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RECONSIDERING PREJUDICE IN ALTERNATIVE DISPUTE RESOLUTION FOR BLACK WORK MATTERS

*Michael Z. Green**

ABSTRACT

In the 1985 foundational article Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution, Richard Delgado and his co-authors identified major concerns with the growing use of alternative dispute resolution (ADR) to resolve disputes involving people of color. The seminal findings from that article highlighted the power differentials exacerbated by informal dispute resolution, and the article contributed immediately to a surge of robust critiques of the increasing use of alternative dispute resolution for those most vulnerable in our society.

More than thirty years after the Delgado article, a community of respected and prominent ADR and discrimination scholars, assembled in panels at a symposium sponsored by the SMU Law Review in February 2017, explored the continued impact of ADR on disempowered disputants by analyzing discrete areas within the ADR process. Joined by keynote remarks from Professor Delgado as he reflected on his 1985 article, these scholars have provided an updated and valuable contribution as a new millennium critique of ADR based upon prejudice.

As part of the scholarly reflections involved in this modern critique of ADR, this Article explores the concern of racial prejudice in using ADR in the workplace. This Black Lives Matter era has led to several situations where workplace disputes have arisen with respect to discussions about race. Employers have started to recognize that they must better prepare to handle workplace disputes related to race as a result of more protest and discussion due to the Black Lives Matter movement.

This Article examines a high-profile agreement between an employer and a union to provide a dispute resolution process to help its diverse employees resolve workplace disputes. The Article asserts that black employees can find racial justice in a workplace that uses a modified merger of the mediation and arbitration program developed by those parties. That process ameliorates many of the concerns about informality and prejudice that

* Professor, Texas A&M University School of Law. I would like to thank the Texas A&M research grant program for its support and the following students for providing diligent research to assist me in completing this Article: Brian Bailey, Mackenzie Lewis, Chelsea Mikulencak, and Christen Sutton. I am also grateful to have the excellent input and editing from the SMU Law Review staff on edits of prior versions of this Article.

Delgado and his co-authors first expressed in 1985. As opposed to the dismal results in the courts, this ADR process provides a much more viable opportunity for black employees to resolve discrimination matters in a dignified way that respects employee voice and offers procedural justice in the workplace. As a result, all three of the key stakeholders, including employers, unions, and black workers, can embrace this merged mediation and arbitration program as a positive dispute resolution process.

I.	INTRODUCTION: RECONSIDERING PREJUDICE IN ADR IN THE NEW MILLENNIUM	641
II.	ADR IN THE WORKPLACE WHILE BLACK	643
	A. NEGOTIATING WHILE BLACK	647
	B. MEDIATING WHILE BLACK	654
	C. ARBITRATING WHILE BLACK	657
III.	MERGING MEDIATION AND ARBITRATION WHILE BLACK: THE SLIGHTLY-MODIFIED PYETT PROTOCOL ADR IN THE WORKPLACE SOLUTION	661
	A. NEGOTIATION: UNIONS LEVEL THE PLAYING FIELD VIA THE PYETT PROTOCOL	661
	B. MEDIATION: THE FIRST STEP IN THE PYETT PROTOCOL	664
	C. ARBITRATION: THE FINAL STEP IN THE PYETT PROTOCOL	665
	D. IMPLICATIONS AND ANALYSIS OF THE PYETT PROTOCOL	666
	E. SLIGHT MODIFICATIONS: DIVERSE NEUTRALS, LEGAL REPRESENTATIVES, AND APPEALS	671
IV.	DISPUTING WHILE BLACK AT WORK MATTERS ...	674
	A. BLACK LIVES MATTER AT WORK: MAKING THE LABOR MOVEMENT GREAT AGAIN	675
	B. PROVIDING DISPUTE MECHANISMS TO GIVE VOICE MATTERS TO BLACK WORKERS	676
	C. RESOLVING BLACK WORKER DISPUTES MATTERS TO EMPLOYERS	677
V.	CONCLUSION: PREJUDICE IN ADR STILL MERITS CONSIDERATION AT WORK	679

I. INTRODUCTION: RECONSIDERING PREJUDICE IN ADR IN THE NEW MILLENNIUM

ALTHOUGH there have been some efforts to make a comprehensive evaluation of the impact of alternative dispute resolution (ADR), many of those studies were conducted quite a long time ago. In a landmark study published in 1985, Professor Richard Delgado and his co-authors used social science research to analyze the use of ADR to resolve disputes involving people of color and women.¹ According to Delgado and his co-authors, being forced to pursue ADR denies persons of color and women the application of certain norms and rules of procedure available in a court trial, including “the flag, the black robes, the ritual—[to] remind those present that the occasion calls for the higher, ‘public’ values, rather than the lesser values embraced during moments of informality and intimacy.”² Under Delgado’s analysis, the “formality of adversarial adjudication deters prejudice” because it counters “bias among legal decisionmakers and disputants” and it “strengthen[s] the resolve of minority disputants to pursue their legal rights.”³ These “[f]ormal rules also counter decisionmaker bias or consideration of extraneous issues.”⁴

On the other hand, Delgado has recognized that increasing concerns regarding the attainment of racial justice in the courts as a result of a “right-wing surge [in] this country” may establish that “[t]he equation of ‘higher’ values with the public sphere is . . . not necessarily[] true” because “[m]any conservative judges and mean-spirited laws have been put in place.”⁵ As a result, one could surmise that “[i]f the public resolution of workplace discrimination through the courts does not represent a fair option, then the private resolution of these disputes . . . may offer a viable option . . . for employees, employers, and unions.”⁶

Although Delgado’s article highlighted that many factors from social science and psychoanalytical studies—including “scapegoating, economic dislocation, power disparities, socialization, and in-group/out-group cog-

1. See Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee & David Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985); see also Susan K. Hippensteele, *Revisiting the Promise of Mediation for Employment Discrimination Claims*, 9 PEPP. DISP. RESOL. L.J. 211, 243 (2009) (stating “Delgado’s hypothesis has support from social scientific studies on decision-making and emotion.”).

2. Delgado, *supra* note 1. at 1388.

3. *Id.* at 1388–89.

4. *Id.* at 1400 n.307.

5. See Richard Delgado, *Alternative Dispute Resolution: Conflict as Pathology: An Essay for Trina Grillo*, 81 MINN. L. REV. 1391, 1391 n.1, 1399–1400 (1997) (quoting both Delgado and his alter ego Rodrigo). *But see* Phyllis E. Bernard, *Minorities, Mediation and Method: The View from One Court-Connected Mediation Program*, 35 FORDHAM URB. L.J. 1, 4–13 (2008) (disagreeing with Delgado’s original concerns about informality in alternatives to the court and asserting that those concerns are not valid).

6. See Michael Z. Green, *Reading Ricci and Pyett to Provide Racial Justice Through Union Arbitration*, 87 IND. L.J. 367, 378–79 (2012).

nitive categories—contribute to the development of prejudice” in resolving disputes,⁷ it also seemed to contribute immediately to a swell of robust critiques over the next ten years about the increasing use of ADR for those who are more vulnerable in our society.⁸ Even so, in 1996, a mere eleven years after the Delgado article, Eric Yamamoto lamented the relatively small number of mainstream law review articles critiquing ADR based on prejudice.⁹ More than thirty years after the Delgado article and twenty years after the Yamamoto article, the time has come to explore the continued impact of ADR on disempowered participants. With new views now being recently expressed by Professor Delgado about the possibilities for ADR in light of the troubling aspects of racial discrimination still ever-present in our society,¹⁰ now is an excellent time

7. Delgado et al., *supra* note 1, at 1382.

8. See, e.g., Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 31–47, 55 (1987) (comparing quality of adjudication versus ADR); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 682 (1986) (asserting that some “important constitutional and public law issues” should be resolved by courts and not by ADR); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549–50 (1991) (expressing concerns about family mediation in coercing women to resolve disputes to their detriment); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 511 (1985) (referring to how some cases involve issues that should not be subject to trade-offs via settlement or ADR because of the importance of the substantive outcomes, such as in employer-employee disputes and some civil rights cases); Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 7–14 (1993) (criticizing ADR as infected with notions of coercive harmony); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 249 (1995) (recognizing informality of ADR differs from formalism of the courts but suggesting the satisfaction with informality of ADR represents more of a criticism of the courts); Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482, 590 (1987) (finding informality of mediation problematic when bargaining power differentials are present). Although another article published shortly before the Delgado article also contributed significantly to the critique of ADR. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (asserting that settlement and other forms of ADR are problematic because of concerns about coercion without judicial involvement in the process); see also Symposium, *Against Settlement: Twenty-Five Years Later*, 78 FORDHAM L. REV. 1117 (2009) (discussing the impact of the Fiss 1984 article). One of the more important articles on unfairness in the disputing system for those who are disempowered was published almost ten years earlier. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 123–24, 137 (1974) (referring to concerns where a dispute resolution system such as the courts may have the perception of an unjust system that is designed only for the “haves” in our society to the exclusion of the “have-nots”).

