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# DISPUTE RESOLUTION LESSONS GLEANED FROM THE ARREST OF PROFESSOR GATES AND “THE BEER SUMMIT”

ELAYNE E. GREENBERG\*

## INTRODUCTION

America’s fantasy of a post-racial society<sup>1</sup> was shattered on July 16, 2009, when a white police officer arrested Harvard Professor Henry Louis Gates, a well-respected African-American academic, in his own home.<sup>2</sup> Our historical racial fissure was widened. Once again, our thoughts were plagued with tortured images of our system of racialized law enforcement: the torture of Abner Louima, the beating of Rodney King, the killing of Amadou Diallo.<sup>3</sup> Predictably, Americans became further polarized, as they simultaneously blamed and defended responses to racism.

In what was perceived by some as a dramatic and unanticipated turn of events, and perceived by others as a necessary political response, on July 30, 2009, President Obama convened the “beer summit,” a metaphorical mediation.<sup>4</sup> President Obama invited Professor Gates and Police Sergeant

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<sup>1</sup> See Lydia Lum, *The Obama Era: A Post-racial Society?*, DIVERSE EDUC., Feb. 5, 2009, [http://diverseeducation.com/artman/publish/article\\_12238.shtml](http://diverseeducation.com/artman/publish/article_12238.shtml) (defining a “post-racial society” as one in which race matters much less than it used to, the boundaries of race have been overcome, and racism is no longer a big problem).

<sup>2</sup> See *Charge against Harvard professor dropped*, CNN, July 21, 2009, <http://www.cnn.com/2009/CRIME/07/21/massachusetts.harvard.professor.arrested/index.html> (noting that Professor Gates was arrested on a charge of disorderly conduct); see also Katie Zezima & Abby Goodnough, *Harvard Scholar Won’t Be Charged*, N.Y. TIMES, July 21, 2009, [http://www.nytimes.com/2009/07/22/us/22gates.html?\\_r=1](http://www.nytimes.com/2009/07/22/us/22gates.html?_r=1) (explaining that the police officer made the arrest while investigating a report of a break-in at the Gates homes).

<sup>3</sup> See Donald F. Tibbs & Tryon P. Woods, *The Jena Six and Black Punishment: Law and Raw Life in the Domain of Nonexistence*, 7 SEATTLE J. SOC. JUST. 235, 242–43 (2008) (listing examples of contemporary legalized violence against black people).

<sup>4</sup> See Kenneth T. Walsh, *Obama’s Beer Summit and Race in America: Henry Louis Gates, James Crowley, Biden, and Obama met on the South Lawn at the White House*, U.S. NEWS AND WORLD REPORT, Aug. 3, 2009, <http://www.usnews.com/articles/news/obama/2009/08/03/obamas-beer-summit-and-race-in-america.html> (describing what the “beer summit” was).

James Crowley to the White House South Lawn to resolve the issues surrounding the arrest of Professor Gates by Sergeant Crowley.<sup>5</sup> As Professor Gates and Sergeant Crowley sat around the table drinking beer with President Obama, their discussion about race shifted from a demonizing conversation to a humanizing conversation. The two men gained insight into what had happened and began exploring what might be done to prevent this from happening again.<sup>6</sup>

The beer summit's success challenges the long-held taboo proscribing the mediation of civil rights violations such as racial profiling. Civil rights activists, critical race scholars, and the benefactors of civil rights advancement have long considered the mediation of civil rights violations as a neutering of civil rights law and a muting of compelling injustice narratives.<sup>7</sup> This commentary encourages civil rights purveyors to step back from such absolutes and reconsider the appropriateness of mediation in select instances of civil rights offenses. Nothing in this commentary should be misconstrued as a blanket endorsement of mediation in lieu of litigation to redress civil rights violations. Rather, this is an invitation to re-examine the possibilities and reconsider mediation as one forum of choice in addressing race-based civil rights conflicts with law enforcement.

Understandably, you may react to this difficult discussion from your personal vantage point about race. After all, whether you consider racial profiling to be a ubiquitous societal problem or a societal ill of the past depends on who you are, your personal experience, your professional perspective, and your definition of the problem.<sup>8</sup> In this commentary, racial profiling is broadly defined as "the practice of 'police routinely [using] race as a negative signal that, along with an accumulation of other signals, causes an officer to react with suspicion.'"<sup>9</sup> For some, the definition will be too encompassing; for others, not broad enough.

<sup>5</sup> See *id.* (detailing that the three men met together for 40 minutes and at distance 50 feet away from the roped-off media).

<sup>6</sup> See *id.* (noting that the conversation itself was confidential).

