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BLINDING JUSTICE AND VIDEO CONFERENCING?

Elayne E. Greenberg*

Until justice is blind to color, until education is unaware of race, until opportunity is unconcerned with the color of men's skin, emancipation will be a proclamation but not a fact.

- Lyndon B. Johnson¹

I. INTRODUCTION

How might dispute resolution processes for civil matters conducted on video conferencing be designed to reduce racial justice inequities and increase Black participants' sense of procedural justice? In March 2020, responding to Covid-19 pandemic health concerns, all in-person, court-connected, and private dispute resolution processes shifted to video conferencing.² Proponents of video conferencing have long touted how video conferencing would increase access to justice by providing an efficient, cost-effective, and time-saving alternative to in-person appearances.³ An unexplored question in March 2020 was how

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1. Lyndon B. Johnson, *Lyndon Johnson on Civil Rights*, C-SPAN, at 7:43 (Dec. 12, 1972), <https://www.c-span.org/video/?320205-1/lyndon-johnson-civil-rights>.

2. See, e.g., *How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations*, PEW CHARITABLE TRS. (Dec. 1, 2021), <https://www.pewtrusts.org/en/research-and-analysis/reports/2021/12/how-courts-embraced-technology-met-the-pandemic-challenge-and-revolutionized-their-operations> (“Beginning in March 2020, all 50 states and D.C. adopted statewide or local rules to govern digital operations, shifting civil court business online in two areas: moving from in-person to virtual hearings and digitizing practical tasks. . .”).

³ See, e.g., John Greacen, *Remote Appearances of Parties, Attorneys & Witnesses: A Review of Current Court Rules and Practices*, SELF-REPRESENTED LITIG. NETWORK 2–3 (Mar. 17, 2017), https://www.ncsc.org/_data/assets/pdf_file/0021/25590/remotearrangements.pdf (“Parties can avoid the costs of lost time from work, transportation, parking, child care, and meals associated with a trip to the courthouse.”).

video conferencing would affect racial justice inequities. Black individuals and other marginalized groups were already disproportionately suffering from the scourge of Covid-19, more vulnerable because of the structural inequities they endure in health care, employment, and housing.⁴ Contributing to the urgency of this inquiry, the video looping of George Floyd's May 15, 2020, murder by Minneapolis police officer Derek Chauvin amplified the historical exigency for racial justice equity and reinforced state courts' long-standing commitment to justice equity.⁵

In the July 2020 joint Conference of Chief Justices ("CCJ") and the Conference of State Court Administrator ("COSCA"), they pledged to:

continue and intensify our efforts to combat racial prejudice within the justice system, both explicit and implicit, and to recommit ourselves to examine what systemic change is needed to make equality under the law an enduring reality for all, so that the justice we provide not only is fair to all but also is recognized by all to be fair.⁶

On July 16, 2020, the CCJ and COSCA memorialized their commitment in a joint report titled "Guiding Principles for Post-Pandemic Technology,"⁷ recognizing that this unprecedented shift to remote use also provided a welcome opportunity for courts to

4. See, e.g., Rashawn Ray, *Why Are Blacks Dying at Higher Rates from Covid-19?*, BROOKINGS: FIXGOV (Apr. 9, 2020), <https://www.brookings.edu/blog/fixgov/2020/04/09/why-are-blacks-dying-at-higher-rates-from-covid-19/> ("Collectively, these structural conditions and micro-level outcomes equate to a recipe for disaster where the consequences are Blacks' increased exposure, diagnosis, and death from the coronavirus."); see *Interim Report*, CAL. TASK FORCE TO STUDY AND DEV. REPARATION PROPOSALS FOR AFR. AMS. (June 1, 2022) <https://oag.ca.gov/system/files/media/ab3121-reparations-interim-report-2022.pdf> (chronicling the systemic racism that has disadvantaged African Americans).

5. Andre M. Perry & Tawanna Black, *George Floyd's Death Demonstrates the Policy Violence that Devalues Black Lives*, BROOKINGS: THE AVE. (May 28, 2020), <https://www.brookings.edu/blog/the-avenue/2020/05/28/george-floyds-death-demonstrates-the-policy-violence-that-devalues-black-lives/>.

6. *CCJ/COSCA Resolution Supports Racial Equality and Justice for All*, NAT'L CTR. FOR STATE CTS. (July 30, 2020), <https://www.ncsc.org/newsroom/at-the-center/2020/ccjosca-resolution-supports-racial-equality-and-justice-for-all>.

7. *Guiding Principles for Post-Pandemic Court Technology*, NAT'L CTR. FOR STATE CTS. (July 16, 2020), <https://www.srln.org/system/files/attachments/Guiding%20Principles%20for%20Post%20Pandemic%20Court%20Technology%20%28CCJ%3ACOSCA%202020%29.pdf>.

strengthen racial justice equities.⁸ The report prescribed six guiding principles:

1. Ensure principles of due process, procedural fairness, transparency, and equal access are satisfied when adopting new technologies.⁹
2. Focus on the user experience.¹⁰
3. Prioritize court-user driven technology.¹¹
4. Embrace flexibility and willingness to adapt.¹²
5. Adopt remote-first (or at least remote-friendly) planning, where practicable, to move court processes forward.¹³
6. Take an open, data-driven, and transparent approach to implementing and maintaining court processes and supporting technologies.¹⁴

We now fast forward to the spring of 2022 as Covid-19 concerns are abating and we are trying to discern the parameters of the “new normal.”¹⁵ Respected legal prognosticators believe that video conferencing will remain a preferred mode of conducting dispute resolution processes because of its time-saving and cost-saving benefits.¹⁶ Nationally, state courts continue to conduct

8. *Id.* at 2.

9. *Id.*

10. *Id.* at 3.

11. *Id.* at 4.

12. *Id.* at 5.

13. *Id.* at 7.

14. *Id.*

15. See, e.g., Harry P. Trueheart, *2022 Virtual Arbitration Report: A Two-Year Retrospective Survey of the Fellows of the College of Commercial Arbitrators*, COLL. OF COM. ARBS. 6 (Apr. 2022), https://www.ccarbitrators.org/wp-content/uploads/2022/04/2022_Virtual-Arbitration-Report-to-CCA.pdf (“The reasons for and benefits of virtual proceedings go well beyond avoiding pandemic related risks and problems and include efficiency, cost savings, and more expeditious scheduling.”); Mark J. Bunim, *Insurance Mediation: Is It Time to Return to the Good Old Days?*, N.Y.L.J. (Apr. 19, 2022), <https://www.law.com/newyorklawjournal/2022/04/19/insurance-mediation-is-it-time-to-return-to-the-good-old-days/> (noting that depending on the case, both virtual and in-person dispute resolution will each have its place in the new normal).

16. See, e.g., Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the Covid-19 Pandemic and Beyond*, 115 NW. U. L. REV. 1887, 1887–89 (2021) (extolling how scheduling a hearing on video conferencing as opposed to in-person

dispute resolution processes on video conferencing.¹⁷ Yet, we are still in the embryonic stage of learning about how dispute resolution processes conducted via video conference might advance racial justice equity outcomes. The sheer volume of cases conducted on video conferencing during the pandemic provides an unanticipated opportunity to begin examining how dispute resolution processes conducted on video conferencing are affecting racial justice inequities.

In the “new normal,” video conferencing is emerging as a favored communication channel for conducting dispute resolution processes. This discussion will focus on three major racial justice equity issues magnified by video conferencing: remediating the digital divide, addressing the implicit racial biases that are triggered when video conferencing, and responding to Black participants’ procedural justice concerns when deciding if dispute resolution processes should take place via video conferencing. This discussion culls from the emerging research and discussions about the intersectionality of video conferencing and implicit racial bias that have been observed in virtual court hearings, interviews, and anecdotally during the Covid-19 pivot. It contributes to this beginning conversation by extrapolating lessons about racial justice equity to the dispute resolution processes that will continue to be conducted on video conferencing.

As a dispute system design professional and practitioner, I acknowledge that I write this Article with a “glass half full” bias. It is only by maximizing the benefits of video conferencing while also understanding how video conferencing is limiting access to justice for Black participants that we can strengthen the use of video conferencing to yield equitable racial justice outcomes. Historically, Black participants have experienced our justice

save commuting costs and endless waiting in the courthouse); *see also id.* at 1888 (citing to a report of the Self-Represented Litigation Network finding that video conferencing also spares litigants child care and lost wages); *id.* at 1889 (explaining that legal-service providers noted that video conferencing can allow legal-aid organizations to expand the number and regions of low-income clients they serve).

17. *See, e.g., Chief Justice Issues Order Lifting Pandemic-Related Restrictions and Announces Policy Continuing Remote Hearings*, MINN. JUD. BRANCH (Apr. 20, 2022), <https://www.mncourts.gov/About-The-Courts/NewsAndAnnouncements/ItemDetail.aspx?id=2105> (discussing how Minnesota continues its use of remote hearings) [hereinafter *Chief Justice Issues Order*]; *Motion for Remote Proceeding or to Appear Remotely*, MD. JUDICIARY, <https://mdcourts.gov/sites/default/files/court-forms/ccdc110.pdf> (July 2021) [hereinafter *Motion for Remote Proceeding*].

system and dispute resolution processes to be white-centered spaces.¹⁸ Now that state courts have pledged to make racial justice equity a priority, let us seize the moment. Ultimately, by raising technological and procedural justice concerns about video conferencing, courts, lawyers, mediators, arbitrators, and the parties themselves might gain insights about how to transform dispute resolution processes conducted on video conferencing from a white-centered space to a more racially equitable justice space.

