace community— has significant practical ramifications. She will need to clarify what race or gender signifies for her in relation to the group with which she is associated. She will expend significant energies trying to reconcile her immediate, personal needs— measured by tangible things like salary or promotion— with her loyalty to the group. She will know that personal survival sometimes depends on neglecting her group and that she may pay a price for not accommodating her needs to the norms of the larger, workplace community. On the other hand, she will understand that the long-term success of her struggle may rest on her refusal to neglect the group.

Whether through explicit acknowledgement of or engagement only through internal struggle, individual discrimination disputants are, in effect, involved in a mediation with two different collectivities: the racial or gender group and the larger, workplace community. Thus, the individual disputant will constantly be recalibrating her approach to these two groups, sometimes choosing to forcefully challenge and compete with the norms of the larger community, sometimes opting for cooperation.

59. For general discussions of how individuals in society struggle with this tension, see Robert J. Condlin, Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role, 51 MD. L. REV. 1, 29-30 (1992) (discussing the need to reconcile the public and the private self); and Bouiding, supra note 13, at 172-73 (defining the choice between peer group and other group). For discussions applicable to civil rights disputes, see Bumiller, supra note 15, at 84-88; and Howard Gadlin, Careful Maneuvers: Mediating Sexual Harassment, 7 NEGOTIATION J. 139, 145 (1991).

60. See, e.g., Balc, supra note 1, at 261 (discussing retaliation against persons who complained about sexual harassment in the Los Angeles County Sheriff's Department).

61. See Bumiller, supra note 15, at 83, 93, for examples of what happens when the struggle remains internal or is suppressed.

62. The choice between competition and cooperation, or between contesting and conforming, is a theme in mediation literature. See, e.g., Carrie Menkel-Meadow, Access to Justice: The Social Responsibility of Lawyers: When Litigation is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering, 10 WASH. U. J.L. & POLY 37, 50 (2002); Patricia A. Gwartney-Gibbs & Denise H. Lach, Workplace Dispute Resolution and Gender Inequality, 7 NEGOTIATION J. 187 (1991), although the implications of the choice in discrimination disputes have not been fully explored.
In disputes in which gender or race is a factor, the entire history of discrimination becomes relevant to these two struggles. For example, members of racial minorities tend to think of incidents of racism as being part of a history of structural, pervasive racism rather than as aberrational, isolated events.\(^6\) Personal injustice may be a “triggering” event, but it taps into and is informed by an understanding of social structures and hierarchies that have historically operated against groups.\(^6\) Racism is clearly seen as Douglass’ “old snake,” which has taken different forms at different times but can surely be trusted to reappear in a different skin.\(^6\) That is why experienced civil rights mediators believe that an understanding of history is an essential attribute of an effective mediator.\(^6\)

Although members of the larger community might wish to see individual incidents of racism or sexism as aberrant, their reactions to complaints of discrimination frequently reveal that they, too, are aware that an individual incident is part of an historical continuum. For example, persons whose institutions and world-views are challenged in a discrimination dispute understand that even disputes seemingly focused on small problems can have huge ramifications and inevitable spillover effects. They know that any resolution of a particular problem in favor of women or minorities will tend to validate or augment the awareness of a gender or racial group and will

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64. See Warfield, supra note 3.

65. See Douglass, supra note 14.

66. See Interview by Heidi Burgess et al. with Werner Petterson, Mediator, Community Relations Service, in Civil Rights Mediation: Oral History Project, at http://www.colorado.edu/conflict/civil_rights/interviews/Werner_Petterson.html (to be an effective civil rights mediator, “you have to be a historian”); Interview by Heidi Burgess and Dana Johnson with Will Reed, Field Representative, Community Relations Service, in Civil Rights Mediation: Oral History Project, at http://www.colorado.edu/conflict/civil_rights/interviews/Will_Reed.html (to be effective, “you have to know what people have historically gone through about certain things. You also have to be aware of some areas of history.”); Hansen Interview supra note 51 (to be an effective civil rights mediator, “you need an understanding of the history... not just the problem in its current form... You may know a young black person in your church whose parents might be richer than you are, and you can’t understand why he’s still discontent. For many white people, it’s difficult to understand how the life of a person of color is shaped not just by his or her own personal history, but the history of his or her people.”) Cf. Richard A. Salem, Mediation as An Alternative to Civil Rights Litigation, in Discretion, Justice and Democracy: A Public Policy Perspective 90, 96 (Carl F. Pinkele & William C. Louthran eds., 1985) (touting mediation for its capacity to take history into account); Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 YALE L.J. 1545 (1991) (the past must not be forgotten in dispute resolution).
increase the future risk to the foundations of all dominant institutions and norms. In the early 1800s, for example, congressional defenders of slavery feared that Congress’ simple act of receiving petitions against slavery would indirectly acknowledge the right of African Americans to demand inclusion in the political community. They therefore vigorously resisted not merely the substance but also the receipt of the petitions. More recently, the white community in Montgomery, Alabama, rejected one of the first proposals for resolving the Montgomery bus boycott despite the fact that the proposal would have substantially preserved racial segregation. It understood that even a minor inroad into the system of racial segregation would pose a significant future threat to the system as a whole.