<sup>7</sup> See Amber McKinney, *THE ACLU and the Propriety of Dispute Resolution in Civil Rights Controversies*, 6 PEPP. DISP. RESOL. L. J. 109, 109 (2006) (citing the American Civil Liberties Union as one civil rights organization holding such concern).

<sup>8</sup> See Lincoln Quillian, *New Approaches to Understanding Racial Prejudice and Discrimination*, 32 ANN. REV. SOC. 299, 301 (2006) (stating that under one definition of racism, racial discrimination or prejudice by subordinate group members against a dominant group cannot be described as racist because it does not contribute toward upholding the dominance of the dominant group); see also DOUGLAS STONE, BRUCE PATTON, & SHEILA HEEN, *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* 32 (Penguin Books) (1999) (highlighting relevant ways in which people are all different).

<sup>9</sup> D.J. Siltan, *U.S. Prisons and Racial Profiling: A Covertly Racist Nation Rides a Vicious Cycle*, 20 LAW & INEQ. 53, 59 (2002) (quoting David Shaffer & Heron Marquez Estrada, *St. Paul Police Search Black, Hispanic Drivers at Higher Rate*, STAR TRIBUNAL, Jan 10, 2001, at A1).

This commentary proceeds with this discussion in five parts. Part One reviews the facts surrounding Professor Gates' arrest. Part Two analyzes the transformation in the participants' conflict discourse that was used to narrate their experience before and after the beer summit. Part Three then hypothesizes why racial profiling remains so pernicious today despite rigorous legislative and judicial enforcement. Part Four offers how mediation might be used as a responsive complement to the existing legal framework. In conclusion, Part Five invites the reader to consider the possibilities that mediation offers as one forum to respond to the multi-dimensional elements of racial profiling, as it exists today.

### I. PART ONE: THE INCIDENT

Briefly, these are the reported facts: Professor Gates was returning from a trip to China, ironically filming a version of PBS' Faces of America. As he struggled to open the front door of his house with his key, he found the door stuck shut.<sup>10</sup> Professor Gates then asked his driver to help open the door. As the two men were pushing and trying to open up the door, a neighbor, Lucia Whalen, walked by.<sup>11</sup> Observing two men struggling to enter the house and thinking they might be burglars, Ms. Whalen called 911.<sup>12</sup>

Cambridge Police Sergeant James Crowley responded to the call and went to Professor Gates' home to investigate.<sup>13</sup> By that time, Professor Gates and the driver had forced the door open; Professor Gates' driver had left the scene; and Professor Gates was in the middle of calling Harvard Housing, the owners of the house, about repairing the front door lock.<sup>14</sup> Sergeant James Crowley came to the door, and asked Professor Gates to step outside.<sup>15</sup>

At that point, the conflict escalated. Professor Gates demanded, "[W]hy, because I'm a black man in America?"<sup>16</sup> It is reported that initially Professor Gates refused to comply with Sergeant Crowley's request for

<sup>10</sup> See Abby Goodnough, *Harvard Professor Jailed; Officer Is Accused of Bias*, N.Y. TIMES, Jul. 20, 2009, [http://www.nytimes.com/2009/07/21/us/21gates.html?\\_r=1](http://www.nytimes.com/2009/07/21/us/21gates.html?_r=1) (noting that this was reported by Professor Gates' attorney).

<sup>11</sup> See Cambridge Police Department, Cambridge Incident Report #9005127, Jul. 16, 2009, available at [http://www.samefacts.com/archives/Police report on Gates arrest.PDF](http://www.samefacts.com/archives/Police%20report%20on%20Gates%20arrest.PDF) [hereinafter *Cambridge Police Report*].

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See Goodnough, *supra* note 10.

<sup>15</sup> See Cambridge Police Report, *supra* note 11.

<sup>16</sup> *Id.*; Goodnough, *supra* note 10.

identification; it is also reported that Sergeant Crowley initially ignored Professor Gates' demands to see Sergeant Crowley's identification.<sup>17</sup> Professor Gates allegedly engaged in loud and "tumultuous" behavior and was arrested for disorderly conduct.<sup>18</sup> He was held for four hours. Four days later, the Cambridge Police dropped the charges.<sup>19</sup>