This discussion proceeds in four parts. Part II begins by discussing how video conferencing can enhance access to justice for those with access to computers and reliable connectivity. Yet, as the courts' pivot to video conferencing magnified, not all parties have access to computers and/or reliable connectivity. Two reports highlight how the digital divide has exacerbated access to justice and the racial justice divide for those who do not have access to computers or reliable connectivity. This Part identifies some responsive interventions courts have already taken to ameliorate this access to justice issue and narrow the digital divide. Part III addresses a seemingly more intractable problem: how dispute resolution processes conducted on video conferencing might trigger implicit racial biases. This Part focuses on two areas: the ways video conferencing—as a communication channel—is likely to trigger implicit racial biases and the ways Black participants' procedural justice concerns when video conferencing traverse the public/private divide. The Part suggests debiasing strategies for neutrals conducting dispute resolution processes on video conferencing. Part IV includes suggested design strategies for

18. See, e.g., Elijah Anderson, "The White Space," 1 SOCIO. OF RACE & ETHNICITY, 10, 10 (2015), https://sociology.yale.edu/sites/default/files/pages_from_sre-11_rev5_printer_files.pdf ("The wider society is still replete with overwhelmingly white . . . courthouses, . . . a situation that reinforces a normative sensibility in settings which black people are typically absent, not expected, or marginalized when present. In turn, blacks often refer to such settings as 'the white space'—a perceptual category—and they typically approach that space with care."); Richard Delgado, *The Unbearable Lightness of Alternative Dispute Resolution: Critical Thoughts on Fairness and Formality*, 70 SMU L. REV. 611, 635 (2017) ("Our society, which today embraces official neglect, deeming it virtuous 'colorblindness,' and worries at least as much about reverse racism and quotas as about relieving historical injustice, may well be approaching a point where, as in South Africa, a disempowered minority citizen may hope for better treatment from an informal source than from an official enforcing brutally cool, uncaring laws and practices."); Sharon Press & Ellen E. Deason, *Mediation: Embedded Assumptions of Whiteness?*, 22 CARDOZO J. CONFLICT RES. 452, 469 (2021) ("Since mediators are disproportionately white, the narratives that resonate are likely those that are understandable in the white experience. Thus, white participants' narratives may be privileged at the expense of BIPOCs' narratives.").

strengthening racial justice outcomes when dispute resolution for civil matters takes place on video conferencing. This discussion concludes with excitement about how the strategic use of video conferencing could help advance racial justice equity.

II. REDUCING RACIAL JUSTICE INEQUITIES ON VIDEO CONFERENCING: DIGITAL AND REPRESENTATIONAL ASYMMETRIES

When courts shifted dispute resolution processes to video conferencing, only those participants with computers and reliable connectivity continued to have meaningful access to justice. This Part reports on how the digital divide actually exacerbated access to justice and racial justice inequities for some individuals. “Digital divide” is an umbrella term that refers to not having the physical device, the internet connectivity, and/or the technological literacy to participate in virtual dispute resolution processes.¹⁹ Courts, consistent with their commitment to address racial justice inequities, have taken affirmative steps to maximize the benefits of video conferencing and mitigate the digital and representation asymmetries that were disparately borne by those Black individuals and other marginalized individuals in the lower socioeconomic group.²⁰ This discussion concludes by highlighting those affirmative steps.

A. Benefits of Video Conferencing

Noted court innovation scholar, Richard Susskind, defines the access to justice problem as follows: “[E]ven in justice systems that we regard as the most advanced, dispute resolution in public courts

19. See, e.g., Kristin Brown et al., *The Digital Divide and Access to Justice*, N.Y. CTS. 4 (Oct. 2021), <https://www.nycourts.gov/LegacyPDFS/accesstojusticecommission/DigitalDivideSlides.pdf>.

20. *How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations*, supra note 2 (“[The] U.S. Census Bureau research showed that 36.4% of Black households and 30.3% of Hispanic household had neither a computer nor broadband subscription, compared with 21.2% of White and 11.9% of Asian households.”); see also *The Digital Divide: Percentage of Households by Broadband Internet Subscription, Computer Type, Race and Hispanic Origin*, U.S. CENSUS BUREAU (Sept. 11, 2017), <https://www.census.gov/content/dam/Census/library/visualizations/2017/comm/digital-divide-percent.pdf>.

generally takes too long, costs too much, and the process is unintelligible to all but lawyers.”²¹

During the Covid-19 pandemic, many welcomed the enhanced access to justice that video conferencing offered.²² No more did litigants have to decide between sacrificing needed wages to spend undetermined hours in court waiting to have their case heard.²³ No more did they have to incur burdensome child care costs because of all the time spent waiting in court to have their case heard.²⁴ No more did they have to incur the transportation costs and the time spent getting to court.²⁵ Another welcome benefit of moving dispute resolution processes to video conferencing is that litigants were even offered the expanded option of scheduling their video conferencing meetings beyond the nine to five workday into evening appointments.²⁶

The time and cost-saving benefits of video conferencing have not yet been fully realized. “Minds have been opened and many people are of the view that we will never go back.”²⁷ Nationally, state courts are continuing to conduct dispute resolution processes on video conferencing because of its multiple benefits.²⁸ For example, the time-saving benefits of video conferencing are allowing pro bono lawyers and public interest legal organizations to provide legal services for those self-representing litigants who would want a lawyer. The Self-Represented Litigants Network reports that 60% of individuals that go to court to resolve a civil matter do so without lawyers.²⁹ Courts, in collaboration with legal service providers, are seizing on the time and cost-saving benefits of video conferencing to expand the number of lawyers they could

21. Richard Susskind, *The Future of Courts*, HARV. L. SCH. CTR. ON THE LEGAL PRO.: REMOTE CTS. (July/Aug. 2020), <https://thepractice.law.harvard.edu/article/the-future-of-courts/>.

22. See, e.g., Bannon & Keith, *supra* note 16 and accompanying text, at 1887–89.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. Brett Milano, *Online Courts: Reimagining the Future of Justice*, HARV. L. TODAY (Dec. 4 2020), <https://today.law.harvard.edu/online-courts-reimagining-the-future-of-justice/> (quote by Professor Richard B. Susskind).

28. See, e.g., *Chief Justice Issues Order*, *supra* note 17; *Motion for Remote Proceeding*, *supra* note 17.

29. SELF-REPRESENTED LITIG. NETWORK, <https://www.srln.org/> (last visited Oct. 4, 2022).

provide for self-represented individuals.³⁰ Another benefit of video conferencing is that it removes geographical barriers, making it more feasible for legal aid providers to expand their services to previously underserved areas.³¹

Yet another advantage of video conferencing that is being talked about, but not yet realized, is that it is an opportunity to ensure that parties are able to select from a diverse roster of arbitrators and mediators.³² Court-connected and private rosters around the country have taken affirmative steps to diversify their rosters.³³ Still, some segregated regions of the country do not have diverse rosters.³⁴ Video conferencing overcomes the geographical limitations so that individuals in segregated regions might also access more diverse neutrals.³⁵ However, only those litigants with access to computers and reliable connectivity are able to benefit from video conferencing. What about those who are on the wrong side of the digital divide?

30. See, e.g., Director's Memorandum 22-01 from David L. Neal, Dir., Exec. Off. for Immigr. Rev., on Encouraging and Facilitating Prop Bono Legal Services 5 (Nov. 5, 2021), <https://www.justice.gov/eoir/book/file/1446651/download> (regarding Appearance by Remote Technology).

31. *Id.*

32. See, e.g., *Using E-Mediation and Online Mediation Techniques for Conflict Resolution: Technology Makes Online Mediation and Professional Dispute Resolution More Accessible*, HARV. L. SCH.: PON DAILY BLOG (June 13, 2022), <https://www.pon.harvard.edu/daily/mediation/dispute-resolution-using-online-mediation/> [hereinafter *Using E-Mediation*]; Melody Lynch, *5 Advantages to Mediation by Video Conference*, JDSUPRA (June 28, 2020, 6:00 PM) <https://www.jdsupra.com/legalnews/5-advantages-to-mediation-by-video-71393/> ("In a mediation by video conference, geography is no longer a barrier. Parties can retain the best mediator and the best lawyers to handle their dispute. Geography is no longer an issue or an impediment to using the right neutral or the right counsel to get your case resolved promptly.").

33. See, e.g., Michael Z. Green, *Arbitrator Diversity Matters for Justice Perceptions and Reality*, THE HILL (June 28, 2021), <https://thehill.com/opinion/judiciary/560603-arbitrator-diversity-matters-for-justice-perceptions-and-realities/> (citing to the scholarship of Sarah Cole and Homer La Rue, as well as his own to explain why diversity in the supply of arbitrators and selection is critical to maintain the integrity of arbitrations); Lorig Charkoudian & Ellen Kabcenell Wayne, *Fairness, Understanding, and Satisfaction: Impact of Mediator and Participant Race and Gender on Participants' Perception of Mediation*, 28 CONFLICT RESOL. Q. 23 (2010) ("[F]ailure to match by racial or ethnic group has little effect, but when an unmatched participant faces both an opposing participant and a mediator who share a racial or ethnic identification, mediation satisfaction decreases in several respects."). *But cf.* Carole Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J.L. & POL'Y 71, 137 (2010) (citing to Clark Freshman questioning if we are making erroneous assumptions in our matching of mediators with parties).

34. Wynne Reece, *The Reconstruction of Mediation: A Shift Toward Cultural Competency and Social Sophistication*, 47 MITCHELL HAMLINE L. REV. 782, 809 (2021).