Thus, both discrimination complainants and their opponents think in historical terms, which draws in group identity. But it is the complainants with which this Article is concerned, for their sense of group history and predicament means that individual disputants will see beyond their individual complaint. At some level, all discrimination disputes entail a quintessentially human struggle of people to secure themselves in history. In A Small Place, Jamaica Kincaid describes this phenomenon. She ascribes the subservient state of African Antiguans in part to the absence of a sense of history that would draw them beyond the personal, the trivial, and the daily event. Confronting a frustratingly persistent powerlessness, she asks:

And might not knowing why they are the way they are, why they do the things they do, why they live the way they live and in the place they live, why the things that happened to them happened, lead these people to a different relationship with the world, a more demanding relationship, a relationship in which they are not victims all the time of every bad idea that flits across the mind of the world?

The way in which group history is wrapped up in individual discrimination complaints will be viewed as problematic if one believes that a focus on past history necessarily gets in the way of thinking
constructively about solutions to a problem. If, for example, a disputant takes into account group history, she will inevitably consider “collective sentiments, historical memories, political myths . . . and traditions of racism,” all of which may interfere with a pragmatic, problem-solving perspective. But group history also offers a disputant an opportunity to take into account whatever “history of consensus” and tolerance may exist in relations between her group and the larger community. If these latter experiences are included in an account of group history, group history will not drive the dispute necessarily toward division.

In addition, group history is simply too important to remedial choice and self-determination objectives to be ignored in a discrimination dispute. One must remember that an individual disputant is involved in a negotiation about more than one group relationship. She cannot identify an appropriate remedial relationship with the larger community without also simultaneously reaching a clear understanding about her relationship with her racial or gender group. Although individuals will value their relationship to the group, its history, and its future differently, effacing the group presence from a discrimination dispute – and insisting that only the disputant’s relationship with the larger community is worthy of attention – must be viewed as a distortion of the dispute and its remedial options. Individual disputants need an opportunity to consider all of the relationships inherent in a discrimination dispute to enable them to make good choices about remedies.

Furthermore, isolating a person from a group with which she chooses to identify herself is, in discrimination disputes, a real harm. Discrimination is not slavery, and slavery is not mere discrimination, but the previous discussion on the harms and essential

73. Cf. infra notes 87-89 and accompanying text.
74. Stone, supra note 35, at 95.
75. Warfield, supra note 3, at 152.
76. See Gadlin, supra note 63, at 37 (different people will give different weights to group and individual identity).
77. The freedom to enter into fruitful, productive human relationships of one’s choice is a basic human right. See, e.g., Jason Mazzone, Freedom’s Associations, 77 WASH. L. REV. 639 (2002); Thomas I. Emerson, Freedom of Association and Freedom of Expression, 74 YALE L.J. 1 (1964). The larger community that resists changes in relationships portended by a new awareness frequently mounts general and direct attacks on the humanity of outsiders, characterizing them as evil, deviant, or abnormal in some way. See, e.g., Terrell A. Northrup, The Dynamic of Identity in Personal and Social Conflict, in INTRACTABLE CONFLICTS AND THEIR TRANSFORMATION 55 (Louis Kriesberg et al. eds., 1989); KINCAID, supra note 29, at 26-34; BUMILLER, supra note 15, at 73-74; Evan Wolfson, Civil Rights, Human Rights, Gay Rights: Minorities and
evils of slavery shows that isolating an individual from the group with which she chooses to identify is more than a trivial harm. If a mediation process appears to insist on the same individual-group isolation that historically has been used to deprive minority groups of autonomy, the process itself will be deficient. When an individual has an awareness of group history, she begins to become more than "a good nobody," is empowered to make truly informed and autonomous choices about her fate, and is better able to resist becoming a passive victim "of every bad idea that flits across the mind of the world." Mediators should recognize that a process that does not take into account the individual-group relationship, including group history, will validate arguments that mediation is about something other than self-determination.

In thinking about how mediation processes might be adapted to better respond to discrimination disputes, it is important to recognize that an awareness of the group presence in an individual discrimination dispute is a high value state of being, not a pathology. If the

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See supra notes 29-32 and accompanying text.

Kincaid, supra note 29, at 55. For discussion of the relationship between empowerment and group identification, see Sheila Foster, Difference and Equality: A Critical Assessment of the Concept of "Diversity," 1993 Wis. L. Rev. 105 (1993). Insofar as tangible links to the group develop out of that awareness, the group is an invaluable source of strength. See supra notes 44-48 and accompanying text. As the Supreme Court has said, "[b]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost." Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 294 (1981); David Fellman, The Constitutional Right of Association (Univ. of Chicago Press 1968) (recalling Tocqueville's observation that associations are particularly important as protections against tyranny of the majority and abuse of political power).

Empowerment can signify many things, but in this Article it refers to the capacity to make free and meaningful choices about mediation processes and outcomes. In this respect, it serves mediation's primary goal of self-determination. See supra note 8. Of course, a lot of things can affect power in dispute resolution processes. See, e.g., Michelle R. Evans, Women and Mediation: Toward a Formulation of an Interdisciplinary Empirical Model to Determine Equity in Dispute Resolution, 17 Ohio St. J. On Disp. Resol. 145 (2001) (discussing power effects of gender differences in negotiating styles); Sara Cobb, Empowerment and Mediation: A Narrative Perspective, 9 Neg. J. 245 (1993) (describing the relationship between the opportunities for a party to speak from a position of power and the coherence of that party's narrative); Gadlin, supra note 63, at 37 (noting factors that bear on power).

