

# Coming Together to Resolve Police Misconduct: The Emergence of Mediation as a New Solution

RYAN P. HATCH\*

## I. INTRODUCTION

One night a mother and father are called and told that their son has been involved in a serious car accident. When the concerned parents arrive at the scene, they approach a police officer to inquire about the condition of their son and his whereabouts. Instead of being responsive to the parents' request and showing some degree of care, the officer refuses to give any information concerning their son. After repeated attempts to get information from the officer, he becomes increasingly belligerent and argumentative—making a bad situation even worse for the anxiety-ridden parents. The mother approaches the other driver involved in the accident to see if he has any information about her son's condition. The agitated officer, however, quickly intervenes and prevents the mother from speaking further to the other driver. Finally, the officer tells the parents that their son was taken to a nearby hospital. Upon arrival at the hospital, the parents find out that the information given by the officer was wrong, and that their son is at a different hospital. When the parents finally arrive at the correct hospital, they learn that their only son has died. Ultimately, the parents file a complaint against the officer for hostile behavior and for acting in an unprofessional manner.<sup>1</sup>

Instead of initiating an Internal Affairs investigation, the Office of Police Complaints contacts both parties to determine if they would be amenable to resolving the complaint through mediation. After the parents and the officer agree to mediate, they meet face-to-face with a trained mediator to discuss their perspectives of the incident and express their feelings. The mediator describes the session as extremely emotional for the parents and the officer.<sup>2</sup> The officer expresses to the parents that his behavior that night was the result

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\* B.A., St. Olaf College, 1998. J.D. Candidate, The Ohio State University Moritz College of Law, 2006. Recipient of the "Outstanding Student Note Award." I thank Lori Turner and the Staff for their hard work on this article; however, any errors or omissions are mine. Lastly, I thank La Rae, my family, and my friends for their infinite patience and support.

<sup>1</sup> This is an example of an actual complaint filed against a Washington, D.C. police officer in 2004. OFFICE OF POLICE COMPLAINTS (FORMERLY OCCR), WASHINGTON, D.C., ANNUAL REPORT 12, Mediation Example #1 (2004), available at [http://occr.dc.gov/occr/frames.asp?doc=/occr/lib/occr/info/docs/annual\\_report\\_fy04\\_cvr\\_chpt1-3.pdf](http://occr.dc.gov/occr/frames.asp?doc=/occr/lib/occr/info/docs/annual_report_fy04_cvr_chpt1-3.pdf).

<sup>2</sup> *Id.*

of trying to handle the very bad car accident by himself in a tough neighborhood.<sup>3</sup> Nevertheless, the officer sincerely apologizes to the parents for the loss of their son, and regrets that his behavior contributed to their pain.<sup>4</sup> As a result of the mediation session, the officer agrees to attend and complete an appropriate stress management course through the Police Department.<sup>5</sup>

When one hears the term “police misconduct,” often the most egregious examples immediately spring to mind: the Rodney King beating in Los Angeles,<sup>6</sup> the torture of Abner Louima in New York,<sup>7</sup> the shooting of Timothy Thomas in Cincinnati,<sup>8</sup> or the LAPD Rampart Scandal.<sup>9</sup> Many of these incidents sparked widespread demonstrations and riots that captured national headlines for several weeks. But for every Rodney King, Abner Louima, or Timothy Thomas, there are hundreds of thousands of incidents like the opening vignette—where police officers are alleged to behave in an insensitive, hostile, or unprofessional manner.<sup>10</sup>

Even though almost all alleged incidents of insensitivity, hostility, and unprofessionalism fail to grab national headlines, it is equally important to

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<sup>3</sup> *Id.*

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

<sup>5</sup> *Id.*

<sup>6</sup> See, e.g., Seth Mydans, *The Police Verdict—Los Angeles Policemen Acquitted in Taped Beating*, N.Y. TIMES, Apr. 30, 1992, at A1; *Riot Statistics*, THE ORANGE COUNTY REG., May 29, 1992, at A4.

<sup>7</sup> See, e.g., Joseph P. Fried, *Protests May Disrupt Louima Trial, Lawyers Say*, N.Y. TIMES, Mar. 29, 1999, at B4.

<sup>8</sup> See, e.g., Amy DePaul & Peter Slevin, *Cincinnati Officials Impose Curfew: Mayor Acknowledges Race Woes as City Acts to Quell Violence*, WASH. POST, Apr. 13, 2001, at A1.

<sup>9</sup> See, e.g., Scott Glover & Matt Lait, *30 L.A. Officers Called to Testify Before Grand Jury*, L.A. TIMES, Apr. 14, 2000, at A1.

<sup>10</sup> It is difficult to precisely quantify incidents of police insensitivity, hostility, or unprofessionalism each year in the United States as a whole. However, between 1997 through 2000, 855 citizens filed complaints against Cincinnati police officers for “minor issues,” including rudeness, inappropriate remarks, discourtesy, and poor service. Robert Anglen & Dan Horn, *Police Review Themselves When Citizens Complain: Officers Exonerated on 90% of Minor Issues*, CINCINNATI ENQUIRER, July 8, 2001, at A1 & A11, available at [http://www.enquirer.com/editions/2001/07/08/loc\\_police\\_review.html](http://www.enquirer.com/editions/2001/07/08/loc_police_review.html). In New York City, the Civilian Review Complaint Board alone received 3,197 total allegations of officer discourtesy in 2003. CIVILIAN REVIEW COMPLAINT BOARD, STATUS REPORT, JANUARY–JUNE 2004, at 9 tbl.1A (2004), available at <http://www.ci.nyc.ny.us/html/ccrb/pdf/ccrbsemi2004.pdf>. During the same period there were 474 allegations that police officers used offensive language. *Id.* In 2004, from January to June, the Civilian Complaint Review Board received 1,606 total allegations of officer discourtesy and 276 allegations of offensive language used by officers. *Id.*

resolve these types of allegations to foster a better relationship between the police and the communities they serve. A majority of Americans will interact with a police officer at some point in their lives.<sup>11</sup> Most people expect that during these interactions citizens would be treated with dignity, respect, and professionalism.<sup>12</sup> As the Supreme Court warned, however, citizen interactions with police have the potential to “inflict great indignity and arouse strong resentment” in the community.<sup>13</sup>

Much has already been written on the causes of police brutality and corruption,<sup>14</sup> with various academics and professionals penning recommendations to curb the more nefarious forms of police misconduct.<sup>15</sup>

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<sup>11</sup> “An estimated 45 million United States residents—one in five—have some sort of face-to-face contact with law enforcement officers annually[.] . . . Among . . . such contacts a third seek police help or offer assistance. Another third witness a crime or report a crime to law enforcement officers. A little less than a third said the police initiated the contact.” Press Release, U.S. Dep’t of Justice, One in Five U.S. Residents In Contact With Police During Year (Nov. 22, 1997), <http://www.ojp.usdoj.gov/bjs/pub/press/puof.pr>.

<sup>12</sup> Surveys conducted by various organizations tend to reveal that minority groups are perceived to be treated less favorably by the police and, more broadly, by the criminal justice system, than whites. See, e.g., Dan Barry & Marjorie Connelly, *Poll in New York Finds Many Think Police are Biased*, N.Y. TIMES, Mar. 16, 1999, at A1. Just as troubling is that these perceptions are very often correct. See generally David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265 (1999).

<sup>13</sup> *Terry v. Ohio*, 392 U.S. 1, 16–17 (1968) (discussing how a police officer’s “stop” and “frisk” of an individual is more than a petty indignity, but “a serious intrusion upon the sanctity of the person”).

<sup>14</sup> See generally Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2004); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296 (2001); Susan Bandes, *Tracing the Pattern of No Pattern: Stories of Police Brutality*, 34 LOY. L.A. L. REV. 665 (2001); Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department’s Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L.A. L. REV. 545 (2001); Robert W. Benson, *Changing Police Culture: The Sine Qua Non of Reform*, 34 LOY. L.A. L. REV. 681 (2001); Harold Baer, Jr. & Joseph P. Armao, *The Mollen Commission Report: An Overview*, 40 N.Y.L. SCH. L. REV. 73 (1995); POLICE BRUTALITY 60–105 (Louise I. Gerdes ed., 2004).

<sup>15</sup> See generally Michael Rowan, *Leaving No Stone Unturned: Using RICO as a Remedy for Police Misconduct*, 31 FLA. ST. U. L. REV. 231 (2003); Holly James McMickle, *Letting DOJ Lead the Way: Why DOJ’s Pattern or Practice Authority is the Most Effective Tool to Control Racial Profiling*, 13 GEO. MASON U. CIV. RTS. L.J. 311 (2003); Asit S. Panwala, *The Failure of Local and Federal Prosecutors to Curb Police Brutality*, 30 FORDHAM URB. L.J. 639 (2003); Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department “Pattern or Practice” Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3 (2003); Roger L. Goldman, *State Revocation of*

The focus of this Note, however, is on the emergence of mediation<sup>16</sup> as a promising means to resolve a specific subset of citizen complaints filed against police officers. Mediation of citizen complaints is most appropriate for cases involving allegations of officer discourtesy, insensitivity, hostility, and other “minor” types of alleged officer misconduct. While mediation is best suited to handle only relatively “minor” abuses of power,<sup>17</sup> police departments must address these complaints to ensure and foster a sense of trust, accountability, and justice in the communities they serve.<sup>18</sup> This is especially true in police departments that embrace the “community policing” model of law enforcement.<sup>19</sup>

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*Law Enforcement Officers' Licenses and Federal Criminal Prosecution: An Opportunity for Cooperative Federalism*, 22 ST. LOUIS U. PUB. L. REV. 121 (2003); Erwin Chemerinsky, *The Role of Prosecutors in Dealing With Police Abuse: The Lessons of Los Angeles*, 8 VA. J. SOC. POL'Y & L. 305 (2001); Brandon Garrett, *Remediating Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41 (2001); Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845 (2001); Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1 (2001); JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* (1993); *POLICE BRUTALITY* 107-138 (Louise I. Gerdes ed., 2004).

<sup>16</sup> Mediation is “an informal process in which a neutral third party with no power to impose a resolution helps the disputing parties try to reach a mutually acceptable settlement.” ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 2 (1994).

<sup>17</sup> One commentator explains that “people in the mediation field agree that no complaint involving potential criminal charges against the officer should be eligible for mediation” and that “[p]olice officials support this position.” Samuel Walker, et. al, U.S. Dep't of Justice, *Mediating Citizen Complaints Against Police Officers: A Guide for Police and Community Leaders* 18 (2002) [hereinafter *Mediating Citizen Complaints*]. See also *infra* Part IV.A, for a more detailed discussion.

<sup>18</sup> The demonstrations and riots that followed the acquittal of the officers who beat Rodney King and the shooting of Timothy Thomas arguably symbolized more than just the beating and shooting of African-American men. The riots also reflected accumulated feelings of injustice and distrust towards the police. See DePaul, *supra* note 8, at A11 (“[T]he riots are not just a reaction to the killing of an African-American male, but to the injustice to our people for so long.”); see also BUSH & FOLGER, *supra* note 16, at 47 (The Rodney King beating “was the tip of the iceberg of police abuse that goes relatively unchecked in cities across the country. . . . [T]he problem was not just police abuse but unfair treatment of all kinds.”).

<sup>19</sup> The Department of Justice defines community policing as “collaboration between police and citizens in a non-threatening and cooperative spirit. It requires that police listen to citizens, take seriously how citizens perceive problems and issues, and seek to solve problems which have been identified.” U.S. DEP'T OF JUSTICE, *PRINCIPLES OF GOOD POLICING: AVOIDING VIOLENCE BETWEEN POLICE AND CITIZENS* 29 (2003), available at

Accordingly, Part II of this Note provides a general description of how existing mediation programs in the United States operate. Part III focuses on the benefits of using mediation to resolve allegations of police misconduct. More specifically, it demonstrates why the use of mediation is often superior to other methods of investigating or dealing with police misconduct. Part IV examines the potential problems and shortcomings of mediation to resolve allegations of police misconduct.