35. See, e.g., *Using E-Mediation*, *supra* note 32; Lynch, *supra* note 32 and accompanying text.

B. Digital and Representational Asymmetries for Low-income Persons Obfuscate Benefits of Video Conferencing and Adversely Impact Racial Equity

While many litigants were welcoming the increased access to justice benefits of having their hearings conducted on video conferencing, low-income litigants, 22% of whom are Black,³⁶ had compromised access to justice because of the digital divide. Although, there is an abundance of anecdotal evidence reporting on how the digital divide has exacerbated the access to justice problem and magnified racial justice inequities, there is a paucity of empirical research documenting how the move to video conferencing limits access to justice based on race and social status.³⁷ The following two reports on court hearings and mediation amplify how those pro se individuals without computers and reliable connectivity did not enjoy the benefits of video conferencing and had limited access to justice.

In a multi-phase research project funded by Pew Charitable Trusts, the research team led by Victor D. Quintanilla reported on the representational and digital asymmetries noted when they observed over 500 video conference hearings, primarily involving eviction and debt collection, in an Indiana small claims court.³⁸ Quintanilla's research team noted that 98.6% of the low-income persons observed were pro se and 64.4% participated on cell phones with audio-only capabilities because they did not have access to computers or broadband.³⁹ Relevant to our discussion, 22% of low-income people were Black.⁴⁰

36. John Creamer, *Poverty Rates for Blacks and Hispanics Reached Historic Lows in 2019*, U.S. CENSUS BUREAU (Sept. 15, 2020), <https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html>.

37. See, e.g., Brown et al., *supra* note 19, at 4; Donna Erez-Navot, *Reimagining Access to Justice: Should We Shift to Virtual Mediation Programs Beyond the Covid-19 Pandemic, Especially for Small Claims?*, 15 N.Y. DISP. RESOL. LAW. 42 (2022); Virtual Interview with Sharon B. Press, Dir. of the Disp. Resol. Inst., Mitchell Hamline Sch. of L. (May 3, 2022).

38. Victor D. Quintanilla et al., *Digital Inequalities and Access to Justice: Dialing into Zoom Court Unrepresented*, LEGAL TECH. AND THE FUTURE OF CIV. JUST. (forthcoming 2022) (manuscript at 8) (on file with author).

39. *Id.*

40. Margaret C. Simms et al., *Racial and Ethnic Disparities Among Low-Income Families*, THE URB. INST. 1 (2009), <https://www.urban.org/sites/default/files/publication/32976/411936-racial-and-ethnic-disparities-among-low-income-families.pdf>.

Quintanilla's team observed three limitations when unrepresented persons participated in video conferences on cell phones. First, those unrepresented persons who participated via cell phones were unable to see or share relevant court documents.⁴¹ Second, those pro se individuals who participated on their cell phones were unable to access the self-help resources that were otherwise available to them during in-person hearings and were unable to observe the in-person court behavior of others that might help them align their behavior with the expected behavior during the proceeding.⁴² Third, participation via cell phone is unreliable and depersonalizes the participant.⁴³ Participants on cell phones might have data plans that require payment for data use, limiting their participation. Moreover, participants using a cell phone with audio-only capabilities will only appear on a video conferencing screen as a block with a number.⁴⁴

Quintanilla's team found these technological asymmetries were further exacerbated when the plaintiff was represented, and the defendant was unrepresented.⁴⁵ They noted that low-income plaintiffs were commonly represented by repeat-player lawyers.⁴⁶ These lawyers are often skilled in advocating effectively during video conferencing.⁴⁷ In sharp contrast, low-income defendants who are participating on their cell phones might be unfamiliar with navigating technology, causing them emotional depletion that will diminish the quality of their participation in the online hearing.⁴⁸

Similarly, those individuals with only cell phones who participated in mediations conducted on video conferencing also experienced limited access to justice. Donna Erez-Navot, Director of the Cardozo Mediation Clinic at Cardozo Law School, mediated cases via video conferencing pursuant to the New York City Small Claims Presumptive Virtual Mediation, a program that was initiated under an Administrative Order by New York City Court Administrative Judge Anthony Cannatoro in August 2020.⁴⁹

41. Quintanilla et al., *supra* note 38 (manuscript at 16).

42. *Id.*

43. *Id.*

44. *Id.* (manuscript at 26).

45. *Id.* (manuscript at 11).

46. *Id.* (manuscript at 12).

47. *Id.*

48. *Id.* (manuscript at 7).

49. Erez-Navot, *supra* note 37, at 42.

Professor Erez-Navot noted the program worked for multiple reasons. First, virtual mediations were scheduled at times convenient for the parties and included after-hours time slots.⁵⁰ Second, court-assigned interpreters were available as needed.⁵¹ Third, prior to each virtual mediation, a pre-mediation tech-prep phone meeting was offered.⁵² This provided an opportunity for self-represented litigants to become familiar with the video conferencing technology and address any legal or emotional concerns they might have.⁵³ Yet, Professor Erez-Navot also echoed the challenges experienced by self-represented litigants who participated on their cell phones.⁵⁴

Understandably, how could litigants without computers and reliable connectivity walk away from this experience with a sense that they have received procedural justice? Procedural justice scholar Tom Tyler reminds us that participants in dispute resolution processes are more likely to regard the process as legitimate, irrespective of the outcome, if they had: *voice*, the opportunity to tell their story from their perspective;⁵⁵ *neutrality*, the decision makers were not biased;⁵⁶ *respect*, the individual was treated “with courtesy and politeness, and showing respect for people’s rights”;⁵⁷ and *trust*, an understanding that the decision-maker was “acting in the interests of the parties, not out of personal prejudices.”⁵⁸ However, self-represented litigants who are participating via cell phone are likely to question the legitimacy of the process as it applies to them.

50. Erez-Navot, *supra* note 37, at 43.

51. *Id.*

52. *Id.* at 43–44.

53. *Id.* at 44.

54. *Id.* at 44; *see also* JANET DiFIORE, EQUAL JUSTICE IN THE NEW YORK STATE COURTS: YEAR IN REVIEW 2020–2021, at 12 (citing the 9th Judicial District’s Faith-Based Court Access Program as one initiative that is providing “unrepresented litigants with safe, technologically equipped spaces in houses of worship and community locations where they can receive remote legal services and participate comfortably and meaningfully in virtual court proceedings”).

55. Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV.: J. AM. JUDGES ASS’N 26, 30 (2007); *see also* Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1, 5 (2011).

56. Tyler, *supra* note 55, at 30; *see also* Hollander-Blumoff & Tyler, *supra* note 55.

57. Tyler, *supra* note 55, at 31–32; *see also* Hollander-Blumoff & Tyler, *supra* note 55, at 6.

58. Tyler, *supra* note 55, at 31; *see also* Hollander-Blumoff & Tyler, *supra* note 55, at 5–6.

C. Courts' Rapid Responses to Bridge the Digital Divide

Courts have quickly responded to bridge the digital divide⁵⁹ through reimagination, partnering, and collaborations by providing needed physical devices, connectivity, and technical literacy coaches.⁶⁰ The pandemic magnified how connectivity has become a basic necessity for education, work, and health—as well as racial equity.⁶¹ In response, Congress authorized the Emergency Connectivity Program as part of the American Rescue Plan, providing discounted internet service and tablets to qualifying individuals and families.⁶² The program is administered by the Federal Communications Commission (“FCC”).⁶³ On December 31, 2021, the program received additional funding and has been renamed the Affordable Connectivity Program (“ACP”), administered by the Universal Service Administrative Company (“USAC”) and overseen by the FCC.⁶⁴ The FCC, in collaboration with USAC, has developed consumer-friendly resources to assist interested applicants to see if they qualify, and if they do, how to apply to the program.⁶⁵ Individual states are doing their part to narrow the digital divide. As one example, on January 5, 2022, New York Governor Kathy Hochul announced the New York ConnectALL Initiative, a one billion dollar initiative in which the state will collaborate with partners to expand New York’s broadband access so that it is affordable and equitable.⁶⁶

59. See, e.g., Erika Rickard & Amie Lewis, *State Courts Seek to Address Racial Disparities in Their Operations*, PEW CHARITABLE TRS. (Jan. 11, 2021), <https://www.pewtrusts.org/en/research-and-analysis/articles/2021/01/11/state-courts-seek-to-address-racial-disparities-in-their-operations>; Brown et al., *supra* note 19, at 4; *COVID and the Courts: Assessing the Impact on Access to Justice, Identifying Best Practices, and Plotting the Path Forward: An Informational Hearing of the Assembly and Senate Committees on Judiciary*, CAL. ASSEMBLY & SENATE COMMS. ON THE JUDICIARY (Feb. 23, 2021), https://ajud.assembly.ca.gov/sites/ajud.assembly.ca.gov/files/reports/Background%20paper_022321.pdf [hereinafter *COVID and the Courts*].

60. See, e.g., Bannon & Keith, *supra* note 16, at 1892 (“Courts and legal-aid offices have gone to varying lengths to bridge this digital divide.”).

61. See, e.g., *How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations*, *supra* note 2.

62. *Emergency Broadband Benefit*, FCC, <https://www.fcc.gov/broadbandbenefit> (May 9, 2022).

63. *Id.*

64. *Id.*; *Affordable Connectivity Program*, FCC, <https://www.fcc.gov/acp> (Aug. 30, 2022).

65. *Affordable Connectivity Program*, *supra* note 64.