Kincaid, supra note 29, at 57.

Delgado, supra note 2; and Boulding, supra note 13, at 308. This Article does not address the issue of whether conflict, in some or all of its manifestations, is pathological. The point here is that awareness and recognition of a group presence
race or gender group relationship is by intent or carelessness neglected, mediation will not fulfill its promise. On the other hand, if given an opportunity to grapple with her relationship to her peer group as well as to the larger community, an individual disputant will be in a good position to take advantage of what mediation has to offer. The trick is to find a practical way of ensuring that mediation processes do not ignore the group presence. Indeed, the task is to find a way of affirmatively cultivating the group presence and the awareness of the connection between individual and group.

III. HONORING AWARENESS AND THE GROUP PRESENCE IN MEDIATION: A PROCESS SUGGESTION

This Article proposes that mediators consciously use first-phase, private caucuses in individual discrimination disputes. The express purpose of doing so would be to explore and enhance awareness of the group presence for the discrimination claimant. The first-phase caucus would thus prepare an individual disputant to participate as an effective problem-solver and empowered bargainer in the mediation.

A standard critique of alternative dispute resolution ("ADR") processes is that they tend to ignore the class basis of many types of
certainly is not pathological, and that these features of an individual discrimination dispute are worth not only preserving but nurturing.

83. Yelnosky, supra note 3, at 617, proposes that the group ought to formally be brought into the dispute as a party and discusses ways it might ethically be accomplished. Although introducing the formal group might ensure that discrimination disputes do not ignore "public goods," id. at 610-11, or ensure that important stakeholders are not omitted, Gray, supra note 11, at 262, the proposal in this Article does not deal directly with these or other interesting issues, for example, whether the formal presence of a group will come to dominate the individual dispute. Cf. Rubenstein, supra note 47, at 1672-73 (asking what would be the status and right of participation of a group that is a formal party to litigation).

84. Courts also employ a special procedure to respond to the formal group presence in class action settlements. See, e.g., Marjorie A. Silver, Fairness and Finality: Third-Party Challenges to Employment Discrimination Consent Decrees After the 1991 Civil Rights Act, 62 Fordham L. Rev. 321 (1993); Maimon Schwarzschild, Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform, 1984 Duke L.J. 897, 909-34 (discussing the use of fairness hearings to avoid perceptions of procedural unfairness). Fairness hearings are typically held after the primary disputing parties have proposed concrete solutions to a problem. They come too late in the process to serve some objectives, such as offering a realistic opportunity for third parties to identify constructive suggestions that might improve settlement options. In contrast, the first-phase, private caucus introduces the group presence at an early stage of the proceedings.
conflicts. For persons who believe this to be the case, one option is simply to avoid ADR. This Article eschews the categorical avoidance option. Instead, it searches for a way to bring the group into the mediation process in a constructive way, even if race or gender is only a background or unspoken factor when a discrimination dispute first surfaces.

Mediation literature cautions against cultivating group identity in discrimination conflicts. When group identity dominates a conflict, some mediators argue that disputants are locked into a choreographed dance governed by set expectations, in which everyone plays a predetermined role. Some mediators may believe that group identity merely perpetuates conflict. Some may worry that disputants who link themselves to a particular group are vulnerable if the group itself is associated with negative gender or racial stereotypes.

These are not trivial concerns, but are overblown in many discussions of mediation, even when a group is a formal party to the mediation. Some mediators have experience dealing with the complexity of group identity issues when a group is a formal party to a mediation. And there are benefits to group identity that do not necessarily confound the possibility of consensus. For example, members of race-based or gender-based workplace identity committees can reap significant benefits from group identification without sacrificing their ties to the larger community. Indeed, participants in such committees seem to affirmatively desire not to sever ties with dominant communities. The fear that the group presence will necessarily stand

85. Scholarly critiques of ADR hold that ADR ignores the group. See, e.g., Delgado et al., supra note 2, at 1397; Yngvesson, supra note 15, at 1706; Edelman et al., supra note 53, at 502, 504; Silver, supra note 2; cf. Rubenstein, supra note 47 (discussing a similar problem in litigation).


87. See Gadlin, supra note 63, at 35-36; Cobb, supra note 80, at 251 (discussing how conflict narratives become entrenched).


89. See Gunning, supra note 2, at 70, 76-77.

90. For a discussion of both advantages and disadvantages of introducing the group into mediation, see Yelnosky, supra note 3, at 617-20.

91. In addition to the sources cited throughout this Article, see Oral History Project, at http://www.colorado.edu/conflict/civil_rights.

92. See Garcia, supra note 11, at 83-84.

93. See id. at 119-20.
in the way of consensus ignores the fact that groups share a history of living together as well as of disputing with one another.94

Moreover, mediation literature focuses on the difficulties group identity creates in joint bargaining sessions, when opponents are attempting to work cooperatively toward a solution.95 The proposal in this Article pertains to private caucuses, where temporarily cultivating the group presence before joint bargaining begins is a constructive act. In the first-phase caucus, the group presence can serve mediation's goals of promoting good problem-solving and self-determination. And it can do so without reinforcing opponents who may act on the basis of negative group stereotypes and without so intensifying the driving force of a conflict that mediation is no longer possible.