## II. PART TWO: CONFLICT DISCOURSE BEFORE AND AFTER THE BEER SUMMIT

The court of public opinion became divided, as Americans allowed their personal experiences and biases to color their interpretation of the facts. Some opted to align with Professor Gates, others with Sergeant Crowley. Professor Gates supporters voiced their outrage and devastation: "It's really kind of unfathomable. If it can happen to him, yeah, it can happen to any of us."<sup>20</sup> "If a mild-mannered, bespectacled Ivy League professor who walks with a cane can be pulled from his own home and arrested on a minor charge, the rest of us don't stand a chance."<sup>21</sup> "We all fit a description. We are all suspects."<sup>22</sup> "To see the mugshot of Skip was a blow to all of us who feel some sense of safety based on our work to try to mend all of these broken fences in America – to make ourselves into people who refuse to be limited by race and class and gender and everything else."<sup>23</sup> "To end up, at the end of the day, treated like a criminal, unjustly stripped of our accomplishments and contributions[,] even if only for a moment, is profoundly disturbing."<sup>24</sup>

Simultaneously, Sergeant Crowley defenders asserted their own indignation and support: "[O]ne more incident involving a black man, a white cop, and charges of racism against the cop for simply doing what he gets paid to do."<sup>25</sup> "I say Gates should do the apologizing for calling Crowley a racist and, after being politely asked to step outside the residence, for making remarks such as, 'Ya, I'll speak to your mama

<sup>17</sup> See Goodnough, *supra* note 10 (outlining both accounts of how the altercation transpired).

<sup>18</sup> See Cambridge Police Report, *supra* note 11.

<sup>19</sup> See Goodnough, *supra* note 10 (quoting Harvard's president).

<sup>20</sup> Wayne Drash, *The "Unfathomable" Arrest of a Black Scholar*, CNN, Jul. 22, 2009, <http://www.cnn.com/2009/US/07/22/gates.arrest.reaction/index.html>.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Rebecca Walker, *On the Arrest of Henry Louis Gates*, Jan. 11, 2010, <http://www.rebeccawalker.com/blog/2009/07/21/thoughts-on-the-arrest-of-henry-louis-gates>.

<sup>25</sup> Gene Lalor, *Sergeant Crowley Does His Job and Is Vilified for It!*, Jul. 23, 2009, <http://www.americanconservativedaily.com/2009/07/sergeant-crowley-does-his-job-and-is-vilified-for-it/> [hereinafter *Sergeant Crowley Does His Job*].

outside.”<sup>26</sup> “I admire the hell out of this union, standing up for their guy False”<sup>27</sup> “I’d be glad if somebody called the police if somebody was breaking into my house.”<sup>28</sup>

The incident even struck President Obama’s personal chords, seemingly resonating with his own experiences as a black man. The President commented that the Cambridge police had acted “stupidly,” a remark the White House later clarified.<sup>29</sup> And, President Obama continued, “There’s a long history in this country of African-Americans and Latinos being stopped by law enforcement disproportionately. That’s just a fact.”<sup>30</sup>

Replaying this discourse and listening with a third ear, we hear that amidst the passion of the conflict, each side spews words that further fuel the conflict and further disenfranchises each group. We observe that each camp uses language of strong emotion, victimization, and disempowerment. Furthermore, the messages in each party’s statements fortify their own position and provide further justification for each side’s chosen perspective. Notably, the statements are statements of absolutes, lacking the tentativeness that allows each person to even consider the validity of the other side’s perspective.

Conspicuously, the conflict discourse was black and white, with no room for gray.<sup>31</sup> What was ignored in this gunfire of emotion and retaliation was that Sergeant Crowley had the support of many African-Americans. He has a reputation for being a good and fair officer. In fact, he had been selected by a black commissioner to teach courses on racial profiling.<sup>32</sup> Also lost in the demonization of the other was that both Professor Gates and Sergeant Crowley are members of the Simon Weisenthal Center, an institution dedicated to promoting the human rights and dignity of all.<sup>33</sup>

<sup>26</sup> *Id.*

<sup>27</sup> Posting of ‘delusianne’ to City-Data.com, <http://www.city-data.com/forum/politics-other-controversies/713711-sgt-crowleys-union-stands-up-him-2.html> (Jul. 24, 2009, 11:26 EST).

<sup>28</sup> Drash, *supra* note 20.

<sup>29</sup> See Lalor, *supra* note 25 (noting that a White House spokesman clarified that President Obama was not calling Sergeant Crowley “stupid”).

<sup>30</sup> *Id.*

<sup>31</sup> See DEBORAH TANNEN, *THE ARGUMENT CULTURE* 219 (Random House) (1988) (explaining that in our culture of “polarized dualisms,” we more readily observe things that are in opposition, and less likely to see areas of “overlap or similarity”).

<sup>32</sup> See *Cambridge Top Cop Stands By Department After Harvard Arrest*, CNN, Jul. 24, 2009, <http://www.cnn.com/2009/US/07/23/officer.gates.arrest/index.html> (stating that Sergeant Crowley taught at the Lowell Police Academy).