66. *Governor Hochul Announces New \$1 Billion ‘ConnectALL’ Initiative to Bring Affordable Broadband to Millions of New Yorkers*, N.Y. STATE (Jan. 5, 2022),

State courts around the country have taken additional steps to narrow the digital divide for the digital have-nots. As one illustration, the Justice Tablet Project, a collaboration with New York's Columbia Law School's Lawyering in the Digital Age Clinic and Queens Legal Aid, loaned clients user-friendly tablets so they could participate in virtual proceedings.⁶⁷ In another example, courts are providing those court users with minimal digital literacy assistance in participating in virtual proceedings.⁶⁸ Depending on the court, these assistants are known by different labels such as digital navigators,⁶⁹ virtual court navigators, technology facilitators, IT staff, and NJ justice ombudspeople.⁷⁰ State courts are also collaborating with community partners to establish informational kiosks and connectivity within the court and community friendly locations such as the library.⁷¹

In California, several legal service providers formed the Disaster Legal Assistance Collaborative ("DLAC") to provide legal information about such topics as benefits, disabilities, consumer, and immigration.⁷² A coalition of California law firms, bar associations, and attorneys have expanded their pro bono commitments to provide pandemic-related legal services related to those low-income court users for consumer debt, employment, or bankruptcy matters.⁷³ New York based Probono.net, a national non-profit, increases access to justice for those without a lawyer by providing legal education and creating a supportive network of pro bono and legal aid advocates to provide needed legal services.⁷⁴ Each of these initiatives is targeted to narrow components of the

<https://www.governor.ny.gov/news/governor-hochul-announces-new-1-billion-connectall-initiative-bring-affordable-broadband>.

67. PERMANENT COMM'N ON ACCESS TO JUST., APPENDICES: REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 74 (Nov. 2021).

68. See, e.g., *id.* at 147; see also *id.* at 74.

69. See, e.g., *Virtual Court Navigator Pilot Program*, NY COURTS: N.Y. STATE CTS. ACCESS TO JUST. PROGRAM, <http://ww2.nycourts.gov/virtual-court-navigator-pilot-program-33006> (last visited Oct. 4, 2022).

70. *Instructions for Participants in Remote Court Events*, N.J. CTS., <https://www.njcourts.gov/attorneys/remote.html> (last visited Oct. 4, 2022); *What Can the Ombudsman Do for You?*, N.J. CTS., <https://www.njcourts.gov/public/ombuds.html?lang=eng> (last visited Oct. 4, 2022).

71. See, e.g., Bannon & Keith, *supra* note 16, at 1892 ("Legal-aid providers have purchased routers to turn their parking lots into digital hot spots and microphones to turn conference rooms into remote-hearing access points.").

72. *COVID and the Courts*, *supra* note 59, at 12.

73. *Id.*

74. *Our Work*, PROBONO.NET, <https://www.probono.net/our-work/> (last visited Oct. 4, 2022).

digital divide and provide racial justice equity, but do they?⁷⁵ As initially recommended, state courts should create evaluations that are designed to specifically measure racial justice equity.⁷⁶

This Part has discussed the ways the digital divide has compromised access to justice and highlighted the affirmative steps courts are taking to narrow that divide. In the next Part, we expand this discussion to consider how video conferencing might trigger implicit racial biases and other ‘isms.

III. VIDEO CONFERENCING AND IMPLICIT RACIAL BIAS

This Part will focus on a little-explored area: understanding how implicit racial biases and other implicit ‘isms might be amplified when dispute resolution processes for civil matters are conducted on video conferencing.⁷⁷ In 2022, the stereotype of Black males as violent, dangerous, and subhuman persists.⁷⁸ This stereotype manifests itself in both explicit and implicit racial biases that Black individuals experience, regardless of the reality,

75. Bannon & Keith, *supra* note 16, at 1892–93 (“However, even when courts have taken affirmative steps to expand access, implementation has had mixed success. In one jurisdiction in Florida, for example, the court created access points within the courthouse but failed to include notice of the option in its summonses.”).

76. See, e.g., *Guiding Principles for Post-Pandemic Court Technology*, *supra* note 7, at 7–8 (“As courts seek to improve their effectiveness through online services, they should collect data to monitor and evaluate new processes and technologies to determine success and address any challenges, while also maintaining proper data management protocols.”).

77. See Caroline Brooks, *There’s an Unconscious Bias in Virtual Meetings. Here’s How You Can Avoid It.*, MSU TODAY (May 14, 2020), <https://msutoday.msu.edu/news/2020/theres-an-unconscious-bias-in-virtual-meetings-heres-how-you-can-avoid-it>; cf. Alicia Bannon & Janna Adelstein, *The Impact of Video Proceedings on Fairness and Access to Justice in Court*, BRENNAN CTR FOR JUST. (Sept. 10, 2020), <https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court> (“While the available scholarship on the use of video proceedings is limited, existing research suggests reason for caution in expanding the use of these practices, as well as the need for further research on their potential effects.”).

78. Jesse McKinley et al., *Gunman Kills 10 at Buffalo Supermarket in Racist Attack*, N.Y. TIMES (May 17, 2022), <https://www.nytimes.com/live/2022/05/14/nyregion/buffalo-shooting> (“A teenage gunman entranced by a white supremacist ideology known as replacement theory opened fire at a supermarket in Buffalo on Saturday, methodically shooting and killing 10 people and injuring three more, almost all of them Black, in one of the deadliest racist massacres in recent American history.”); see, e.g., Mark W. Bennett & Victoria C. Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 U.C. DAVIS L. REV. 745, 760 (2018) (“This fundamental view of Blacks as sub-human, rooted slavery, allowed the narrative of Blacks as violent and dangerous to grow and flourish.”).

and regardless of that individual's accomplishments.⁷⁹ Black women, too, experience implicit racism, albeit somewhat differently than their male counterparts; they may be treated as invisible or subhuman.⁸⁰ As we engage in this discussion, it compels each of us to reflect on how our implicit racial biases have been shaped by our country's historical racism.

Implicit bias is the term used to describe the unconscious stereotypes that shape our conscious behavior.⁸¹ Our implicit biases are formed by the implicit and explicit messages our brain absorbs through media, observations, and messages reinforced in our broader culture about who is and who is not good.⁸² Even though our implicit biases may contradict our publicly-stated values,⁸³ our implicit biases shape our preferences, our judgments, and our decision making.⁸⁴ An even more horrifying realization to some is that upwards of 80% of our mental life is unconscious.⁸⁵

As stated in the introduction of this Article, in July 2020, the joint Conference of Chief Justices ("CCJ") and the Conference of State Court Administrator ("COSCA") pledged to:

continue and intensify our efforts to combat racial prejudice within the justice system, both explicit and implicit, and to

79. See, e.g., Elayne E. Greenberg, *Dispute Resolution Lessons Gleaned from the Arrest of Professor Gates and the "Beer Summit,"* 25 J. CIV. RTS. & ECON. DEV. 99, 99, 102 ("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. We all fit a description. We are all suspects." (internal quotations omitted)); ABC News, *New Video of Former Tennis Player James Blake Slammed to Ground by NYPD Officer*, YOUTUBE (Sept. 11, 2015), <https://www.youtube.com/watch?v=oga0RjpfWw>; see Bennett & Plaut, *supra* note 78, at 772 (referencing "abhorrent Photoshopped images of President Obama and the First Lady as apelike, one of them under the heading 'Primate-In-Chief'").

80. See, e.g., Viva Chen, *Bullied and Interrupted: Sexism, and Racism at Judge Jackson Hearing*, BLOOMBERG (Mar. 25, 2022) <https://news.bloomberglaw.com/business-and-practice/bullied-and-interrupted-sexism-racism-at-brown-jackson-hearing> ("If you had a scintilla of doubt that women of color, particularly Black women, face a special blend of racism and sexism, these hearings should put it to rest."); Rennee Nicole Allen, *From Academic Freedom to Cancel Culture: Silencing Black Women in the Legal Academy*, 68 UCLA L. REV. 364, 383 (2021).

81. See, e.g., IMPLICIT RACIAL BIAS ACROSS THE LAW 3 (Justin D. Levinson & Robert J. Smith eds., 2012).

82. See, e.g., MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE, at xii (2013).

83. See, e.g., Deanna Pollard Sacks, *4 Torts Implicit Biased-Inspired Torts*, in IMPLICIT RACIAL BIAS ACROSS THE LAW 61 (Justin D. Levinson & Robert J. Smith eds., 2012).

84. See, e.g., SHANKAR VEDANTAM, THE HIDDEN BRAIN: HOW OUR UNCONSCIOUS MINDS ELECT PRESIDENTS, CONTROL MARKETS, WAGE WARS, AND SAVE OUR LIVES 3-4 (2010).

85. See DAVID EDWARDS, THE LAB: CREATIVITY AND CULTURE 98 (2010) (referring to Nobel Prize winner Dr. Eric Kandel's determination that "80 to 90% of our mental life is unconscious").

recommit ourselves to examine what systemic change is needed to make equality under the law an enduring reality for all, so that the justice we provide not only is fair to all but also is recognized by all to be fair.⁸⁶

Implicit in that statement are courts' obligations to ensure that video conference use is not perpetuating explicit and implicit racial prejudice and is promoting equitable justice outcomes.⁸⁷

Despite the courts' ongoing commitment to racial justice equity,⁸⁸ some question if it is even possible to achieve equitable justice outcomes when we have all absorbed the implicit racial biases that are embedded in our society and have perpetuated the systemic racism in our justice system.⁸⁹ Adding to this skepticism, Prescott, Rabinovich-Einy, and Mentovich, in their empirical research on equitable justice outcomes, reported that they had to blind the racial identities of Black defendants in traffic court to help equalize the racially disparate justice outcomes.⁹⁰ But video conferencing is about "seeing" participants, including their racial identities.

