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Transformative Mediation: Empowering the Oppressed Voices of a Multicultural City to Foster Strong Democracy.

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NOTES

TRANSFORMATIVE MEDIATION: EMPOWERING THE OPPRESSED VOICES OF A MULTICULTURAL CITY TO FOSTER STRONG DEMOCRACY

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I. Introduction

Democracy derives its power from the "demos," which includes the practices of the "demes"[1] – the ancient Athenian political units – and the whole people.[2]

A substantive democracy is "a situation in which *all citizens* have *relatively equal* chances to influence and control the making of *decisions that affect them.*"[3] However, the current democratic system within the United States lacks this equality.[4] The existing economic inequality in this country hinders the formation of a substantive democratic system where all citizens have the power of self-determination.[5] Voting, a primary source of political power, creates a procedural/passive democratic system, as opposed to a substantive democratic system, which is responsive to the needs of all of the citizenry.[6]

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1. Michael Sarbanes & Kathleen Skullney, *Taking Communities Seriously: Should Community Associations Have Standing in Maryland?*, 6 MD. J. CONTEMP. LEGAL ISSUES 283, 292 (1995).

> "Demes" were small, territorially-based associations, which formed the basic political unit of the Athenian polity. There were approximately 150 of these, so that each was composed of probably between 400 and 1200 people (about the size of community associations today). These small territorial associations met regularly, had social interactions, played a role in religious festivals, and developed local leadership. They also exercised considerable latent power, since they controlled citizenship and voter registration and provided representatives to the boule. *Id.* (footnotes omitted).

2. *Id.* ("The Greek word 'demos' means both the whole people and the smaller deme local unit.").

3. IRA KATZNELSON & MARK KESSELMAN, THE POLITICS OF POWER: A CRITICAL INTRODUCTION TO AMERICAN GOVERNMENT 19 (3d ed. 1987) (emphasis added).

4. *Id.* at 12 ("Democracy is seen as a method, a set of formal procedures by which citizens can select among a limited number of alternative sets of leaders.").

5. *Id.* at 19 ("What is the relationship between a political system based on equality of representation and an economic system based on the inequality of capital and labor?").

6. *Id.* at 12 ("This purely procedural definition of democracy has become an ideological tool of social control. . . . In this way, the procedural approach to democracy requires and promotes a relatively passive citizenry.").

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Mediation, specifically transformative mediation, is a tool that can empower the politically marginalized within society. Transformative mediation allows the politically marginalized to personally and actively decide the *outcome* of their dispute in a self-empowering way.[7] The politically marginalized tend to be those individuals who are poor and "culturally" or "ethnically" different than the mainstream. Mediators help parties resolve conflicts in areas such as the government, environment, and neighborhoods. Various mediation approaches are used to resolve conflict, yet no approach utilizes the adversarial legal process.[8]

The goal of conflict resolution remains simple: communication between people leading to a sense of mutual understanding that, in return, plants the seeds for a platform upon which change can both occur and continue to blossom.

This Note focuses on how transformative mediation is the key to breaking political, economic, and cultural barriers to achieving a more substantive form of democracy. Part II of this Note delves into the various styles of mediation, focusing on transformative mediation as the style that best serves oppressed minorities. Part III explores how multicultural differences have resulted in minorities having lower levels of access and inclusion in our democratic system. Concluding with Part IV, this Note discusses the overwhelming benefits of transformative mediation as a tool of social improvement that allows voiceless minorities to gain greater access to our democratic system.

II. EMBRACING TRANSFORMATIVE MEDIATION THEORY AND PRACTICE

Mediation does not limit itself to a fixed and constrained definition. In fact, mediation is a general term referring to various modes of conflict resolution that involve a mediator and disputants. In particular, there are three distinct styles of mediation: facilitative,[9] evaluative,[10] and trans-

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7. *See infra* Part II. Transformative mediation is a unique style of mediation which has more support in theory than in practice. However, review of the theory supports the more widespread adoption and application of transformative mediation to empower disputing parties, especially those individuals who lack economic and political power.

8. *See infra* Part II.

9. Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation,* Sept. 2000, http://www.mediate.com/articles/zumeta.cfm (explaining the various types of mediation styles). Facilitative mediation emerged in the 1960s and 1970s contemporaneously with volunteer dispute resolution centers. *Id.* The mediator's role is to "structure[ ] a process to assist the parties in reaching a mutually agreeable resolution." *Id.* This style of mediation assumes the mediator remains neutral and does not opine as to the substantive merits of the case. *Id.* The mediator focuses on the parties' "interests" instead of "positions" by asking questions, probing interests, and researching viable resolutions to the conflict. *Id.* A facilitative mediator does not speculate as to the outcome of the case

formative. Evaluative mediation is the most widely adopted style; however, transformative mediation holds benefits that should lead to transformative mediation's more widespread use in legal and non-legal settings.

A. *The Transformative Mediation Model: Empowering the Disempowered*

The "empowerment and recognition model," also known as transformative mediation, most espouses the preservation of the parties' rights to self-determination in the dispute resolution process.[11] Empowerment allows disputants to restore their sense of personal fortitude,[12] while recognition helps disputants empathize with each other's problems.[13] Collectively, empowerment and recognition form a spiral known as a "virtuous cycle," which serves as a strong base for personal self-discovery and conflict resolution.[14]

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should it eventually be adjudicated in court, nor does the mediator make recommendations to the disputants. *Id.* The parties involved control the eventual outcome, while the mediator facilitates the process by which the outcome is reached. *Id.*

10. *Id.* (explaining how evaluative mediation, the most commonly adopted style of mediation, is structured around "settlement conferences held by judges"). The evaluative mediator "structures the process, and directly influences the outcome of the mediation." *Id.* Legal rights and concepts of fairness are paramount to an evaluative mediator. *Id.* The focus is on the parties' "positions," as opposed to "interests." *Id.* Also, mediators who practice this style of mediation utilize "shuttle diplomacy," which involves the mediator meeting separately with the various parties and their respective counsels. *Id.* Unlike facilitative mediation, a settlement may be reached on grounds other than a mutually beneficial solution to the dispute. *Id.* This form of mediation arose from court-mandated mediation. *Id.*

11. Samuel J. Imperati, *Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation*, 33 WILLAMETTE L. REV. 703, 712 (1997) ("[T]he mediator encourages the parties to chose independently whether and how to resolve their dispute, while respecting one another in the process." (footnote omitted)).

12. George J. Siedel, *The Role of Business Deal Making and Dispute Resolution in Contributing to Sustainable Peace*, 44 AM. BUS. L.J. 379, 386–87 (2007) ("Empowerment is . . . 'the restoration to individuals of a sense of their value and strength and their own capacity to make decisions and handle life's problems.'" (quoting ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT 22 (2005))).

13. *Id.* at 387 (referencing Bush and Folger's definition of "recognition"). "Bush and Folger define recognition as 'the evocation in individuals of acknowledgement, understanding, or empathy for the situation and the views of others.'" *Id.*

14. *Id.* ("[T]he 'virtuous cycle' is defined as '[t]he stronger I become, the more open I am to you. The more open I am to you, the stronger you feel, the more open you become to me, and the stronger I feel.'" (footnote omitted)).