<sup>33</sup> See Abraham Cooper, *Reenlisting Gates and Crowley*, Jul. 31, 2009, [http://newsweek.washingtonpost.com/onfaith/guestvoices/2009/07/gates\\_crowley\\_and\\_tools\\_for\\_tolerance.html?hpid=talkbox1](http://newsweek.washingtonpost.com/onfaith/guestvoices/2009/07/gates_crowley_and_tools_for_tolerance.html?hpid=talkbox1) (last visited Jan. 11, 2010) (inviting Professor Gates and Sergeant Crowley back to the Museum of Tolerance to help create the next “teaching moment” for the nation); see also TANNEN, *supra* note 31, at 219.

How paradoxical to find two men who are committed to eradicating hate crimes personally embroiled in their own racialized conflict.

As with other instances of alleged racialized justice, Professor Gates had choices about how to address and resolve this conflict.<sup>34</sup> Demonstrations, litigation, dispute resolution, or just walking away may have been viable options. Each is a distinct process that offers its own attractions, its own limitations, and its own remedies. As with any conflict resolution choice, the decision is a personal one that is determined by the type of offense, the available evidence, the victim's values, and the type of resolution sought.

The choice of an appropriate dispute resolution forum is also a value-laden decision that, in part, is supported by the values embedded in our broader culture. Historically, our American culture is a culture that values the adversarial approach to promote ideas and resolve conflict.<sup>35</sup> Aggression and argumentation are coveted values that pervade our culture. Our lexicon is rich with fighting metaphors: battle of the sexes, war on crime, war on cancer, ideological wars, and politicians' turf battles.<sup>36</sup> In our educational system, teachers educate by debate and critique.<sup>37</sup> In another example, our entertainment industry is replete with talk shows and survival shows that showcase the individual overcoming the fight against the other.<sup>38</sup> Most notably, our American legal system, the fulcrum of our society, believes that truth and justice emerge from an adversarial paradigm.

Paradoxically, the American culture is also an empathic culture in which our humanness and desire for connection propel us from childhood onward to connect and collaborate with each other.<sup>39</sup> Our empathic consciousness has prompted us to expand the way we look at justice, courts, and laws,<sup>40</sup> and has motivated us to seek ways to customize our concept of justice by expanding our dispute resolution offerings beyond the traditional adversarial paradigm. No longer is justice just a favorable judgment that may only be secured in litigation. Now justice may include the concept of reconciliation, focusing on how the relationship between the victim and the perpetrator might be habilitated and how emotional healing might take place.<sup>41</sup> Justice may be found in the multi-disciplinary collaboration of

<sup>34</sup> See TANNEN, *supra* note 31, at 3–4.

<sup>35</sup> *Id.* at 3–4.

<sup>36</sup> *Id.* at 4.

<sup>37</sup> *Id.* at 257.

<sup>38</sup> *Id.* at 285.

<sup>39</sup> JEREMY RIFKIN, *THE EMPATHIC CIVILIZATION* (Jeremy P. Tarcher ed., Penguin Books) (2009).

<sup>40</sup> *Id.* at 17.

<sup>41</sup> *Id.* at 16.

problem-solving courts. And for increasing numbers, justice may be found in mediation where parties have an opportunity for empathy and reconciliation.

Yet, Professor Gates chose to participate in the beer summit when President Obama invited him. This metaphorical mediation shifted the conversation from a battle to a collaborative dialogue that transformed President Obama's, Professor Gates', and Sergeant Crowley's perspectives on the conflict. Although the conversation during the beer summit itself remained confidential,<sup>42</sup> the participants publicly shared their reactions following the summit. Of significance, their conflict discourse was markedly changed. Individual empowerment and recognition of each other's humanity took the place of demonization and polarization.<sup>43</sup> Openness to considering each other's perspective and comprehending the incomprehensible replaced the parties' entrenched, defensive stance.<sup>44</sup>

President Obama characterized the beer summit as "three folks having a drink at the end of the day and hopefully giving people an opportunity to listen to each other."<sup>45</sup> "I have always believed that what brings us together is stronger than what pulls us apart."<sup>46</sup>

Professor Gates reflected: "The national conversation over the past week about my arrest has been rowdy, not to say tumultuous and unruly. But we've learned that we can have our differences without demonizing one another. There's reason to hope that many people have emerged with greater sympathy for the daily perils of policing, on the one hand, and for the genuine fears about racial profiling, on the other hand. . . . I am hopeful that we can all move on, and that this experience will prove an occasion for education, not recrimination."<sup>47</sup> "My entire academic career has been based on improving race relations not exacerbating them. I am hopeful that my experience will lead to greater sensitivity to issues of racial profiling in the criminal justice system."<sup>48</sup>

<sup>42</sup> See Walsh, *supra* note 4 (pointing out that the media were kept out of earshot and no questions were allowed).