9. See Eric K. Yamamoto, *ADR: Where have the Critics Gone?* 36 SANTA CLARA L. REV. 1055, 1065, 1067 (1996). Yamamoto has updated this critique as part of this symposium. See Eric K. Yamamoto, *Critical Procedure: ADR and the Justices’ “Second Wave” Constriction of Court Access and Claim Development*, 70 SMU L. REV. 765 (2017) (discussing a restrictive approach to procedure couched in increasing use of ADR through compelled, private arbitration).

10. See Richard Delgado, *The Unbearable Lightness of Alternative Dispute Resolution: Critical Thoughts on Fairness and Formality*, 70 SMU L. REV. 611 (2017) (referring to concerns about major forces currently pressing society to greater levels of inequality and noting that as the courts and the law have been used to try and rescue endangered groups, empowered predators have been alerted and responded to make the formal system potentially even more discriminatory than the informal system of ADR); see also Richard Del-

for a modern critique of ADR based upon prejudice. This Article offers a new millennium reconsideration of the prejudicial impact of ADR as stated in Delgado's article and focuses on race in the workplace.

In Section II, this Article examines the unique issues presented by our current racial climate when using ADR in the workplace for black employees, including examining aspects of negotiation, mediation, and arbitration of race discrimination issues. Section III discusses a high-profile agreement between an employer and a union that seeks to provide a fair dispute resolution process that merges mediation and arbitration while aimed at helping employees who have been discriminated against in the workplace resolve their statutory claims outside of the courts. Section III also suggests some modifications to that dispute resolution process to ensure the disputes may be resolved by diverse mediators and arbitrators and the employees have reasonable opportunities for legal representation and voice. Section IV explains why such a merger of fair mediation and arbitration procedures negotiated by a union committed to racial justice can adequately address the concerns of all stakeholders, including employees, unions, and employers. Section V concludes that the prejudice issues Delgado raised more than thirty years ago must still continue to be analyzed for both ADR and court systems used to resolve worker discrimination claims based on race in today's Black Lives Matter climate.

II. ADR IN THE WORKPLACE WHILE BLACK

Black employees have the statutory right under Title VII of the Civil Rights Act of 1964 (Title VII)¹¹ to be free from discrimination in the workplace based upon race.¹² Most Title VII charges of workplace discrimination filed with the Equal Employment Opportunity Commission (EEOC) from 1997 to 2014 were based on race.¹³ Nevertheless, a recent study indicates the increasing lack of court success at the pleading stage when pursuing race discrimination claims in the workplace and how white judges were more willing to dismiss black pro se plaintiffs' claims of employment discrimination as compared with black judges.¹⁴ A 2016 national survey conducted by Pew Research Center also found that while

gado and Jean Stefancic, *The Hole-in-the-Wall Gang View of Life and America's Racial Future*, 51 WAKE FOREST L. REV. 745, 748 (2016) ("Our thesis is that the country's changing demographic composition will create increasing anxieties and turmoil . . . [and] . . . whites will not readily accept second-place status in a diversifying population and economy.").

11. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (Title VII is codified as amended in pertinent part at 42 U.S.C. §§ 2000e-2-2000e-17 (2014)).

12. 42 U.S.C. §§ 2000e-2(a)(1)-(2) (2014) (prohibiting discrimination because of race in addition to color, national origin, religion, and sex).

13. See Charlotte S. Alexander, *Misclassification and Antidiscrimination: An Empirical Analysis*, 101 MINN. L. REV. 907, 921 (2017).

14. See George A. Martinez, *Further Thoughts on Race, American Law, and the State of Nature: Advancing the Multiracial Paradigm Shift and Seeking Patterns in the Area of Race and Law*, 85 UMKC L. REV. 105, 112 (2016) (citing Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of Iqbal's Effect of Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1, 36-39 (2011)).

64% of black adults believe they are treated less fairly than whites in the workplace, only 22% of whites agree (a difference of 42 percentage points).¹⁵ As a result, in recent years, employees seeking to address race discrimination claims have been pushed to recast their claims as a race-neutral concern, as courts and the public have started to believe that “race discrimination is rare and race-based protections are no longer necessary.”¹⁶

Despite a strong desire to have voice in the workplace,¹⁷ empirical studies demonstrate that employees facing workplace discrimination “do not always exercise voice” out of a “fear [of] retaliation for their complaints, and retaliation protections are inadequate to overcome this muzzle to worker voice.”¹⁸ Further, critical race theory demonstrates that black employees are subjected to unique forms of discrimination in the workplace based on covering identity, implicit bias, institutional racism, and intersectional forms of discrimination that do not fit easily within the parameters of Title VII’s protections.¹⁹

Because many scholars²⁰ have questioned the feasibility of pursuing lit-

15. See *On Views of Race and Inequality, Blacks and Whites are Worlds Apart*, PEW RES. CTR. 5 (June 27, 2016), http://assets.pewresearch.org/wp-content/uploads/sites/3/2016/06/ST_2016.06.27_Race-Inequality-Final.pdf [<https://perma.cc/M9RR-UFWU>].

16. See Charlotte S. Alexander, Zev Eigen & Camille Gear Rich, *Post-Racial Hydraulics: The Hidden Dangers of the Universal Turn*, 91 N.Y.U. L. REV. 1, 4 (2016).

17. See Thomas A. Kochan, *Rethinking and Reframing U.S. Policy on Worker Voice and Representation*, 26 A.B.A. J. LAB. & EMP. L. 231, 233 (2011); see also Kenneth G. Dau-Schmidt, *Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform*, 94 MARQ. L. REV. 765, 805 (2011) (referring to “a variety of theories suggesting” the value of “giving workers a say in the workplace”); Nancy A. Welsh, *What Is “(Im)partial Enough” in a World of Embedded Neutrals?*, 52 ARIZ. L. REV. 395, 424 (2010) (describing the importance of allowing participants “to tell their stories (‘voice’)” as part of the perceptions of fairness and procedural justice in assessing a dispute resolution system).

18. See Naomi Schoenbaum, *Towards a Law of Coworkers*, 68 ALA. L. REV. 605, 620 n.85 (2017) (citing Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 20, 37 n.58 (2005)).

19. See Lauren B. Edelman, Aaron C. Smyth & Asad Rahim, *Legal Discrimination: Empirical Sociological and Critical Race Perspectives on Antidiscrimination Law*, 12 ANN. REV. L. & SOC. SCI. 395, 400–02 (2016). Professor Elayne Greenberg has suggested a comprehensive ADR system design based upon recognizing that implicit bias discrimination in the workplace does not fit with court dispute resolution. See Elayne E. Greenberg, *Fitting the Forum to the Pernicious Fuss: A Dispute System Design to Address Implicit Bias and ‘Isms in the Workplace*, 17 CARDOZO J. CONFLICT RESOL. 75, 100 (2015) (suggesting the development of a reconciliation-focused dispute resolution system specifically aimed at handling implicit bias claims of discrimination in the workplace with education about implicit bias, a transformative mediation focus, and an assessment accountability).

20. See Alexander, *supra* note 13, at 909 n.8 (using the following citations as support: “Sandra F. Sperino & Suja A. Thomas, *Fakers and Floodgates*, 10 STAN. C.R. & C.L. 223, 247–49 (2014) (summarizing barriers to Title VII plaintiffs). There is also an extensive body of empirical literature on the poor chances of Title VII plaintiffs in federal courts. See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 132 (2009); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004); John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991); John J. Donohue III & Peter Siegelman, *The Evolution of Employment Discrimination Law in the 1990s: A Preliminary Empirical Investigation*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES 261 (Laura Beth Nielsen & Robert L. Nelson eds., 2005); Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mo-*

igation to resolve discrimination claims in the workplace, some have suggested the use of ADR as a more viable option.²¹ However, as Professor Theresa Beiner explained in 2014, some study of how ADR affects workplace disputes should be attempted before rushing to use it instead of the courts for employment discrimination claims:

Unfortunately, there is no way to know how methods of alternative dispute resolution—arbitration, mediation, settlement, or internal employer grievance mechanisms—are actually working. Most of these alternative dispute resolution systems are not studied and scrutinized by professionals. They exist ‘in the shadow of the law,’ as commentators suggest. There is no realistic way to know if these alternative dispute resolution mechanisms are bringing about just results. In addition, these mechanisms do not alert employers and employees to what is and is not acceptable workplace behavior.²²

Within the last few years, the prominence of racial issues in our society has been highlighted by the Black Lives Matter movement, which started as a response to the killings of black men in Ferguson, Missouri; New York, New York; Charleston, South Carolina; Baltimore, Maryland; and several other cities.²³ The Black Lives Matter movement has led to several situations where workplace disputes have arisen with respect to discussions about race.²⁴ Labor activists and the Black Lives Matter

bilization? Employment Discrimination Litigation in the Post-Civil Rights United States, 7 J. EMPIRICAL LEGAL STUD. 175 (2010)).