This model places responsibility on the mediator to ensure that the parties have the fullest opportunity of mutual acknowledgement.[15] Further, the mediator must not unilaterally impose a particular style of mediation on the parties.[16] Instead, the mediator should explore the parties' needs and employ the style which will allow the parties the best opportunity to exercise their respective rights of self-determination.[17]

Also, Robert Bush and Joseph Folger, the main proponents for transformative mediation, encourage transformative mediators to actively (rather than passively) listen and participate in facilitating the empowerment of disputants.[18] Under this view, the mediators *should* push the participants to focus on the issues.[19] Under the transformative model, mediators try to help the parties change the quality of their interaction from "negative and destructive to positive and constructive."[20]

B. *Transformative Mediation in Action*

Although transformative mediation has been effectively utilized in many legal and non-legal settings, the promises of transformative mediation ought to spur more attorneys, disputants, and businesses to adopt or incorporate transformative mediation in dispute resolution processes or

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15. Samuel J. Imperati, *Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation*, 33 WILLAMETTE L. REV. 703, 712–13 (1997) ("Under the empowerment and recognition model, the mediator's job is to guarantee the parties the fullest opportunity for self-determination and mutual acknowledgment.").

16. *Id.* at 714 (debating the ethical standards and Model Standards of mediation).

17. *Id.* at 714–15 ("Mediators should explore the parties' desires and needs . . . . [F]ail[ing] to do so is to diminish the parties' right of self-determination.").

18. John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 860 (1997) ("[B]ush and Folger contend that a mediator oriented toward promoting empowerment would routinely and persistently act to help the principals become more deliberative in making decisions in a dispute. Bush and Folger do not conceive of empowerment as requiring mediators to be passive." (footnote omitted)).

19. *Id.*

[Bush and Folger] argue that good transformative mediators *should* "push" principals to focus on the issues as much as possible, and that failing to do so would deprive principals of the greatest potential benefits of mediation. In essence, transformative mediators try, gently but firmly, to help the principals in a dispute responsibly exercise their decisionmaking authority. *Id.* (footnotes omitted).

20. 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, 280 (2003) (expressing the mediator's goal under the transformative model). "The purpose of transformative mediation is to move the parties from a sense of alienation from self and the other to a sense of competence and strength, and finally to recognition of the other party." *Id.*

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proceedings.[21] For example, the use of transformative mediation in employment disputes may help resolve an employee's grievance, while boosting workplace morale.[22]

The U.S. Postal Service's (USPS) REDRESS (Resolve Employment Disputes Reach Equitable Solutions Swiftly) program is an example of a successful application of the transformative model on a massive scale, particularly in "one of the largest civilian employers in the world."[23] The REDRESS program began in the fall of 1997 to deal with approximately 14,000 Equal Employment Opportunity Commission (EEOC) complaints.[24] The program resulted in a thirty percent drop in formal complaints within the first twenty-two months of its initiation.[25] Further, eighty percent of the 17,645 cases that were mediated under REDRESS were resolved.[26] Moreover, by 2005, "the number of mediations conducted under the REDRESS program exceeded 60,000."[27]

The USPS was able to save "millions of dollars in legal costs and improved productivity" by implementing the REDRESS program.[28] Thus, corporate deal-making and dispute resolution processes lead to added shareholder value creation and to the intangible benefit of a peaceful so-

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21. Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in the USPS RE-DRESS™ Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L.J. 399, 399 (2001) ("The transformative model of mediation, although well established in the mediation of family and community disputes, is a relatively new approach to dispute resolution in employment settings.").

22. Bennett G. Picker, *ADR: New Challenges, New Roles, and New Opportunities*, 72 TEMP. L. REV. 833, 838 (1999) ("The emerging field of 'transformative mediation' in employment disputes, for example, strives not only to resolve the employee's grievance, but also to enhance morale in the workplace.").

23. George J. Siedel, *The Role of Business Deal Making and Dispute Resolution in Contributing to Sustainable Peace*, 44 AM. BUS. L.J. 379, 387 (2007) (quoting Lisa B. Bingham & Mikalea Cristina Novac, *Mediation's Impact on Formal Discrimination Complaint Filing: Before and After the REDRESS Program at the U.S. Postal Service*, 21 REV. PUB. PERS. ADMIN. 308, 311 (2001)); *see also* 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, 261 (2003) ("When the USPS implemented the program on a nationwide basis, REDRESS became the world's largest employment discrimination mediation dispute resolution program." (footnote omitted)).

24. George J. Siedel, *The Role of Business Deal Making and Dispute Resolution in Contributing to Sustainable Peace*, 44 AM. BUS. L.J. 379, 387 (2007) (providing background information on the USPS's REDRESS program).

25. *Id.* ("In the first twenty-two months that the program was fully operational, there was a thirty percent drop in formal complaints.").

26. *Id.* at 387–88 ("Specifically, '17,645 informal disputes were mediated under RE-DRESS and of those, eighty percent were resolved.'").

27. *Id.* at 388.

28. *Id.*

ciety.[29] Due to the success of REDRESS I, the USPS initiated RE-DRESS II, which reaffirmed the integral role of the USPS's attorneys in implementing the transformative model as an effective internal corporate dispute resolution process.[30] Ultimately, the REDRESS program addressed internal corporate conflict (i.e., the EEOC complaints) by transforming employer-employee relations.[31]

Further, transformative mediation has been a helpful dispute resolution method in Title VII mediation dealing with unconscious employer discrimination, even when coupled with binding arbitration.[32] A dispute resolution process that starts with transformative mediation and, in a deadlock, results in binding arbitration, retains the empowering effect that transformative mediation has on the disputants and leads to fairer results in both the mediation and arbitration stages.[33] The transformative mediation stage provides each party with a "sword and a shield."[34] Moreover, the mutual understanding that is likely to emerge from the

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29. George J. Siedel, *The Role of Business Deal Making and Dispute Resolution in Contributing to Sustainable Peace*, AM. BUS. L.J. 379, 388–89 (2007) (addressing the success of the program). As noted by Fort and Schipani, companies can encourage "the use of voice by employees," which is a constitutive factor of a democratic society. *Id.* at 388.

30. Karen A. Intrater & Traci Gabhart Gann, *The Lawyer's Role in Institutionalizing ADR*, 18 HOFSTRA LAB. & EMP. L.J. 469, 477 (2001).

For the past two years, REDRESS™ has shown the power of transformative mediation in reducing the number of new formal complaints. Now, with REDRESS™ II, the Postal Service is taking transformative mediation to the next level—seeking to reduce the number of formal complaints that become federal district court cases. The Postal Service's attorneys are pivotal partners in this new venture. *Id.*

31. Cynthia J. Hallberlin, *Transforming Workplace Culture Through Mediation: Lessons Learned from Swimming Upstream*, 18 HOFSTRA LAB. & EMP. L.J. 375, 382–83 (2001) (reemphasizing Cynthia J. Hallberlin's, founder of the REDRESS program, view on transformative mediation). "Transformative mediation transformed the lives of postal employees two people at a time, at different tables, in different cities and different communities across the country each day. Not every four to five hour session changed lives, but many did. And one by one each individual experience accumulated, eventually making a difference in the workplace." *Id.*

32. 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, 267 (2003) ("Title VII mediation can provide companies and their decision-makers a non-combative space for making reforms without the exposure and pressure of the public sphere.").

33. *Id.* at 278 ("Knowing that an arbitration system that stacks the deck against employees has a fair chance of being overturned on appeal will create incentives for designing a fairer system and for coming to agreement during the transformative mediation stage.").

34. *Id.* at 290.