<sup>43</sup> ROBERT A. BARUCH BUSH & JOSEPH FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (Jossey-Bass, Inc.) (1994).

<sup>44</sup> See *id.*

<sup>45</sup> Jake Tapper, Karen Travers & Huma Khan, *Obama, Biden Sit Down for Beers with Gates, Crowley*, ABC NEWS, Jul. 30, 2009, <http://abcnews.go.com/Politics/story?id=8208602&page=1>.

<sup>46</sup> *Id.*

<sup>47</sup> Henry Louis Gates Jr., *An Accident of Time and Place*, July 30, 2009, THE ROOT, <http://www.theroot.com/views/accident-time-and-place>.

<sup>48</sup> Daniel Sieden, *Henry Gates, Sgt. James Crowley, and President Obama solve racial controversy over beers*, EVERGREEN ST. C. EXAMINER, Aug. 3, 2009, <http://www.examiner.com/x-18520-Evergreen-State-College-Examiner~y2009m8d3-Henry-Gates-police-Sgt-James-Crowley-and>



Sergeant Crowley commented:

We agreed to move forward . . . . I think what you had today was two gentlemen agreeing to disagree on a particular issue. I don't think that we spent too much time dwelling on the past. We spent a lot of time discussing the future.<sup>49</sup>

Seven months after the beer summit, Professor Gates was asked about whether he had seen Sergeant Crowley following the beer summit.<sup>50</sup> "We had a drink at my favorite pub in Cambridge. We met at the River Gods café several months ago, and he gave me the handcuffs."<sup>51</sup> "I donated them to the new National Museum of African American History and Culture at the Smithsonian."<sup>52</sup> "No one would exactly call me Malcom X. And I don't think as time goes on I will be remembered for handcuffs. I hope not."<sup>53</sup>

Noticeably, the conflict discourse shifted from the language of demonization to the language of collaboration, healing, and resolution. To the chagrin of many, there were no mea culpas, no public apologies, and no clear-cut resolutions. Instead, the conflict discourse of Professor Gates and Sergeant Crowley reflected personal reflections, acknowledgements, and advancements forward. These personal benefits may have immeasurable, personal value and satisfaction to the individual participants. However, such subtleties may be lost and undervalued by some public observers. Of significance, these different assessments of the value of the beer summit reflect the ongoing public debate about whether mediation has any value and whether a conflict such as racial profiling should ever be resolved in a private forum such as mediation.

### III. RETHINKING APPROACHES TO THE RACIAL PROFILING OF TODAY

The arrest of Professor Gates compels us to question why racial profiling remains so pernicious despite our aggressive prosecution of perpetrators. Victims of racial profiling have sought redress through the enforcement of constitutional and statutory prohibitions against racial profiling including:

President-Obama-solve-racial-controversy-over-beersdelim.

<sup>49</sup> Associated Press, *Obama: Beer Meeting 'Thoughtful,'* Jul. 30, 2009, THE ROOT, <http://www.theroot.com/views/obama-beer-meeting-thoughtful>.

<sup>50</sup> See Deborah Solomon, "After the Beer Summit: Questions For Henry Louis Gates, Jr.," N. Y. TIMES MAGAZINE, Feb. 11, 2010, <http://www.nytimes.com/2010/02/14/magazine/14fob-q4-t.html>.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

U.S. Section 1983, the Fourth Amendment, the Fourteenth Amendment, the Civil Rights Act of 1964, and the Violent Crime Control and Law Enforcement Act of 1994. Yet, racial profiling remains a persistent problem.<sup>54</sup> As one jarring example of the severity of racialized law enforcement, forty-nine percent of African-Americans are inmates of our prison system even though African-Americans only comprise twelve percent of the U.S. population. How could this be? Two possible explanations are offered. First, the laws that prohibit racial profiling may be enforced in a racially prejudicial way. Second, a new type of racism has emerged that is more covert and unconscious, and less easily ferreted out by litigation.<sup>55</sup>

Paradoxically, laws intended to prevent racial discrimination may be interpreted and enforced in a way that promotes the very racism the law is trying to avert.<sup>56</sup> Several phenomena may elucidate this incongruous effect. For example, racially selective empathy and indifference, “the unconscious failure to extend to a minority the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one’s own group,” is one bias that may influence how judges apply laws.<sup>57</sup> In another example, raced-based laws may unintentionally stigmatize the very victims it seeks to protect by characterizing the victim as an inferior individual warranting greater protection. Such classifications may cause the racially-protected group long-term and debilitating psychological consequences.<sup>58</sup> Finally, some triers of fact may be influenced by their own racial animus.