## II. HOW THE AVERAGE MEDIATION PROGRAM OPERATES

As of 2002, approximately 16 citizen-police mediation programs were operational in the United States.<sup>20</sup> The first pilot program began in Portland, Oregon in 1993.<sup>21</sup> Most current mediation programs use a citizen oversight body that screens citizen complaints to evaluate whether or not the complaint is a good candidate for mediation.<sup>22</sup> While different criteria are used by oversight bodies to select complaints for mediation,<sup>23</sup> once a complaint is selected for mediation, both parties are contacted to determine if they are amenable to mediation.<sup>24</sup>

If the citizen complainant and the police officer voluntarily agree to mediate,<sup>25</sup> the complaint is referred to a professional mediation service,<sup>26</sup>

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<http://www.usdoj.gov/crs/pubs/principlesofgoodpolicingfinal092003.pdf>. The polar opposite of community policing is the “proactive paramilitary style of policing,” which projects the appearance of “omnipresent intimidation and total command of the streets” that is aggressive and confrontational. Chemerinsky, *supra* note 14, at 568–570.

<sup>20</sup> CITY OF PORTLAND, INDEPENDENT POLICE REVIEW (IPR) DIVISION, ANNUAL REPORT 99 (2003), available at <http://www.portlandonline.com/shared/cfm/image.cfm?id=54001>.

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

<sup>22</sup> *Mediating Citizen Complaints*, *supra* note 17, at 44. Walker notes that “four mediation programs are operated by neighborhood community justice or dispute resolution centers.” Two of the mediation programs are operated by the police department themselves. The remaining mediation programs are operated by citizen oversight agencies. *Id.*

<sup>23</sup> See *supra* note 17 and accompanying text.

<sup>24</sup> *Mediating Citizen Complaints*, *supra* note 17, at 17.

<sup>25</sup> During the mediation session the citizen is not entitled to legal representation. *Id.* Likewise, the police officer is not entitled to legal or union representation. *Id.*

<sup>26</sup> *Id.* at 29 (“Mediation programs should only use trained professional mediators. Mediation is an important and complex undertaking, and it should not involve amateurs.”). “The Minneapolis Mediation Program requires that its mediators be certified, and, in addition, attend a 40 hour course prior to mediating citizen complaints against police officers.” Peter Finn, *Two Mediation Systems Help Manage Citizen Complaints*, THE POLICE CHIEF, Aug. 2000, at 67, 73. The Portland Mediation Program

which typically has contracted with the city or oversight agency to provide its services.<sup>27</sup> Usually there is no cost to either party to participate in mediation sessions.<sup>28</sup> Prior to conducting the mediation session, the citizen and police officer are required to sign a participation agreement and a confidentiality agreement to encourage honesty and openness.<sup>29</sup> Once the session begins,<sup>30</sup> the mediator facilitates the conversation and gives each party an opportunity to describe its side of the incident.<sup>31</sup> The session continues until both parties come to a mutual resolution or until either party, or the mediator, decides to terminate the session because a satisfactory

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Guidelines state that “mediators are expected to adhere to standards of ethical practice that are embodied in the Oregon Mediation Association’s “[s]tandards of [m]ediation [p]ractice.” Independent Police Review Division, PSF-5.10: Independent Police Review, Mediation Program Guidelines (2002), <http://www.portlandonline.com/auditor/index.cfm?&a=9041&c=27455>.

<sup>27</sup> For example, the Minneapolis Review Authority refers appropriate complaints to the Minneapolis Mediation Program, which is a non-profit organization that has an annual contract with the city of Minneapolis. Finn, *supra* note 26, at 71. Likewise, the Washington D.C. mediation program has contracted with the Community Dispute Resolution Center to provide “a pool of well trained, experienced, and diverse mediators.” OFFICE OF POLICE COMPLAINTS (FORMERLY OCCR), WASHINGTON D.C., ANNUAL REPORT 6 (2003), available at [http://occr.dc.gov/occr/frames.asp?doc=/occr/lib/occr/pdf/annual\\_report\\_fy03\\_final.pdf](http://occr.dc.gov/occr/frames.asp?doc=/occr/lib/occr/pdf/annual_report_fy03_final.pdf). Mediation programs that do not have a formal relationship with a mediation center often draw from a list of certified mediators provided by the local bar association. *Mediating Citizen Complaints*, *supra* note 17, at 45.

<sup>28</sup> OFFICE OF POLICE COMPLAINTS, *supra* note 27, at 6.

<sup>29</sup> For an example of the Agreement to Mediate required by the Minneapolis Mediation Program, see PETER FINN, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, CITIZEN REVIEW OF POLICE APPROACHES AND IMPLEMENTATION 75 (2001), available at <http://www.ncjrs.org/pdffiles1/nij/184430.pdf>.

<sup>30</sup> The mediation process in this context is no different than other mediations. *Mediating Citizen Complaints*, *supra* note 17, at 32. The session begins with an opening statement or introduction by the mediator, which typically explains the process and ground rules for the parties. Second, each party is given an opportunity to present his or her side of the complaint. Third, the mediator summarizes the complaint in an impartial manner, and helps the parties identify specific issues and set up a framework to discuss the issues. Fourth, as the parties continue discussing the issues and possible solutions, the mediator may help identify alternative solutions to the conflict, especially when the parties may be unable to come up with their own solution. Fifth, the mediator may help the parties choose the appropriate resolution and assist in the drafting of the agreement, if the parties reach an agreement on the appropriate resolution. *Id.*; see also NANCY ROGERS & RICHARD SALEM, A STUDENT’S GUIDE TO MEDIATION AND THE LAW 20–39 (1987), reprinted in STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 113 (2003).

<sup>31</sup> CITY OF PORTLAND, *supra* note 20, at 102.

agreement cannot be reached.<sup>32</sup> On average, most mediation programs allot about an hour for each mediation session.<sup>33</sup>

If the parties come to a mutually agreeable resolution, or the complainant expresses satisfaction with the process, the complaint is dismissed and no further action against the police officer is taken by the police department.<sup>34</sup> Likewise, no record of the complaint is placed in the officer's personnel file.<sup>35</sup> Most programs, however, have procedural safeguards in place so that officers do not attempt to avoid departmental discipline by continually agreeing to mediate complaints. Typically, an officer cannot mediate a complaint if he or she has mediated a complaint involving similar conduct in the past twelve months.<sup>36</sup>

### III. THE BENEFITS OF USING MEDIATION TO RESOLVE ALLEGATIONS OF POLICE MISCONDUCT

#### A. *The Shortcomings of Traditional Methods*

A brief overview of the more traditional methods of resolving complaints of alleged police misconduct helps illustrate the potential strengths of using mediation to resolve conflicts between citizens and police officers. Typically, citizens seeking to file a complaint about police misconduct have few options; they can file a complaint with the department's division of Internal Affairs,<sup>37</sup> with a Citizen Review Board,<sup>38</sup> or initiate a civil lawsuit for deprivation of civil rights.<sup>39</sup>

<sup>32</sup> *Mediating Citizen Complaints*, *supra* note 17, at 34.

<sup>33</sup> *Id.* at 33.

<sup>34</sup> *Id.* at 34. If, however, the officer withdraws from the mediation session, he or she runs the risk of having the complaint returned to Internal Affairs or the Citizen Review Board for further investigation. *Id.* at 17. Accordingly, "mediation is more voluntary for the citizen complainant than for the police officer." *Id.* at 34.

<sup>35</sup> CITY OF PORTLAND, *supra* note 20, at 99–100.

<sup>36</sup> OFFICE OF POLICE COMPLAINTS, *supra* note 27, at 6; *see also Mediating Citizen Complaints*, *supra* note 17, at 19 (discussing New York's and Minneapolis' guidelines for eligibility of officers to participate in mediation). In Portland, however, there is recognition "[t]hat the number of complaints an officer may get is sometimes the result of the nature of their assignment. In addition, we are not convinced that the disciplinary system is in a better position to improve officer conduct than referrals to mediation." CITY OF PORTLAND, *supra* note 20, at 101. Accordingly, Portland will review each complaint on a case-by-case basis to determine eligibility for mediation. *Id.*

<sup>37</sup> Internal Affairs is a division or office within a police department that is generally comprised of police officers only, and has no civilian oversight. Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 536 (2004)

Most citizens who file a complaint with Internal Affairs simply do not believe any meaningful resolution will occur. This is due to the perception that Internal Affairs is akin to “the fox guarding the hen house.”<sup>40</sup> Internal Affairs is perceived to protect police officers because a majority of complaints are decided in favor of the police officers.<sup>41</sup> Likewise, Internal Affairs Divisions operate with very little transparency during the investigatory process and typically refuse to make public information obtained in the course of their investigation.<sup>42</sup> After a citizen files a

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(citations omitted). The officers that comprise the Internal Affairs office “receive, investigate, and adjudicate citizen complaints.” *Id.* An internal affairs investigation closely resembles a criminal investigation, whereby Internal Affairs will, *inter alia*, “interview witnesses, prepare statements, collect physical evidence, and review arrest reports.” *Id.* At the conclusion of the investigation, the Internal Affairs office will submit a written report stating its findings and recommended discipline, if any is warranted, to the Chief of Police for final disposition and approval. *Id.*

<sup>38</sup> Many communities have created Citizen Review Boards, which generally act as external, independent oversight agencies that, depending on the community, have differing responsibilities in the investigation and resolution of allegations of police misconduct. For a more in depth discussion on Citizen Review Boards, see generally Justina R. Cintrón Perino, *Developments in Citizen Oversight of Law Enforcement*, 36 URB. LAW. 387 (2004); Merrick Bobb, *Civilian Oversight of the Police in the United States*, 22 ST. LOUIS U. PUB. L. REV. 151 (2003); Debra Livingston, *The Unfulfilled Promise of Citizen Review*, 1 OHIO ST. J. CRIM. L. 653 (2004).

<sup>39</sup> For example, citizens may bring a federal action for damages under 42 U.S.C. § 1983 (1994), which states in pertinent part: “Every person who, under [color of law] . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights . . . secured by the Constitution . . . shall be liable to the party injured in an action of law.”

<sup>40</sup> Armacost, *supra* note 37, at 537 n.523 (“Perhaps the most significant limitation of internal review is the potential for real or perceived conflicts of interest.”); Chemerinsky, *supra* note 14, at 604 (“Internal Affairs is run by officers steeped in the LAPD’s code of silence, loyalty, aggression, retaliation, and image protection.”); Rob Yale, Note, *Searching for Consequences of Police Brutality*, 70 S. CAL. L. REV. 1841, 1853 (1997) (Internal Affairs is “the world’s biggest washing machine. Everything that goes in dirty, comes out clean.”) (citations omitted).

<sup>41</sup> *Mediating Citizen Complaints*, *supra* note 17, at 15. Walker notes that about 90% of all complaints are found in favor of police officers.