The *sword* operates to increase empowerment of parties . . . by giving them the opportunity to tell their stories in their own voices, bringing in whatever ancillary events they feel are important to round out the narrative . . . . Behind the *shield* the parties have the opportunity to listen carefully to the narrative coming from the other side

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transformative stage could positively affect subsequent adversarial proceedings such as arbitration or litigation.[35]

In the criminal justice context, transformative mediation seems to be a well-suited method to deal with racial bias during the plea bargaining process.[36] Specifically, transformative mediation may combat the "institutionalized racial bias of the criminal system" vis-à-vis a person of color.[37] Through the transformative process, the State urges the defendant to understand the legitimate societal concerns related to the offense for which he or she is charged.[38] In a plea bargain negotiation, transformative mediation will place defendants on equal footing with the State by exposing and exploring the roots of institutionalized racial bias.[39]

Moreover, the transformative model has positively contributed to the efficacy of Prisoner Facilitated Mediation, where prisoners serve as mediators in the prison setting.[40] Actually, prisoners can use their prob-

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and to spend the time and emotional energy necessary to allow themselves to recognize the opponent's shared humanity. *Id.* (emphasis added).

35. *Id.* ("[T]he empowerment and recognition that can be achieved through mediation will redound to the benefit of all parties and could positively affect any arbitration or litigation that may follow.").

36. Adina Levine, *A Dark State of Criminal Affairs: ADR Can Restore Justice to the Criminal "Justice" System*, 24 HAMLINE J. PUB. L. & POL'Y 369, 392 (2003).

In the current adversary system of criminal adjudication the plea bargain functions as a tool to resolution. However, that resolution comes with a price, the price of racial bias. ADR intervention at the plea bargaining process would provide neutrality at this pivotal juncture in the criminal process where racial bias runs rampant. Mediation between the prosecutor, the defense attorney and the defendant with a diversity-trained mediator possessing transformative, facilitative and evaluative skills would also restore a human element of social collaboration. *Id.* (footnotes omitted).

37. *Id.* at 395 ("Transformative mediation would encourage the State to abandon . . . the inherent racism of the system by the prosecutor's recognition of the defendant's legitimate concerns and interests, including those based on his culture, race, familial, and community needs.").

38. *Id.* ("The transformative process would thus encourage people of color who are accused of crimes to engage with the State as a member of society by either upholding their innocence or by taking responsibility for his own actions.").

39. *Id.* at 395–96 ("By restoring equal bargaining power to a plea bargain negotiation, transformative mediation can stop racial bias and implement a process that inherently promotes equality."); *see also* Andrea F. Blau, *Available Dispute Resolution Processes Within the Reauthorized Individuals with Disabilities Education Improvement Act (IDEIA) of 2004: Where Do Mediation Principles Fit in?*, 7 PEPP. DISP. RESOL. L.J. 65, 77 (2007) (empowering parents by transforming "power disparities between parents and schools" through informal meetings addressing special education issues).

40. Jeremy Coylewright, Comment, *New Strategies for Prisoner Rehabilitation in the American Criminal Justice System: Prisoner Facilitated Mediation*, 7 J. HEALTH CARE L. & POL'Y 395, 407 (2004) ("The use of Transformative Mediation presents a model for the development of emotional maturity in the settlement of disputes and has great potential for use in the prison setting.").

lem-solving skills in their home communities to reintegrate into society. Thus, transformative mediation offers prisoners the opportunity for rehabilitation, which has historically been missing in the American criminal justice system.[41] Attorneys or mediators trained in community mediation can help rehabilitate the prisoners by developing the prisoners' abilities to solve problems, which will likely lead to the rehabilitation of the prisoners' "home communities" if and when they are released.[42] Prisoners tend to come from neighborhoods rampant with social problems, such as poverty and crime; therefore, released prison mediators could help effect change in the "streets" of their communities, especially because they are not an extension of the State's coercive power.[43]

Transformative mediation also has shown great promise in promoting dialogue between victims and offenders, and can thus transform the relationship between the parties. In domestic violence cases, custody and visitation mediation allows the mediator to give the victim of domestic violence "a voice and a sense of control."[44] Similarly, courts are using transformative mediation to bring offenders face-to-face with victims, rel-

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41. *Id.* at 409.

Under the transformative rehabilitative framework, disputes are "viewed not as problems at all, but as opportunities for moral growth and transformation." With this view in mind, "conflict affords people the opportunity to develop and exercise both self-determination and self-reliance," as well as "an opportunity for acknowledging the perspectives of others." *Id.* (quoting ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 82 (1994) (footnotes omitted)).

42. *Id.* at 410 ("Experienced community mediators should be brought in to help develop the abilities of inmates to solve problems for themselves. This allows for an expansion of the empowerment dimension for the prison population and will provide prisoners a useful tool that will help them with their own personal rehabilitation and that of their home communities."). Also, prisoner family relations stand to improve through transformative mediation's empathy-centered approach to conflict resolution. *Id.* at 419.

43. *Id.* at 411.

[P]rison mediators could be equipped with a valuable tool to bring back to their home communities. Many prisoners come from the same neighborhoods, where social problems and criminal activity abound. . . . Bringing the skills of highly-trained and practiced transformative mediators to this setting would serve to provide models for others who need guidance in the decision-making and problem-solving process. *Id.* (footnote omitted).

44. Lauri Boxer-Macomber, *Revisiting the Impact of California's Mandatory Custody Mediation Program on Victim's of Domestic Violence Through a Feminist Positionality Lens*, 15 ST. THOMAS L. REV. 883, 890 (2003) (discussing California's mandatory custody mediation program). "While custody and visitation mediation mandated by California courts is not intended to be transformative mediation . . . [it] has the potential to spark cooperation between the parties without requiring victims to be submissive to their abusers." *Id.* (footnote omitted).

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atives, and community members to shape or reinforce desired behavior.[45] The transformative process makes the offender aware of the pain he or she has caused to all involved parties.[46] Likewise, the victim and community are able to discover any sociological and psychological problems which may explain, yet not necessarily justify, the offender's behavior.[47]

Under a healing-centered framework, the use of transformative mediation in medical malpractice cases has lead to improved doctor-patient relations.[48] The confidential nature of mediation fosters openness, which ultimately may lead to improved standards of care.[49] Further, the transformative process creates a forum where patients can come to terms with the harms they have suffered due to malpractice.[50] In Israel, the multifaceted nature of internal transformative resolution (ITR) seems best

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45. Frank V. Williams, III, *Reinventing the Courts: The Frontiers of Judicial Activism in the State Courts*, 29 CAMPBELL L. REV. 591, 659 (2007) ("Known by such terms as Transformative Mediation . . . courts are using mediation and community-based settings to induce the secular equivalent of repentance by bringing community offenders face to face with their victims, relatives, and representatives of the community, now also a victim." (footnote omitted)); *see also* Marjorie A. Silver, *Lawyering and Its Discontents: Reclaiming Meaning in the Practice of Law*, 19 TOURO L. REV. 773, 784 (2004) (providing an example of transformative mediation used to resolve a dispute among neighbors in a community mediation context). "[T]wo couples of different cultural backgrounds whose dispute was resolved when they were able to communicate to each other their respective cultures' understandings of what it means to be a 'good neighbor.'" *Id.*

46. Frank V. Williams, III, *Reinventing the Courts: The Frontiers of Judicial Activism in the State Courts*, 29 CAMPBELL L. REV. 591, 659 (2007) ("[T]he offender can see the pain he has caused his victim, the shame he has brought on his family, and the outrage and loss of the community which has had its feeling of peace and security shattered." (footnote omitted)).