Social scientists posit that the racism of today is a more covert, unconscious type of racism than the racism that had previously existed.<sup>59</sup> Civil rights legislation and litigation have been effective weapons to combat overt, intentional forms of racial profiling, signaling that overt

<sup>54</sup> See Stilton, *supra* note 9, at 53-54 (stating that the U.S. criminal justice system is doing more than good with respect to racism); see also Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 307 (1987) (arguing that an unfair social system survives by using piecemeal reform to disguise and legitimize oppression).

<sup>55</sup> See Stilton, *supra* note 9, at 56 (pushing for legislation to be designed to attack the covert or “unconscious” racism that fuels and fosters racial profiling and racial disparity in prisons).

<sup>56</sup> See Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 18-19 (1976) (discussing how school desegregation and preferential employment and admissions policies might reflect assumptions that minorities are innately inferior and therefore in need of special aid).

<sup>57</sup> See *id.* at 7-8.

<sup>58</sup> See *id.* at 8 (explaining that victims of discrimination suffer especially “frustrating, cumulative, and debilitating injuries”); but see Delgado, *supra* note 54, at 311 (arguing that the concept of false consciousness may not hold true for minorities).

<sup>59</sup> Quillian, *supra* note 8, at 312 (asserting that modern racism believes that discrimination is in the past and that a new complex of prejudicial beliefs has replaced the old prejudice).

forms of racial profiling will not be tolerated in our society. However, racism is so rooted in our history that it is Pollyannaish to believe that it can be eradicated just by the aggressive enforcement of racial prohibitions.<sup>60</sup> Instead, racism continues, but in a different form. The racism of today is more obscure, ubiquitous, and often unconscious.<sup>61</sup> Expectedly, this unconscious form of racism is more challenging to prove in court. Resistant to sanctions, this covert racism perniciously flourishes in our society.<sup>62</sup>

#### IV. MEDIATION

For many, the leap from the discussion about the success of the beer summit to a discussion about developing mediation programs for racial profiling conflicts still remains a perilous one that requires a more informed consideration. First, I discuss the unique benefits that mediation offers. Second, I identify the inherent risks in mediating these types of cases. Third, I propose guidelines to be incorporated into the design of a mediation program prototype, culling lessons from similar successful mediation programs and heeding warnings from a less successful program. All the while, the reader is keeping his trepidations at bay, remembering that this discussion is about choice.

As a complement to our comprehensive civil rights legal schema,<sup>63</sup> mediation offers parties in civil rights conflicts an appealing alternative in which parties may seek their personalized form of justice. Mediation allows parties to address this difficult conflict in a more informal, personal, and authentic way, inviting parties to share perceptions and understandings beyond the bounds of evidentiary proof. Remedies such as acknowledgment, apologies, and collaboration to affect change are all possibilities. Bypassing the evidentiary and adversarial limitations of litigation, mediation is a forum of particular appeal to address covert racism. After all, the offender may not even be conscious of the racist effect of his actions, and the victim may lack the requisite evidentiary proof

<sup>60</sup> Stilton, *supra* note 9, at 58 (stating that although unconscious racism is ingrained in society and its effects may be blatant, its surreptitiousness makes it difficult to isolate).

<sup>61</sup> See Quillian, *supra* note 8, at 313 (pointing out that new prejudice theorists argue that it is difficult to clearly distinguish the race component of new prejudice); Maria Krysan, *Prejudice, Politics and Public Opinion: Understanding the Sources of Racial Policy Attitudes*, 26 ANN. REV. SOC. 135, 141–46 (2000) (noting an implicit racism test).

<sup>62</sup> See Stilton, *supra* note 9, at 58 (warning that the notion that racial prejudice in the U.S. has actually been eradicated is “absurd and potentially dangerous”).

<sup>63</sup> See Robert Cooter & Stephen Marks with Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. L. STUD. 225 (1982).

to seek legal redress.

As a process, mediation also offers unique elasticity to respond to the paradoxes inherent in resolving racial profiling conflicts. First, parties have the opportunity to rely on their own values and sense of fairness, in addition to the law, to fashion their customized form of justice. This avoids the risk of racialized and politicized judicial determinations that may disfavor either party. Second, the mediation process may be structured to minimize the further victimization and demonization of the parties that are de rigueur of litigation. Instead, mediation offers parties a critical mixture of informality and confidentiality, which allows parties to listen, acknowledge, and understand each other without fear of recrimination. This may be especially invaluable in instances of covert racial profiling, where the victim has the opportunity to make the perpetrator aware of the harms inflicted by previously unconscious racial actions, in the hope that this enhanced awareness will effect real change. Finally, parties in mediation are allowed to discuss the racial profiling incident in a more authentic way that acknowledges the shades of gray in the conflict, the fluidity of reality, the vagaries of perception, and the recognition that truth is not an absolute.