<sup>42</sup> Armacost, *supra* note 37, at 537 (“The universal practice of police organizations of limiting information regarding complaints filed and aspects of the investigation . . . creates an appearance of favoritism and undermines citizen perceptions of legitimacy.”); see also Steven D. Zansberg & Pamela Campos, *Sunshine on the Thin Blue Line: Public Access to Police Internal Affairs Files*, 22 COMM. LAW. 34, 34 (2004). The authors state that the mistrust of police officers, and the Internal Affairs process itself, is fueled in part by police departments’ refusal to allow public inspection of completed Internal Affairs investigations. Denial of public access to these records is



complaint or has his or her statement taken, the next contact is most likely a terse letter from Internal Affairs notifying the citizen that the complaint has been unsubstantiated or unfounded.<sup>43</sup> In some cases, the citizen may never learn about the disposition of his or her complaint against the officer.<sup>44</sup> Accordingly, citizens are left unhappy and frustrated because they feel “their issues were not adequately addressed.”<sup>45</sup>

Most Citizen Review Boards, while seeking to promote impartiality, confidence, and thoroughness<sup>46</sup> in the investigation of police misconduct, through the inclusion of civilians who are not sworn police officers,<sup>47</sup> have likewise failed to engender much confidence from the public.<sup>48</sup> Many complaints can take up to two years to be resolved.<sup>49</sup> Of the 2,418 investigations conducted by the New York City Civilian Complaint Review Board (CCRB) in 2000, only 8 percent “involved at least one substantiated allegation of police misconduct.”<sup>50</sup> Even if a Citizen Review Board does substantiate a misconduct complaint against an officer, the Board often has little power to do anything but suggest an appropriate punishment to the

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usually predicated on one of two grounds: “(1) the privacy rights of the officers involved, and (2) the ‘deliberative process privilege’ attached to pre-decisional records recommending a policy or course of action (i.e., what, if any, disciplinary sanction to impose).” *Id.* Zansberg and Campos argue that greater public access to Internal Affairs investigations under states’ open record laws would help instill trust in the community and accountability in the police. *Id.*

<sup>43</sup> “At the close of the investigation, the complainant usually receives a ‘close out’ letter stating the finding of the investigation. Often, this letter is the only information the police department reveals to citizens.” Armacost, *supra* note 37, at 536 (citations omitted).

<sup>44</sup> “Citizens who file minor complaints often are left in the dark about the outcome of their cases[.]” Anglen & Horn, *supra* note 10. For example, a citizen filed a complaint against an officer for making rude comments and generally unprofessional conduct in 1998. However, the citizen learned the officer had been exonerated only when contacted by reporters in June of 2001. *Id.*

<sup>45</sup> *Mediating Citizen Complaints*, *supra* note 17, at 15.

<sup>46</sup> Livingston, *supra* note 38, at 654.

<sup>47</sup> Samuel Walker & Carol Archbold, *Mediating Citizen Complaints Against the Police: An Exploratory Study*, 2000 J. DISP. RESOL. 231, 232.

<sup>48</sup> See Livingston, *supra* note 38, at 653. (“The New York Civil Liberties Union . . . concluded that the [New York City Civilian Complaint Review] Board ‘has proved to be largely ineffective’ . . . . At least from the perspective of public perception, this is surely true in New York.”) (citations omitted).

<sup>49</sup> Jack Maple, *Soapbox: Brutality Isn’t Part of New Tactics*, N.Y. TIMES, Sept. 21, 1997, at Section 13 CY, Page 17.

<sup>50</sup> Livingston, *supra* note 38, at 656.

officer's superiors.<sup>51</sup> Another frequent criticism leveled against Civilian Review Boards, mostly by the police themselves, is that "lay-persons lack a sufficient understanding of police practices and operating conditions to knowledgeably perform a meaningful evaluation" of police work.<sup>52</sup> If the Civilian Review Board cannot appreciate the risks involved in daily police activity, then it cannot fairly assess the officer's actions in the underlying incident contained in the complaint.<sup>53</sup>

However, it should be noted that the low substantiation rate of citizen complaints is also a "function of the complaint procedure," as there is often little independent evidence other than the complainant's word against the officer's word.<sup>54</sup> Without some independent evidence, it is "impossible to determine the facts definitively."<sup>55</sup> This does not mean that one of the parties is lying; it may simply be that there are differing perspectives on what happened.

Internal Affairs Divisions and Citizen Review Boards are adversarial in nature.<sup>56</sup> Each is designed to find a "unitary or stable truth" about what happened in order to determine liability and recommend the appropriate punishment.<sup>57</sup> In many cases of minor police misconduct, however, it is

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<sup>51</sup> Bill Rhett, *Civilians Cannot Objectively Oversee Police Practices*, in POLICE BRUTALITY 161–164 (Louise I. Gerdes ed., 2004) (noting that Civilian Review Boards act in a strictly advisory role, as they do not have the ability to terminate officers, prosecute officers, or sanction officers).

<sup>52</sup> *Id.* ("This would be similar to an automobile mechanic being chosen to evaluate the work of a surgeon."); see also Armacost, *supra* note 37, at 535 ("One of the reasons that members of all professions—from medicine to law to policing—resist outside review of their conduct is that they view outsiders as having little insight into the practicalities of their professional practice.") (citation omitted).

<sup>53</sup> Sa'id Wekili & Hyacinth E. Leus, *Police Brutality: Problems of Excessive Force Litigation*, 25 PAC. L.J. 171, 193 (1994).

<sup>54</sup> Livingston, *supra* note 38, at 656.

<sup>55</sup> *Id.*

<sup>56</sup> The adversarial nature of citizen complaint procedures, both internal and external, involves the following elements: [1] a citizen complaint is investigated to determine whether there is sufficient evidence to sustain it; [2] the accused officer enjoys a presumption of innocence; [3] disposition of the complaint is based on the strength of the evidence; [4] and, if the complaint is sustained, the finding is referred to the police chief executive for disciplinary action.

Walker & Archbold, *supra* note 47, at 232.

<sup>57</sup> Robert Rubinson, *Client Counseling, Mediation, and Alternative Narratives of Dispute Resolution*, 10 CLINICAL L. REV. 833, 851 (2004) (discussing how "litigation is consumed with determining 'what happened' in order to determine liability"); Armacost, *supra* note 37, at 541 (noting that "these mechanisms have a 'fundamentally punitive orientation'") (citation omitted).

impossible to achieve a unitary truth about what happened because “most police encounters occur under isolated conditions.”<sup>58</sup> Moreover, “the accounts of an incident proffered by the participants in such incidents are often diametrically opposed: . . . the citizen alleges that she was derided with a sexist slur, an allegation vehemently denied by the police officer who cited her for failing to pay the subway fare.”<sup>59</sup>

This does not suggest that investigating allegations of police misconduct is always fruitless. Rather, in those cases where there is no independent evidence or disinterested witnesses, it is unlikely that the complaint will be resolved satisfactorily for the citizen.<sup>60</sup> But, it is also unfair to punish a police officer when there is no reasonable basis to believe misconduct has occurred.<sup>61</sup>

Citizens, however, do not alone look skeptically upon the Internal Affairs process. For example, it is not uncommon for officers in major police departments to express their deeply held distrust for the disciplinary system.<sup>62</sup> The police officers who work in Internal Affairs are seen by their peers as “headhunters” out to get fellow officers.<sup>63</sup> Likewise, rank-and-file officers perceive the investigation process as unfair, alienating, and protectionist of certain officers at the expense of others.<sup>64</sup> This perception of the disciplinary system “undermines morale in the Department and reinforces the code of silence, as officers are unwilling to use a disciplinary system they regard as capricious and unfair.”<sup>65</sup> Several officers interviewed by the Vera Institute of Justice<sup>66</sup> expressed a desire to meet with citizens face-to-face.<sup>67</sup> The officers believe such an opportunity would provide them with the occasion to explain their actions to citizens.<sup>68</sup>

<sup>58</sup> Livingston, *supra* note 38, at 656.

<sup>59</sup> *Id.*

<sup>60</sup> *Mediating Citizen Complaints, supra* note 17, at 15. “Unsustained complaints usually leave [complainants and police officers] unhappy: complainants feel their issues were not adequately addressed and police officers feel they were falsely accused.” *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Chemerinsky, *supra* note 14, at 598.

<sup>63</sup> *Mediating Citizen Complaints, supra* note 17, at 7.

<sup>64</sup> Chemerinsky, *supra* note 14, at 598.

<sup>65</sup> *Id.*

<sup>66</sup> The Vera Institute of Justice was established more than 40 years ago to study and implement reform in the justice system to ensure “fair[ness], human[ity], and efficien[cy].” Vera Institute of Justice, Mission and Origins, [http://www.vera.org/about/about\\_2.asp](http://www.vera.org/about/about_2.asp) (last visited Dec. 16, 2005).

<sup>67</sup> *Mediating Citizen Complaints, supra* note 17, at 7.

<sup>68</sup> *Id.*

Filing a civil lawsuit is no more attractive to citizens than filing a complaint with Internal Affairs or a Citizen Review Board, and it is even more onerous. Procedurally, civil lawsuits are costly, slow, and relatively inefficient.<sup>69</sup> Moreover, many lawyers may be unwilling to take a section 1983<sup>70</sup> case on a contingency basis because of the inherent financial risk involved.<sup>71</sup> Most complainants are also unlikely to have the financial resources to engage in protracted litigation.<sup>72</sup> Even with counsel, and assuming the alleged misconduct rises to a constitutional violation,<sup>73</sup>

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<sup>69</sup> Based on the Federal Court Management Statistics for 2003, the median time from filing a civil lawsuit to disposition was 9.3 months for all U.S. District Courts. However, the median time from filing the suit to trial was 22.5 months. The percentage of pending civil cases over three years old was 13%. U.S. Courts, Administrative Office, Federal Court Management Statistics (2003), <http://www.uscourts.gov/cgi-bin/cmsd2003.pl> (select the "Generate" button for Caseload Profile). Arthur Miller writes that "[t]he inability of the American judicial system to adjudicate civil disputes economically and efficiently is one of the most pressing issues facing the court today." Arthur Miller, *The Adversary System: Dinosaur or Phoenix*, 16 MINN. L. REV. 1, 1 (1984). He also analogizes federal civil litigation to the dance marathon contests of yesteryear: "The object of the exercise is to select a partner from across the 'v,' get out on the dance floor, hang on to one's client, and then drift aimlessly and endlessly to the litigation music for as long as possible, hoping that everyone else will collapse from exhaustion." *Id.* at 9.

<sup>70</sup> See *supra* note 39.

<sup>71</sup> Tara L. Senkel, Note, *Civilians Often Need Protection From the Police: Let's Handcuff Police Brutality*, 15 N.Y. L. SCH. J. HUM. RTS. 385, 413 (1999). In an attempt to rectify this situation, Congress enacted 42 U.S.C. § 1988(b) (1994), which allows a court, in its discretion, to allow a prevailing party reasonable attorney's fees for certain enumerated civil rights actions, including a § 1983 action. As described by the Supreme Court:

Congress enacted §1988[b] specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process. These victims ordinarily cannot afford to purchase legal services at the rates set by the private market. Moreover, the contingent fee arrangements that make legal services available to many victims of personal injuries would often not encourage lawyers to accept civil rights cases, which frequently involve substantial expenditures of time and effort but produce only small monetary recoveries.

*City of Riverside v. Rivera*, 477 U.S. 561, 576 (1986) (plurality opinion) (citations omitted).

<sup>72</sup> *Id.*

<sup>73</sup> Arguably, most allegations of minor police misconduct—such as insensitivity, hostility, and unprofessionalism—will not rise to a cognizable violation of the Fourth Amendment. To illustrate, in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), the Supreme Court reviewed a § 1983 suit filed against the City of Lago Vista, which alleged that one of its officers violated Atwater's Fourth Amendment rights. Atwater was pulled

prospective plaintiffs must clear several other hurdles. Police officers are generally afforded qualified immunity while performing discretionary police functions.<sup>74</sup> If the plaintiff is able to overcome a pre-trial motion to dismiss for failure to state a claim upon which relief can be granted<sup>75</sup> and claims of qualified immunity, the plaintiff must still present sufficient evidence to jurors. Several commentators suggest that juries may be sympathetic to police officers who are defendants.<sup>76</sup> Juries are reluctant to sustain a criminal or civil judgment against police officers because the jury “knows that cops on the job are trying to protect not only themselves, but, more importantly, us.”<sup>77</sup>

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over after the officer observed that she and her two small children were not wearing seatbelts as proscribed by Texas law. *Id.* at 323–24. After the officer approached the vehicle, he began to verbally berate Atwater, placed her under arrest for the seatbelt violation, put her in the back of his squad car, refused to allow Atwater to take her small frightened children to a nearby friend’s house, and then took her to the police station for processing. *Id.* at 324. In a 5–4 opinion, the Court ruled that Atwater’s custodial arrest for the minor criminal offense of not wearing a seatbelt did not violate the Fourth Amendment. *Id.* at 354. Moreover, Atwater’s arrest was not made “in an extraordinary manner [that was] unusually harmful to [her] privacy or physical interests . . . . The arrest and booking were inconvenient and embarrassing to Atwater, but not so extraordinary as to violate the Fourth Amendment.” *Id.* at 354–55 (citations omitted).