Holding separate, confidential caucuses with only one party to a dispute is not a revolutionary idea in mediation.96 Indeed, one treatise on mediation asserts that caucuses are the distinctive feature of mediation and the setting where most of the important work of mediation is accomplished.97 Early caucusing is viewed as especially helpful in race-based community disputes, as illustrated by a series of interviews conducted by the University of Colorado Conflict Research Consortium with mediators from the Community Relations Service of the United States Department of Justice ("CRS").98 CRS mediators routinely meet individually and confidentially with community groups prior to commencing the formal mediation between adversaries. Some mediators describe the meetings as "coaching" sessions.99

94. See supra note 75 and accompanying text.
95. See, e.g., Gunning, supra note 2, at 76-77.
96. For descriptions of the traditional caucus and its objectives, see Moore, supra note 11, at 262-71. Other useful commentary on caucuses may be found in Golann, supra note 51, at 68-73 and J. Michael Keating, Jr., In Mediation, Caucus Can Be a Powerful Tool, 14 ALTERNATIVES TO HIGH COSTS LITIG. 85 (1996).
97. Golann, supra note 51, at 68 (emphasis added); see also Keating, supra note 96, at 85 ("The caucus is one of the mediator's most powerful tools for moving parties toward settlement.").
98. See Oral History Project, supra note 91. See also Ricigliano et al., supra note 3, at 96 (describing early use of caucuses and meetings to deal with racial tensions within a given community); Warfield, supra note 3, at 155-56 (early planning is essential in community racial conflicts).
Others think of them as an opportunity to provide technical assistance. In these caucuses, ground rules for the mediation with opposing parties are set. Mediators help groups "identify what their interests and concerns are . . ., what they hope to get out of [the] process," and to understand that they need "a good agenda". As one CRS mediator puts it, the group needs "to be very clear about . . . concerns . . . and they need to be definable . . . [and] stated in a way that they can be resolved." CRS mediation practices are consistent with those in routine mediations, where mediators use first-phase caucuses to decide if mediation is possible, to probe for potential obstacles to settlement, to gather information, to help a specific party think creatively and clearly about priorities and objectives in mediation, or to educate a party on the ins and outs of mediation processes.

In an individual discrimination dispute, however, the group is by definition not a formal party to the mediation. Its presence is figurative, virtual. Under these circumstances, one may legitimately ask what it means to use a first-phase caucus to cultivate the group presence in the mediation of an individual discrimination dispute.

To state what is perhaps the obvious, a mediator's first step toward cultivating the group presence must be to avoid suppressing a group presence that is obviously a factor in a dispute. Many mediators who work in the civil rights field acknowledge, de facto, the group presence by, for example, using teams of mediators representing different racial or gender groups. In the workplace, more or less formal identity groups may already be a background factor taken into account in processing individual grievances. But there is evidence that some mediators suppress the group presence when it does

100. Hansen Interview, supra note 51.
101. See Ferrell Interview, supra note 99.
102. Hansen Interview, supra note 51. See also Warfield, supra note 3, at 160.
104. Ferrell Interview, supra note 99.
105. Gray, supra note 11, at 167-68.
106. Golann, supra note 51, at 70.
107. See Keating, supra note 96, at 85.
108. See id.; Gray, supra note 11, at 170 (meetings help groups get organized).
109. See Menkel-Meadow, When Dispute Resolution Begets, supra note 2, at 1905 (crediting Lawrence Susskind for the use of caucuses to train parties in negotiation).
110. See Gunning, supra note 2, at 88-89; see also Garcia, supra note 11, at 160 (suggesting use of identity caucus members as third party mediators in intra-union disputes).
111. See Garcia, supra note 11; Sturm, supra note 3, at 530-31.
appear in order to guard against its intrusion into the individual dispute. Suppression, for example, may be a particular problem when internal mediators are asked by organizations to handle workplace disputes. Under these circumstances, mediators will have some obligation to serve institutional interests,\textsuperscript{112} one of which may be simply to avoid litigation.\textsuperscript{113} This objective is frequently best served by narrowing the dispute at all costs. In addition, certain mediation philosophies may tend to encourage suppression of the group presence.\textsuperscript{114} Or, suppression may occur simply because a mediator just does not know what to do with the group presence when it merely "tinges" and is not at the precise center of the dispute.\textsuperscript{115} To properly make use of a first-phase caucus in an individual discrimination dispute, mediators must at the very least resist suppression of an evident group presence.

But a mediator must do more. Just because an individual is not speaking openly about the group presence in an individual discrimination dispute does not mean that the group is absent from the dispute. A mediator must actually look for, probe, and even enhance the group presence. In other words, she must cultivate it.

The precise mechanisms for cultivating the presence through a first-phase caucus must be left to individual mediators, but the objectives of cultivating the presence will be the same in every mediation. First, a mediator will cultivate the group presence to prepare the disputant to be an effective problem-solver. Second, a mediator will cultivate the group presence to prepare the disputant to truly exercise self-determination with respect to both mediation outcomes and the joint bargaining process that will occur in mediation. These two objectives are explored in the following sections.

\textsuperscript{112} See Edelman et al., supra note 53, at 506-07, 528 (mediators who act on behalf of institutions are empowered to serve institutional interests and may exert coercion to serve those interests).

\textsuperscript{113} See Sturm, supra note 3, at 543.