The following discussion will focus on two areas: identifying the contexts in which video conferencing as a communication channel is ripe for triggering implicit racial biases; and questioning how video conferencing might affect Black participants' sense of procedural justice. Going forward, each area warrants further exploration. This Part will then suggest specific debiasing strategies for courts, ADR providers, and neutrals to consider when conducting dispute resolution processes on video conferencing.

86. *CCJ/COSCA Resolution Supports Racial Equity and Justice for All*, *supra* note 6.

87. *See, e.g.*, Rickard & Lewis, *supra* note 59 ("As judges and court administrators move processes and services online, they face new challenges in ensuring that advances in technology are not creating adverse consequences based on race.").

88. *Id.*

89. *Preliminary Information*, HARV.: PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/takeatest.html> (last visited Oct. 4, 2022).

90. Avital Mentovich, J.J. Prescott & Orna Rabinovich-Einy, *Are Litigation Outcome Disparities Inevitable? Courts, Technology and the Future of Impartiality*, 71 ALA. L. REV. 893, 956, 961, 963 (2020); *see also* Jerry Kang, *What Judges Can Do About Implicit Bias*, 57 CT. REV. 78, 83 (2021) ("If we are entirely unaware of (and do not assume and cannot infer) the social category of a person, implicit biases regarding that category cannot directly impact our decision making.").

A. Video Conferencing: A Communication Channel Ripe for Implicit Racial Biases

Video conferencing is a petri dish for triggering implicit racial bias and other ‘isms for the unaware.⁹¹ Zoom fatigue, viewing participants from the shoulder up, a participant’s choice of background for the video conference, or the inability of the technology used to differentiate a range of skin tones, all are possible triggers for “filling in the gaps” with our implicit racial biases.

Participants on video conferencing experience cognitive overload or Zoom fatigue, making it more likely for them to rely on implicit biases.⁹² Moreover, Zoom fatigue is caused by the cognitive dissonance between appearing on Zoom and not really being there.⁹³ In fact, participants have to alter their usual patterns of in-person communication to effectively communicate on Zoom.⁹⁴ For example, participants have to look at the camera, rather than at the participant, to make eye contact.⁹⁵ In another example, participants’ focus on gallery view is different than the experience of looking at all participants during an in-person meeting.⁹⁶ Moreover, participants need to consider how to position themselves

91. See, e.g., Jyothi Marbin et al., *Avoiding the Virtual Pitfall: Identifying and Mitigating Biases in Graduate Medical Education Videoconference Interviews*, 96 ACAD. MED. 1120, 1120 (2021) (“While video conference interviews (VCIs) can be both convenient and costeffective, they may also exacerbate existing biases and introduce new sources of bias . . .”).

92. See, e.g., *id.* at 1121 (“When our cognitive load is increased, we automatically rely on implicit associations to help us process information.”); see Jean R. Sternlight & Jennifer K. Robbennolt, *In-Person or via Technology? Drawing on Psychology to Choose and Design Dispute Resolution Processes*, 71 DEPAUL L. REV. 701, 746 (2022) (“Differences in the technological nature of dispute resolution processes may impact the judgement and decision-making capabilities of disputants, lawyers, judges, jurors, arbitrators and mediators.”); Janice Gassam Asare, *3 Ways Video Conferencing Can Unintentionally Cause Bias*, FORBES (May 7, 2020) <https://www.forbes.com/sites/janicegassam/2020/05/07/3-ways-video-conferencing-can-unintentionally-cause-bias/?sh=2fe202d31123> (“One aspect of video conferencing that deserves exploration is how bias can seep into the process.”); Noam Ebner & Elayne E. Greenberg, *Designing Binge-Worthy Courses: Pandemic Pleasures and Covid-19 Consequences*, 36 NEGOT. J., 537–38 (2020) (explaining the phenomenon of Zoom Fatigue).

93. See, e.g., Marbin et al., *supra* note 91, at 1121; Ebner & Greenberg, *supra* note 92, at 538.

94. See, e.g., Marbin et al., *supra* note 91, at 1121; Ebner & Greenberg, *supra* note 92, at 538.

95. See, e.g., Marbin et al., *supra* note 91, at 1121; Ebner & Greenberg, *supra* note 92, at 538.

96. See, e.g., Marbin et al., *supra* note 91, at 1121; Ebner & Greenberg, *supra* note 92, at 538.

on video conferencing to avoid being “in our face” or only showing the top of their heads.⁹⁷ All these adjustments contribute to our Zoom fatigue and make us more receptive to our implicit biases.

Another source of implicit biases stems from participants having to “fill in the gaps” when they can only view a participant from the shoulder up.⁹⁸ Video conferencing, as a channel of communication, allows participants to see each other’s faces, observe limited non-verbal communications, experience the tone of participants’ voices, gather limited information about each participant, and share documents.⁹⁹ Unlike in-person communication, participants in video conferencing, however, cannot see each other’s entire body and all the non-verbal communications that go with it.¹⁰⁰ Our implicit biases help “fill in the gaps.”

The participant’s choice of background on video conferencing may also be a source of implicit bias triggers¹⁰¹ that help “fill in the gaps” when assessing a participant. Is there an in-group or an out-group opportunity to reinforce or challenge implicit racial biases? For example, if the background includes photos of family and events you can connect to, books you may have read, or teams you also cheer for, those connections may evoke in the observer an “in-group” or “affinity bias.”¹⁰²

97. See, e.g., Marbin et al., *supra* note 91, at 1121; Ebner & Greenberg, *supra* note 92, at 538.

98. Marbin et al., *supra* note 91, at 1121; see, e.g., Noam Ebner, *The Human Touch in ODR: Trust, Empathy and Social Intuition in Online Negotiation and Mediation*, in *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE* 73, 73–136 (Daniel Rainey et al. eds., 2nd ed. 2021) (“In video communication, lags and delays undermine the impact of your best empathetic intentions.”).

99. See, e.g., Sternlight & Robbenolt, *supra* note 92, at 708; Bunim, *supra* note 15.

100. See, e.g., Sternlight & Robbenolt, *supra* note 92, at 708; Bunim, *supra* note 15 (commenting on how an in-person mediation increased the likelihood of settlement—“[e]ach side got to see the other’s body movements, frustrations, anger, emotional reactions—live”).

101. Marbin et al., *supra* note 91, at 1121–22; see, e.g., Edna Sussman, *Affiliation and Affinity: Unconscious Drivers of Arbitrator Decision-Making*, 15 N.Y. DISP. RESOL. LAW. 27, 27–30 (2022).

102. Marbin et al., *supra* note 91, at 1121–22; see, e.g., Sussman, *supra* note 101, at 27–29; David S. Ross, *Bedrooms, Bookcases or Beaches: Choosing and Organizing Your Background with Purpose*, JAMS: ADR INSIGHTS (Oct. 26, 2020), <https://www.jamsadr.com/blog/2020/bedrooms-bookcases-or-beaches-choosing-and-organizing-your-background-with-purpose> (“Several Master Mediators opined that virtual backgrounds prevent them from seeing people ‘in their natural environment,’ denying them access to useful personal information and an opportunity to connect. By design, virtual backgrounds depersonalize the mediation process. In fact, by choosing to hide your natural environment—and keep it a secret—you may even undermine people’s perception of your candor and authenticity. What *else* is he not sharing with me?”).

Implicit racial stereotypes may also be exacerbated when the video conferencing technology used does not have the ability to calibrate for a range of skin tones.¹⁰³ The development of camera and film technology has a racist history.¹⁰⁴ Until the 1970s, the “Shirley cards,” that are used to calibrate skin tones and light, only contained Caucasian models.¹⁰⁵ The impetus for revising the “Shirley cards” to more accurately represent a range of skin tones came from furniture and chocolate manufacturers who complained that the photographs of their products were not capturing the range of brown shading.¹⁰⁶ Imagine! The profit motive rather than the humanity motive incentivized the change.

Social psychologists remind us that implicit racism is more nuanced than a Black/white race binary. Rather, “colorism,” the term referring to a bias against darker skin tones,¹⁰⁷ and the prevalence of Afrocentric facial features,¹⁰⁸ are also triggers for implicit racial bias. Thus, dark-skinned participants who are not using technology that can accurately represent a range of skin tones may appear darker than they are and are more likely to trigger implicit racial biases. This issue warrants further empirical study.

Researchers Marbin, Hutchinson, and Schaeffer reported on the potential implicit biases that emerged in video conferencing interviews after the Association of American Medical Colleges recommended that student, resident, and faculty candidate

103. Sarah Lewis, *The Racial Bias Built into Photography*, N.Y. TIMES (Apr. 25, 2019), <https://www.nytimes.com/2019/04/25/lens/sarah-lewis-racial-bias-photography.html?smid=em-share> (explaining how an “unconscious bias that was built into photography . . . [b]y categorizing light skin as the norm and other skin tones as needing special corrective care, photography has altered how we interact with each other without us realizing it.”); Nadia Latif, *It’s Lit! How Film Finally Learned to Light Black Skin*, THE GUARDIAN (Sept. 21, 2017), <https://www.theguardian.com/film/2017/sep/21/its-lit-how-film-finally-learned-how-to-light-black-skin> (“It’s about moving past the light-skinned straight-haired blackness of the past, to embrace the dark skin and natural hair of our future.”).