<sup>74</sup> See *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (“Despite their participation in this constitutionally impermissible conduct, [government officials] may nevertheless be shielded from liability for civil damages if their actions did not violate ‘clearly established statutory or constitutional rights of which a reasonable person would have known.’”) (citations omitted); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (“[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”).

<sup>75</sup> FED. R. CIV. P. 12(b)(6).

<sup>76</sup> See *Wekili & Leus*, *supra* note 53, at 189–91 (1994) (discussing how police officers are trained to testify and how that impacts juror perception of them); Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL’Y 111, 114–15 (2003) (in the context of unlawful searches, jurors often fail to identify with plaintiffs who bring tort actions against the police because the plaintiff is perceived to be a criminal, or the sort likely to be a criminal); *Armocost*, *supra* note 37, at 468 (“Judges and juries (and most ordinary citizens) view police officers as public servants who work under difficult, dangerous, and uncertain conditions to maintain the ‘thin blue line’ between order and chaos.”). *But see* Deborah Sontag & Dan Barry, *The Price of Police Brutality: A Special Report*, N.Y. TIMES, Sept. 17, 1997, at B5 (“New York juries, while more likely to believe the officers 20 years ago, are now more likely to favor the victims[.]”).

<sup>77</sup> Scott Turow, *Why the Diallo Verdict Isn’t Surprising*, WASH. POST, Mar. 13, 2000, reprinted in POLICE BRUTALITY 189, 191 (Louise I. Gerdes ed., 2004). From his experience prosecuting police brutality cases, Turow states that “when a police officer is

It is also clear that some citizens who complain about alleged officer misconduct do not want the officer punished and do not seek monetary compensation.<sup>78</sup> A Vera Institute study indicated that of all the complaints against officers to the New York City Civilian Complaint Review Board, only 20 percent of the complainants wanted the involved officer punished.<sup>79</sup> Instead, 61 percent wanted to see the officer verbally reprimanded or counseled.<sup>80</sup> Another study, which gave a hypothetical incident of police misconduct to a focus group, indicated that participants would want an apology or the “opportunity to express their views to the officer in person.”<sup>81</sup> As one commentator succinctly stated, “[f]or some complaints, it may simply be more important that citizens have their perspectives acknowledged and that police learn from the experience.”<sup>82</sup>

Thus, mediation can be an important tool for citizen complaints that typically are not satisfactorily resolved by Internal Affairs Divisions, Citizen Review Boards, or through civil lawsuits. Instead of dismissing an aggrieved citizen’s complaint outright, mediation seeks to provide a constructive environment for citizens and the police to express their feelings, understand and appreciate the other side’s perspective,<sup>83</sup> seek an explanation, or any number of other possible solutions.<sup>84</sup> The potential benefits of mediating minor allegations of police misconduct are best illustrated through the transformative model of mediation,<sup>85</sup> the many ways in which mediation can

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trying to do what he’s been sworn to do, which is to corral bad guys, even if he has gone about it overzealously or stupidly, juries often refuse to convict.” *Id.* at 189.

<sup>78</sup> CITY OF PORTLAND, *supra* note 20, at 97.

<sup>79</sup> Livingston, *supra* note 38, at 664 n.51 (citing a 1989 Vera Institute of Justice Survey).

<sup>80</sup> *Id.*

<sup>81</sup> *Mediating Citizen Complaints*, *supra* note 17, at 9.

<sup>82</sup> Livingston, *supra* note 38, at 664–65.

<sup>83</sup> STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 112 (2003).

<sup>84</sup> *Mediating Citizen Complaints*, *supra* note 17, at 9.

<sup>85</sup> The transformative model of mediation will be more fully described *infra* in Part III.B. For a more in depth analysis of the transformative model, see generally BUSH & FOLGER, *supra* note 16. See also Dorothy J. Della Noce, *From Practice to Theory to Practice: A Brief Retrospective on the Transformative Mediation Model*, 19 OHIO ST. J. ON DISP. RESOL. 925 (2004) [hereinafter Della Noce, *From Practice to Theory to Practice*]; Dorothy J. Della Noce et al., *Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy*, 3 PEPP. DISP. RESOL. L.J. 39 (2002) [hereinafter Della Noce, *Clarifying*]; Robert A. Baruch Bush & Sally Ganong Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 PEPP. DISP. RESOL. L.J. 67 (2002); Jeffrey R. Seul, *How Transformative is Transformative Mediation?: A Constructive Development Assessment*,

help find creative solutions to disputes, the reduced cost and greater efficiency of mediation, and the greater citizen and officer satisfaction rates with mediation.

### *B. The Transformative Model of Mediation: The Benefits of a Meaningful Conversation*

The transformative model of mediation is predicated on a “relational ideology in which human beings are assumed to be fundamentally social—formed in and through their relations with other human beings, essentially connected to others, and motivated by a desire for both personal autonomy and constructive social interaction.”<sup>86</sup> A conflict within the transformative model is a “crisis in some human interaction . . . [that] quickly degenerates and assumes a mutually destructive, alienating, and dehumanizing character.”<sup>87</sup> More specifically, compared to an individual’s pre-conflict state, conflict may generate for the individual a sense of weakness, perceived loss of control over the situation, doubt, and uncertainty.<sup>88</sup> “This overall sense of ‘weakening’ is something that occurs as a very natural human response to conflict; almost no one is immune to it, regardless of their initial ‘power position.’”<sup>89</sup> In addition to personal weakness, the transformative model presupposes that conflict will generate “self-absorption,” whereby, as compared to the pre-conflict state, “each party becomes more focused on self-alone—more protective of self, and more suspicious, hostile, closed, and impervious to the perspective of the other person.”<sup>90</sup> These notions of weakness and self-absorption interact with and reinforce one another causing a downward spiral in the two parties’ interaction.<sup>91</sup>

The mediation process “contains within it a unique potential for transforming people . . . by helping them wrestle with difficult circumstances

15 OHIO ST. J. ON DISP. RESOL. 135 (1999); Institute for the Study of Conflict Transformation, <http://www.transformativemediation.org> (last visited Dec. 16, 2005).

<sup>86</sup> Della Noce, *Clarifying*, *supra* note 85, at 51 (emphasis in original).

<sup>87</sup> *Id.* at 50. “Conflict is . . . most importantly about people’s interaction with one another as human beings. What affects and concerns people most about conflict is precisely the crisis in human interaction that it engenders.” Bush & Pope, *supra* note 85, at 72–73.

<sup>88</sup> Bush & Pope, *supra* note 85, at 73.

<sup>89</sup> *Id.* (citations omitted).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 74. The interaction between weakness and self-absorption is described as a “feedback loop.” *Id.* “[T]he weaker I feel myself becoming, the more hostile and closed I am toward you; and the more hostile I am toward you, the more you react to me in kind, the weaker I feel, the more hostile and closed I become, and so on.” *Id.*

and bridge human differences[.]”<sup>92</sup> At the very core of the transformative model is the belief that mediation has the potential to

generate two important effects, empowerment and recognition. In simplest terms, *empowerment* means the restoration to individuals of a sense of their own value and strength and their own capacity to handle life’s problems. *Recognition* means the evocation in individuals of acknowledgement and empathy for the situation and problems of others.<sup>93</sup>

Thus, mediation is more than simply helping conflicting parties reach a resolution.<sup>94</sup> At a deeper level, mediation can provide the parties with a sense of empowerment and recognition, which will allow the respective parties to better “understand themselves and relate to one another *through and within conflict*.”<sup>95</sup>

### 1. *Empowerment*

Mediation can achieve empowerment because the parties, in essence, “own their own conflict.”<sup>96</sup> More specifically, the parties themselves “control the conflict resolution process, and craft resolutions that are mutually agreeable.”<sup>97</sup> The feelings of weakness and incapacity engendered by the conflict are transformed during the mediation into “self-worth, security, self-

<sup>92</sup> BUSH & FOLGER, *supra* note 16, at 2.

<sup>93</sup> *Id.* (emphasis in original).

<sup>94</sup> To achieve empowerment and recognition, the mediator’s responsibility is

(1) to foster empowerment shifts, by supporting—but never supplanting—each party’s deliberation and decision-making, at every point in the session where choices arise (regarding either process or outcome) and (2) to foster recognition shifts, by encouraging and supporting—but never forcing—each party’s freely chosen efforts to achieve new understandings of the other’s perspective.

Bush & Pope, *supra* note 85, at 84. While the specific means by which mediators accomplish these goals are beyond the scope of this Note, see generally BUSH & FOLGER, *supra* note 16, at 113–226; Bush & Pope, *supra* note 85, at 85–95.

<sup>95</sup> BUSH & FOLGER, *supra* note 16, at 4. Moreover, Professors Bush and Folger argue that “empowerment is an objective that can be achieved in *all* cases; recognition, on the other hand, can only be attained when parties willingly give it—either in response to a mediator’s efforts or spontaneously.” *Id.* at 94. However, “[recognition] is achievable much more often than normally assumed.” *Id.*

<sup>96</sup> EDWARD W. SCHWERIN, *MEDIATION, CITIZEN EMPOWERMENT, AND TRANSFORMATIONAL POLITICS* 7 (1995).

<sup>97</sup> *Id.*



determination, and autonomy” because the party has regained a sense of strength to take “greater control over [his or] her own situation.”<sup>98</sup>

When a complaint is resolved through Internal Affairs or a Civilian Review Board, there is no opportunity to achieve empowerment—for either the officer or citizen—because those processes are controlled by third parties responsible for resolving the conflict and crafting the appropriate resolution, to the exclusion of the parties in conflict.<sup>99</sup> If the citizen and the officer are unable to “regenerate some sense of their own strength . . . it is unlikely they can move on and be at peace with themselves . . . [and] [t]he parties’ confidence in their own competence to handle life’s challenges remains weakened[.]”<sup>100</sup>

Through mediation, however, the police officer and the citizen are active participants and take actual control of the process to reach a mutually agreeable resolution. As each party participates in the mediation, the officer and citizen may individually become empowered in several different ways. First, “she reaches a clearer realization . . . of what matters to her and why, together with a realization that what matters to her is indeed important.”<sup>101</sup> Second, “she becomes aware of the range of options available to secure her goals in whole or part, and of her control over those options . . . [including] whether or not to stay in or leave the mediation . . . [and] accept or reject a possible solution.”<sup>102</sup> Third, “she increases or adds to her own skills in conflict resolution. She learns how to better listen, communicate, organize, and analyze issues, present arguments, brainstorm and evaluate alternative solutions . . . and then strengthens those skills by using them practically in the mediation.”<sup>103</sup> Fourth, “she gains new awareness of resources already in her possession (or readily available to her) to achieve her goals and objectives.”<sup>104</sup> Finally, empowerment is achieved when “she reflects, deliberates, and makes conscious decisions for herself about what she wants to do—including decisions about what to do in the mediation discussions

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<sup>98</sup> BUSH & FOLGER, *supra* note 16, at 85–87.

<sup>99</sup> “According to advocates of mediation, some forms of conflict management such as the formal court system are *disempowering* for the disputing parties because of the domination and control of judges and lawyers that is inherent in the court system.” SCHWERIN, *supra* note 96, at 7 (emphasis added).

<sup>100</sup> Bush & Pope, *supra* note 85, at 75–76.

<sup>101</sup> BUSH & FOLGER, *supra* note 16, at 85. Bush and Folger label this as “empowerment as to goals.”