21. See, e.g., Theresa M. Beiner, *The Many Lanes Out of Court: Against Privatization of Employment Discrimination Disputes*, 73 MD. L. REV. 837, 837–39 (2014) (referring to criticism of federal courts by “[m]any scholars” regarding “lackluster enforcement of employment discrimination laws” as suggesting “that out-of-court processes may better serve the aims of anti-discrimination laws.”).

22. *Id.* at 840 (footnotes omitted).

23. See Charles R. Lawrence III, *The Fire This Time: Black Lives Matter, Abolitionist Pedagogy and the Law*, 65 J. LEGAL EDUC. 381, 385–86, n.15 (2015) (“‘Black Lives Matter’ was first coined by two black women, Alicia Garza and Patrisse Cullors, in response to George Zimmerman’s being found not guilty in the killing of Trayvon Martin.”) (citing Nishat Kurwa, “*Black Lives Matter*” Slogan Becomes a Bigger Movement, NPR (Dec. 4, 2014), <http://www.npr.org/2014/12/04/368408247/black-lives-matter-slogan-becomes-a-bigger-movement> [<https://perma.cc/M8V6-YCF5>]); Nicole D. Porter, *Expanding Public Safety in the Era of Black Lives Matter*, 70 MIAMI L. REV. 533, 535 n.3 (2016) (“Black Lives Matter is a social justice movement and social media framework (#BlackLivesMatter) founded in the United States that started after the July 2013 acquittal of George Zimmerman in the shooting death of Florida teenager Trayvon Martin. The movement was further animated by the 2014 shooting of Michael Brown in Ferguson, Missouri. The social justice organizers who conceived the term, Black Lives Matter, have asserted that it reinforces that African American lives, often viewed without value, are important.”). The Black Lives Matter movement website states that this movement was created “after Trayvon Martin’s murderer, George Zimmerman, was acquitted for his crime, and dead 17-year old Trayvon was posthumously placed on trial for his own murder.” *About*, BLACK LIVES MATTER, <http://blacklivesmatter.com/about/> [<https://perma.cc/6N7S-Z67A>] (last visited Oct. 24, 2017); see also John Eligon, *One Slogan, Many Methods: Black Lives Matter Enters Politics*, N.Y. TIMES (Nov. 18, 2015), https://www.nytimes.com/2015/11/19/us/one-slogan-many-methods-black-lives-matter-enters-politics.html?_r=1. [Perma link unavailable] (describing origins of the Black Lives Matter movement and its decentralized and spreading organization).

24. See, e.g., Daniel Craig, *Employee at Philly Hospital Loses Job over Racially Charged Facebook Post*, Philly Voice (July 14, 2016), <http://www.phillyvoice.com/em->

movement have joined forces as part of a Black Lives Matter at Work coalition that uses the hashtag #BlackWorkMatters.²⁵ Employers have

ployee-philly-hospital-fired-over-racially-charged-facebook-post/ [https://perma.cc/G5S4-KV98] (referring to Diane Amoris, a hospital nurse, who was terminated for posting a Facebook post that stated, among other things, that “Blacks kill each other every day, all day long, and it’s ok with them. Why no protest when Jamal kills Kalif???? Well, I AM WHITE AND PROUD TO BE WHITE!! WHITE LIVES MATTER!!!! POLICE LIVES MATTER!!! Keep your circus in your own neighborhood!!! Get a life, a honest job, and RAISE YOUR KIDS TO BE PRODUCTIVE CITIZENS!!!! I am sick and tired of all this bulls*** with the black people!”); Michael Kagan, *The Public Defender’s Pin: Untangling Free Speech Regulation in the Courtroom*, 111 N.W. U. L. REV. ONLINE 125, 126 (2017) (discussing Ohio public defender, Andrea Burton, who settled a contempt of court case where she agreed not to wear a “Black Lives Matter” pin on the condition that police officers were prohibited from wearing black armbands commemorating slain officers); Eileen Keithly, *Black Employee Says Georgetown Restaurant Owner Fired Her for Supporting Black Lives Matter Marchers*, SOUTH STRAND NEWS (Oct. 1, 2016), http://www.southstrandnews.com/news/black-employee-says-georgetown-restaurant-owner-fired-her-for-supporting/article_389cfc35-aa14-5dd3-8d90-98c3cdc98de0.html [https://perma.cc/KKP5-U9N9] (describing a restaurant worker, Kiana Knowlin, who was fired by the restaurant’s owner for supporting a Black Lives Matter protest march passing by the restaurant); Joshua Rhett Miller, *UVA Instructor Out After Comparing Black Lives Matter to KKK*, NY POST (Oct. 10, 2016), <http://nypost.com/2016/10/10/professor-takes-leave-after-comparing-black-lives-matter-to-kkk/> [https://perma.cc/9R5M-3V8S] (referring to University of Virginia Lecturer, Douglas Muir, who “agreed to take leave” after comparing Black Lives Matter to the Ku Klux Klan); Ken Ritter, *Defense Attorney Sparks “Black Lives” Protest in Vegas Court*, AP NEWS (Sep. 21, 2016), <https://apnews.com/f0812b206ffa4385ae31da44f05e7281/defense-attorney-sparks-black-lives-protest-vegas-court>; [https://perma.cc/8M48-DUQ3] (referring to Erika Ballou, public defender, who was asked to remove Black Lives Matter button while in court); Kathryn Schroeder, *Teacher Fired After Wearing “Black Lives Matter” Button*, SOCIETY: OPPOSING VIEWS (Dec. 3, 2016), <http://www.opposingviews.com/i/society/75-year-old-teacher-wears-pin-class-immediately-banned-school>; [https://perma.cc/D5AA-B6NX] (describing how 75-year old who taught as a substitute teacher for fifteen years was fired after wearing a “Black Lives Matter” button in class); Brandon Scott, *Jefferson Co. Employee Fired for Black Lives Matter Post*, BEAUMONT ENTERPRISE (July 20, 2016), <http://www.beaumontenterprise.com/news/article/County-employee-goes-on-social-media-tirade-8388312.php> [https://perma.cc/5JR2-7LXN] (referring to Patricia Kloefkorn, coordinator for State District Judge Raquel West, who was terminated for Facebook post stating that Black Lives Matter protesters should get a job and that “since when did being black . . . give you the right to shoot people.”); Dave Urbanski, *“F*** Black Lives Matter”: Firefighter Out of a Job After Posting Racist Remarks on Facebook*, THE BLAZE (Dec. 14, 2016), <http://www.theblaze.com/news/2016/12/14/f-black-lives-matter-firefighter-out-of-a-job-after-posting-racist-remarks-on-facebook/> [Perma link unavailable] (describing Ryan Hudson, a Michigan fire fighter, who was terminated after posting racist speech about Black Lives Matter on Facebook).

25. See Greg Chern, *Black Lives Matter at Work: New Report Offers Resources for Labor Activists to Fight White Supremacy*, IN THESE TIMES: WORKING IN THESE TIMES (Sept. 24, 2015), <http://inthesetimes.com/working/entry/18447/black-lives-matter-labor-movement> [https://perma.cc/3QL3-ADY3] (describing Young Workers Media Project calling for solidarity with Black Lives Matter movement and worker groups while compiling stories of worker organizing and interviews with young labor activists of color along with reflections from fast food workers at the frontlines of protest); see also Jessica Dickerson, *Citizens Stand for Economic Equality With #BlackWorkMatters and #Fightfor15*, BLACK VOICES: HUFFINGTON POST (Apr. 15, 2015), http://www.huffingtonpost.com/2015/04/15/black-work-matters-15_n_7071946.html?utm_hp_ref=black-voices [https://perma.cc/XR8L-W9KA] (describing hashtag #BlackWorkMatters campaign as also known as the Fight for 15 which has focused on nationwide effort to obtain a minimum wage of \$15 per hour while recognizing the disproportionate number of young black people who work in low wage jobs); OIC OF AMERICA, *Black Work Matters: Race, Poverty and the Future of Work in Philadelphia*, <https://www.uniteherephilly.org/wp-content/uploads/Black-Work-Matters-Report.pdf>. [https://perma.cc/Y92C-BMFZ] (discussing benefits of Unite Here Union in

started to recognize that they must be better prepared to handle workplace disputes related to race as a result of more protest and discussion due to the Black Lives Matter movement.²⁶

A. NEGOTIATING WHILE BLACK²⁷

Despite the significance of the Delgado article in 1985, even ten years later, two scholars acknowledged that “few” empirical studies had attempted to prove the prejudice concerns with informality in ADR.²⁸ Now, Cynthia Mabry did express concerns for blacks in negotiations as far back as 1998 when discussing existing empirical work:

Empirical studies have shown that race affects negotiations. For example, when adversaries are members of the same race, they bargain more cooperatively with one another. Same-race disputants are more cooperative because they trust each other more easily than they trust people of different racial groups. In contrast, intercultural adversaries endeavor to ‘maintain a certain face or posture in the eyes of someone different.’ This posturing influences the parties’ efforts to solve their problem.²⁹

Philadelphia and how that union addresses racial inequality for workers in the hospitality industry).