\textsuperscript{114} These philosophies have received a fair bit of scholarly attention and criticism. See, e.g., Delgado et al., supra note 2 (focusing on restorative justice); Yngvesson, supra note 15, at 1706, 1708 (therapeutic discourse that creates a relationship between mediator and party improperly supplants the development of a relationship between individual and racial group); Ellen Waldman, Therapeutic Jurisprudence / Preventive Law and Alternative Dispute Resolution: Substituting Needs for Rights in Mediation: Therapeutic or Disabling?, 5 PSYCH. PUB. POL’Y & L. 1103, 1111-13 (1999) (focusing on therapeutic theories of mediation); Fiss, Out of Eden, supra note 2, at 1672 (criticizing the religious perspective embodied in Andrew W. McThenia & Thomas L. Shaffer, For Reconciliation, 94 YALE L.J. 1660 (1985)).

\textsuperscript{115} Gadlin, supra note 63, at 35.
A. Cultivating the Group Presence as Preparation for Good Problem-Solving

In any first-phase caucus, a mediator begins to explore the underlying facts of the dispute, to test how an individual thinks about the dispute and about her goals in mediation, and to anticipate a range of potential resolutions for the dispute. In undertaking these tasks in an individual discrimination dispute, a mediator will undoubtedly discern the group presence. The only response consistent with a mediator's obligation to identify the real stakes in a dispute so as to arrive at an effective remedy is to confront the group presence and to permit its implications to be fully explored. A mediator must look beyond the individual "triggering incident."

As the previous discussion of the importance of the group presence to remedies shows, good decisions about remedies may not be made if the group presence is not fully acknowledged and explored. Good remedial decisions depend on an accurate understandings of what is at stake in a dispute and, in an individual discrimination dispute, the following relational interests are at stake: the relationship with the identity group and the relationship with the larger workplace community.

Consider, for example, an individual who says that she is interested in ensuring that what happened to her will not happen to anyone else, as well as in finding a solution for her own plight. This individual has explicitly expressed a desire for a remedy that strikes an appropriate remedial balance between her relationship with her identity group and her relationship with the larger community. Even when the desire is not openly voiced, however, a need for a similar remedial balance is inherent in the discrimination dispute. An individual discrimination disputant is looking for a remedy that allows her to satisfy both a need to contest and a need to conform. The group presence must be taken into account by a mediator, not because the group itself deserves consideration for its own benefit, but because the group presence as preparation for good problem-solving is essential.

116. See, e.g., Keating, supra note 96, at 85 (in early caucuses, mediators are already trying to discern the potential structure of a resolution); Balc, supra note 1, at 246 (prior to the mediation, parties must be permitted to assess their situation).

117. See, for example, the woman described in Carol A. Wittenberg et al., Employment Disputes, in Golann, supra note 51, at 461.

118. See supra note 62 and accompanying text.

119. Whether mediators have ethical obligations to absent third parties is a hotly debated topic. See Menkel-Meadow, When Dispute Resolution Begets, supra note 2, at 1919-20 (examining to what extent mediators bear responsibility for the results of their mediation sessions).
but because the relational interests of the individual disputant demand consideration of the group.

In addition, specific remedial solutions will look better or worse to a given individual, depending on their consequences for the group. For example, whether a given remedy offers protection to the group may have quite concrete ramifications for the individual who, after all, remains a member of the group. If an individual accedes to a remedy that leaves discriminatory institutions, structures, procedures, or people in place, she may be agreeing to put herself at future risk. A mediator must tease out the group presence to ensure that problematic structures, procedures, and people are no longer in a position to threaten discriminatory harm.\textsuperscript{120} Furthermore, some remedies tailored to directly help only the individual will require the assistance of a group to enforce. And, remedies intended primarily to benefit an individual may be sabotaged if the group rejects them as having detrimental effects on group interests. Thus, an accurate assessment of remedial options requires consideration of the group.

To accurately assess remedial options, a mediator may even wish to bring group representatives into the mediation as non-party consultants – persons who can provide needed information about patterns of conduct and histories of discrimination that will bear on whether any given remedy will be truly effective.\textsuperscript{121} Taking this information into account may cause a disputant to see a problem in a new light and to see new remedial options.\textsuperscript{122} Such information

\begin{itemize}
\item \textsuperscript{120} The EEOC reportedly fails to uncover patterns and practices of discrimination when they exist because its mediation process is permitted to focus too exclusively on individuals. See Mayer, supra note 86, at 167; Mark D. Klimek, \emph{Discrimination Claims Under Title VII: Where Mandatory Arbitration Goes Too Far}, 8 Ohio St. J. on Disp. Resol. 425, 435 (1993).
\item \textsuperscript{121} See Sturm, supra note 3, at 531-34. Talbot, supra note 12, at 660, cautions, however, that current employees may not wish to become involved in another's dispute. Just as a mediator might bring in third-party expert witnesses to assist in resolving a dispute, see Scanlon, supra note 11, at 35-36, so groups might formally be brought in with this status. Bringing in a group as a third-party expert is, of course, different from bringing in the group as a formal party, but introducing a group into the process in any capacity will require a more flexible approach to confidentiality see Ellen E. Deason, \emph{Predictable Mediation Confidentiality in the U.S. Federal System}, 17 Ohio St. J. Disp. Resol. 239 (2002) ("The importance of confidentiality is axiomatic in mediation."). and while statutes may bear on this issue, see id. at 256-74 (discussing statutory protections), the precise boundaries and terms of confidentiality are open to negotiation. For a review of some confidentiality issues in mediation see Ellen E. Deason, \emph{Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality}, 35 U.C. Davis L. Rev. 33 (2001); Kevin Gibson, \emph{Confidentiality in Mediation: A Moral Reassessment}, 1992 J. Disp. Resol. 25; Maute, supra note 54.
\item \textsuperscript{122} See, e.g., Felstiner et al., supra note 38, at 639-40 (the entry of new parties into a dispute will change the way the dispute is seen). One CRS mediator provides a
\end{itemize}
might also give a mediator a better sense of what habits of thought and behavior, what attitudes of resistance and problem-solving, she will be dealing with when bargaining begins. And it may help a mediator identify persons who will be in a position to help in the practical task of remedial enforcement.