47. *Id.* at 659–60.

On the other hand, the victim, family, and community can see and appreciate the sociological and psychological problems of the offender who may have grown up in a broken home, suffered the abuse of bullies in school, lost his job, or some other unfortunate turn of events, all of which are intended to produce a sense of grace and forgiveness, and, more importantly, a sense of calm and peace to all concerned. *Id.* (footnote omitted).

48. Jonathan Todres, *Toward Healing and Restoration for All: Reframing Medical Malpractice Reform*, 39 CONN. L. REV. 667, 698 (2006) ("[M]ediation can be structured to allow more open dialogue between physician and patient about medical decisions and any errors. Under a healing-centered framework analysis, both arbitration and mediation offer more benefits than current tort reform proposals . . . ." (footnote omitted)).

49. *Id.* at 699 ("Mediation's facilitative or transformative process and its confidential nature allows for greater openness and thus, hopefully, subsequent improvements in standards of care.").

50. *Id.* ("[T]ransformative-styled mediation, appears to offer greater hope for creating a forum in which patients can receive information and apologies to help foster emotional healing.").

suited to deal with hospital cover-ups of questionable medical practices.[51] An internal capacity for handling hospital disputes initiates open dialogue between all parties, which is necessary to deal with the compounded nature of the conflict.[52] An ITR system transforms a hospital's approach to patient complaints from individual solutions to a systematic macro-level preventative approach.[53]

C. *Criticism of Mediation*

Current training in mediation has different camps teaching the three distinct styles (facilitative, evaluative and transformative); however, the level of acceptance of each style varies depending on the philosophy of the mediator.[54] Evaluative and transformative mediation have both been criticized quite consistently, and yet facilitative mediation seems acceptable to many mediators, even though it may be time-consuming.[55] Evaluative mediation has been seen as coercive, top-down, and lacking impartiality due to its heavy reliance on the mediator.[56] Additionally, transformative mediation has been criticized for being idealistic, too wide in scope, and ineffective in business or court settings.[57] However, supporters of evaluative and transformative mediation posit their respective defenses. Samuel Imperati, a seasoned mediator and conflict specialist, believes that evaluative mediation can range on a continuum from soft to

51. *See* Orna Rabinovich-Einy, *Beyond IDR: Resolving Hospital Disputes and Healing Ailing Organizations Through ITR*, 81 St. John's L. Rev. 173, 173–75 (2007) (discussing the ITR model and the effect it has on the Israeli dispute resolution landscape).

52. *Id.* at 184 ("In the hospital context, both internal and external disputes tend to be complex, and there are, therefore, clear advantages for the parties involved, as well as the hospital, in resolving the problem through the use of internal mechanisms in general, and ITR specifically, over other routes."). "In Israel, this reality [of hierarchical decision-making in hospitals], is further compounded by an industry in which the operator of the major hospitals, the Ministry of Health, is also the regulator and monitor of their functioning." *Id.*

53. *Id.* at 201 ("Adopting an ITR system as described in this article can transform hospital treatment of complaints and problems (as well as successes) from individual and ad hoc solutions into a preventative, systematic methodology.").

54. Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation*, Sept. 2000, http://www.mediate.com/articles/zumeta.cfm ("Most mediation training still teaches the facilitative approach, although some attorney-mediators train in the evaluative model, and Folger and Bush have a complement of trainers teaching the transformative approach.").

55. *Id.* ("There seem to be more concerns about evaluative and transformative mediation than facilitative mediation. Facilitative mediation seems acceptable to almost everyone, although some find it less useful or more time consuming.").

56. *Id.* ("[M]uch criticism has been leveled against evaluative mediation as being coercive, top-down, heavy-handed and not impartial.").

57. *Id.* ("Transformative mediation is criticized for being too idealistic, not focused enough, and not useful for business or court matters.").

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hard; therefore, it is misleading to constrict the effects and scope of evaluative mediation due to its seemingly coercive legal nature.[58] Also, Bush and Folger see transformative mediation as flexible and applicable in a wide-ranging spectrum of disputes.[59]

Also, transformative mediation is seen by critics as utopian and lacking grounding in practice, primarily because it is linked to a relational as opposed to individualist worldview.[60] Nevertheless, the successful application of the transformative model in various contexts ought to lessen the weight, if any, afforded to its critiques.[61]

Another concern for attorneys and clients alike is the uncertainty inherent in the mediation process itself. This uncertainty manifests itself in regards to the particular approach a mediator espouses.[62] Before committing to mediation, many participants feel that the mediator should disclose which approach he or she will utilize to resolve the dispute.[63] However, some mediators choose to reserve the right to employ the particular mediation style that they perceive will best lead to resolution. According to these mediators, employing a particular mediation style can only be done after hearing and understanding the disputants' needs.[64]

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58. *Id.* ("Sam Imperati, for example, sees evaluative mediation as ranging from soft to hard: from raising options, to playing devil's advocate, to raising legal issues or defenses, to offering opinions or advice on outcomes.").

59. Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation*, Sept. 2000, http://www.mediate.com/articles/zumeta.cfm ("Folger and Bush, on the other side of the discussion, see transformative mediation as ultimately flexible and suited to all types of disputes."); *see also* Neal Milner, *Mediation and Political Theory: A Critique of Bush and Folger*, 21 LAW & SOC. INQUIRY 737, 743 (1996) (reviewing ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994)) ("Transformative-oriented mediators are less concerned with keeping the process linear and 'on track.' . . . They are more willing to listen to the discussion of past events in order to give the parties the fullest chance to remind themselves of the richness and complexity of their relationship.").

60. Neal Milner, *Mediation and Political Theory: A Critique of Bush and Folger*, 21 LAW & SOC. INQUIRY 737, 759 (1996) ("The individualist society continues to flourish and expand while the relational society, the decent society of Bush and Folger's dreams, remains too much what they do not want it to be: a utopian dream rather than a gradually emerging reality.").

61. *See supra* Part II.B.

62. Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation*, Sept. 2000, http://www.mediate.com/articles/zumeta.cfm ("Another concern is that many attorneys and clients do not know what they may get when they end up in a mediator's office.").

63. *Id.* ("Some people feel that mediators ought to disclose prior to clients appearing in their offices, or at least prior to their committing to mediation, which style or styles they use.").

64. *Id.*

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Samuel Imperati and Leonard Riskin believe that the three styles reside on a continuum.[65] Meanwhile, other prominent figures in conflict resolution, such as Bush and Folger, see an angular difference in the styles, such as "top-down" and "bottom-up" mediation.[66] Furthermore, Bush and Folger opine that evaluative and facilitative mediation may attribute too much value to legal information and outcomes, while transformative mediation serves more of a nurturing and lasting role in preserving an amicable and lasting resolution to conflict.[67] In practice, many mediators admit that they mix transformative and facilitative techniques, depending on the context of the mediation and needs of the involved parties.[68] Generally, mediators operate on some fluid portion on the continuum, leaving themselves room to adapt to the nature and complexity of various cases.[69] The continuum may be constructed starting with transformative to facilitative to evaluative mediation, from least to most interventionist.[70]

III. The Imperfect Match Between Difference and Democracy: How Difference Creates an Oppressed Class

In addition to disparities in economic and political power, "cultural differences" further alienate multicultural community members from realizing a substantive form of democracy that furthers popular sovereignty.[71]

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65. *Id.* ("Samuel Imperati and Leonard Riskin believe these styles are more a continuum than distinct differences, from least interventionist to most interventionist.").