104. Lewis, *supra* note 103; see Latif, *supra* note 103.

105. Lewis, *supra* note 103.

106. *Id.*

107. See, e.g., Bennett & Plaut, *supra* note 78, at 753–54 (“Colorism has been defined as the ‘process of discrimination that privileges light-skinned people of color over their dark-skinned counterparts’ or ‘the prejudice and discrimination that is directed against African Americans with darker skin.’”); Maxine S. Thomson & Steve McDonald, *Race, Skin Tone, and Educational Achievement*, 59 SOCIO. PERSP. 91 (2016) (finding that racism and colorism have adverse effects on learning opportunities).

108. Bennett & Plaut, *supra* note 78, at 755 (“‘Afrocentric features’ . . . generally refers to some combination of facial features such as ‘dark skin, wide nose, coarse hair, dark eyes, and full lips.’”).

interviews take place through video conferencing.¹⁰⁹ Although the Article addresses interviewing, the examples used are salient to our discussion about how implicit racial bias can emerge and adversely influence outcomes when video conferencing. In one illustrative example, the authors point to two candidates, one Black and one white, who come to a video conferencing interview prepared.¹¹⁰ However, the implicit racial bias held by the interviewer caused the interviewer to interpret the preparedness differently of each candidate: the white candidate must have “prepared diligently” while the Black candidate “must have had help setting up.”¹¹¹ The authors stressed the importance that interviewers become aware of their implicit biases and develop strategies for mitigating these biases if graduate medical programs are committed to diversity and equity.¹¹² The authors also noted that the Association of American Medical Colleges provides a tip sheet for applicants and interviewers, a useful strategy to prime participants to engage in more equitable interview processes.¹¹³

B. Procedural Justice Concerns When Professional/Personal Boundaries Are Blurred: The Black Participant’s Perspective

For some Black participants, video conferencing creates an unwanted intrusion into the professional/personal boundaries they have successfully constructed,¹¹⁴ impacting their personal assessment of procedural justice. When dispute resolution processes take place on video conferencing, some Black participants might question whether the professional/personal

109. Marbin et al., *supra* note 91, at 1120.

110. *Id.* at 1122.

111. *Id.*

112. *Id.* at 1120.

113. *Id.* at 1122 (citing *Virtual Interviews: Tips for Medical School Applicants*, ASS’N AM. MED. COLLS. (May 14, 2020), https://www.aamc.org/system/files/2020-05/Virtual_Interview_Tips_for_Medical_School_Applicants_05142020.pdf).

114. See, e.g., Laura Morgan Roberts & Courtney L. McCluney, *Working from Home While Black*, HARV. BUS. REV. (June 17, 2020), <https://hbr.org/2020/06/working-from-home-while-black> (“Videoconferencing has transformed formerly safe, private spaces for authentic cultural expression into focal points of the public gaze.”); Courtney L. McCluney et al., *The Costs of Code-Switching*, HARV. BUS. REV. (Nov. 15, 2019), <https://hbr.org/2019/11/the-costs-of-codeswitching> (“Broadly, code-switching involves adjusting one’s style of speech, appearance, behavior, and expression in ways that will optimize the comfort of others in exchange for fair treatment, quality service, and employment opportunities. Research suggests that code-switching often occurs in spaces where negative stereotypes of [B]lack people run counter to what are considered ‘appropriate’ behaviors and norms for a specific environment.”).

barriers they have protectively constructed will come tumbling down, exposing them to the very implicit racial biases they have sought to minimize and safeguard against. This anxiety could questionably influence their perception of the legitimacy of the process.¹¹⁵

The legal system and dispute resolution processes have traditionally been considered “white spaces”¹¹⁶ that are replete with implicit and explicit racial biases. In order to successfully navigate these “white spaces” and enjoy more equitable treatment, some Black individuals have opted to engage in code-switching.¹¹⁷ As the term suggests, code-switching is the masking of the more authentic Black-self to fit in with the white-dominant norms.¹¹⁸ For Black people and other individuals of marginalized groups, code-switching mitigates the negative stereotypes attached to their group and instead, helps enable employers to see them as contributing employees who can lead and succeed.¹¹⁹ However, code-switching comes at an emotional cost, the cost of suppressing your authentic self.¹²⁰

Black participants’ assessment of procedural justice is an unexplored area that warrants further study. Professor Donna Shestowsky reinforces the importance of hearing from participants’ own vantage points whether they considered the process fair.¹²¹ Even though participants in dispute resolution processes that were conducted on video conferencing were, in fact, asked to complete a participant satisfaction survey, the term “participant” was used as a generic term.¹²² Participant

115. See Tyler, *supra* note 55, at 30; see also Hollander-Blumoff & Tyler, *supra* note 55, at 2–3.

116. See, e.g., Anderson, *supra* note 18 and accompanying text; Delgado, *supra* note 18 and accompanying text, at 635; Press & Deason, *supra* note 18 and accompanying text, at 469.

117. See, e.g., McCluney et al., *supra* note 114 and accompanying text.

118. *Id.*

119. *Id.*

120. *Id.*

121. Donna Shestowsky, *Researchers Can Help Courts Understand Whether Litigants Think the Civil Legal System Is Fair—and Why (or Why Not)*, PEW CHARITABLE TRS. (June 14, 2021), <https://www.pewtrusts.org/en/research-and-analysis/articles/2021/06/14/researchers-can-help-courts-understand-whether-litigants-think-the-civil-legal-system-is-fair>.

122. See E-mail from Nick White, Ph.D., Rsch. & Evaluation Dir., Md. Judiciary’s Mediation and Conflict Resol. Off., to Elayne E. Greenberg (Mar. 15, 2022) (on file with author); see E-mail from Daniel Kos, Assistant Alt. Disp. Resol. Coordinator, N.Y. State Unified Ct. Sys. Off. of Alt. Disp. Resol. Programs, to Elayne E. Greenberg (Mar. 2, 2022)

evaluations, consistent with courts' goal of promoting racial justice equity, would be helpful to further revise the participant evaluation forms to break down the generic term "participant" to include the race of the participant, and to include questions that capture the procedural justice assessment of each participant.¹²³

C. Debiasing When Using Video Conferencing

Yes, mediators, arbitrators, judges, lawyers, and clients themselves may have already taken implicit bias training. However, in the throes of shifting to video conferencing and in acclimating to the "new normal," they have not figured out how to apply implicit bias training to video conferencing. This Part does that.

Implicit bias scholars,¹²⁴ including this author, have prescribed variations of two foundational debiasing steps for in-person meetings: develop heightened awareness of your implicit biases and provide reality-based counter-narratives that challenge your implicit biases.¹²⁵ For example, Professor Jerry Kang has recommended that judges debias by following a four-step approach: deflate, debias, defend, and data.¹²⁶ *Deflate* is to acknowledge your implicit biases.¹²⁷ *Debiasing* is removing unwanted implicit biases by having visuals or developing relationships that defy your implicit biases.¹²⁸ *Defend* against reoccurring biases by using such strategies as slowing down, being mindful, trying perspective-taking and employing checklists and rubrics to guide decision-making.¹²⁹ *Data* will help assess if your decision-making is objective or infected by implicit bias.¹³⁰

(on file with author); see also *Report on CDRC Client Satisfaction*, N.Y.S. UNIFIED CT. SYS., CMTY. DISP. RESOL. CTRS. PROGRAM (2020–2021), <https://ww2.nycourts.gov/sites/default/files/document/files/2022-09/CDRC%20Satisfaction%20Surveys%202020-2021.pdf>.

123. See, e.g., *Guiding Principles for Post-Pandemic Court Technology*, *supra* note 7 and accompanying text, at 7.

124. See, e.g., IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 81; Banaji & Greenwald, *supra* note 82; Kang, *supra* note 90; Izumi, *supra* note 33.

125. See Izumi, *supra* note 33, at 152.

126. Kang, *supra* note 90, at 78 (explaining that his article "focuses mostly on individual-level responses that judges can take themselves although institutional-level reforms may be what's most important").

127. *Id.* at 81.

128. *Id.* at 82.

129. *Id.* at 83–88.

130. *Id.* at 89.

Another implicit bias scholar, Professor Carol Izumi, recommends awareness,¹³¹ awareness of external neutrality by “paying attention to process attributes, nuances of language and narrative, and the physicality of mediator actions.”¹³² Reflect on the engagement,¹³³ replace the implicit biases with realities that reflect a more “egalitarian belief,”¹³⁴ and develop mindfulness mediation.¹³⁵

This author stresses the power of empathy to help counteract implicit biases.¹³⁶ Empathy, as a conflict resolution resource, allows the empathetic person to develop an awareness of their own biases, acknowledge how the discriminated against person feels, and incentivizes the empathetic person to take affirmative steps to counter these implicit biases.¹³⁷

However, mediators, arbitrators, judges, lawyers, and clients who participate in dispute resolution processes conducted on video conferencing often neglect to generalize those in-person lessons about implicit racial biases.¹³⁸ Moreover, emerging research is showing that video conferencing can create different types of triggers for implicit biases than in-person meetings.¹³⁹ This Part discusses how to customize the foundational debiasing strategies used for in-person meetings and apply them when video conferencing.

D. Prior to Opting to Participate in a Dispute Resolution Process on Video Conferencing; Acknowledge and Provide Informed Consent

Participants need to acknowledge that implicit racial biases and other implicit biases might be triggered on video conferencing. As part of this acknowledgment, the neutral and participating

131. Izumi, *supra* note 33, at 141.

132. *Id.* at 123.

133. *Id.* at 147.

134. *Id.*

135. *Id.* at 151.

136. Elayne Greenberg, *Bridging Our Justice Gap with Empathetic Processes that Change Hearts, Expand Minds About Implicit Discrimination*, 32 OHIO STATE J. ON DISP. RESOL. 441, 477 (2017); see also Elayne E. Greenberg, *Fitting the Forum to the Pernicious Fuss: A Dispute System Design to Address Implicit Bias and 'Isms in the Workplace*, 17 CARDOZO J. OF CONFLICT RESOL. 75, 77–78 (2015).