Cultivating the group presence in a first-phase caucus can help ensure that the stakes in mediation are accurately assessed and that remedies are effectively structured to provide enforceable protection to the individual. It reinforces a practical, beneficial, problem-solving mindset. But a mediator will also want to cultivate the group presence as a way of supporting self-determination in decisions made about mediation outcomes and processes.

B. Cultivating the Group Presence for Self-Determination in Outcome and Process

A common critique of mediation processes in discrimination disputes is that they disempower disputants. If empowered participation consists of a disputant's capacity to make free and informed decisions as to both mediation process and outcome, a first-phase caucus is a good place to develop or support the capacity through cultivating the group presence.

A hypothetical example of how a discrimination dispute may evolve when a disputant takes into account the existence of a third-party group: Community members initially focus on getting rid of a school superintendent they perceive as racist. But once the mediator helps these individuals realize that the School Board, with the responsibility for hiring and firing the superintendent, might also be part of the problem, they move to an understanding that structural changes might be required to deal with entrenched problems of racism. See Hansen Interview, supra note 51.

123. See, e.g., Ricigliano et al., supra note 3, at 113-14 (describing how much work is done with dominant groups).

124. Pulling in a group gives mediators an opportunity to identify internal facilitators, see Warfield, supra note 3, and helps build the capacity for continued struggle against the intractable problem of discrimination, see Ricigliano et al., supra note 3. Sturms, supra note 3, at 490, considers the capacity for future self-help as one criterion for determining whether a mediation process is successful. As one CRS mediator puts it, ultimately it is the group, not an individual, "that is going to hold the right people to account." Hansen Interview, supra note 51.

125. See, e.g., Shailor, supra note 1, at 7, 13-14; see also Harkavy, supra note 1, at 160-61 (personal empowerment, the ability to control the terms of resolution, is a "recognition of personhood").

126. See supra note 8. Although I do not agree with all of her conclusions, Cobb, supra note 80, offers an insightful critique of the empowerment issue in mediation.

127. See Gewurz, supra note 8, at 153 (discussing the need for an early assessment of relative power). See also Hansen Interview, supra note 51; Interview by Heidi Burgess et al. with Wally Warfield, Mediator, Community Relations Service, in Civil Rights Mediation: Oral History Project, at http://www.colorado.edu/conflict/civil_rights/Interviews/Wally_Warfield.html [hereinafter Warfield Interview]; Interview by
As previous discussions attest, a mediator who cultivates the group presence will give an individual discrimination disputant the opportunity to negotiate her relationships with the racial or gender group and the larger community. Providing this opportunity enables the disputant to begin to think clearly and coherently about what is at stake for her and what remedial options will actually serve her interests. Clarity, sophistication, and coherence of thought in these respects are the primary protections for self-determination in the mediation. For example, how a dispute is initially framed will have a strong influence on the ultimate agreement. If a disputant has framed her complaint in a coherent narrative that draws on common cultural stories that honor all aspects of the group history, she will be relatively more powerful. If she has clarity in these respects, she will be able to better speak without intimidation and to better stick to her goals. Self-determination is directly related to the clarity with which individual disputants negotiate their relationships with both race or gender group and the larger workplace community.

A mediator will also inevitably enhance self-determination by cultivating the group presence when she explores the exit option that exists in any discrimination dispute — the right to turn to judicial processes and legal remedies for group discrimination. Having a

Heidi Burgess et al. with Ozell Sutton, Regional Director, Community Relations Service, in Civil Rights Mediation: Oral History Project, at http://www.colorado.edu/conflict/civil_rights/interviews/Ozell_Sutton.html (an assessment of power, and even power-balancing, needs to be done early in the process).

128. See Cobb, supra note 80, at 251-252.

129. See Greenebaum, supra note 11, at 118 (how the dispute is conceived will dictate its resolution); Cobb, supra note 80, at 250 (the first narrative frames the agreement); id. at 253 (a mediator might want to have very early, separate meetings with parties to explore the narratives).

130. See generally Gunning, supra note 2; Cobb, supra note 80, at 251-252. If disputants know how to frame and think about the dispute, if the real stakes in the dispute are on the table, and if all interests are properly identified and named, the more powerful opponent is not free to dominate the framing of issues. See Warfield, supra note 3; cf. Onora O'Neill, Reason and the Resolution of Disputes, 67 NOTRE DAME L. REV. 1365, 1369 (1992) (outsiders are at a disadvantage in debate because the terms of the debate are generally set by dominant groups).