26. See Jessica Guynn, *Zuckerberg Reprimands Facebook Staff Defacing “Black Lives Matter”*, USA TODAY (Feb. 25, 2016), <http://www.usatoday.com/story/tech/news/2016/02/25/facebook-mark-zuckerberg-black-lives-matter-diversity/80933694/> [https://perma.cc/7GWF-AAZH] (describing how Facebook CEO Mark Zuckerberg responded forcefully after employees crossed out Black Lives Matter and wrote All Lives Matter on the walls of the company’s campus by launching an investigation, stating that those communications represented a “deeply hurtful and tiresome experience for the black community,” and mentioning the comments were “unacceptable” to him and he was “very disappointed by this disrespectful behavior”); see also Nicole Cozier, *Black Lives Matter at Work as Much as Everywhere Else: AT&T and Ben & Jerry’s Set Example*, HUMAN RIGHTS CAMPAIGN (Oct. 11, 2016), <http://www.hrc.org/blog/black-lives-matter-at-work-as-much-as-everywhere-else-att-and-ben-jerrys-se>. [https://perma.cc/Q2N5-XPQM] (describing how leaders of prominent businesses such as AT&T and Ben & Jerry’s have affirmed the necessity and relevance of the Black Lives Matter movement). But see Laura Donovan, *An Email About “Handling” Workplace Diversity Is Facing Heavy Scrutiny*, ATTN (Aug. 31, 2016), <https://www.attn.com/stories/11073/controversy-over-email-about-handling-workplace-diversity> [https://perma.cc/YU72-A44P] (describing responses of activist and educator, Britany Packnett, who was outraged by a webinar that cast doubt on racial bias in the workplace and insulted by its suggested need for training on how to respond to people involved in the Black Lives Matter movement).

27. The text of Section II(A) was, in substantial part, first published as Michael Z. Green, *Negotiating While Black*, in THE NEGOTIATOR’S DESK REFERENCE ch. 41 (Christopher Honeyman & Andrea Kupfer Schneider, eds., DRI Press 2017).

28. See Gary LaFree & Christine Rack, *The Effects of Participants’ Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 LAW & SOC’Y REV. 767, 769–70 (1996) (“Despite widespread concern about potential bias against minorities and women in informal dispute resolution processes, there have been surprisingly few empirical efforts to validate or disprove the existence and severity of bias. Cross-cultural studies have been restricted to surveys on procedural preference in hypothetical disputes and anthropological observations on nonindustrialized societies.”) (citations omitted).

29. See Cynthia R. Mabry, *African Americans “Are Not Carbon Copies” of White Americans—The Role of African American Culture in Mediation of Family Disputes*, 13 OHIO ST. J. ON DISP. RESOL. 405, 420 (1998) (quoting Charles B. Craver, *Effective Legal Negotiation and Settlement*, in NEGOTIATION: WINNING TACTICS AND TECHNIQUES 81, 126 (PLI Litig. & Admin. Practice Course Handbook Series No. 347, 1988)).

Many of the prominent studies that look at what it means to negotiate while being black have been conducted by Professor Ian Ayres. In a 1991 study, with a first report in 1991,³⁰ and then further analysis in a new and expanded audit of that study with resulting data and conclusions reported in 1995,³¹ Ayres examined differences based upon race by using pairs of testers, always including a white male versus someone of a different race, who were all trained to negotiate the same way and sent to purchase a new car at randomly selected Chicago auto dealerships.³² Ayres found that black buyers were induced to pay much higher prices due to both the initial offer they received from the salesperson and also the final offer which represented the lowest price offered by the salesperson after a number of rounds of bargaining.³³ Specific results demonstrated that “[b]lack female testers were asked to pay over three times the markup of white male testers, and black male testers were asked to pay over twice the white male markup.”³⁴ Ayres also found that salespersons believed that white males had better search details and were more informed about the dealer’s actual costs than black purchasers.³⁵

Ayres has even more recently noted, in a 2011 unpublished paper with co-authors Mahzarin R. Banaji and Christine Jolls, that more nuanced and technical forms of negotiating, such as through electronic bartering and auction services like eBay, have also indicated biased results for black persons.³⁶ Ayres and his co-authors constructed a field experiment

30. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 856 (1991) (describing salespersons were more likely to negotiate price of a new car with white purchasers versus black persons as 61% of black persons did not know that car sticker prices are negotiable versus only 31% of white persons who did not know the prices were negotiable); see also Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 ECON. REV. 304, 312–13 (1995) (further confirming findings from 1991 study and suggesting that the reasons why blacks were subjected to much higher prices than whites during negotiations).

31. Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 MICH. L. REV. 109 (1995) [hereinafter, Ayres, *Further Evidence*].

32. Ayres & Siegelman, *supra* note 30, at 305.

33. Ayres, *supra* note 30, at 819, 830 (“The tests reveal that white males receive significantly better prices than blacks”); Ayres & Siegelman, *supra* note 30, at 319 (“In negotiations for more than 300 new cars, Chicago car dealers offered black and female testers significantly higher prices than white males with whom they were paired, even though all testers used identical bargaining strategies.”); Ayres, *Further Evidence*, *supra* note 31, at 116 (“The current study confirms the original study’s findings that offers to black males and black females are significantly higher than those made to white males.”).

34. Ayres, *supra* note 30, at 828.

35. Ayres & Siegelman, *supra* note 30, at 317 (describing assumptions about lack of information among blacks and whites having a lower reservation price (the maximum amount the buyer was willing to pay) could have led to disparity in offers for automobile purchases based on race); Ayres, *supra* note 30, at 848–49 (referring to reasoning as to why car dealerships would charge white males less based upon assumed higher search costs for blacks and women). The Ayres studies did not address discrimination in automobile loan financing because the script for those testers required that they inform the dealerships that the testers would provide their own financing. Ayres, *supra* note 30, at 823 n.22.

36. See Ian Ayres, Mahzarin R. Banaji & Christine Jolls, *Race Effects on eBay* (Sep. 27, 2011) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1934432 [<https://perma.cc/4VDF-4N2F>] and http://works.bepress.com/ian_ayres/23/ [<https://perma.cc/EWB2-3WKW>].

to test the effects of race on transactions involving baseball card auctions on eBay. The tester elements involved a display of photographs showing the same cards being “held by either a dark-skinned/African American hand or a light-skinned/Caucasian hand.”³⁷ Their results indicated that the “[c]ards held by African-American sellers sold for approximately 20% (\$0.90) less than the cards held by Caucasian sellers.”³⁸

A similar study on the effects of race in negotiations was created by Jennifer Doleac and Luke Stein in the online sale of an Apple iPod.³⁹ These researchers “posted classified advertisements offering an iPod Nano portable digital music player for sale on several hundred locally focused websites throughout the US” and signaled race by the skin color of the hand holding a picture of the iPod being offered for sale in the advertisement.⁴⁰ This study differed somewhat from the Ayres eBay study because the eBay parties would never expect to meet and the purchases through eBay were insured by eBay. The participants in the iPod study would expect to meet in person to close the deal, and there was no insurance involved.⁴¹

The Doleac and Stein study specifically used pictures of a man’s black hand, or a man’s white hand, or a man’s white hand with a tattoo, each holding a new, unopened iPod Nano.⁴² Potential buyers responded via anonymized e-mail addresses. There was no formal bidding process and “either party [could] cease communication at any time without facing any consequences.”⁴³ About two hours after each advertisement was posted, the researchers sent an e-mail to each responder stating they received numerous responses and asked for their best offers.⁴⁴ From these results, Doleac and Stein concluded: “Black sellers receive 18% fewer offers than white sellers, whereas tattooed sellers receive 16% fewer.”⁴⁵ Also, with respect to amounts, the mean offer received was \$49.86 and maximum offer of \$54.05.⁴⁶ But, “[c]ompared with white sellers, black sellers receive average offers of \$5.72 (11%) lower and tattooed sellers \$5.53 (10%) lower.”⁴⁷

Further, Doleac and Stein concluded that the best offers both “[b]lack and tattooed sellers” received were “also lower than whites’ by \$7.07 (12%) and \$6.60 (11%), respectively.”⁴⁸ Final conclusions from Doleac and Stein were that “black sellers suffer worse market outcomes than

37. *Id.* at 5.