For many participants, mediation provides the type of social contact that has been found to reduce prejudice.<sup>64</sup> In mediation, all parties are accorded equal status.<sup>65</sup> Each party in the mediation is assisted to experience the mediation interaction as beneficial, rather than dangerous.<sup>66</sup> During the in-person mediation meetings, parties have the opportunity to highlight acts of bias and inconsistency, and create modifications in racist behaviors and attitudes.<sup>67</sup>

Yet, civil rights activist and critical race scholars warn that mediation is actually a forum of racialized justice and caution against its use.<sup>68</sup> Mediation's informality will only increase the likelihood of a racialized process.<sup>69</sup> After all, rules and procedures are necessary to keep racist beliefs in check. Others express concerns that the mediators in this

<sup>64</sup> See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1385 (1985) (noting that this "social contact" hypothesis underlies much of the movement toward institutional integration).

<sup>65</sup> See *id.* at 1386 (listing this as the first requirement for social contact to lessen prejudice).

<sup>66</sup> See *id.* (setting forth the second requirement for contact to lessen prejudice).

<sup>67</sup> See *id.* (describing the "confrontation theory" proposed for reducing prejudice).

<sup>68</sup> *Id.* at 1359 (raising a seemingly overlooked concern that deformalization may increase the risk of class-based prejudice).

<sup>69</sup> *Id.* at 1387-88 (asserting that our judicial system has incorporated societal norms into institutional expectations and rules of procedure, and that these norms create a public conscience and a standard of expected behavior that check overt signs of prejudice).

informal setting are more likely to voice their own racist beliefs,<sup>70</sup> causing victims to be further victimized. Another concern is that the confidentiality protections of mediation will be used as a shield to cover racialized injustices. Still, others fear that confidential mediation agreements will rob our justice system of vital legal interpretations of civil rights laws.

Although some may hear these concerns as the death knell of potential mediation programs for racial profiling conflicts, dispute resolution system design professionals heed these concerns as cautionary guides that help formulate guidelines for more responsive mediation programs. First, any mediation program should be a voluntary adjunct to, not a replacement for, our legal system. A party that elects to mediate still retains her right at any time during the mediation to change her mind, abandon mediation, and proceed to litigate her claim.<sup>71</sup> Second, to safeguard against misusing mediation as a shield for racism, the mediation program should be administered and overseen by an appropriate government agency, rather than be party-administered. If an outcome of the mediation is an agreement, the agreement should be reviewed by the appropriate government agency to ensure that agreement comports with civil rights law. Third, all the stakeholders who might be involved in the referral and use of the mediation program need to be involved in the design of the mediation program to ensure that the stakeholders contribute to a mediation-supportive culture.

Finally, the mediation program should adopt a transformative mediation ideology, a non-directive style of mediation,<sup>72</sup> that is likely to minimize mediator bias and party victimization.<sup>73</sup> Mediation ideology determines how the conflict will be defined, what role the neutral will play, and how the parties will participate. On a spectrum from directive to elicitive, there are four principle mediation ideologies: evaluative, facilitative, understanding-based, and transformative. Dispute resolution scholar Professor Len Riskin informs us that even though many mediators might self-identify with a specific mediation ideology, in practice, many mediators actually employ an amalgam of styles during the mediation

<sup>70</sup> See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L. J. 1545, 1590 (1991) (arguing that “the very intimacy that renders mediation such a potentially constructive process may facilitate the mediator’s projection of her own conflicts onto the parties...”).

<sup>71</sup> *Id.* at 1596 (explaining why it is essential that the parties retain this right).

<sup>72</sup> See BUSH & FOLGER, *supra* note 43; see also Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 33 (1996) (noting that under this style of mediation, the parties involved are provided opportunities to give “recognition” to one another).

<sup>73</sup> Riskin, *supra* note 72, at 33 (contrasting the facilitative-broad mediator from the narrow mediator and evaluative-broad mediator).

process, from directive to elicitive. I posit that those mediators who are more anchored in the transformative ideology, the least directive ideology, will be less likely to be directive and will inject their own racist biases.