<sup>102</sup> *Id.* at 86. Bush and Folger label this as “empowerment as to options.”

<sup>103</sup> *Id.* Bush and Folger label this as “empowerment as to skills.”

<sup>104</sup> *Id.* at 86–87. Bush and Folger label this as “empowerment as to resources.”

themselves, and decisions about whether and how to settle the matter or what other steps to take.”<sup>105</sup>

## 2. Recognition

Recognition in mediation is achieved when a party “voluntarily choose[s] to become more open, attentive, sympathetic, and responsive to . . . the other party, thereby expanding their perspective to include an appreciation for another’s situation.”<sup>106</sup> Within the traditional framework of resolving police misconduct, there is no opportunity for either the police officer or the complainant to achieve recognition.<sup>107</sup> Accordingly, mediation sessions provide a unique opportunity for the parties to have a face-to-face conversation, thereby allowing for the recognition and appreciation of the other party’s perspective. The following hypothetical helps demonstrate the achievement of recognition in the context of police misconduct.

Early on a weekday morning, a detective and several officers forcefully pound on an apartment door, yelling for the occupants to open the door.<sup>108</sup> Still groggy and dressed only in t-shirts, a mother and her teenage daughter go to the door to see what the officers want. The mother partially opens the door and the detective informs her that they have an arrest warrant for “John Smith.” The mother truthfully informs the detective that “John Smith” is her daughter’s ex-boyfriend, but that he is not in the apartment, nor has he been to the apartment for several weeks. Nevertheless, the detective insists that he and the other officers come into the apartment to ensure that “John Smith” is not there. Although the mother consents, she innocently begins to close the door so that she and her daughter can put on more appropriate clothing. The detective immediately places his foot in the door so that it cannot be closed. Enraged, the mother begins to scream at the detective and other officers for infringing upon their privacy. In return, the detective, losing his temper, threatens her with arrest for obstruction if she fails to calm down. After the incident, the mother files a complaint against the detective for hostility and unprofessionalism.

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<sup>105</sup> *Id.* at 87. Bush and Folger label this as “empowerment as to decision making.”

<sup>106</sup> *Id.* at 89.

<sup>107</sup> See *Mediating Citizen Complaints*, *supra* note 17, at 6. (“In traditional citizen complaint review procedures the complainant and the officer never meet face-to-face, and as a consequence there is no opportunity for dialog and understanding.”) (citations omitted).

<sup>108</sup> The hypothetical is loosely based on an actual case referred to mediation by the New York City Civilian Complaint Review Board. Livingston, *supra* note 38, at 663.

At the mediation session, the mother and the detective each discuss their individual perspectives of the underlying incident, and listen to the other party's perspective. For her part, the mother begins to appreciate and understand the detective's point of view: the detective was concerned about officer safety because he did not know if there were weapons in the apartment or who else may have been in the apartment; people often lie in an attempt to buy extra time for the person of interest to escape, hide, or obtain a weapon; the intent of the detective was not to humiliate either woman; and, more generally, effecting an arrest warrant is a highly stressful endeavor requiring officers to maintain control over the situation.<sup>109</sup> For his part, the detective begins to appreciate and understand the mother's point of view: she had just been roused out of her sleep by loud banging on the door; the mother was confused as to why the police would be at her door looking for someone who did not live there; the mother was not attempting to be obstructive, but simply protecting her daughter's modesty.<sup>110</sup>

Thus, the detective and the mother achieve recognition by moving away from their individualized perspectives of the incident in order to "acknowledge, consider, and be concerned about the other[']s perspective."<sup>111</sup> When parties achieve recognition through the mediation process, they begin to see the other party in a more favorable light.<sup>112</sup>

A corollary to the transformative model's recognition of the other party's perspective is the notion that the mediation process promotes greater understanding in other areas. For example, citizens have the opportunity to become more familiar with policing and the stress associated with an officer's job.<sup>113</sup> During mediation the police officer can explain the information he had at the time of the incident, which formed the basis of his actions.<sup>114</sup> Through mediation, citizens can also come to an understanding that police officers are just like everyone else: officers have bad days and can

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> BUSH & FOLGER, *supra* note 16, at 91.

<sup>112</sup> *Id.* at 90.

<sup>113</sup> *Mediating Citizen Complaints, supra* note 17, at 10. In one case

a sergeant who, returning from an extremely stressful call . . . and feeling very upset, tailgated a car, ticketed the driver, and used inappropriate language during the interaction. The mediation session, however, provided an opportunity for the officer to explain the circumstances of the incident and for the citizen to understand the effect of job stress on the officer's behavior.

*Id.*

<sup>114</sup> FINN, *supra* note 29, at 77.

often lose their tempers when confronted with rudeness and hostility.<sup>115</sup> While “[o]fficers are not justified in losing their temper[s] and berating a citizen . . . mediation can help citizens understand why officers did so.”<sup>116</sup>

Police officers, for their part, also realize how their behavior or actions affect citizens.<sup>117</sup> An officer’s tone or mannerisms with a citizen may escalate tensions during an encounter.<sup>118</sup> Accordingly, “*what* [the officer] did on the job is proper, [but] *how* they did it may offend people.”<sup>119</sup> Police officers who take the mediation session seriously can learn how to handle themselves in a more professional manner and reduce friction with citizens in the future.<sup>120</sup>

### C. Mediation as a Way to Find Creative Solutions to Problems

One of the strengths of using mediation to resolve minor allegations of police misconduct is that there is no predetermined outcome to the dispute. In contrast to Internal Affairs, Civilian Review Boards, or a judge, a “mediator . . . has no power to impose an outcome on disputing parties.”<sup>121</sup> Rather, it is up to the parties themselves to determine the appropriate resolution to the complaint. Mediation can be an important tool in resolving citizen complaints because the range of possible solutions to any given problem is virtually limitless. Mediation, therefore, allows for a resolution tailored to the needs of each situation.

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Mediating Citizen Complaints, supra* note 17, at 6.

<sup>118</sup> In an exit survey, one officer reported: “The citizen and I got to explain our actions in a friendly manner. I was able to see both sides of the situation and see how it escalated.” CITY OF PORTLAND, *supra* note 20, at 107.

<sup>119</sup> *Mediating Citizen Complaints, supra* note 17, at 7 (emphasis in original).

<sup>120</sup> FINN, *supra* note 29, at 79. For example, a Portland police officer was the subject of complaints from citizens on a fairly regular basis. Even after several “conversations” with his superior officers, this particular officer failed to clean up his act. After receiving another citizen complaint, the officer was referred to mediation. In an exit interview the officer stated that prior to mediation he was often frustrated because he genuinely tried to conform his behavior, but did not understand what he was doing wrong. The mediation session with the citizen, however, helped him understand how citizens perceived his actions and that helped him realize what he had been doing wrong. After the mediation session, he was no longer a “problem officer.” Telephone Interview with Laurie Stewart, Program Director for the Portland Mediation Program (Mar. 7, 2005) (notes on file with author).

<sup>121</sup> GOLDBERG, *supra* note 83, at 111.

When a complaint is successfully mediated, the prototypical outcome is simply that the complaint was resolved to the satisfaction of both parties.<sup>122</sup> Or, the terms of the agreement may simply read, “[b]oth parties agreed that the dialogue was helpful in allowing them to understand each other’s experiences and viewpoints.”<sup>123</sup> In other cases, the police officer, the citizen, or both may apologize to each other for the misunderstanding.<sup>124</sup>

The more creative solutions that have been used to resolve complaints demonstrate how mediation can build greater amounts of trust, understanding, and accountability between the police and citizens.<sup>125</sup> For example:

- In Washington D.C., several high school students filed complaints against a group of police officers alleging that they were harassed after leaving a convenience store near the school. The officers told the students that they matched the description of people selling drugs. The complaint was referred to the mediation program, which then set up a plan for the students, school officials, and over 15 officers to engage in a mediation program. As a result of mediation, the parties set up a working group comprised of students and police officers in an effort to develop a better relationship.<sup>126</sup>
- Also in Washington D.C., a complainant alleged that an officer was unprofessional after the complainant reported a possibly stolen vehicle in front of his house. The complainant explained that the officer was extremely rude and responded to him in an accusatory manner. As a result of the mediation the officer agreed to take a sensitivity course which included stress management, negotiation, and respectful communication.<sup>127</sup>

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<sup>122</sup> *Mediating Citizen Complaints*, *supra* note 17, at 34.

<sup>123</sup> FINN, *supra* note 29, at 74.

<sup>124</sup> Office of Police Complaints, Washington D.C., FAQs About the Mediation Program, <http://www.occr.dc.gov/occr/cwp/view,a,3,q,495519.asp#1> (last visited Dec. 16, 2005).

<sup>125</sup> *Mediating Citizen Complaints*, *supra* note 17, at 35.

<sup>126</sup> OFFICE OF POLICE COMPLAINTS, *supra* note 27, at 12–13.

<sup>127</sup> OFFICE OF POLICE COMPLAINTS, WASHINGTON D.C., ANNUAL REPORT, Example #2, (2002), available at [http://www.occr.dc.gov/occr/frames.asp?doc=/occr/lib/occr/pdf/annual\\_report\\_fy02\\_final.pdf](http://www.occr.dc.gov/occr/frames.asp?doc=/occr/lib/occr/pdf/annual_report_fy02_final.pdf).

- In Minneapolis, one officer agreed to attend a cultural diversity course after a successful mediation session based on an undisclosed complaint. At the conclusion of another mediation session, a different complainant provided resource materials to the Minneapolis Police Training Unit on hypoglycemic diabetes for use in officer training. Yet another complainant agreed to go on a ride-along with an officer.<sup>128</sup>
- In an unnamed city, an African-American citizen alleged that an officer used an offensive racial epithet while speaking to him. The complainant reportedly told the mediator that “I just wish [the officer] could see me in church on Sunday to see what kind of person I really am.” At the suggestion of the mediator, the citizen and the officer agreed to have coffee together after church.<sup>129</sup>

These examples are important because they not only demonstrate how mediation can foster trust, understanding, and accountability, but also how mediation can allow parties to craft mutually agreeable solutions unique to their complaint.<sup>130</sup> Many resolutions may be fairly simplistic, like being able to explain to the other party why he or she acted in a particular manner. Yet other resolutions, such as ride-alongs,<sup>131</sup> may promote an even greater understanding and appreciation for the policies, procedures, and precautions that officers follow.

#### D. *Economic Cost and Efficiency of Providing a Mediation Program*

The most practical concern about providing mediation programs to resolve minor allegations of police misconduct is the financial cost to run such a program, especially where police oversight agencies already complain about the lack of adequate resources.<sup>132</sup> There is also likely to be trepidation

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<sup>128</sup> FINN, *supra* note 29, at 74.

<sup>129</sup> *Mediating Citizen Complaints*, *supra* note 17, at 35

<sup>130</sup> *Id.* (“When such creative outcomes are agreed to, however, it is important to document an understanding of what activity will occur and that it was satisfactory. Failure of one side or the other to fulfill the terms of the agreement would be considered [an] unsuccessful mediation.”).

<sup>131</sup> Ride-along programs allow citizens to accompany police officers in police vehicles during a portion of the officer’s tour of duty. See Metropolitan Police Department, Police Ride Along Program, <http://mpdc.dc.gov/mpdc/cwp/view,a,1242,q,547130.asp> (last visited Dec. 16, 2005).

<sup>132</sup> Vivian Berger, *Mediation Helps Build Understanding Between Cops and Citizens*, DISP. RESOL. MAG., Fall 2000, at 18, 18.

in creating a program that requires well-trained and experienced mediators,<sup>133</sup> but will only mediate a small subset of complaints against the police. However, the average cost to mediate an allegation of police misconduct is significantly lower than an investigation by either Internal Affairs or a Civilian Review Board.