66. *Id.* ("Folger and Bush see more distinct differences in styles, particularly the difference of 'top-down' vs. 'bottom-up' mediation.").

67. Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation*, Sept. 2000, http://www.mediate.com/articles/zumeta.cfm ("[T]hey believe that evaluative and facilitative mediation may take legal information too seriously, and that resolutions coming from the parties are much more deep, lasting, and valuable."); *see also* Neal Milner, *Mediation and Political Theory: A Critique of Bush and Folger*, 21 Law & Soc. Inquiry 737, 740 (1996) (noting that success in the transformative process is not measured purely by settlement).

68. Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation*, Sept. 2000, http://www.mediate.com/articles/zumeta.cfm ("[M]any practitioners who utilize the transformative model state that they mix facilitative and transformative techniques rather than using one or the other exclusively.").

69. *Id.* ("[I]n general mediators are on a continuum from transformative to facilitative to evaluative mediation, but are not squarely within one camp or another.").

70. *Id.* (alluding to a theory established by Samuel Imperati and Leonard Riskin).

71. Ira Katznelson & Mark Kesselman, The Politics of Power: A Critical Introduction to American Government 7 (3d ed. 1987).

What shall we make of uneven voting, the unequal distribution of reading skills, large divergences in the earnings and social class position of the population, and of the impact of monied interests on elections and the political process? More generally, to

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As transformative mediation focuses on the needs of the various parties, one must determine what the term "minority" encompasses and how "minority" needs can be met to encourage a more democratic, cooperative society. Three authors have developed a distinct definition of "minority": Leonie Sandercock, Jeff Spinner, and Stephen Castles. Sandercock discusses the expansive definition of "minority," focusing on those who are different from the stereotypical "White" person. Spinner narrows the definition of "minority" by looking primarily at race and the unique identities inherent in African-American culture. Finally, Castles focuses on the limited acceptance of immigrants to American social culture and the effects of such acceptance. Analyzing each author's different perspective allows for a broad and expansive understanding of minorities and, later in Part IV, its applicability to mediation styles.

A. *Leonie Sandercock's Analysis of the "Voices from the Borderlands"*

Sandercock describes minorities as unheard voices from the borderlands. However, she is not simply speaking of the predominantly Hispanic population existing between the Mexico-U.S. border, she is speaking of something much larger.[72] Sandercock states that "[t]hese [voices from the borderlands] are the voices not only of immigrants but also of indigenous people, African-Americans, gays and lesbians, groups who have experienced a long history of racist and imperialist and homophobic oppression."[73] Sandercock argues that society excludes people who are not affiliated with the dominant White culture.[74] More importantly, people with differences, regardless of the group to which they belong, face exclusion from the community.[75] This exclusion results in the disempowerment of individuals wanting to partake in decision-making processes at the community level. The "borderland" members do not have access to voice their opinion in a communal arena fostering inclusion based on equality, mutual support and recognition, and trust.[76] Race

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what extent is popular sovereignty possible in a society organized within a capitalist framework? *Id.*

72. LEONIE SANDERCOCK, TOWARD COSMOPOLIS: PLANNING FOR MULTICULTURAL CITIES 119 (1998) (equating "borderlands" to a region beyond the Mexico-U.S. border).

73. *Id.* (listing minority groups who face discrimination by the dominant culture because they are culturally "different").

74. *Id.* at 124 ("Groups experiencing cultural imperialism have been objectified and marked with a devalued essence by the dominant culture they are excluded from making.").

75. *Id.* ("Difference thus emerges not as a description of the (essential) attributes of a group but as a function of the relations between groups and the interaction of groups with institutions.").

76. *Id.* at 123 ("The difference that is defined by (those in) power always means absolute otherness.").

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represents one of the factors that encompass "a different way of being in the world."[77]

Additionally, Sandercock believes that "the 'voices from the border-lands' are the voices of the multicultural city, of those who have been marginalized, displaced, oppressed or dominated."[78] These "voices from the borderlands" are crucial to establishing a strong democracy because they represent the foundation of a democracy which attempts to ensure equality among its citizens. However, due to their marginalized state in society, the people from the "borderlands" do not have a voice within the political system; therefore, our current democracy is weak.[79] The members of the so-called "borderlands" have extenuating circumstances that hinder their active participation in the community. More significant matters of what to eat on a daily basis and where to sleep at night are more pertinent matters to these disadvantaged individuals. People do not choose to be disenfranchised in society; rather, they confront a figurative line between membership in society and exclusion based on intolerance of differences (race, gender, sexual orientation, socioeconomic status, and culture) by a more dominant group or culture.[80] Sandercock illustrates how people, placed into the "borderlands" because of their differences, lose their "voice" in society and, consequently, their autonomy remains threatened by constricted access to influence political norms.

People who are different than the mainstream community do not have a powerful "voice" in the community that demands recognizing their existence. Inclusion begins with regaining power within the community through civil interaction and participation, which will shift attention to the needs of marginalized people.[81] The "Politics of Difference" emphasizes "the importance of giving voice to all oppressed peoples and the inappropriateness of, for example, middle-class white women speaking on

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77. Leonie Sandercock, Toward Cosmopolis: Planning for Multicultural Cities 125 (1998) (defining the meaning of the word "difference").

78. *Id.* at 110 (describing a group of people whose voice is often not heard by planners due to cultural, gender, or social differences).

79. *Id.* at 111 ("These 'voices from the borderlands' belong to people who dwell in cultures of displacement and transplantation, to cultures with a long history of oppression, to people who have been marginalized for hundreds of years . . . .").

80. *Id.* (discussing the differences between people that eventually lead to the division of people into majority of minority social groups).

81. *Id.* at 124–25 (determining that minority social groups want to be "acknowledged and valued as different within a society of citizens" in a way that does not separate them from the majority). "Their claim is to be allowed to be different *within an inclusive society*." *Id. See also supra* Part II.

behalf of women of colour, straights on behalf of gays, and so on."[82] The "oppressed" encompasses the people in society who have been excluded on the basis of differences.[83]

To enable the "borderland" citizens to gain political autonomy, politically empowered citizens need to collectively push to revive the politically deprived through community acceptance.[84] "Iris Young defines a social group as 'a collective of people who have affinity with one another because of a set of practices or way of life; they differentiate themselves from or are differentiated by at least one other group according to these cultural forms.'"[85] The cultural forms ("set of practices or way of life") of which Young speaks should become universal forms which pertain to all who are part of civil society in order to foster an understanding of difference. Tight-knit relationships only can be achieved through a common understanding of everyone's different needs, which necessarily includes understanding people's differences.

We need to revive the disadvantaged and help them participate in civil society to strengthen our democracy. Reform can only progress through a collective voice in civil society. Transformative mediation, which focuses on the need for community acceptance, can break down barriers to inclusion. Through the participation of disadvantaged individuals in mutual networks based on a "common good" (common interest) within the community, democracy will be strengthened due to the effectiveness of civil society in fostering change based on democratic principles of inclusion.[86]

B. *Jeff Spinner's View of Race, Citizenship, and Cultural Identity*

Next, Jeff Spinner focuses on the African-American race as a definition of "minority": "When slavery ended, Black-American culture changed considerably, yet the continued oppression of Blacks ensured that Black culture and identity remained distinct from mainstream culture."[87] Spinner argues Blacks must be recognized as having their own identity, recon-

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82. LEONIE SANDERCOCK, TOWARD COSMOPOLIS: PLANNING FOR MULTICULTURAL CITIES 122 (1998) (discussing a form of new politics that values experience and subjectivity over theory and objectivity).