In fact, the tenets of transformative mediation ideology support party self-determination rather than mediator imposition. For example, one tenet of transformative mediation is that the parties in the conflict have the capacity to resolve the conflict themselves. Another belief of transformative mediation ideology is that the role of mediators who follow transformative mediator ideology is to support, not supplant, the parties in their conflict discourse, their deliberations, and their decision-making process. In this party-driven type of mediation, the parties decide how they would like to discuss the conflict and how, if at all, they wish to resolve it. Parties in this process often experience a shift in their feelings of victimization to feelings of empowerment that then enable them to become clearer about what is important to themselves and the other person. Thus, we see that transformative mediation ideology anchors the mediator in a process of party self-determination, making it less likely that the mediator might inflict his own racist views on the parties.

Two successful civil rights mediation programs that have incorporated many of these suggested guidelines are the Keybridge Foundation's American Disabilities Act Mediation Program in conjunction with the Department of Justice, and the EEOC mediation program in conjunction with the Equal Employment Opportunity Commission. Both programs are prototypes of administered mediation programs. In each mediation program, a corresponding government agency oversees the mediation program to ensure that all mediated agreements are in compliance with the applicable civil rights laws in question. Party participation is voluntary, and parties may opt out of mediation at any time. Distinguishably, both programs train their roster mediators in a facilitative mediation ideology. Further study is needed to see how the application of this ideology on roster mediators heightens the likelihood of mediator directiveness and bias.

One example of a mediation program that has not garnered the requisite support of its stakeholders is the New York City Civilian Complaint Review Board's mediation program for civilians who have suitable complaints against police officers, including racial profiling.<sup>74</sup> Even though the program has a high mediation settlement rate and the NYC Police

<sup>74</sup> See New York City Civilian Complaint Review Board, *Mediation*, <http://www.nyc.gov/html/ccrb/html/mediation.html> (last visited on Jan. 10, 2010) (noting the CCRB excludes those conflicts involving bodily, damaged property or those in which the police officer involved already has a lengthy record of complaints).

Commissioner, Raymond W. Kelly, has endorsed the program, the mediation program remains an underutilized resource.<sup>75</sup> In part, there remains mistrust by the police officers about how mediation communications might be misused. Moreover, this reflects the tentativeness and ambivalence in our broader society about using mediation for issues of racialized law enforcement.

As detailed, the development of a viable mediation program for racial profiling conflicts requires distinctive considerations that maximize its benefits and minimize its misuses. First, the program needs to be administered and overseen by a related government agency. Second, participation needs to be voluntary. Participants need to be able to freely opt out of mediation and have ongoing access to courts. Third, the program needs to flourish in a culture where the stakeholders promote and support its purpose. Finally, the mediators should be trained in a non-directive style of mediation to minimize the likelihood of mediation bias.

## V. CONCLUSION

Some reading this commentary, struggling to extrapolate the salient lessons, may still be questioning the broader applicability of the beer summit to the mediation of racialized law enforcement conflicts. After all, it is not commonplace to have a neutral of President Obama's stature serving as the mediator. Nor is it typical to serve beer or other alcohol as the chosen elixir in mediation. Moreover, mediation resolutions are typically not subject to media and public scrutiny. Others may question whether there was, in fact, any resolution. After all, there were no mea culpas and no public apologies.

However, what is typical about the beer summit is that it showcases how mediation might be used to address the covert racism that remains prevalent in our society. It demonstrates how parties involved in racial profiling can shift from polarization to collaboration. It provides a confidential, private alternative for those who prefer to address racial profiling conflicts in private, rather than public forums. Of significance, it shows how racial profiling incidents may provide opportunities from which we can all learn in a way that unites us to minimize its reoccurrence rather

<sup>75</sup> See *NYPD Commissioner Kelly Encourages Mediation: Police Officers Encouraged to Use Mediation for Resolving Civilian Conflicts*, ENJOY MEDIATION, <http://www.enjoymediation.com/2009/09/nypd-commissioner-kelly-encourages.html> (last visited Jan. 11, 2010) (stating that Police Commissioner Kelley urged uniformed members of the service to avail themselves of the mediation process as a non-disciplinary way to resolve complaints against them).

than further divide us.

Embedded in this discussion are the many paradoxes in our society about race. In 2010, when racism remains an unacceptable part of our society, we have choices about how we wish to respond. Ironically, at the same time, our country is also grappling with how to rehabilitate our global identity as an aggressive brute. In part, where we wind up in this discussion about considering mediation to address racial profiling conflicts is a statement about our individual and societal values. For some, eradicating racism will be about developing understanding, and mediation has appeal. For others, eradicating racism is about aggressive litigation, and litigation remains the preferred mode. Still, for others, there remains curiosity about how mediation and litigation might interface as part of a cohesive approach to confronting racial profiling. Yes, it's about choice, change, and values.