38. *Id.* at Abstract.

39. See Jennifer L. Doleac & Luke C.D. Stein, *The Visible Hand: Race and Online Market Outcomes*, 123 *ECON. J.* F469 (2013).

40. *Id.* at F470.

41. *Id.* at F472.

42. *Id.* at F476.

43. *Id.* at F474.

44. *Id.* at F477.

45. *Id.* at F482.

46. *Id.* at F484.

47. *Id.*

48. *Id.*

their white counterparts,” including the receipt of “13% fewer responses and 18% fewer offers,” and these negative results were “similar in magnitude to those associated with a seller’s display of a wrist tattoo.”⁴⁹ Also, this study found that “black sellers do better in markets with larger black populations, suggesting that the disparities may be driven, in part, by buyers’ preference for their own-race sellers.”⁵⁰

A 2013 unpublished study of professionals at a business conference, who all made more than \$50,000 per year, involved asking them certain questions about negotiation of their salary offers as part of a job scenario.⁵¹ The participants included both men and women and whites and blacks, and all were asked under the scenario how they would respond if they believed the person they were negotiating with was prejudiced against them.⁵² The survey’s responses indicated that black professional women were less willing to negotiate salary with individuals they perceived as biased or prejudiced.⁵³

Similarly, with respect to further issues in workplace negotiations while black,⁵⁴ a study in March 2000 by Marc-David Seidel, Jeffrey Polzer, and Katherine Stewart found that black professionals negotiate less beneficial salary and benefit agreements than whites.⁵⁵ Seidel, Polzer, and Stewart noted that “[d]iscriminatory wage differences between White and minority employees have been documented in many organizations.”⁵⁶ These authors recognized several potential causes for this wage discrimination including overt organizational hostility based on race, manifested by efforts to cabin certain lower positions for minorities, as well as specifically choosing to give unequal pay for equal work.⁵⁷

Seidel and his co-authors also decided to investigate whether salary negotiations may be infected by white assumptions that initial offers could be made lower to black applicants because they had less information about whether the employee’s salary was negotiable and what the company’s reservation price might be.⁵⁸ Also, this same study raised the ques-

49. *Id.* at F490.

50. *Id.* at F491.

51. See Erika V. Hall, Evan P. Apfelbaum & Leigh Thompson, *Seeing Racism and Forecasting Worth: Perceived Prejudice Decreases Blacks’ Propensity to Negotiate* (2013) (unpublished) (results discussed at Leigh Thompson, *Negotiation Theory and Research: Gender and Diversity*, March 2013, at Slides 21–28, available at <http://bsddiversity.uchicago.edu/sites/bsddiversity.uchicago.edu/files/uploads/2013%2003%20UC%20Diversity%20onegotiate%206Leigh%20PDF.pdf>) [<https://perma.cc/7PR4-ZJLJ>] and <https://www.youtube.com/watch?v=2aHtwLEg8R4&list=UU-FLdSMY1eGwn%20pzA8e4qHw&index=1> [<https://perma.cc/5ES3-DF7U>], videotape at 52:22–1:07:35 time).

52. *Id.*

53. *Id.*

54. A more detailed analysis of workplace negotiations while black is discussed through a detailed hypothetical in Green, *Negotiating While Black*, *supra* note 27, at 7–11.

55. Marc-David L. Seidel, Jeffrey T. Polzer & Katherine J. Stewart, *Friends in High Places: The Effects of Social Networks on Discrimination in Salary Negotiations*, 45 *ADMIN. Sci. Q.* 1, 1–24 (March 2000).

56. *Id.* at 1.

57. *Id.*

58. *Id.* at 3.

tion of whether direct racial bias by the company negotiator would make him less likely to give salary increases.⁵⁹ The authors also identified a concern about whether cultural differences in negotiating norms might explain the reason for lower salaries.⁶⁰

Seidel and his co-authors tested their hypothesis that “[m]embers of racial minority groups will negotiate smaller increases to their initial salary offers than their White counterparts.”⁶¹ The authors also noted that “information about the employing organization may provide an advantage to a job candidate attempting to negotiate a higher starting salary.”⁶² More specifically, the authors described “[o]ne of the most useful sources of tailored, timely information may be a personal relationship with someone in the company, which can provide sensitive information that is not available to other sources.”⁶³ Thus, social networks play a huge role in negotiation, and black persons with lesser social contacts than their white counterparts are disadvantaged by the impact of those social networks.

As Seidel and his co-authors explained, the information that could be helpful in a salary negotiation would

include the organization’s concessions in negotiations with previous job candidates, the potential negative consequences associated with pushing harder for further concessions, the range of starting salaries granted by the organization to similarly qualified past hires, the strength of the organization’s preferences across the multiple issues being negotiated (e.g., salary, benefits), the organization’s time frame for the hiring decision, the organization’s alternative job candidates, and the organization’s norms for conducting negotiations (e.g., which individual the candidate should approach to request a higher salary).⁶⁴

A union as a social or business network or an identity caucus within a union might be able to help negotiate on behalf of black employees to help address the information imbalance.

However, black persons have unique issues that may arise in their workplace negotiations. There is an inherent concern or fear that one’s actions in negotiations to obtain certain workplace benefits will reinforce negative stereotypes. By affecting the negotiating posture of a black worker in this way, Professor Claude Steele has referred to this concern or fear that one’s actions will reinforce negative stereotypes as stereotype threat.⁶⁵ A black worker has an unusual worry about producing stereo-

59. *Id.*

60. *Id.*

61. *Id.* at 3, 10.

62. *Id.* at 4.

63. *Id.*

64. *Id.*

65. See Claude M. Steele, *A Threat in the Air, How Stereotypes Shape Intellectual Identity and Performance*, 52 *AM. PSYCHOL.* 613, 614 (1997) (referring to how the existence of negative stereotypes about certain groups may arise where “members of these groups can fear being reduced to that stereotype” to the point where “the threat of these stereotypes can be sharply felt and, in several ways, hampers their achievement”); see also Elise K.

type-confirming conversations if she pushes too hard in negotiating workplace benefits.⁶⁶ Specifically, “the existence of stereotypes diminishes an employee’s workplace bargaining power, and thus her ability to negotiate” her own work terms.⁶⁷

And black persons, more likely than any other racial group, tend to find themselves pressured to “cover” or conform to norms that deny their racial identity at work.⁶⁸ This form of covering in workplace negotiations represents a tradeoff between the lesser of two evils related to racial stereotyping. She must act against her own financial interest to lose the battle for a higher negotiated salary in order to win the war of not losing out on overall professional opportunities for being viewed as incompetent or unqualified or lazy based upon a racial stereotype.

A lot of negotiation theory derives from game theory, which “makes no claims at offering powerful prescriptive advice for negotiations.”⁶⁹ Any prescriptive approaches to negotiation have tended to counsel the negotiators to emphasize “their and their opponents’ underlying interests rather than . . . positions.”⁷⁰ Overall, one of the biggest concerns that should be addressed is the lack of information. One way for black persons to obtain additional information for fairer negotiations can be through receiving common information available to all parties, possibly through posting it on the Internet and making sure that all parties have the same information. But as the Seidel study explained, companies may be unwilling to establish any policies aimed at correcting any information discrepancies related to salary negotiations because it “would result in higher payroll expenses.”⁷¹ Another way to improve the information disparity

Kalokerinos, Courtney von Hippel & Hannes Zacher, *Is Stereotype Threat a Useful Construct for Organizational Psychology Research and Practice?*, 7 *INDUS. & ORGAN. PSYCHOL.* 382, 391–92 (2014) (describing how stereotype threat affects negotiation and how affirmative action and other equal opportunity programs aimed at responding to discriminatory prospects in the workplace can create stereotype threat among potential recipients as suggesting they need help because their abilities are insufficient, even when they have strong qualifications, as well as the possibility of stereotype threat for women faced with family-friendly policies as not committed to work).

66. See Devon W. Carbado & Mitu Gilati, *Conversations at Work*, 79 *ORE. L. REV.* 103, 109 (2000) (discussing challenges that people of color face due to workplace stereotypes that make certain conversations at work more difficult and even limit the type of work and opportunities these individuals may pursue).

67. *Id.* at 110.