Based on available information, the average cost for each successful mediation session ranged from \$133 to \$150.<sup>134</sup> In comparison to the relatively inexpensive cost of mediating citizen complaints, the average cost of an investigation by either Internal Affairs or Civilian Review Board is significantly higher. A review of nine different Citizen Review Boards found that the “Mean Cost per Complaint Filed or Reviewed” ranged from \$361 to \$4,864 in 1997.<sup>135</sup> Likewise, an evaluation of the Minneapolis Police Department’s Internal Affairs Division found that the average cost per complaint was approximately \$6,278 in 1996.<sup>136</sup> The Portland Mediation Program estimates that the average cost to investigate a complaint by Internal Affairs is roughly \$1,000.<sup>137</sup>

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<sup>133</sup> To ensure that mediation is conducted by well-trained and experienced mediators, many current programs contract with local mediation agencies or keep a roster of qualified mediators in the area. See *supra* note 26. In Minneapolis, for example, the Civilian Review Authority pays \$2,000 a year to the Minneapolis Mediation Center to mediate. *Mediating Citizen Complaints*, *supra* note 17, at 13. The \$2,000 is used only to cover administrative costs, as the individual mediators work on a pro bono basis. *Id.* at 44. On the other hand, the Portland Mediation Program pays mediators \$50 per hour for their services. Telephone Interview with Laurie Stewart, *supra* note 120.

<sup>134</sup> *Mediating Citizen Complaints*, *supra* note 17, at 13 (“In Minneapolis each successful mediation case cost \$153 in 1998 and \$133 in 1999.”). The average cost per mediation for the Portland Mediation Program was around \$150 in 2004, including the officer’s paid attendance. Telephone Interview with Laurie Stewart, *supra* note 120.

<sup>135</sup> FINN, *supra* note 29, at 131–32. However, both Finn and Professor Walker note the considerable difficulty in obtaining reliable data on the average per-case cost of conducting either an Internal Affairs or Citizen Review Board investigation. *Mediating Citizen Complaints*, *supra* note 17, at 14. “[C]onsequently, putting mediation in a meaningful cost context is difficult.” *Id.* For example, one study found that the average cost per complaint in Berkeley, California was approximately \$8,571. *Id.* Yet a different study found the average cost to be only \$4,864. *Id.* “[T]he discrepancy highlights the difficulty in obtaining reliable data regarding the cost of complaint investigation.” *Id.*

<sup>136</sup> *Mediating Citizen Complaints*, *supra* note 17, at 14. It is also important to recognize that the average amount of money spent on an Internal Affairs investigation includes not only minor allegations of police misconduct, but also the more egregious complaints of misconduct like the use of excessive force and corruption. The total cost to investigate one allegation of officer discourtesy may pale in comparison to an undercover sting operation to catch a police officer selling previously seized narcotics.

<sup>137</sup> Telephone Interview with Laurie Stewart, *supra* note 120. The figure of \$1,000 was calculated by estimating the average time it took to complete the investigation of the

Even though it may be difficult to precisely quantify the average costs to either mediate or investigate a complaint, mediation is nevertheless a more efficient and cost-effective solution for minor allegations of police misconduct. Aside from the administrative time it takes to screen the appropriate cases for mediation and setting up the mediation itself, the amount of time spent actually resolving the complaint is on average 2.5 hours for mediation.<sup>138</sup> In comparison to mediation, traditional complaint processes are far more labor-intensive and require more time to investigate.<sup>139</sup>

Similarly, the average time it takes to process a complaint, from the intake of the complaint to final resolution, is typically much shorter for mediation than the traditional complaint process. Of the successfully completed mediations in Portland, Oregon during 2003, 90 percent were resolved within four months after intake of the complaint.<sup>140</sup> Compared to mediation's short turn-around time, the now defunct Washington, D.C. Citizen Complaint Review Board<sup>141</sup> averaged eight months between the date a complaint was filed to the date a recommendation was handed down.<sup>142</sup> In the following years, that average time frame for the Review Board steadily

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complaint by a Sergeant in Internal Affairs (about 15 hours at \$35/hr), added to the time necessary to prepare the written report (about four hours at \$35/hr), added to the cost of bringing the subject officer (about 1.5 hours at \$25/hr), and his union representative (1.5 hours at \$30/hr), into Internal Affairs for a statement, plus miscellaneous other costs and overhead (\$252). *Id.*

<sup>138</sup> *Id.* The average mediation session lasts for approximately 1.25 hours. The other 1.25 hours is used prior to the mediation session by the mediator for "case development," where the mediator reviews the complaint and prepares for the session. *Id.* In Washington, D.C., however, the average mediation session lasts for a "couple hours" and, depending on what the parties and mediator agree is appropriate, can extend into multiple mediation sessions. Office of Police Complaints, *supra* note 124.

<sup>139</sup> A traditional complaint investigation can take on average 15 hours to complete. Telephone Interview with Laurie Stewart, *supra* note 120.

<sup>140</sup> CITY OF PORTLAND, *supra* note 20, at 109. In 2003, the Portland Mediation Program reported that one of their main goals was to improve on timeliness. For the 20 successfully mediated complaints in 2003, 5 complaints completed mediation within 60 days of intake; 8 complaints completed mediation within 60–90 days; 5 complaints completed mediation within 90–120 days; and the remaining 2 completed mediation more than 120 days after intake. *Id.* The typical delays included working around the personal and business schedules of the mediator, officer, and complainant. *Id.*

<sup>141</sup> *Mediating Citizen Complaints*, *supra* note 17, at 13.

<sup>142</sup> *Cox v. District of Columbia*, 821 F. Supp. 1, 12–13 (D. D.C. 1993) (holding that consistent and chronic delays endemic to the civilian review complaint process can constitute a policy or custom that may amount to deliberate indifference to the rights of citizens who come into contact with police officers) *See also Mediating Citizen Complaints*, *supra* note 17, at 13.



increased, until 1990 when the average time was a staggering 33 months between receipt and resolution.<sup>143</sup>

Accordingly, mediating minor complaints of police misconduct can be a useful resource to help ease the financial burden of labor-intensive investigations conducted by Internal Affairs or Civilian Review Boards. Without mediation, these types of complaints are otherwise relegated to the traditional complaint processes at a greater economic cost and investigated in a less efficient manner.<sup>144</sup> Mediation can help “enable[] oversight and internal affairs staff to devote more time to more serious cases or reduce their backlog of cases.”<sup>145</sup>

### E. Greater Satisfaction Rates With Mediation

Citizens and police officers that have participated in mediation report a significantly higher satisfaction rate with the process. Exit surveys from the Portland Mediation Program show about 52 percent of the complainants believed that the dispute was *completely* resolved to their satisfaction, 32 percent believed the dispute was *partially* resolved to their satisfaction, and only 16 percent indicated that the dispute was *not at all* resolved to their satisfaction.<sup>146</sup> Surveys completed by the officers after mediation showed about the same satisfaction rate: 70 percent believed the dispute was *completely* resolved to their satisfaction, 15 percent believed the dispute was *partially* resolved to their satisfaction, and the remaining 15 percent believe that the dispute was *not at all* resolved to their satisfaction.<sup>147</sup> Perhaps more indicative of the satisfaction rate of the parties participating in mediation was their response to the question, “[w]ould you recommend the mediation process to others?” Almost 97 percent of the citizens said yes, while the other 3 percent said they were unsure.<sup>148</sup> Close to 86 percent of the officers said

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<sup>143</sup> Cox, 821 F. Supp at 6; see also Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective In Deterring Police Brutality*, 44 HASTINGS L.J. 753, 783 (1993) (explaining that the average Internal Affairs Investigation can take anywhere from 60 days to one year).

<sup>144</sup> *Mediating Citizen Complaints*, *supra* note 17, at 14.

<sup>145</sup> FINN, *supra* note 29, at 79.

<sup>146</sup> CITY OF PORTLAND, *supra* note 20, at 105. The Annual Report also states that the sample size was too small to effectively compare the satisfaction rates of mediation against the satisfaction rates of the traditional complaint process. *Id.* at 104.

<sup>147</sup> *Id.* at 105.

<sup>148</sup> *Id.*

they would recommend mediation, about 5 percent said they would not recommend it, and the remaining 9 percent said they were unsure.<sup>149</sup>

While other programs have not published detailed statistical data on satisfaction rates like the Portland Mediation Program, many report that their mediation programs are also well-received by the parties. The 2004 Annual Report for the Washington, D.C. program states “the overwhelming majority of complainants and subject officers who responded to the survey found the mediator to be helpful or very helpful, the mediation session to be satisfactory or very satisfactory, and the resulting agreement to be fair or very fair.”<sup>150</sup>

#### IV. POTENTIAL SHORTCOMINGS AND PROBLEMS OF USING MEDIATION TO RESOLVE CITIZEN COMPLAINTS

Even though mediation has promising benefits to offer, there are some concerns about the use of mediation for resolving complaints against police officers. The general concerns that typically arise with the use of mediation in this context include the types of complaints that are appropriate for mediation, and whether mediation will produce any lasting results or solve larger systemic problems in police departments.

##### *A. Concerns About the Types of Cases that are Appropriate for Mediation*

As noted earlier in Part II, the various mediation programs across the United States use different criteria to select cases they believe to be appropriate for mediation. While most programs will categorically deny any complaint that involves excessive use of force resulting in an injury, police corruption, or those allegations that may subject a police officer to criminal liability, there has been some general debate about the appropriateness of mediating cases that involve complaints with racial or ethnic overtones,<sup>151</sup> or cases involving the use of force that do not result in an injury to the complainant.

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<sup>149</sup> *Id.* In addition to the figures already cited, 100% of the citizens and officers believed that the mediators were fair to both sides. Likewise, 93.3% of the citizens believed they had an opportunity to explain themselves during the process, and 96% of the officers felt the same way. *Id.*

<sup>150</sup> OFFICE OF POLICE COMPLAINTS, *supra* note 1, at 12.

<sup>151</sup> *Mediating Citizen Complaints*, *supra* note 17, at 21.

## 1. Racial and Ethnic Related Complaints

There are several different arguments for and against mediating complaints that have a racial or ethnic component. While a few complaints involve the use of a racial slur,<sup>152</sup> the most common complaints involving race or ethnicity implicate disparate treatment.<sup>153</sup> The argument against mediating racial or ethnic-related complaints typically centers around the notion that the mediation will not be conducted on a level playing field.<sup>154</sup> An oft-voiced concern about mediation, generally, is that it “may be an instrument of oppression where there is a gross imbalance in bargaining power between the parties.”<sup>155</sup> Since police officers occupy a unique role in society that comes with an inherent amount of power,<sup>156</sup> some commentators are wary that such power will put citizens, especially minorities, at a disadvantage during mediation sessions.<sup>157</sup> Disadvantaged citizens will not be able to “engage as equals in the deliberation and decisionmaking that occur within [the mediation] process.”<sup>158</sup>

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<sup>152</sup> *Id.* at 19 (noting that as a matter of policy the San Francisco Mediation Program does not mediate complaints that allege that an officer used a racial, ethnic, or gender-related slur).

<sup>153</sup> Telephone interview with Laurie Stewart, *supra* note 120; see also *Mediating Citizen Complaints*, *supra* note 17, at 19.

<sup>154</sup> National Black Police Association, NBPA Statement Regarding Mediation (2000) (on file with the author).

<sup>155</sup> Thomas J. Stipanowich, *The Quiet Revolution Comes to Kentucky: A Case Study in Community Mediation*, 81 KY. L.J. 855, 873 (1993).

<sup>156</sup> *Mediating Citizens Complaints*, *supra* note 17, at 27. The inherent power that police officers bring to the mediation session is best symbolized by their uniform. Professor Walker notes that there has been some concern about police officers wearing their uniforms to mediation sessions because

[t]he uniform symbolizes the unique power of the police officer, which tends to create a power imbalance in mediation . . . On the other hand, a few people interviewed feel that the uniform may actually increase the significance of a satisfactory outcome in that the complainant and the officer first made contact in these status positions, so the outcome may give the complainant a sense of power and control.