83. *Id.*

84. *Id.* at 124–25 (expressing the need for the members of social minority groups to have a voice and participate in the political community).

85. *Id.* at 124 (citation omitted).

86. *Id.* at 120 (advocating the need for understanding and accommodating the different "voices" within society).

87. JEFF SPINNER, THE BOUNDARIES OF CITIZENSHIP: RACE, ETHNICITY, AND NATIONALITY IN THE LIBERAL STATE 114 (1994) (discussing the disparity between African-American culture and the dominant culture).

figuring civil society to include Blacks, and empowering Blacks to be equal citizens in our current democracy.[88]

Spinner's article recognizes the unique identities of African-Americans. Spinner emphasizes that "[t]hey [African-Americans] aspire toward a recognition of Black citizenship by other citizens."[89] As Spinner says, "Black citizenship, I argue, must be made *visible* in a way that induces white citizens to revise their vision of American citizenship so that it includes Blacks."[90] As a community, African-Americans lose their identity by not being recognized as a distinct group of people.[91] If minorities choose to differentiate themselves from the White culture and decipher their own identity, they will remain marginalized because of their deviance from White norms. Yet if they conform to the White stereotype of themselves, they accept and subscribe to the misrepresentation of their group by the dominant culture.

Spinner's main message conveys the wish for complete community integration. Inclusion of African-Americans as productive and effective participants in tight-knit relational networks defined by civil interaction will result in "[a] plurality of institutions in civil society–some Black-owned, some owned by ethnics, some by whites, and some by a combination of people–will give Blacks and others more choices about the institutions they want to attend."[92] Thus, integration encompasses broader inclusion for African-Americans within the boundaries of a predominantly White society.

The notion of citizenship, which embodies democratic principles of inclusion rather than exclusion, remains the key to facilitating the integration of African-Americans into our current White-dominated society. Citizenship should not be denied on the basis of difference. Differences should serve as a mode of respect and admiration for a cultural other, rather than a point of division. Tolerance mandates the recognition of a cultural other, yet acceptance prescribes to the inclusion of people with differences. Through methods such as transformative mediation, the need for tolerance and acceptance can "transform" to ultimate tolerance

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88. *Id.* at 113–14 ("The subordination and separation of Black people has ensured the development of identity based on race in the United States, posing an acute problem for American liberalism.").

89. *Id.* at 122 (suggesting ways to transform the Black identity and give Black Americans more opportunities to interpret themselves).

90. *Id.*

91. *Id.* at 125 ("Recognition of Black people satisfies another need: it gives Black people recognition as Black people. It says that they are worthwhile as Blacks, that they do not have to become like whites to be appreciated and recognized.").

92. JEFF SPINNER, THE BOUNDARIES OF CITIZENSHIP: RACE, ETHNICITY, AND NATIONALITY IN THE LIBERAL STATE 128 (1994) (emphasizing the need to "reconfigure" civil society).

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and acceptance, even amongst cultural differences. Thus, transformative mediation can play an essential role in the democratization of the community by emphasizing the need to collectively welcome others who are different from the mainstream culture.

C. *Stephen Castles's Take on the United States Model for Managing Diversity: Differential Exclusion*

Castles describes various models for managing diversity while emphasizing that the United States has historically managed diversity through the process of differential exclusion.[93] Castles characterizes differential exclusion as a "situation in which immigrants are incorporated into certain areas of society . . . but denied access to others . . . ."[94] Exclusion based upon this model may be de jure (prescribed by law) or de facto (racism and discrimination).[95] This "ethnic" model views the "[a]cceptance of new linguistics and cultural diversity . . . as a threat to national culture."[96] Such a model does not productively deal with diversity.[97] It leads to a "split society" with profound levels of cultural misunderstanding, which, in turn, leads to racist violence, and eventually a decrease in cooperation and tolerance.[98]

The imperfect acceptance of different cultures on the macro-level, especially in the United States, leads to cross-cultural misunderstanding at the micro-level, primarily in the daily lives of individuals. Misunderstanding trickles down to the micro-level because it is not properly dealt with at the level of different cultures interacting with each other, thus cross-cultural conflicts arise. Focusing on the need for equal "inclusion" of immigrants will break down the walls created by differential exclusion.

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93. Stephen Castles, *Multicultural Citizenship: The Australian Experience, in* CITIZEN-SHIP AND EXCLUSION 113, 114–21 (Veit Bader ed., 1997) (referencing "the differential exclusion model," "the assimilationist model," and "the pluralist model").

94. *Id.* at 115.

95. *Id.* at 115–16 ("Exclusion may be effected through legal mechanisms . . . or through informal practices . . . .").

96. *Id.* at 116 ("Nations based on ethnic belonging are unwilling to accept immigrants and their children as members.").

97. *Id.* ("This contradicts the basic liberal-democratic principle that all members of civil society should also be members of the political community.").

98. Stephen Castles, *Multicultural Citizenship: The Australian Experience, in* CITIZEN-SHIP AND EXCLUSION 113, 116 (Veit Bader ed., 1997) ("Exclusion of minorities leads to a split society, serious social problems, growing levels of racist violence and a threat to democracy from the extreme right.").

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IV. Mediation and Democratic Empowerment

Mediation serves as a nexus between self-governance and self-empowerment.[99] Mediation alone cannot solve conflicts between disputants. The disputing parties must cooperatively strive towards a resolution to their conflict. A mediator is a facilitator, not a judge who through his or her institutional power can compel compliance to an agreement between two litigants.

A. *Self-Governance Leading to Self-Empowerment*

The "hands-on" ability to resolve conflict in mediations results in personal self-determination leading to self-empowerment. Active participation in dispute resolution leads to the empowerment of traditionally disempowered individuals, which is critical to a strong and robust democratic system.[100] Using mediation to encourage self-determination in a democracy enhances the dignity of the involved disputants while strengthening democratic values.[101]

Historically, citizen participation has been a constitutive element in the development of, at least, a normative vision of democracy.[102] Currently, democratic institutions within the United States are weak due to the lack of quality in both substantive decision-making and popular participation

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99. Carrie Menkel-Meadow, *Deliberative Democracy and Conflict Resolution*, 12 No. 2 Disp. Resol. Mag. 18, 18 (2006) (explaining that the deliberative-democracy and conflict-resolution movements have been "theorizing about and attempting to structure processes for increased participation in decision-making by the parties most affected by those decisions").

100. Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock*, 24 Fla. St. U. L. Rev. 985, 1001–02 (1997) ("Concepts of participation and empowerment are not idle pleasantries . . . but are central principles of a democratic society and critical features of consensual decisionmaking processes, of which mediation is traditionally thought to be a prime example." (footnote omitted)).

101. Jacqueline Nolan-Haley, *Self-Determination in International Mediation: Some Preliminary Reflections*, 7 Cardozo J. Conflict Resol. 277, 277–78 (2006) ("As adapted to private mediation theory, the right of self-determination allows parties to participate in decision-making and voluntarily determine the outcome of their disputes. . . . The principle of self-determination in mediation offers procedural justice protections, providing parties with fairness and dignity." (footnote omitted)).

102. Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 Cal. L. Rev. 577, 635 (1997).