68. See Kenji Yoshino & Christie Smith, *Uncovering Talent: A New Model of Inclusion*, at 5–6 (Dec. 6, 2013), <http://www2.deloitte.com/content/dam/Deloitte/us/Documents/about-deloitte/us-inclusion-uncovering-talent-paper.pdf> [<https://perma.cc/KS6M-5BPS>] (referring to data collected regarding “covering at work” and noting that “Black respondents” constituted the “cohort that reported the highest degree of covering”); see also Dorie Clark, *Why So Few Women and Minorities at the Top? Here’s the Real Reason*, *FORBES* (Sept. 3, 2013), <http://www.forbes.com/sites/dorieclark/2013/09/03/why-so-few-women-and-minorities-at-the-top-heres-the-real-reason/> [Perma link unavailable] (describing Yoshino and Smith study).

69. Robert H. Mnookin, *Strategic Barriers to Dispute Resolution: A Comparison of Bilateral and Multilateral Negotiations*, 8 *HARV. NEGOT. L. REV.* 1, 2 (2003).

70. See Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 *GEO. L.J.* 1789, 1814 (2000).

71. Seidel et al., *supra* note 55, at 22.

involves hiring more racially-diverse employees as a whole, so they can provide a social network for sharing information with same-race applicants. Unions also are able to balance the information sharing process for racially diverse groups of employees.

With technological advances, the use of the Internet may also help remove information disparities through developing social and electronic media networks that fairly disseminate information without consideration of race. As mentioned earlier, the Ayres studies have shown that being black represented a negative result in auto purchase negotiations. However, Fiona Morton, Florian Zettelmeyer, and Jorge Silva-Russo studied an online referral service, Autobyte.com, to show that the use of that Internet service helped to level the playing field in automobile car pricing for minorities.⁷² The authors noted that despite African American and Hispanic minorities probably being within the racial groups least likely to use the Internet, their findings suggest that those minorities who do use the Internet to assist with their auto purchases will benefit the most from doing so. While establishing that disadvantaged minorities pay 2.0-2.3% more for their cars than do white consumers, the authors found that this minority premium can be explained with differences in nonracial demographics and search costs between minority groups and whites.⁷³ Then, the authors asserted that when obtaining information through the Internet via a referral service like Autobyte.com where party demographics are not known, this process eliminates most of the offline minority premium.⁷⁴

As a result, unless the black person in the negotiation has as much information as a similar white counterpart, be it through social or Internet networks or some other means, and the white person negotiating with her focuses on excising any conscious and subconscious race-based stereotypes from the process, negotiating while black, even in 2017 and even with relatively well-meaning counterparts, means that unproductive obstacles still exist. To the extent that companies do not find ways to address the stereotype threat that leads racial minorities to “cover” at work to protect themselves at their own expense in salary negotiations, those companies will lose out on finding and nurturing productive black talent in their workplace.⁷⁵

72. See Fiona Scott Morton, Florian Zettelmeyer & Jorge Silva-Russo, *Consumer Information and Price Discrimination: Does the Internet Affect the Pricing of New Cars to Women and Minorities?*, NAT'L BUREAU OF ECON. RESEARCH, Working Paper No. 8668, 2001, <http://www.nber.org/papers/w8668.pdf>. [<https://perma.cc/6VJ9-ELTN>].

73. See *id.* at 2.

74. *Id.* at 3.

75. See Michelle Marks & Crystal Harold, *Who Asks and Who Receives in Salary Negotiation*, 32 J. ORG. BEHAV. 371, 372 (2011) (referring to how perceptions of fairness in job salary negotiation affect “job satisfaction and commitment” and eventually affect “performance and turnover”); see also Yoshino & Smith, *supra* note 68, at 13 (describing a loss of talent that results as covering “negatively impacts [on] individuals’ sense of self” and “their commitment to their organizations”); see also Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379, 413–14

Kenji Yoshino and Dorie Clark suggest that organizations adopt a model that focuses on following four approaches to address covering in the workplace which could also help address racial consequences in negotiations: reflect, diagnose, analyze, and initiate.⁷⁶ While acknowledging that more study of stereotype threat involving racial minorities in the workplace must be done, since most studies have focused on stereotype threat for women, Elise Kalokerinos, Courtney von Hippel, and Hannes Zacher have found that identity matching may help.⁷⁷ The authors also suggest a three-step approach in addressing stereotype threat in the workplace: 1) focus on primary prevention; 2) diagnose and treat early stages of stereotype threat before it has long-term consequences; and 3) undo the consequences from those who have been subjected to stereotype threat.⁷⁸

To capsulize these suggestions from Yoshino and Clark, Kalokerinos, von Hippel, and Zacher, the best way to prevent covering and stereotype threat from infecting workplace negotiations over key concerns such as salary, a company should seek a very diverse leadership group providing many examples of people who look like and reflect the background of the black person negotiating with that company. Then, black persons can identify with people who are successful and look and sound like them to ease any apprehension about performing in a way that feeds into negative stereotypes. Through mentoring networks, identity caucuses, or unions, black persons can meet similar role models who provide a positive reflection and offer social or business information to level the negotiating playing field. These groups help combat the application of negative stereotypes and also encourage self-affirming opportunities to show that negative stereotypes do not match the individual black person involved.

B. MEDIATING WHILE BLACK⁷⁹

Isabelle Gunning has explained the problem that sometimes arises in mediation for black persons occurs “when ‘minority’ group members in-

(2008) (describing how covering involves suppressing “signals of identification with socially salient groups.”).

76. Yoshino & Smith, *supra* note 68, at 15–16.

77. See Kalokerinos et al., *supra* note 65, at 381–82, 384, 387 (describing how stereotype threat can result in “unfavorable job attitudes, disidentification or disengagement at work, altered decision making, and lowered career aspirations”).

78. *Id.* at 395; see also Andrea Kupfer Schneider, Catherin H. Tinsley, Sandra Cheldelin & Emily T. Amanatullah, *Likeability v. Competence: The Impossible Choice Faced by Female Politicians, Attenuated by Lawyers*, 17 DUKE J. GENDER & POL’Y 363, 382 (2010) (arguing that women should fight the stereotype as a response by mentally reframing the negotiation as a group based negotiation rather than as an individual one).

79. Concerns about mediation of employment discrimination disputes for disempowered employees have been addressed by several scholars. See, e.g., Mijha Butcher, *Using Mediation to Remedy Civil Rights Violations When the Defendant Is Not an Intentional Perpetrator: The Problems of Unconscious Disparate Treatment and Unjustified Disparate Impacts*, 24 HAMLINE J. PUB. L. & POL’Y 225, 284–92 (2003) (asserting that mediation, despite its faults, is better for resolving employment discrimination disputes than litigation); Emily M. Calhoun, *Workplace Mediation: The First-Phase, Private Caucus in Individual Discrimination Disputes*, 9 HARV. NEGOT. L. REV. 187, 209–10 (2004)

teract with ‘majority’ group members in mediation where the results that minority members get are arguably less just than if they went to court.”⁸⁰ By its nature, mediation provides dignity and self-determination for black employees because they are able to articulate their concerns to the mediator and to the employer that is the source of the conflict, and the employee must agree to whatever resolution is pursued.⁸¹ Still, just having dignity and self-determination is not enough if “Black and Brown people just get a sense of dignity and self-determination” without “the deserved financial resources that support a meaningful and actual self-determination.”⁸² Essentially, the problem is that mediation involves telling a story, and the way stories get communicated may perpetrate cultural myths that operate to the disadvantage of a black employee:

(arguing that private caucus is an essential procedural element to be used in mediation of workplace discrimination claims because it allows the mediator to cultivate racial group presence involved in the dispute); Aimee Gourlay & Jenelle Soderquist, *Mediation in Employment Cases Is Too Little Too Late: An Organizational Conflict Management Perspective on Resolving Disputes*, 21 *HAMLIN L. REV.* 261, 262–65 (1998) (asserting that mediation is being employed too late for employment discrimination by being pursued after a charge of discrimination is filed or a lawsuit begins); Michael Z. Green, *Tackling Employment Discrimination with ADR: Does Mediation Offer a Shield for the Haves or Real Opportunity for the Have-Nots?*, 16 *BERKELEY J. EMP. & LAB. L.* 321, 325–26 (2005); Jonathan R. Harkavy, *Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes*, 34 *WAKE FOREST L. REV.* 135, 161–64 (1999) (discussing disadvantages of mediating sexual harassment employment claims); Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 *U. ILL. L. REV.* 583, 604–08 (1999) (discussing power imbalance concerns in mediating employment discrimination disputes based on Title VII). Other scholars have raised concerns about mediation for minorities and those lacking power beyond just employment discrimination matters. See Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 *J. DISP. RESOL.* 55, 67–80 (1995) (reviewing concerns with bias and prejudice in mediation); Carol Izumi, *Implicit Bias and the Illusion of Mediator Impartiality*, 34 *WASH. U. J.L. & POL’Y* 71, 109–16 (2010) (describing biases that may affect mediation with Asian Americans); Mabry, *supra* note 29, at 427–29, 457–59 (referring to dealing with prejudice from informality in family mediation); Carrie Menkel-Meadow, *Dismantling the Master’s House: Essays in Memory of Trina Grillo: What Trina Taught Me: Reflections on Mediation, Inequality, Teaching and Life*, 81 *MINN. L. REV.* 1413, 1423 (1997) (describing how mediation must appreciate the differences of the participants based upon race and issues for others); Sharon Press, *Court-Connected Mediation and Minorities: A Report Card*, 39 *CAP. U. L. REV.* 819, 825–34 (2011) (referring to most of the critiques of mediation for minorities as follows: informality of the process; minority performance in mediation; the effect of the mediator on minorities; private versus public values).