137. Elayne Greenberg, *Bridging Our Justice Gap with Empathetic Processes that Change Hearts, Expand Minds About Implicit Discrimination*, *supra* note 136, at 448.

138. See Sternlight & Robbennolt, *supra* note 92, at 746–47.

139. See Marbin et al., *supra* note 91, at 1120.

lawyers may wish to take the Implicit Association Test (“IAT”).¹⁴⁰ Participants should also make an informed decision about whether to participate in-person or on video conferencing. Part of that informed decision is appreciating not only the benefits of video conferencing, but also understanding how video conferencing, as a communication channel, presents different contexts and challenges that make it more likely for implicit biases to emerge.

E. Pre-Dispute Resolution Phase for Video Conferencing: A Priming Opportunity

The pre-dispute resolution phase for video conferencing is an opportunity to prime all participants to engage in a debiased process. Some mediators and arbitrators have suggested that the pre-dispute resolution tech meetings, that are now a regular part of good practice when dispute resolution processes are conducted on video conferencing, are also an opportunity to get to know the participants, empathize, and debias.¹⁴¹ As part of the pre-mediation preparation, arbitrators, mediators, and Alternative Dispute Resolution (“ADR”) providers might also wish to provide participants with a tip sheet to ensure that all participants are prepared for the video conference.¹⁴² What a welcome opportunity for the neutral and/or ADR provider to customize the tip sheet to convey the importance of structuring a dispute resolution process that is fair. As part of the tip sheet customization process, some neutrals may wish to engage all participants to further customize the tip sheet based on the concerns of the participants. During the pre-meeting, participants should agree on the rules of

140. *Project Implicit*, *supra* note 89; *see also* Harvard Univ., *Implicit Bias: Learn the Science. Make Better Decisions*, OUTSMARTING IMPLICIT BIAS, <https://outsmartinghumanminds.org/> (last visited Oct. 4, 2022) (providing modules that show the different contexts that implicit bias influences decision-making).

141. *See, e.g.*, Ken Shigley, *A Dozen Tips for Zoom Mediations*, MILES MEDIATION & ARB.: COMMENT. (July 29, 2020), <https://milesmediation.com/blog/a-dozen-tips-for-zoom-mediations/>; Robin H. Gise, *Effective Mediation by Videoconference: A Neutral’s Use of Zoom During the Coronavirus (COVID-19) Crisis*, JAMS: JAMS ADR INSIGHTS (Apr. 2, 2020), <https://www.jamsadr.com/blog/2020/effective-mediation-by-videoconference-a-neutrals-use-of-zoom-during-the-covid-19-crisis>.

142. *See, e.g.*, AAA-ICDR *Virtual Hearing Guide for Arbitrators and Parties Utilizing Zoom*, AM. ARB. ASS’N: INT’L CTR. FOR DISP. RESOL., https://go.adr.org/rs/294-SFS-516/images/AAA269_AAA%20Virtual%20Hearing%20Guide%20for%20Arbitrators%20and%20Parties%20Utilizing%20Zoom.pdf (last visited Oct. 4, 2022); *Tips and Techniques for a Successful Videoconference*, JAMS ADR, <https://www.jamsadr.com/files/Uploads/Documents/JAMS-Virtual-ADR-Tips.pdf> (last visited Oct. 4, 2022); *Virtual Interviews: Tips for Medical School Applicants*, *supra* note 113.

participation, including whether the use of video conference backgrounds will be permitted.¹⁴³

F. During the Video Conferencing

During the dispute resolution process, all participants should be permitted to take regular breaks to counteract the Zoom fatigue, a.k.a. cognitive overload, that will make it more likely that their implicit biases are shaping their assessments, decision-making, and producing racially biased justice outcomes.¹⁴⁴ Participants should also use active listening skills to ensure that their interpretation of what is being communicated by other participants is accurate and not distorted by the technological challenges of communicating during video conferencing.¹⁴⁵

G. When the Video Conferencing Is Over . . .

At the conclusion of the dispute resolution process conducted on video conferencing, each participant should receive a satisfaction survey to help assess participants' procedural justice experience and whether they considered the process to be legitimate.¹⁴⁶ As mentioned earlier in this Article, the survey should ask questions that help evaluate if Black participants felt they received racial justice equity.

Individual neutrals and ADR providers can opt to implement these debiasing prescriptive and assessments now. However, as video conferencing becomes an accepted part of the "new normal," those committed to racial justice equity for all should also advocate for consistent, coordinated, and targeted design considerations in a system-wide adoption of video conference use. The next Part identifies those design considerations.

143. See, e.g., *Virtual Interviews: Tips for Medical School Applicants*, *supra* note 113; *Arbitrator's Guide to Remote EDNY Arbitration*, E. DIST. OF N. Y.: ARB. PROGRAM, https://img.nyed.uscourts.gov/files/local_rules/Remote%20Guidelines%20for%20EDNY%20Arbitrators.pdf (Feb. 3, 2021) ("Witnesses may not use a 'virtual background.' Instead, the remote venue from which they are testifying must be visible."); Sussman, *supra* note 101; Ross, *supra* note 102 and accompanying text.

144. Marbin et. al, *supra* note 91, at 1121.

145. See, e.g., Ebner, *supra* note 98 ("While displaying empathy via body language might be constrained by the medium, we can adapt most of our tools for use online. These include online versions of those basic communication tools negotiators and mediators employ with empathy-showing in mind: Active listening, reflecting, and asking relevant, productive, and to-the-point questions showing interest in your counterpart and their needs and concerns.")

146. See Shestowsky, *supra* note 121.

IV. DESIGN CONSIDERATIONS GOING FORWARD

Courts, ADR providers, neutrals, lawyers, and litigants are realizing that the use of video conferencing for conducting civil dispute resolution processes will remain part of the “new normal.”¹⁴⁷ How might video conferencing be used to enhance access to justice, mitigate racial biases, and promote racial justice equity? The suggested design recommendations are gleaned from the issues that have been discussed throughout this Article.

A. Include Black Justice Stakeholders at the Design Table if the Courts Are Committed to Providing Racial Justice Equity.

A basic tenet of program design that is often overlooked is that developers of programs should include the targeted users of the program when designing the program.¹⁴⁸ Black stakeholders, both as users of video conferencing and survivors of implicit racial bias, should have a voice at the design table.

B. Courts and ADR Providers Should Continue to Take Affirmative Steps to Narrow the Digital Divide so that the Digital “Have Nots” Have Meaningful Access to Justice.

Since March 2020, when courts were compelled because of pandemic concerns to conduct dispute resolution hearings via video conferencing, courts have taken affirmative steps to narrow the digital divide and provide access for the digital have-nots. On July 28, 2021, at the Conferences of Chief Justices and State Court Administrators, national courts committed to continuing their

147. See, e.g., Bannon & Keith, *supra* note 16, at 1880 (“The Covid-19 pandemic has forced innovation, but the next step is to make sure we take the right lessons from the experience, so that technology is embraced when—and only when—it is consistent with fair proceedings and access to justice for all.”); Sternlight & Robbenolt, *supra* note 92, at 704 (“Some tout the possibilities for using technology to facilitate access to justice, but others worry about the ways that technology might impede such access.”).

148. See, e.g., Margaret Hagan, *Participatory Design for Innovation in Access to Justice*, 148 DÆDALUS, THE J. OF AMER. ACAD. OF ARTS & SCIS. 120, 122 (2019) (“Participatory design asks people who are meant to use a system’s services to help identify where it needs to be reformed, define what ‘better’ operation would look like, and design new interventions to reform it. Teams of designers working with customers and professionals generate innovations that users rate as better than traditional innovations.”); Noam Ebner & Elayne E. Greenberg, *Strengthening Online Dispute Resolution Justice*, 63 WASH. UNIV. J. OF L. & POL’Y 65, 67 (2020) (“Curiously, lawyers—major stakeholders in the justice system—are absent from the design, development, and implementation of many court-infused ODR processes.”); Bannon & Keith, *supra* note 16, at 1913.

efforts to narrow the digital divide.¹⁴⁹ The pandemic highlighted how access to computers and reliable broadband service is a life necessity,¹⁵⁰ and magnified how it is a racial justice equity. Meaningful progress continues.¹⁵¹

C. Ensure that the Participant Satisfaction Evaluations are Aligned with the Goals of Racial Justice Equity.

When program administrators are trying to assess Black participants' justice experience when the dispute resolution process is conducted via video conferencing, the program administrator should then ensure that the survey evaluations include the participant's race and contain questions to help assess the participant's sense of procedural justice.¹⁵² This would aid the program administrators to assess if the design of the program is achieving the program's goals, racial justice equity,¹⁵³ and to consider, how, if at all, might the design of the program be tweaked to better achieve the goal of racial equity.¹⁵⁴ Another benefit of having program evaluations aligned with its goal, program administrators might be transparent about these evaluations to

149. See, e.g., *Conf. of Chief Justs. & Conf. of State Ct. Adm'rs, Resolution 2: In Support of Remote and Virtual Hearings*, CONF. OF CHIEF JUST. & NAT'L CTR. FOR STATE CTS. 2, https://ccj.ncsc.org/__data/assets/pdf_file/0016/67012/Resolution-2_Remote-and-Virtual-Hearings.pdf (last visited Oct. 4, 2022) ("Be It Further Resolved that the Conference of Chief Justices and the Conference of State Administrators offer leadership and encourage, where appropriate, collaborations with federal, state, and local government agencies and legislative bodies, private funders, and other civil justice system partners to support and provide financial resources to increase broadband, and address other solutions regarding the digital divide.").