> Indeed, in rebelling against the English autocracy and all its trappings, the colonists insisted on this right of participation in its most dynamic terms. The complex process of selecting democracy as a form of government . . . was predicated on a fundamental belief in the importance of citizen participation in government. The Federalists were ultimately able to reach a consensus on the appropriateness of a national constitution only by arguing that it was "the people" who were delegating the authority to draft such a document in the first instance. *Id.* (footnotes omitted).

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in the making of those decisions.[103] Similar to alternative dispute resolution theorists, participatory-democracy theorists believe that citizen deliberation in decision-making processes leads to, at least, the perception of legitimacy in the political system.[104] The true virtue of deliberation is not necessarily to reach the "right result," but to participate in the decision of a contested matter.[105] Both autonomy and participation are constitutive values of mediation and participatory democracy.[106] Autonomy stems from the belief that a human being is a distinct person.[107] Moreover, participation allows one to influence decisions that affect oneself, thereby reinforcing one's personal autonomy.[108]

Contemporarily, mediation as a form of dispute resolution originated in response to civil unrest and recognition of social values that have been traditionally associated with a participatory democracy.[109] Therefore, to construe mediation as "purely private" serves to undermine the previously mentioned values inherent to mediation and democracy, and to undermine the legitimacy of American democracy (i.e., popular consent to

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103. Carrie Menkel-Meadow, *Deliberative Democracy and Conflict Resolution*, 12 No. 2 DISP. RESOL. MAG. 18, 19 (2006) ("Current democratic institutions in the United States, and perhaps worldwide, are gridlocked, outdated and ineffective for both: (1) the quality of substantive decision-making, and (2) the quality of participation citizens have in the polity.").

104. Katherine R. Kruse, *Learning from Practice: What ADR Needs from a Theory of Justice*, 5 NEV. L.J. 389, 395 (2004-2005) ("Like alternative dispute resolution theorists, the political theorists of deliberative democracy . . . offer . . . a procedurally-based vision, anchored by principles of inclusive and participatory deliberation that measure justice, not by the outcome of processes, but by their participatory character.").

105. *Id.* ("Like alternative dispute resolution . . . the goal is not deliberation for the sake of reaching the 'right result,' but deliberation for the sake of allowing all to hear and be heard—to transform the views of others and to allow one's own views to be transformed . . . .").

106. Joseph B. Stulberg, *Mediation, Democracy, and Cyberspace*, 15 OHIO ST. J. ON DISP. RESOL. 619, 624–27 (2000) (discussing what the author describes as "anchor values" of mediation).

107. *Id.* at 624 ("[E]xercising autonomy reflects in the most profound sense possible the notion that this is *my* judgment regarding the manner in which I want to live my life.").

108. *Id.* at 627.

It is not good enough that other persons make the right decisions for someone else, for that simply results in a state of affairs being bestowed on an individual. She must engage her deliberative faculties and encounter the risks, excitement, or apprehension that attend the process of making choices in order to experience her personhood in a meaningful sense. *Id.*

109. Elizabeth R. Kosier, *Mediation in Nebraska: An Innovative Past, a Spirited Present, and a Provocative Future*, 31 CREIGHTON L. REV. 183, 185 (1997) ("In the United States, consensual conflict resolution was spurred by civil unrest and the rise in the 1960's of social values rooted in participatory democracy, respect for human dignity, and personal autonomy.").

be governed).[110] Transformative mediation should be embraced as an "expansion of public justice," as opposed to a "private alternative to public justice."[111] As Chief Justice John Marshall resolutely noted in *Marbury v. Madison*,[112] "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[113] Transformative mediation, if used more widely as a process by which to remedy violations of one's rights, may occupy a unique role in our constitutional democracy, in that it may serve as an effective method to resolve disputes, while being fundamentally rooted in many of the core values that legitimize the American democratic system.

1. The Lawyer's Role

Mediation allows citizens to be more directly involved in the decision-making process as opposed to administrative and legislative processes.[114] Moreover, a lawyer representing a client in a transformative mediation does not usurp the client's autonomy.[115] Actually, the lawyer facilitates the transformation of the relationship between the disputants.[116] Through the more widespread use of mediation concepts to achieve "just" and lasting solutions to conflict, lawyers will have to employ meth-

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110. Richard C. Reuben, *Public Justice: Toward a State Action Theory of ADR*, 85 CAL. L. REV. 577, 636 (1997) ("An understanding of ADR as purely private can contradict these values, thereby threatening to undermine American democracy by eroding public confidence, its foundation.").

111. *Id.* at 641.

This need not mean that court-related and contractual ADR is somehow invalid; public policy strongly favors its use, and its proper growth should be strongly encouraged . . . . [T]he arrival of ADR should be recognized as an expansion of public justice, rather than the establishment of a private alternative to public justice. *Id.*

112. 5 U.S. (1 Cranch) 137 (1803).

113. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

114. Robert Zeinemann, *The Characterization of Public Sector Mediation*, 24 ENVIRONS ENVTL. L. & POL'Y J. 49, 53 (2001) ("[M]ediation mechanisms allow for more direct involvement of those most affected by decisions than do most administrative and legislative processes.").

115. Joseph B. Stulberg, *Mediation, Democracy, and Cyberspace*, 15 OHIO ST. J. ON DISP. RESOL. 619, 628 (2000) ("A compromise in autonomy only occurs when the consultative process converts to a paternalistic perspective that has the expert persuasively, aggressively, or pointedly telling the person to accept a particular arrangement because the expert knows what is in the client's best interest, even if the client disagrees.").

116. *Id.*

ods, such as transformative mediation, which differ from the conventional methods lawyers have customarily used to pursue justice.[117]

B. *Empowerment in a Multicultural Context*

Differences among cultures should be viewed as points of interest and celebration, as opposed to barriers which lead to dissension. However, the preceding statement seems more of an ideal than a practical occurrence.

At the heart of difference theory is an urgent and desperate need for inclusion of "others" in society.[118] Inclusion, for example, demands the integration of those on the "borderlands" and African-Americans within civil society.[119] The assumption, here, is that including various minority groups in civil society leads to personal empowerment.[120] In other words, by shifting from a procedural democracy, where political power rests solely in the power to vote, to a more substantive democratic system, in which people can more rightfully participate in institutional decisions that affect their lives, this will eventually bring minority groups closer to self-governance. In this instance, the marginalized are those who are politically underrated due to their lack of economic power and those who are discriminated against because they are different from the mainstream culture.[121]

The associational ties that are forged and developed in a "community" have profound effects on the ability of individuals to live productive and fulfilling lives.[122] Mediation-empowered individuals within multicultural communities can strive to reduce the "tension between cohesion and ex-

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117. Carrie Menkel-Meadow, *Practicing "In the Interests of Justice" in the Twenty-First Century: Pursuing Peace as Justice*, 70 FORDHAM L. REV. 1761, 1771 (2002) ("Whether called 'consensus building fora,' negotiated rule-makings ('reg-neg') or public dispute management events, new fora have developed to respond to a host of legal and political conflicts including environmental siting, regulation drafting, budget allocation, international treaties, municipal governance, and community and diversity disputes.").

118. *See supra* Part III.

119. *See supra* Part III.

120. *See supra* Part III.

121. *See supra* Part III.

122. Michael Sarbanes & Kathleen Skullney, *Taking Communities Seriously: Should Community Associations Have Standing in Maryland?*, 6 MD. J. CONTEMP. LEGAL ISSUES 283, 291 (1995).

> The importance of community, in its broadest sense, to the human psyche, to civil society, and to democracy is at the root of Western philosophical and political thought and deep in American tradition. From the ancient Greeks forward, it is a commonplace that human beings need association with others to live a fully human life . . . . *Id.* (footnote omitted).