*Id.* at 28.

<sup>157</sup> See *id.* “The community . . . enters into a . . . relationship with the police, ceding to them the power to deprive persons of ‘life, liberty, and the pursuit of happiness.’” Kenneth Adams, *What We Know About Police Use of Force*, in USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA 1 (1999), available at <http://www.ncjrs.gov/pdffiles1/nij/176330-1.pdf>.

<sup>158</sup> Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights From Procedural and Social Justice Theories*, 54 J. LEGAL EDUC. 49, 57 (2004).

Another commentator, and former police officer, believes that mediation perpetuates the problem of racial discrimination in policing.<sup>159</sup> If officers are allowed to subvert the traditional disciplinary system by voluntarily agreeing to participate in mediation, they avoid departmental punishment for practices of racial discrimination.<sup>160</sup> Likewise, even though litigation is often more costly and less efficient than mediation, “[it] has been a powerful instrument of social change that has provided an avenue by which the powerless level the playing field with powerful groups or institutions.”<sup>161</sup>

On the other side of the argument, that mediation *is* an appropriate mechanism to resolve complaints involving race and ethnicity, proponents argue that the mediation process in this context is completely voluntary.<sup>162</sup> The complainant is free to have his or her complaint resolved through the traditional complaint process or terminate the mediation session at any time “if he or she feels victimized by a power imbalance[.]”<sup>163</sup> The right to terminate the mediation session is an important safety valve for the complainant if he or she begins to feel uncomfortable in the situation.

Proponents also argue that mediation can have a “special role” in helping to “bridge the racial and ethnic divide because it is the only procedure for investigating complaints that brings the disputing parties together in a face-to-face meeting.”<sup>164</sup> In many instances, the mediation session will allow each party to explain and clarify their actions or perspectives so that “[e]ach party can see where the other is coming from.”<sup>165</sup> In the same vein, mediation can also help abolish stereotypes that some police officers believe about minorities and those stereotypes that minorities have about police officers.<sup>166</sup>

Another argument in favor of using mediation to resolve complaints involving race and ethnicity stems from the notion of empowerment from the

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<sup>159</sup> *Mediating Citizen Complaints*, *supra* note 17, at 20.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 21. In other situations—such as divorce, child custody, and probate—a court may order both parties to attend mediation to resolve their conflict. *Id.* at 17.

<sup>163</sup> *Id.* at 21.

<sup>164</sup> *Id.* at 22 (“In contrast, the lack of direct contact perpetuated by traditional complaint investigation procedures may aggravate racial and ethnic divisions, leaving both sides angry and suspicious of the other.”).

<sup>165</sup> Berger, *supra* note 132, at 18 (citation omitted). From her experience as a mediator in New York, Professor Vivian Berger believes “that these complaints lend themselves extremely well to non-evaluative, purely facilitative mediation.” *Id.*

<sup>166</sup> *Mediating Citizen Complaints*, *supra* note 17, at 21 (“[P]olice officers are often perceived as symbols of an oppressive society. For their part, some officers react to young men of color in a symbolic or stereotypical manner.”).

transformative model of mediation.<sup>167</sup> Because minorities may feel powerless as a result of conflict with the police,<sup>168</sup> mediation is an important opportunity to transform the feelings of weakness and incapacity into “self-worth, security, self-determination, and autonomy.”<sup>169</sup>

With specific safeguards in place, many of the legitimate concerns about mediating racial and ethnic complaints can be obviated. First, the use of trained and experienced mediators ensures that complainants are not victimized by a power imbalance. Qualified mediators are better able to create a “level playing field” and likely to be more “cognizant of both manifest and latent racial dynamics” occurring between the parties.<sup>170</sup> If the mediator is unable to adequately level the playing field, the mediator may also simply terminate the mediation session.

Second, programs that choose to mediate these complaints can implement a two person “team” of mediators to facilitate the sessions.<sup>171</sup> For example, the team could be comprised of one Caucasian mediator and one African-American mediator. The potential benefits of such an approach include: the ability of mediators to “share perceptions about what is taking place and how to proceed, [o]ne mediator can pick up on verbal and behavioral cues the other may have missed, [and both] mediators can brainstorm [together on] possible solutions when mediation reaches an impasse.”<sup>172</sup>

Third, a rigorous complaint screening process can ensure that “the parties [are] capable of dealing fairly with each other.”<sup>173</sup> The staff responsible for selecting the cases eligible for mediation needs to be conscientious of the officer’s specific complaint history, mediation history, and general patterns of conduct that may suggest a more systemic problem. If the staff believes that a particular officer will not be amenable to mediation, or has previously

<sup>167</sup> See *supra* Part III.B.1.

<sup>168</sup> See *Mediating Citizen Complaints*, *supra* note 17, at 22 (“Empowerment is especially important in regard to race and ethnicity-related complaints, because the core issue in police-community relations for nearly 50 years has been the powerlessness many racial and ethnic minorities felt with respect to local police.”).

<sup>169</sup> BUSH & FOLGER, *supra* note 16, at 87. See also *supra* note 159 (discussing how successful mediations with a uniformed officer may give complainants a sense of power and control).

<sup>170</sup> *Mediating Citizen Complaints*, *supra* note 17, at 27.

<sup>171</sup> FINN, *supra* note 29, at 74. For example, the Minneapolis Mediation program always uses two mediators, one man and one woman, for all sessions, regardless of the nature of the complaint. *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Mediating Citizen Complaints*, *supra* note 17, at 23.

demonstrated a lack of good faith in the process, then the traditional complaint investigation process is more appropriate.

Apart from the dynamic between the parties, another concern with mediating allegations involving racial or ethnic related claims of misconduct is that "cultural and [ethnic] based stereotypes may block a disputing party's trust of the mediator."<sup>174</sup> A mediator's ability to help the parties come to a successful resolution of the complaint depends in large part "upon the willingness of the parties to accept the mediator."<sup>175</sup> Without trust, parties may become more defensive, less candid, and unwilling to value the mediator's help or advice.<sup>176</sup> In order to gain trust, the complainant and the police officer must perceive that the mediator is someone who cares about both parties, treats them impartially, is honest, and will protect each party during the mediation session.<sup>177</sup> However, a citizen who files a complaint involving an issue of race or ethnicity may initially believe that the mediator, who shares the same race or ethnicity of the officer, may not be objective during the mediation session. The officer may likewise question a mediator's neutrality if the mediator is the same race as the citizen.

For example, a Caucasian motorist files a complaint against an African-American officer for racial discrimination stemming from an incident during a public event.<sup>178</sup> The motorist alleges that he observed the officer allow several African-American drivers pass onto the blocked street that had been closed for the public event, but turn away several Caucasian drivers. The complaining motorist attempted to gain access to the blocked street, where his office was located, but the officer would not let him pass and a heated exchange ensued. After the complainant and the officer agree to mediation, the Caucasian motorist arrives at mediation to find that the mediator is an African-American woman. Prior to the start of the mediation session, the motorist may question whether the mediator will have the ability to be impartial. Likewise, as the mediation session progresses, the motorist may continue to doubt the mediator's impartiality if he perceives that he is not being treated equally or fairly in relation to the officer.

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<sup>174</sup> GOLDBERG, *supra* note 83, at 149.

<sup>175</sup> ROGERS & SALEM, *supra* note 30, at 113.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> The underlying facts are from an actual complaint mediated by the Washington D.C. mediation program. OFFICE OF POLICE COMPLAINTS, *supra* note 1, at 13-14. However, in the course of the mediation neither the complainant nor the officer questioned the mediator's neutrality. I use the underlying facts only to set up the example.

There are several possible solutions to the problem when one of the parties may question the objectivity of the mediator because of his or her racial identity. In many cases, it may be important for the mediator to caucus<sup>179</sup> with each party to establish trust, allow the party to privately express any concerns they may have about the mediator's neutrality, and clarify any issues prior to the start of the mediation session.<sup>180</sup> Another solution is to again use the two-person mediation team to facilitate the session.<sup>181</sup> Finally, if one party is unlikely to trust the mediator's neutrality the mediation session should be terminated.

## 2. Use of Force Complaints

There has also been disagreement on whether allegations involving the use of force is appropriate for mediation. Commentators generally agree that any allegation which, if sustained, exposes an officer to criminal liability should not be mediated.<sup>182</sup> The underlying reason is that an allegation involving a potentially criminal use of force "is too serious of an issue for mediation,"<sup>183</sup> and Internal Affairs or the Federal Bureau of Investigation, or both, should investigate such allegations.<sup>184</sup> However, the policy that *all* use of force complaints should not be mediated has not been universally accepted.

For example, the New York City Civilian Complaint Review Board will allow complaints of excessive force to be mediated so long as there is no injury to the complainant and both parties agree to mediate.<sup>185</sup> Minneapolis' Civilian Review Authority will likewise allow use of force complaints to be

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<sup>179</sup> A caucus is:

a private meeting the mediator conducts with each party during the course of mediation. They are used to: provide an opportunity for a party to vent and cool down when emotions flare; encourage candor and get to the root of the dispute; clarify an issue; spend time alone with a party to build trust; provide time to review the issues and alternatives[.]

ROGERS & SALEM, *supra* note 30, at 117.

<sup>180</sup> *Id.*

<sup>181</sup> See *supra* note 172 and accompanying text.

<sup>182</sup> *Mediating Citizen Complaints, supra* note 17, at 18. For example, an officer who maliciously strikes an individual who is handcuffed and fully compliant may be subject to criminal liability. See 18 U.S.C. § 242 (1994).

<sup>183</sup> CITY OF PORTLAND, *supra* note 20, at 100.

<sup>184</sup> The Federal Bureau of Investigation has the authority to investigate allegations of use of excessive force in possible violation of 18 U.S.C. § 242 (1994).

<sup>185</sup> *Mediating Citizen Complaints, supra* note 17, at 18.

mediated if there is not injury to the citizen.<sup>186</sup> Portland's Mediation Program has refused to categorically exclude use of force cases because "[it] means losing valuable opportunities for citizens and police to better understand each other's perspective, explore how they might prevent similar problems in the future, and for citizens to come to a satisfying resolution of their complaint."<sup>187</sup> The Portland Mediation Program also takes the position that in most circumstances the use of force by its officers is determined to be appropriate under the circumstances.<sup>188</sup>

One particular problem with the debate on the appropriateness of use of force complaints for mediation is that there is not a single, universally accepted definition of what constitutes "force."<sup>189</sup> Moreover, the term force connotes a wide spectrum of tactics that police use in different circumstances.<sup>190</sup>

In training police officers, most police departments employ some type of "use of force continuum,"<sup>191</sup> which often takes the form of a pyramid or ladder,<sup>192</sup> that represents a "fluid and flexible policy guide"<sup>193</sup> for officers to

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<sup>186</sup> *Id.*

<sup>187</sup> CITY OF PORTLAND, *supra* note 20, at 100.

<sup>188</sup> *Id.*

<sup>189</sup> "Police administrators and social scientists... undoubtedly differ on exactly what constitutes force." TOM MCEWEN, NATIONAL DATA COLLECTION ON POLICE USE OF FORCE 43 (1996), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ndcopuof.pdf>. As a practical example of the problem, in several pieces of literature Professor Walker notes that "use of force complaints should be ineligible for mediation." *Mediating Citizen Complaints*, *supra* note 17, at 18; SAMUEL WALKER, FREQUENTLY ASKED QUESTIONS ABOUT MEDIATING CITIZEN COMPLAINTS AGAINST POLICE OFFICERS 7, <http://www.policylab.org/downloads/CDAP%20mediation.pdf> (last visited Dec. 16, 2005). However, Professor Walker provides no general description of what he means when using the term "use of force" or the term's contours.

<sup>190</sup> Adams, *supra* note 157, at 3 (discussing how different definitions of force will yield different statistics in evaluating use of force data from various police departments; for example, "broad definitions of use of force, such as those including grabbing or handcuffing a suspect, will produce higher rates than more conservative definitions").