150. See, e.g., *New York City to Close Digital Divide for 1.6 Million Residents, Advance Racial Equity*, N.Y.C.: OFF. OF THE MAYOR (Oct. 28, 2021), <https://www1.nyc.gov/office-of-the-mayor/news/724-21/new-york-city-close-digital-divide-1-6-million-residents-advance-racial-equity>.

151. See, e.g., PERMANENT COMM'N ON ACCESS TO JUST., *supra* note 67, at 139.

152. See, e.g., Shestowsky, *supra* note 121 ("Because procedural justice is largely subjective, when trying to create ODR platforms that litigants will regard as fair, courts need to consider the litigant perspective."); LISA BLOMGREN AMSLER ET AL., *DISPUTE SYSTEM DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT* 37 (2020) ("Success can be defined not only by whether the system achieves its intended goals but also by whether it achieves broader societal goals, including fairness and justice."); Bannon & Keith, *supra* note 16, at 1919 ("If courts systems are going to continue to rely on expanded remote proceedings, they need data on what works, with particular attention paid to the impact on marginalized communities.").

153. AMSLER ET AL., *supra* note 152, at 37.

154. *Id.*

reinforce the program's credibility and incentivize additional user comments.¹⁵⁵

D. Include Black and Other Diverse Program Evaluators When Evaluating Dispute Resolution Programs Conducted Via Video Conferencing and Assessing the Data.

Black evaluators are likely to have heightened sensitivity about identifying racially biased acts and microaggressions because they are likely to have experienced racism in all its many iterations.¹⁵⁶ In addition, program participants are more likely to be forthcoming and candid about sharing their own procedural justice assessment with evaluators who they believe will understand them.¹⁵⁷

E. Seize the Time and Travel Efficiencies of Video Conferencing so that Legal Services Can More Easily Provide Legal Representation to a Greater Number of Unrepresented.

The Self-Represented Litigants Network reports that 60% of individuals that go to court to resolve a civil matter, do so without lawyers.¹⁵⁸ Now, legal services providers have the opportunity to represent a greater number of unrepresented litigants who seek representation and/or reside in underserved areas, if dispute resolution processes are conducted via video conferencing rather than at an in-person hearing.¹⁵⁹ Scheduling dispute resolution processes via video conferencing eliminates the cost and time of

155. *Id.*

156. *See, e.g.,* Leon D. Caldwell & Katrina L. Bledsoe, *Can Social Justice Live in a House of Structural Racism? A Question for the Field of Evaluation*, 40 AM. J. OF EVALUATION 6, 7 (2019) (“[E]valuation and evaluators are uniquely positioned to either maintain or challenge established and perceived beliefs about people, places, systems, and events. Social justice in evaluation has served as a siren call of the profession to . . . meaningfully address issues of race, socioeconomic status, privilege, inclusions, sexuality, and the like.”); Ikenna Okezie, *I Saw Racism Firsthand Growing Up. It Makes Me a Better Doctor for Black Patients*, USA TODAY, <https://www.usatoday.com/story/opinion/columnists/2022/03/12/black-doctors-black-patients-black-history/9218089002/> (Mar. 13, 2022) (“Changing this systemic problem for the medical establishment requires acknowledging the reality that many people of color have a lived experience that makes them distrust and mistrust the system itself.”).

157. *See, e.g.,* Shani M. King, *Race, Identity, and Professional Responsibility: Why Legal Service Organizations Need African American Staff Attorneys*, 18 CORNELL J.L. & PUB. POL’Y 1, 4, 15–6, 19, 28 (2008).

158. SELF-REPRESENTED LITIG. NETWORK, *supra* note 29.

159. *See, e.g.,* Director’s Memorandum 22-01, *supra* note 30 (regarding appearance by remote technology).

traveling to an in-person hearing and wasting multiple hours in court for an in-person hearing that might, in some cases, take just a few minutes.

F. Seize the Economic and Travel Efficiencies of Video Conferencing so that Parties Can Have Greater Access to a Diverse Pool of Neutrals.

A common reason for not having a diverse pool of neutrals from which parties might select their neutral of choice is: “[T]here are no diverse neutrals in my community.”¹⁶⁰ Video conferencing provides those parties living in segregated areas without a diverse pool of neutrals the opportunity to overcome that geographical barrier and access a more diverse pool of neutrals.¹⁶¹

G. Distinguish the Different Contexts that Implicit Racial Bias Appears in Video Conferencing and Educate About Strategies to Mitigate These Implicit Biases.

Now that video conferencing has become part of the “new normal” and dispute resolution processes may take place in-person or via video conferencing, judges, neutrals, and lawyers should receive training about the different implicit bias triggers that occur in-person and via video conferencing. As explained in this Article, video conferencing creates different contexts that may make it more likely for implicit biases to emerge.¹⁶² Although many judges, neutrals, and lawyers may have received implicit bias training as part of their professional training requirements for in-person dispute resolution work, it remains unclear if those professionals are able to generalize the information learned to video conferencing. Anecdotally, many of my informal conversations with dispute resolution professionals about this topic could be

160. See, e.g., Rachael A. Gupta, *DEI & ADR: 5 Practical Ways to Increase Diversity in the Selection of Neutrals*, ACC DOCKET (May 23, 2022), <https://docket.acc.com/dei-adr-5-practical-ways-increase-diversity-selection-neutrals>; Benjamin G. Davis, *Report to the House of Delegates*, 2018 A.B.A. SEC. DISP. RESOL. 105, at 2, 4–5.

161. See, e.g., *Using E-Mediation*, *supra* note 32; Lynch, *supra* note 32 and accompanying text.

162. See, e.g., Marbin et al., *supra* note 91 and accompanying text, at 1121 (“When our cognitive load is increased, we automatically rely on implicit associations to help us process information.”); Sternlight & Robbenolt, *supra* note 92 and accompanying text, at 746; Asare, *supra* note 92 and accompanying text; Ebner & Greenberg, *supra* note 92 and accompanying text, at 537–38; Emma Goldberg, *You’re Still on Mute*, N.Y. TIMES (June 19, 2022), <https://www.nytimes.com/2022/06/19/business/wfh-setups-rto.html>.

summed up as, “Gee, I never thought about that.” The implicit bias training for dispute resolution professionals might be offered as one training that addresses both the overlapping and distinct trigger contexts of in-person and via video conferencing. Alternatively, each training could be offered as separate modules. This author supports a professional requirement that all neutrals take implicit biases training that addresses in-person and video conferencing dispute resolution processes because it is highly likely that all neutrals may conduct their dispute resolution processes in-person and via video conferencing.

H. Ensure that Video Conferencing is an Informed Justice Option

Prior to electing to participate in-person or via video conferencing, parties should be informed about the benefits and concerns about each process for their matter.¹⁶³ As we emerge from the pandemic and dispute resolution professionals and lawyers are looking beyond their technological mastery of video conferencing, they are developing a more nuanced understanding about video conferencing as a justice option. Dispute resolution professionals and lawyers have an ethical obligation to ensure that participants have that information and are making an informed decision to participate via video conferencing.¹⁶⁴

This author acknowledges that this is just a beginning list, and each suggestion generates additional questions that merit further study.

V. CONCLUSION

The theme of this symposium has been *Is Remote Justice Still Justice?* The implication is that court hearings and dispute resolution processes conducted in-person will yield just and equitable outcomes. Yet, for Black individuals and members of

163. Bannon & Keith, *supra* note 16, at 1918 (“Remote proceedings involve sometimes-complex costs and benefits, and the parties and attorneys involved in a case will often be best situated to understand these tradeoffs, which are rooted both in the nature of the proceedings as well as individual-level factors.”).

164. See, e.g., Jacqueline Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 794–96, 799–800 (1999); MODEL RULES OF PROF'L CONDUCT r. 1.2(a), (AM. BAR ASS'N 2002) (Scope of Representation between Attorney and Client).

other marginalized groups that has not been their reality. The optimistic focus of this Article has been how to change that reality and finally blind justice when dispute resolution processes for civil matters are conducted via video conferencing.

In July 2020, the joint Conference of Chief Justices and the Conference of State Court Administrator, committed to addressing implicit and explicit racism in the courts so that all participants can expect to be treated fairly and receive equitable justice outcomes, and have already taken affirmative steps to do so. When it became apparent that the digital divide was actually a racial justice divide, courts took steps to narrow that divide by collaborating with community partners and providing connectivity, tech guidance, and legal representation to the digital have-nots.¹⁶⁵

Now that courts are acknowledging that video conferencing is part of the “new normal,” how might we build on what we have learned? As raised in this Article, more needs to be done to expand the successful community and legal service collaborations to expand access to justice and racial justice equity. We also need research to assess if the courts’ good intentions are actually creating the systemic changes needed to yield equitable justice outcomes. This can be done.

Professor Richard Susskind, the esteemed prognosticator about the future of online courts opined:

I don’t think dropping hearings into Zoom has been a shift in paradigm. The reality is that the problems remain much the same, we still have the access to justice problem. So COVID-19 is best regarded as an experiment. It offers a springboard, I have no doubt, into a new world. My message to you today is that we are just at the foothills.¹⁶⁶

Let’s climb to the top of that mountain.

165. See, e.g., *How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations*, *supra* note 2; PERMANENT COMM’N ON ACCESS TO JUST., *supra* note 67 (reporting on court-supported initiatives to narrow the digital divide and provide improved access to justice for low-income individuals.).

166. Milano, *supra* note 27.