131. See Gunning, supra note 2, at 91-92.

132. See Gewurz, supra note 8.

133. There is an increasing acknowledgment that legal rights are likely to be introduced in mediation, and that mediators in certain types of disputes may need some knowledge of the law, for example, if they are to be called on to assume an evaluative role. See Harkavy, supra note 1, at 167; Kochan et al., supra note 1, at 275. Even if not performing an evaluative role, mediators are frequently called on to work closely with legal counsel to parties, which may require some knowledge of applicable law. For a good discussion of the lawyer's role in mediation, see Jean R. Sternlight, Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to
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clear sense of alternatives to the mediation process empowers any mediation participant, and the first-phase caucus can be used to explore these alternatives and to remind disputants that they have a veto power over any proposed outcome. In a discrimination dispute, the most potent exit option – abandoning mediation in favor of legal, group discrimination remedies – is necessarily a group exit option and must be thought of as such.

Some mediators will not wish to talk about the group exit option and will want to avoid so-called “rights talk” for a variety of reasons, including its supposed polarizing effects. Most concerns about discussions of rights, however, relate to the joint bargaining process, not to a first-phase caucus. In a caucus, skilled mediators can help individual disputants think about group rights and the group exit option without unduly polarizing a dispute. In this setting, group rights become simply part of the problem-solving calculus. They are relevant to a good assessment of what is at stake and of relevant remedial options. They may help establish appropriate behavioral and remedial aspirations, which in turn will enable parties to better articulate why and where given conduct falls short. Although the meaning of discrimination, group identity, and connection to the larger community is specific to each individual, no given individual needs to negotiate this meaning entirely on her own. Insofar as the legal tradition can provide some help in thinking about discrimination, the legal tradition should be made available to the disputant. And, of course, the legal tradition will include reminders of group ties to the larger community as well as ways of thinking about single-group


134. Gewurz, supra note 8, at 153; Evans, supra note 80, at 174; and Weckstein, supra note 8, at 560-62.

135. See the discussions in, for example, Neal Milner, The Denigration of Rights and the Persistence of Rights Talk: A Cultural Portrait, 14 Law & Soc. Inquiry 631 (1989); and Waldman, supra note 114.

136. Whether unduly polarizing effects even exist in mediation is a subject of debate. Many people remind us that rights can have a unifying effect. See, e.g., Shklar, supra note 16, at 126; Cobb, supra note 80, at 252; Milner, supra note 135, at 656, 671, 674; and Martha Minow, Interpreting Rights: An Essay for Robert Cover, 96 Yale L.J. 1860 (1987).

137. See Edelman et al., supra note 53, at 529, 530 (noting that individuals who resolve disputes through mediation may be forced to renegotiate alone the meaning of discrimination).
Thus, discussion of group rights and the group exit option can empower individual disputants without undermining the mediation.139

Self-determination in mediation is not merely about ensuring that final, remedial agreements will be made freely. Mediation's promise of self-determination also encompasses assurances of autonomy and control of the bargaining process of the mediation; and the bargaining process itself includes not only the formal procedure to which all parties agree to adhere, but also all of the smaller choices that determine the direction a given mediation will take.140 Fulfilling the promise of self-determination is, therefore, a formidable task.

Enhancing the group presence in an individual discrimination dispute, through the use of a first-phase caucus, will help ensure that choices made in mediation outcome and process will be informed and truly autonomous. Indeed, a mediator should have an ethical obligation to take an active role in cultivating the group presence even if a disputant seems unaware of the group implications of her dispute and even if the mediator fears that the chances of reaching a settlement will be lessened by enhancing the group presence.

The ethical obligation does not exist because mediators owe something to the group, as a group. It exists because mediators have obligations to the parties and to the process.141 If enhancement of the group presence will preserve the integrity of mediation as a process of self-determination and the outcomes of mediation as reflective of the true stakes in a dispute, mediators must be activists in working with the group presence.142 In fact, involving the group at an

138. Rights – even rights that are viewed as deficiently “individualistic” when invoked in litigation – have, in this setting, the ability to draw individuals closer to a group. See supra note 135 regarding the polarizing effects of rights-based discussions.

139. Rights can remind individuals that complaints are legitimate and worthy of being taken seriously. Milner, supra note 135 (arguing that rights may provide the energy needed to pursue change); Grillo, supra note 66 (contending that the ability to assert a legal right helps women know that their positions have validity and gives them the energy to pursue change); MERRY, supra note 39 (discussing how rights give people a sense of entitlement).

140. See DEBORAH M. KOLB & JUDITH WILLIAMS, THE SHADOW NEGOTIATION: HOW WOMEN CAN MASTER THE HIDDEN AGENDAS THAT DETERMINE BARGAINING SUCCESS (2000) (discussing all of the small moves and repositioning that occur in bargaining, and how choices made during this process will tip the scales regarding outcomes).

141. See Menkel-Meadow, When Dispute Resolution Begets, supra note 2, at 1912 (discussing how mediators have an ethical obligation to protect self-determination). Menkel-Meadow provides an interesting overview of a variety of ethical issues for mediators. Id. at 1911-22. See also supra notes 118-119 and accompanying text.