<sup>191</sup> See Appendix A for a representative example of the use of force continuum. The use of force continuum—along with additional information on the use of force—is also available at <http://www.cpsd.pdx.edu/html/forcepolicy.htm>.

<sup>192</sup> Paul W. Brown, *The Continuum of Force in Community Supervision*, FED. PROBATION, Dec. 1994, at 31, 31.

<sup>193</sup> Letter from Steven H. Rosenbaum, Chief of the U.S. Dep't of Justice Special Litigation Sec., to Alejandro Vilarello, Miami City Attorney 3 (Mar. 13, 2003), available at [http://www.usdoj.gov/crt/split/documents/miamipd\\_techletter.pdf](http://www.usdoj.gov/crt/split/documents/miamipd_techletter.pdf).



use in the field when confronted with a situation requiring force.<sup>194</sup> At the first, or lowest level of the typical<sup>195</sup> use of force continuum is the mere presence of an officer, which includes body language, demeanor, and identification of authority.<sup>196</sup> The second level of force involves verbal communication—giving a direct order, questioning, or persuasion—when the individual is argumentative or verbally resistant.<sup>197</sup> The third level of force involves an officer using physical *contact*, or “soft-hands techniques,”<sup>198</sup> which includes directional contact or escorting an individual.<sup>199</sup> In the fourth level of force, the police officer uses physical *control* by means of takedown maneuvers, use of pressure points, or other physical defensive tactics to gain compliance of a physically resistive individual.<sup>200</sup> The fifth level of force is classified as serious physical control, whereby the use of impact or intermediate weapons, or both, focused blows or kicks, or chemical irritants are authorized.<sup>201</sup> The sixth, and final, level of force on the use of force continuum is the use of deadly force which encompasses “any force that is readily capable of causing death or serious bodily injury.”<sup>202</sup>

The use of force continuum, which virtually encapsulates every type of contact that a citizen may have with a police officer, demonstrates the difficulty of using the bright-line rule that “use of force complaints should be ineligible for mediation,”<sup>203</sup> without then providing a working definition of what constitutes use of force. The concern with the suggested bright-line rule

<sup>194</sup> See generally Adams, *supra* note 157, at viii (noting that “officers are trained to use force progressively along a continuum, and policy requires that officers use the least amount of force necessary to accomplish their goals”).

<sup>195</sup> I use the term “typical” in the sense that all police departments who use the use of force continuum are free to modify the continuum to reflect the specific types of force its officers are trained to use. For example, many police departments place the use of physical defensive tactics on a lower level of the continuum than the use of mace, pepper spray, or other chemical irritants. The Federal Probation and Pretrial Services System, however, has placed the use of chemical irritants before the use of physical control in its use of force continuum because its officers do not receive defensive tactics training. Brown, *supra* note 192, at 35.

<sup>196</sup> Use of Force Continuum, Appendix A. “Although commonly not thought to constitute force, the mere presence of the officer represents authority and control. Presence is the proper level of force when the offender is basically compliant without additional direction from the officer.” Brown, *supra* note 192, at 33.

<sup>197</sup> Use of Force Continuum, Appendix A.

<sup>198</sup> Letter from Steven H. Rosenbaum, *supra* note 193, at 4.

<sup>199</sup> Use of Force Continuum, Appendix A.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> See *supra* note 189.

is that it is under-inclusive, thereby excluding complaints that may be particularly good candidates for mediation.

For example, a college student alleges that one night after leaving a bar a police officer approached him, escorted him to the hood of the police cruiser, and forced him to lay spread eagle on the cruiser while “frisking” him. Although he was not physically injured, the student nonetheless believed that he had done nothing wrong, and that the officer was without just cause. Accordingly, the student files a complaint against the officer alleging the use of excessive force.<sup>204</sup> In this scenario, it is clear that the officer used some level of force against the student: the student was escorted to the police cruiser, forced to lay spread eagle on the hood, and then frisked. Under the bright-line rule, this complaint would be ineligible for mediation. If this case was allowed to proceed to mediation, however, the officer would have explained that he was called to a disturbance at the bar and a third-party pointed to the student as the offender.<sup>205</sup> This would explain why, the officer approached the student and “took precautions to ensure the student was not armed and under the officer’s control.”<sup>206</sup> The officer would have explained that it was a case of mistaken identity,<sup>207</sup> and possibly apologized to the student for the inconvenience. The student would have understood why the officer acted in that manner.<sup>208</sup>

Ultimately, the better method to determine which use of force complaints to mediate is through a case-by-case analysis, looking at several different factors. Using the Portland Mediation Program<sup>209</sup> as a model, complaints

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<sup>204</sup> The underlying facts are from an actual complaint mediated by the Minneapolis Mediation Program. Finn, *supra* note 26, at 74.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* It is also important to note that had the college student filed a complaint with Internal Affairs, the officer’s conduct would likely be found to be an appropriate use of force under the Supreme Court’s pronouncement in *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (The Fourth Amendment “permit[s] a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.”).

<sup>209</sup> Portland uses “more inclusive case selection criteria” in determining which complaints to mediate. CITY OF PORTLAND, *supra* note 20, at 100. The only cases that are not mediated involve corruption, criminal misconduct by the officer, or cases where an officer is a potential witness against a complainant in a pending criminal action. *Id.* In addition, if a particular officer has demonstrated that he or she “is not amenable to mediation . . . that officer will not be invited to participate in future mediations.” *Id.* at 101. Mediation is approved for those complaints “where IPR and IAD believe [mediation] is likely to (1) result in greater complainant satisfaction, (2) improve citizen

should be reviewed by Internal Affairs and the appropriate citizen oversight agency for mediation eligibility. In determining which complaints to mediate, several factors should be evaluated: the type of force employed, the amount of force employed, injuries to the complainant (if any), injuries to the officer (if any), the outcome of the contact (was the complainant arrested, cited, or warned), and if the complaint was sustained by Internal Affairs against the officer, would it lead to the imposition of serious discipline (termination, demotion, or lengthy suspension).<sup>210</sup>

### B. *Mediation as a Means to Change Organizational Culture or Solve Systemic Problems*

One of the growing areas of research and debate over police misconduct is the role of police departments' organizational culture and its "underappreciated" link to police misbehavior.<sup>211</sup> Recent scholarship suggests that police officers on the streets are not "independent agents," but instead "act within the constraints of a very powerful organizational culture that significantly influences and constrains their judgment and conduct."<sup>212</sup> When police officers interact with citizens, they behave in the manner in which they have been trained, whether "explicitly or implicitly."<sup>213</sup> Accordingly, "interventions seeking to change cop behavior must include the organization or they will ultimately fail."<sup>214</sup>

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understanding of police procedures and actions, (3) result in improved officer conduct, and (4) contribute to community policing goals of improved citizen-police relations." *Id.* at 100.

<sup>210</sup> *Id.*

<sup>211</sup> Armacost, *supra* note 37, at 456.

<sup>212</sup> *Id.* at 476. In the context of police brutality, Professor Armacost argues that incidents of police misconduct are often not aberrations by "rogue cops" acting outside the accepted behavior of an otherwise professional police force. *Id.* at 455. Politicians and police leadership who attempt to distance the department from incidents of misconduct or brutality fail to understand, or worse ignore, the power of the police organization as a cause of police misconduct. *Id.* at 458. Thus, "viewing police brutality as a string of unrelated incidents belies reality." *Id.* at 476.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 521. Professor Armacost identifies three primary traits of police departments that "predispose officers to abuse their power." *Id.* at 516. First, "officers consider themselves to be the thin blue line between social order and disorder." *Id.* Charged with the maintenance of law and order in society, and empowered by the state to defend against chaos, police can overreact in situations. *Id.* at 517. Second, "police officers regard disrespect and resistance by citizens as a threat, not only to them individually, but to the very social order." *Id.* Police may treat these individuals more aggressively because they "need to be taught a lesson." *Id.* Third, "police officers believe

To date, there have been no empirical studies or scholarly research investigating the impact of mediation on police departments' organizational culture. However, the leading commentator and proponent of using mediation to resolve allegations of police misconduct, believes that mediation can "eventually" have an impact on the organizational culture of police departments.<sup>215</sup> While the current organizational culture of many police departments "works against building or maintaining a respectful, trusting relationship with citizens,"<sup>216</sup> mediation is uniquely situated to help foster trust and accountability between officers and citizens.<sup>217</sup>

Even though mediation does not confront the problem of organizational culture on a broad scale, it can slowly have an impact as individual officers participate in the mediation process with citizens. When an officer achieves recognition<sup>218</sup> and understands the citizen's point of view, it may be harder to be insensitive, hostile, and unprofessional.<sup>219</sup> When a significant number of police officers begin to lose the "us versus them" mentality, the possibility of creating healthier organizational norms increases.<sup>220</sup> Likewise, more police officers may be willing to change the organizational culture if they are "active participants in the process of self-reform."<sup>221</sup>

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that they have been given the impossible task of keeping society safe while, at the same time, ... [being] constrained by unrealistic legal and constitutional demands." *Id.* Inherent in these three traits is also what some commentators refer to as the "us versus them" mentality. *Mediating Citizen Complaints, supra* note 17, at 11; Armacost, *supra* note 37, at 517.

<sup>215</sup> *Mediating Citizen Complaints, supra* note 17, at 11.

<sup>216</sup> *Id.*

<sup>217</sup> WALKER, *supra* note 189, at 5.

<sup>218</sup> *See supra* Part III.B.2.

<sup>219</sup> *See Berger, supra* note 132, at 18.

<sup>220</sup> Armacost, *supra* note 37, at 541.

<sup>221</sup> *Id.*

[B]oth internal (police) review and external (citizen) review have inherent limitations in their ability to effect change in the organizational culture of policing. One of the primary impediments to their effectiveness is that these mechanisms have a "fundamentally punitive orientation" rather than a reformatory one: Police officers operating within an adversarial system [like internal and external review], pushed to prove their "innocence" and to defend themselves at all costs, will rarely see a citizen's complaint and its investigation as grounds for changing their behavior.

*Id.* (footnotes and citations omitted).

## V. CONCLUSION

The emergence of mediation as a means to resolve minor complaints of alleged police misconduct has been an important development in helping to strengthen the relationship between citizens and police officers. Mediation is a non-confrontational forum for the parties to come together and put their issues on the table and cooperatively strive for a mutually agreeable solution to the conflict. Out of the conflict is an opportunity for both parties to regain a greater sense of self-worth and control, as well as a better appreciation for the other party's perspective.

Mediation for citizen complaints against police officers is still in its relative infancy. Yet, the existing programs have demonstrated a great deal of success in terms of satisfaction rates, efficiency, cost savings, and problem solving. As more mediation programs are developed across the country, and more complaints are resolved through existing programs, the empirical data is likely to show mediation's effectiveness in rebuilding trust, accountability, and justice in communities.

While no one is quite ready to label mediation the panacea for police misconduct,<sup>222</sup> in comparison to the traditional complaint procedures, it is not that far off.

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<sup>222</sup> Berger, *supra* note 132, at 18.

APPENDIX A

FORCE CONTINUUM

DPSST Force Continuum					
Level of Force		Method of Force		Level of Resistance	Threat
VI	Deadly	Any force readily capable of causing death or serious physical injury		Lethal	RESISTIVE
V	Serious Physical Control	Neck Restraint Impact Weapon Focused Blows Mace (CN/CS)	O C  R E S T R A I N T S	Ominous	
IV	Physical Control	Hair Takedown Joint Takedown Digital Control Joint Come-along Pressure Points Electronic Stun Device Temp. Restraints		Active  Static	
III	Physical Contact	Escort Position Directional Contact		Verbal	
II	Verbal Communication	Direct Order Questioning Persuasion			
I	Presence	Display of Force Option Body Language/Demeanor Identification of Authority		None	Complying

Also available at <http://www.cpsd.pdx.edu/html/forcepolicy.htm>.