80. See Isabelle R. Gunning, *Know Justice, Know Peace: Further Reflections on Justice, Equality, and Impartiality in Settlement Oriented and Transformative Mediations*, 5 *CARDOZO J. CONFLICT RESOL.* 87, 88–89 (2004) (emphasis omitted).

81. *Id.* at 89; see also Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 *U. MIAMI L. REV.* 873, 881 (2002) (describing how the Model Standards for Conduct of Mediators “suggest that mediation is based upon the principle of self-determination”); Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 *NOTRE DAME L. REV.* 775, 776 (1999) (finding self-determination is a key value in mediation); Donald T. Weckstein, *In Praise of Party Empowerment—and of Mediator Activism*, 33 *WILLAMETTE L. REV.* 501, 503–04 (1997) (discussing mediator’s role in providing information to foster self-determination).

82. Gunning, *supra* note 80, at 89–90 (suggesting mediators take on an activist approach to rectify the problems of cultural myths).

“Out” groups, women and minorities tend to have fewer positive cultural myths within which to nest their stories. Consequently, some conscious effort to examine the shallowness of common myths and to create new moral codes must be made, or disadvantaged groups will remain disadvantaged in the mediation process. Thus, when mediators do nothing or “remain neutral,” the outcome will tend to conform with the dominant and familiar cultural myths.⁸³

In a recent article, Carol Izumi explained the concerns that a mediator may have in attempting to be impartial despite the presence of implicit bias based upon Asian American stereotypes, such as assuming “that they are not the targets of racial discrimination.”⁸⁴ Also, the “stereotype that Asian Americans are deferential and unassertive hurts their potential to advance in various professional fields.”⁸⁵ Relying on the work of Sarah Burns,⁸⁶ Izumi has suggested that mediators carefully consider the impact of metaphors and figures of speech to address bias in mediation.⁸⁷ For a fair mediation process regarding claims based on race, the parties should consider these factors: “selection of the third-party neutral, procedural rules, remedial authority, allocation of costs,” and consideration of power differentials.⁸⁸ Racial minorities should also have some right to reject the selection of a mediator because of concerns of the employee or the employee’s attorney.⁸⁹

Because mediation is a process that is driven by self-determination, all aspects of mediation should focus on party empowerment, not mediator or employer empowerment, especially for the party with the least bargaining power: the employee.⁹⁰ Also, mediators should be selected based upon their ability to facilitate negotiation of the dispute at issue. But those mediators should also have the experience and cultural competence to help facilitate communications in a race discrimination dispute involving a black employee.⁹¹ This does not mean that the mediator has to be of

83. *Id.* at 93.

84. Izumi, *supra* note 79, at 113.

85. *Id.*

86. See Sarah E. Burns, *Thinking About Fairness & Achieving Balance in Mediation*, 35 *FORDHAM URB. L.J.* 39, 54 (2008).

87. Izumi, *supra* note 79, at 126–127.

88. Green, *supra* note 79, at 353–54 (citing Dennis Nolan, *Labor and Employment Arbitration: What’s Justice Got to Do With It?*, 53 *DISP. RESOL. J.*, 40, 46 (1998)).

89. *Id.* at 355.

90. *Id.* at 358–59.

91. See John Barkai, *Cultural Dimension Interests, the Dance of Negotiation, and Weather Forecasting: A Perspective on Cross-Cultural Negotiation and Dispute Resolution*, 8 *PEPP. DISP. RESOL. L. J.* 403, 448 (2008) (referring to how failure to allow for and understand cultural dimensions in ADR “leads to frustration and resentment” where one party may not be interested in continuing the relationship and will not follow its current terms); John Barkai, *What’s a Cross-Cultural Mediator To Do? A Low-Context Solution for a High-Context Problem*, 10 *CARDOZO J. CONFLICT RESOL.* 43, 43–44 (2008) (discussing the role of a mediator in cross-cultural mediation as the ability to “understand and adapt to the cross-cultural differences of the parties and use different approaches”); Pat K. Chew, *The Pervasiveness of Culture in Conflict*, 54 *J. LEG. EDUC.* 60, 66 (2004) (suggesting that parties understand their own cultural dynamics in a conflict and the cultural profile of their opponents, as well as the cultural profile of the arbitrator or mediator involved, to be in position

the same race as the person filing the discrimination claim.⁹² The process for selecting the mediator just needs to be one where a black employee has a fair chance to select someone who may look like and understand the experiences a black employee may face in dealing with workplace discrimination.⁹³ Specifically, a mediation process that provides fairness for a race discrimination claimant should have the following components:

- 1) encourage, expect and provide mechanisms for employees to obtain legal representation;
- 2) provide a critical mass of mediators of color and women as a qualified cadre of mediators that employees of color and female employees can realistically select to mediate their employment discrimination disputes;
- 3) allow employees some role in the design of procedures that will constitute the framework for conducting the mediation;
- 4) require that mediators determine the goals and interests of the parties in each individual dispute, and as long as those goals do not present any ethical concerns, the mediator should actively help the parties resolve their conflict in a way that matches their goals;
- and 5) allow employees to seek additional forms of dispute resolution relief, including the right to go to court if mediation or other informal methods do not work.⁹⁴

C. ARBITRATING WHILE BLACK⁹⁵

One of the major concerns for employees who bring race discrimination claims in arbitration is the fairness of the arbitration system. As I

to better resolve the conflict); *see also* Lela Love & Ellen Waldman, *The Hopes and Fears of All the Years: 30 Years Behind and the Road Ahead for the Widespread Use of Mediation*, 31 OHIO ST. J. ON DISP. RESOL. 123, 146 (2016) (highlighting the development of the International Mediation Institute and one of its projects to focus on the importance of training and certification of mediators on “inter-cultural competency”); Cynthia A. Savage, *Culture and Mediation: A Red Herring*, 5 AM. U. GENDER & L. 269, 274 (1996) (“Defining cultural identity as being the same as ethnicity misses certain potential similarities in culture,” and the problem of “conflating ‘culture’ with ethnicity is that it may perpetuate harmful and simplistic stereotypes.”); Wallace Warfield, *Building Consensus for Racial Harmony in American Cities: Case Model Approach*, 1996 J. DISP. RESOL. 151, 157–58 (1996) (noting that as opposed to a typical “industrial labor dispute,” mediators in a “racial conflict” can “bring their own cultural baggage . . . influencing not only what takes place in negotiations, but shaping the outcomes as well,” and they should decide whether their intervention in the dispute “will help or hinder the progress of racial understanding”).

92. *See* Gunning, *supra* note 79, at 89 (“Matching parties and mediators based upon gender or race or sexual orientation does not assure that those individuals who happen to be members of the same identity groups will have the same perspectives”); *see also* Izumi, *supra* note 79, at 136–39 (criticizing race matching for mediation but suggesting it might be useful if there is also a co-mediator); Savage, *supra* note 91, at 274 (arguing that because culture is not limited by ethnicity, the mediator must not rely on stereotypes that do not focus on the real identity of the participant, as mediators and participants with the same ethnicity may not have the same cultural identity).

93. Gunning, *supra* note 79, at 89 (suggesting that having a team of diverse co-mediators can “provide symbolic and practical advantages to a mediation” and may help participants by giving them “the perception . . . their chances of being treated fairly increased by having at least one mediator be from their own identity group” and “conveying to the parties that there is at least an opportunity or possibility that one’s circumstances and experiences can be understood”).