142. Weckstein, supra note 8, explains why mediators can be activists when it comes to process. As activists, mediators use separate caucuses, claim a right to
early stage may actually minimize dilemmas mediators might otherwise face. Although mediation literature on empowerment is sensitive to imbalances of power that arise in mediation, it tends to focus on what a mediator himself might do in that setting to rectify power imbalances. Because of the perceived need for activist intervention, concerns are expressed that the role of the mediator as a neutral party will be compromised.¹⁴³ Cultivating the group presence in a first-phase caucus is a self-help measure that, if effectively managed, will have spillover effects that may ameliorate the need for mediator intervention later on.¹⁴⁴

IV. CONCLUDING THOUGHTS

Using first-phase, private caucuses to enhance the group presence in an individual discrimination dispute may not inevitably and always be appropriate, but mediators and civil rights advocates should take seriously the group presence in an individual discrimination dispute and take appropriate advantage of the opportunities offered by first-phase caucuses to work with that presence. This Article argues that enhancing awareness and the group presence through first-phase caucuses will prepare individual disputants to be good problem-solvers and ensure self-determination in process and outcome.¹⁴⁵

¹⁴³ Evans, supra note 80, at 169; Gewurz, supra note 8; Grillo, supra note 66, at 1592; Gunning, supra note 2; Weckstein, supra note 8.

¹⁴⁴ As long as the fact and purpose of the meetings is transparent, there should be no ethical issues with which to deal. Consistent with this objective, the CRS mediators work to ensure that the process is transparent – that the other side understands why the meetings are being held. Ferrell Interview, supra note 99; Warfield Interview, supra note 127. Cf. BENNETT G. PICKER, MEDIATION PRACTICE GUIDE: A HANDBOOK FOR RESOLVING BUSINESS DISPUTES (American Bar Association 2d ed. 2003) (1998) (arguing caucuses can be used to address disputes among multiple defendants).

¹⁴⁵ There may, of course, be other reasons to pursue the recommendations of this Article. For example, if victims of workplace discrimination can be assured that appropriate attention will be paid to the group presence, they may increasingly turn to mediation rather than courts if courts appear reluctant to grant formal class action status to a discrimination dispute. See, e.g., Mijha Butcher, Using Mediation to Remedy Civil Rights Violations When the Defendant is Not an Intentional Perpetrator: The Problems of Unconscious Disparate Treatment and Unjustified Disparate Impacts, 24 HAMLINE J. PUB. L. & POL’Y 225, 284-89 (2003) (discussing judicial refusals to grant class action status). Victims also may opt for mediation if they are unsure that courts will properly take intra-group conflicts into account. See, e.g., Brown-
The proposal will undoubtedly raise practical implementation questions that mediators accustomed to imagining creative and flexible adaptations of conventional mediation processes should consider. Attorneys, who frequently have the responsibility for discussing the mediation option with a client (or with a prospective mediator), for interviewing and selecting a mediator,\textsuperscript{146} and for striking an agreement regarding the conditions on which mediation will occur, will also undoubtedly have opinions about the proposal. Attorneys litigating discrimination disputes have thought strategically and ethically about the group presence in discrimination disputes for many years,\textsuperscript{147} and they therefore have a great deal to offer to the discussion of proper uses of first-phase caucuses.

Adapting mediation processes to provide opportunities for cultivating the group presence in individual discrimination disputes may increase the complexity of a dispute. Nonetheless, it will also increase the likelihood that choices made by disputants as to both process and outcome will be informed and truly autonomous. It is one way of ensuring that neither mediation processes nor mediation agreements become an unintended vehicle for inflicting additional harm on individual discrimination disputants.\textsuperscript{148}

This Article began with Justice Marshall’s contention that civil rights disputes necessarily belong in court. Justice Marshall’s view will continue to have validity insofar as mediation processes are not adapted to accommodate the reality of civil rights disputes. For example, the Lawyers’ Committee for Civil Rights Under Law recently urged the Supreme Court of the United States to reject another ADR procedure (arbitration) if that procedure could not accommodate the

\textsuperscript{146} A good test of whether a mediator handles individual discrimination disputes appropriately is whether she believes that awareness (with all of its properties) has a positive value and is willing to design the mediation process so as to appropriately enhance awareness. I assume that there are experienced mediators who have thought about the group presence in disputes and will be willing to flexibly adapt the practices to "fit the fuss." Menkel-Meadow, \textit{When Dispute Resolution Begets Disputes of its Own}, supra note 2, at 1901. It may be difficult for civil rights advocates to find such mediators, but doing so is critical for any given mediation. \textit{Cf.} \textsc{William Butler Yeats}, "... How can we know the dancer from the dance? ...," from the poem, \textit{Among School Children}, in \textit{The Poems} \textsc{221} (Richard J. Finneran, ed., Scribner 2d ed. \textsc{1997}) (1989).

\textsuperscript{147} \textit{See} Rubenstein, \textit{supra} note 47 (discussing how the individualist orientation of judicial rules and procedures for litigation has group consequences).

\textsuperscript{148} \textit{See} Grillo, \textit{supra} note 66, at \textsc{1610} (discussing the dangers of a mediation process that asks disempowered people to consent to their own oppression).
class treatment of claims that are inherently class-based. The first-phase, private caucus is one device that can be used to ensure that mediation processes do take proper account of the group presence inherent in individual, workplace discrimination disputes.