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clusion" within a community.[123] Communities may attempt to exclude individuals who do not "fit their perceived shared values[.]"[124] Moreover, inter-community competition over scarce resources and cultural symbols can lead to tensions within a community.[125] However, self-empowerment stemming from active self-determination in a mediation setting may help mitigate the cohesion versus exclusion tension and lead to a more inclusive multicultural community, which allows individuals an equal opportunity to pursue their own ends.[126] Community and inter-ethnic disputes in a multicultural setting are best addressed by the convergence of deliberative-democracy and conflict resolution theory. An understanding of the political landscape within which a dispute occurs is vital to understanding the relationship between the parties and the long-term viability of any proposed resolution.

1. The Lawyer's Role

Lawyers have a significant role to play in the process of conflict resolution leading to self-empowerment in a multicultural setting.[127] Lawyers, as "architects of process" and "architects of participatory democracy," can bring clarity to conflicts that arise due to the modern problems of social complexity.[128]

Consensus-building lawyering is a powerful mechanism by which lawyers can participate in the resolution of disputes, and further the pursuit

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123. *Id.* at 296 ("The very self-definition which binds some people within a community is likely to exclude others. . . . [A]t a certain point, any community can point to some people who do not fall within its embrace.").

124. *Id.* at 296–97 (discussing the inherent tensions in the term "community").

125. *Id.* at 297 ("[I]nter-community competition over land, private resources, governmental resources, public space, and cultural symbols can create tension and exacerbate inequalities.").

126. *Id.* at 296 ("This inevitable tension, which is inherent in the notion of community, can take on profound historical and legal significance in the United States, where a diversity of cultures and a history of racism and economic inequality may bring community cohesion/exclusion into conflict with widely held principles of justice.").

127. Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347, 352 (2004-2005).

> To the extent that modern life is characterized by greater social fragmentation, diversity, demographic and cultural pluralism, multi-party and intractable disputes which have created greater social complexity than many of our current political and legal institutions can effectively deal with, new forms of political and legal participation may be necessary. *Id.* (footnote omitted).

128. *Id.* ("Whether tied to traditional constitutional and legal institutions . . . or created new out of the particularities of specific situations . . . lawyers have the knowledge, skills, craft and wisdom . . . to help create and manage such institutions." (footnote omitted)).

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of deliberative democracy.[129] Various political theorists support the underlying foundation of consensus-building by noting "greater, wider and deeper participation in democracy and political and legal decision making will be better for our society, as well as for individuals[.]"[130] By initiating consensus-building in mediations, a lawyer can pursue justice by taking into account the involved parties' interests and positions to ensure that multicultural community members are fully heard.[131] Ultimately, the consensus-building lawyer serves as an "architect" for deliberative democracy by encouraging and facilitating compromise in light of varying interests.[132] At the same time, disputants, especially those espousing "minority" viewpoints, preserve their right to self-determination.[133]

For example, a special approach is required when different groups from different cultures come face-to-face to initiate discussion and to collaboratively resolve mutual disputes. If mediators in a multicultural setting represent the disputants, it alleviates the disputants' experiencing of alienation, coercion, and fear. The disputants should feel at ease and be ready to discuss anything that they feel is pertinent to the issue(s) necessitating discussion.[134] Additionally, the best type of mediator is someone who all the involved parties trust. Hypothetically, in a mediation among a Latino, African-American, and an Armenian, if multiple mediators

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129. *Id.* at 359 ("The term[ ] 'consensus building process[ ]' . . . describe[s] efforts to create new forms of participatory and democratic lawmaking, decision making and problem solving.").

130. *Id.* at 357.

The unifying theme is one of articulating a vision of collaborative, cooperative social processes, in opposition to the more adversarial and competitive assumptions of Hobbesian and Madisonian theories of contest and factionalism in human deliberation. . . . [T]he claims for deliberative democracy recapitulate old dualisms between liberalism (individualism) and democracy (republican and representative forms). *Id.*

131. *Id.* at 360.

Most consensus building professionals regard themselves as enforcers of a participatory democracy model that differs from simple majority rule, so that "minority" interests are fully heard and protected. Whether the "consensus" is purely unanimous or some other rule of decision arrived at by a group, "consensus" is meant to convey more "consent" than simple voting. *Id.*

132. Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347, 359 (2004-2005) ("Consensus building lawyering is one of the concrete ways in which the vision of deliberative democracy can be realized.").

133. *Id.* at 359–60 (referring to the concept called "Habermasian"). The focus of Habermasian is "to create 'ideal speed conditions' in which citizens or interested parties communicate directly with each other and with decision makers to participate in the making of rules or decisions that will affect them." *Id.*

134. Laurel Kaufer, *The Value in Mediation*, ADVOC. MAG., Oct. 2007, at 62, 64 ("Not only does your client need to be heard by the mediator, but also and often more importantly, by the opposing party to the conflict, even if it is an insurance adjuster who is standing in the shoes of the accused wrongdoer.").

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were present, each one representing one of the ethnic groups involved in the mediation, that would create an ideal atmosphere for compromise and change. In this setting, although the lawyer may engage in consensus-building to better represent the perceived needs of the client, the lawyer actually does a disservice to the client if he or she does not let the client take an active role in the dispute resolution process.[135] Mediation may be the only opportunity a client may have "to 'be heard.'"[136]

V. CONCLUSION

Mediation, when facilitated and aimed at transforming relationships, leads to participatory democracy, and fosters an arena for self-governance, which inevitably leads to self-empowerment. The level of self-empowerment may vary among individuals, but when the citizenry decides important personal issues, that leads to a purer democracy. Additionally, with such an enthralling transformation, individuals are empowered not only to make impacting decisions, but to take control of other aspects of their lives.

The traditional legal process remains myopic in scope. The American legal system stands in notoriety for its adversarial nature. The outcomes of legal cases can be classified in terms of wins and losses. While parties may not be completely satisfied with the results of a particular mediation session, the initiation of open discourse, itself, creates a win-win situation. Mediation serves as an informal, yet effective mode of dispute resolution.

Mediation stands out as the best method for resolving conflict, especially when racial or cultural overtones are present, as opposed to a judge sitting atop his or her mountain of institutional power. Ultimately, when conflicted individuals take control of a situation and initiate resolution through open dialogue, peace becomes highly viable. Optimistically, mediation-driven self-empowerment at the individual-level leading to conflict resolution and peace will reap similar benefits for communities plagued with violence, hatred, and misunderstanding across cultures.

Traditionally, minority groups have had to attack and change preexisting social hierarchies to champion their own causes and establish their own previously "voiceless" identities. While social change is often diffi-

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135. *Id.*

Lawyers have been taught that the legal process is cerebral and professional and that it is the job of counsel and representative to substitute cogent legal arguments for the emotion of their clients. Letting go of this responsibility is difficult, if not impossible at times, but imperative in the process of serving our clients' underlying needs in most situations. *Id.*

136. *Id.* (emphasis omitted) (recognizing the importance of mediation due to the small number of cases that actually go to trial).

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cult to achieve, social change is necessary for democratic inclusion of minority groups. Difference tends to be targeted and attacked because it threatens individuals who do not understand the nature and cause of the difference, both at a cognitive and visual level. Ultimately, in a globalized world with a rich mix of different cultures, peace only can be achieved and maintained through understanding, acceptance, and inclusion, where all people are treated with dignity and respect.