94. Green, *supra* note 79, at 359.

95. Several articles have addressed concerns about individuals fairly participating in arbitration based on race. *See, e.g.*, Green, *supra* note 6, at 369; Michael Z. Green, *An*

have argued previously, “when arbitration agreements coerce black employees into a private dispute resolution system where employers may apply racial stereotypes without little regulation, it raises concerns about the integrity of that system.”⁹⁶ Some empirical research has found that black workers alleging racial harassment do not do well in the courts, and they fare even worse in arbitration.⁹⁷ Further, “the lack of diversity in the arbitrator pool may cause black employees not to pursue their discrimination claims out of a feeling that it would be futile in such a questionable system.”⁹⁸

In 2011, Janice Tudy-Jackson found that there is an “underutilization of ADR by African-American communities and the underrepresentation of African Americans as ADR providers.”⁹⁹ Tudy-Jackson reviewed a 2005–2006 qualitative study of “barriers experienced by African-Americans, Latino-Americans, and Asian-Americans in the New York City metropolitan area as it pertains to entering, remaining, and advancing in the ADR field.”¹⁰⁰ Those barriers included obstacles that apply to anyone seeking entry to or advancement within the ADR profession:

(1) a lack of clear entry points or career paths for the ADR profession; (2) ambiguity about ADR credentials; (3) a lack of mentors and role models from the underrepresented racial and ethnic groups; (4) a heavy reliance on volunteerism, particularly for mediators; (5) a “[l]ack of public knowledge about ADR’ generally; and (6) the domination of the ADR field by the legal profession.¹⁰¹

That study also identified specific barriers to entry for African-Americans, Latino-Americans, and Asian-Americans, collectively, to include:

(1) the ADR profession is a gated community where it is very difficult to gain information or experience; (2) there is an “‘old boys’ network” in the ADR field; (3) mediation still relies heavily on volunteers who receive little or no compensation, which reminds African-America[n]s of slavery and exploitation; (4) African-American, Latino-American, and Asian-American families and communities

Essay Challenging the Racially Biased Selection of Arbitrators for Employment Discrimination Claims, 4 J. AM. ARB. 1, 3–4 (2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=939452 [<https://perma.cc/55QV-GZRX>]; Sarah Rudolph Cole & E. Gary Spitko, *Arbitration and the Batson Principle*, 38 GA. L. REV. 1145, 1149 (2004); E. Gary Spitko, *Gone but Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275 (1999).

96. See Green, *supra* note 95, at 4.

97. See Pat K. Chew, *Arbitral and Judicial Proceedings: Indistinguishable Justice or Justice Denied?*, 46 WAKE FOREST L. REV. 185, 207–08 (2011) (finding black employees have a lower success rate in arbitration of 5.3% versus a success rate in courts of 22%).

98. See Green, *supra* note 95, at 4.

99. See Janice Tudy-Jackson, “Non-Traditional” Approaches to ADR Processes That Engage African-American Communities and African-American ADR Professionals, 39 CAP. U. L. REV. 921, 930 (2011).

100. *Id.* at 934 (citing Maria R. Volpe et al., *Barriers to Participation: Challenges Faced by Members of Underrepresented Racial and Ethnic Groups in Entering, Remaining, and Advancing in the ADR Field*, 35 FORDHAM URB. L.J. 119, 122–24 (2008)).

101. *Id.* at 935.

place high value on job security; and (5) client and institutional biases still exist.¹⁰²

In Tudy-Jackson's assessment of the study's results, she noted that one reason for the underutilization of ADR may be because African-Americans may prefer collectivist or group values more than individualist values.¹⁰³

To address this concern about the lack of diversity in the arbitrator pool, I asserted in 2005 that black employees should be able to challenge "race-based arbitrator selections as . . . a purported violation of the Civil Rights Act of 1866, codified at 42 U.S.C. Section 1981 (Section 1981)."¹⁰⁴ This Section 1981 claim, based upon racial discrimination in the making and enforcement of a contract to arbitrate a dispute, would balance the fact that "the process to select the arbitrator who will [make] the Title VII decision for black employees claiming race discrimination depends primarily upon the unregulated and private whims of the parties, especially the party with the most bargaining power, the employer."¹⁰⁵ Regardless, "if the arbitrator selection process denies black employees the right to have blacks as part of the pool of individuals who will decide the employment discrimination case as arbitrators, some mechanism must be made available to address these concerns."¹⁰⁶

The court challenges made to the diversity of the arbitrator pool have "fallen on deaf ears,"¹⁰⁷ and the pool of potential decision-makers offered by national arbitral organizations remains largely homogeneous. As an example, plaintiffs in two cases unsuccessfully attempted to sue the American Arbitration Association for failing to provide a diverse panel of arbitrators to hear a dispute.¹⁰⁸ The National Academy of Arbitrators (NAA) is a non-profit organization of arbitrators—one of the most highly regarded and experienced groups of arbitrators in the labor and employment industry. To be an NAA member, an arbitrator must have "a minimum of 60 written decisions in a time period not to exceed six years."¹⁰⁹ Several years ago in 2005, I conducted an informal survey by looking at the NAA member list on its website.¹¹⁰ In that survey, which included talking to then-current members of the NAA, I found from the website listing of over 600 members that only twelve members were black—about

102. *Id.* (citing Volpe, *supra* note 100, at 139–42).

103. *Id.* at 940–41.

104. Green, *supra* note 95, at 4.

105. *Id.* at 13.

106. *Id.* at 21.

107. *Id.* at 25.

108. *See, e.g.,* Smith v. Am. Arbitration Ass'n, Inc., 233 F.3d 502 (7th Cir. 2000); Olson v. Am. Arbitration Ass'n, 876 F. Supp. 850 (N.D. Tex. 1995), *aff'd* 71 F.3d 877 (5th Cir. 1995).

109. NAA Membership Guidelines, THE NATIONAL ACADEMY OF ARBITRATORS, http://naarb.org/member_guidelines.asp [<https://perma.cc/S2UD-VXQ7>].

110. *See* Green, *supra* note 95, at 31–32. *See* Membership List, THE NATIONAL ACADEMY OF ARBITRATORS, http://naarb.org/member_list.asp [<https://perma.cc/WK9Z-UQQZ>].

2%.¹¹¹ Twelve years later in February 2017, I repeated that survey. Now with a membership listing closer to 630 members, I found there were seventeen black members—about 2.7%.¹¹² Out of the seventeen black arbitrators who are members of the NAA, only three were women, and one of the three women became a member within the last couple of years.

Unfortunately, the sad reality is that in disputes involving matters of race discrimination brought by black employees, these employees appear to have little chance of obtaining an arbitrator who will look like them or have any experience with being a black employee subjected to workplace discrimination.¹¹³ Merely being of the same race as the employee participant is not a guarantee of fair treatment, as many arbitrators of different races can have empathy for a black employee's situation and decide the dispute fairly.¹¹⁴ However, the failure of a major reputable organization or a key service provider to provide a critical mass of black arbitrators casts doubt about the overall integrity of the system.¹¹⁵ While the small percentage of black judges in the court system might suggest that the lack of arbitrator diversity does not represent a real problem and may even be "the lesser of two evils" when compared with judicial diversity,¹¹⁶ the court system is part of the public, formal process that Delgado argued was more trustworthy than an informal ADR process back in 1985.¹¹⁷ As a result, any ADR system, especially one involving arbitrators who will decide the outcome of racial discrimination disputes, must have a sufficient cadre of black arbitrators on its roster to validate the integrity of

111. Green, *supra* note 95, at 31–32. The website only lists names and does not have demographic or racial information; however, I determined the number of black arbitrators from personal knowledge and confirmed with actual members of the NAA. *See id.* at 31 n.131.

112. In replicating the same process from 2005 in 2017, I am not identifying the seventeen black arbitrators for their own privacy.

113. *See* William B. Gould IV, *Kissing Cousins? The Federal Arbitration Act and Modern Labor Arbitration*, 55 EMORY L.J. 609, 658 (2006) ("Yet the fact is that an extremely small percentage of arbitrators are blacks, other minorities, or women. The same miniscule representation is reflected in the membership rolls of the blue ribbon organization (the National Academy of Arbitrators) and it is reflected on the panels established by both the AAA and JAMS.").

114. The real importance is the symbolism "where the disputant believes that an appreciation of and a respect for his minority culture" has become a part of the arbitration process. *See* Cole & Spitko, *supra* note 95, at 1216; Green, *supra* note 95, at 39 n.155, 50 (arguing that racial matching of the arbitrator with the participants feeds into stereotypes of blacks as a community "monolithic in its configuration, views, or values" and that what is more important is the "appearance of a fair system . . . demonstrated by the value of knowing that qualified people of color will possibly be involved in the final decision and its related processes"); *see also* Gunning, *supra* note 79, at 89 ("Diverse mediation teams may well be able to provide symbolic and practical advantages to a mediation"); Spitko, *supra* note 95, at 295–97 (referring to how minorities can be empowered by arbitration if they have the opportunity to pick their own arbitrator who can understand their unique needs).

115. *See* Gould, *supra* note 113, at 655 (describing that the selection of arbitrators may be an even more unsatisfactory process than selection of judges).

116. *See* Green, *supra* note 95, at 33 & n.135 (recognizing that the "federal court system does not provide a panacea-filled critical mass of black judges either").

117. *See* Delgado et al., *supra* note 1, at 1388.

that system.¹¹⁸ As Professor Gould has explained, the message sent by not having a diverse pool of arbitrators can be quite detrimental and hostile:

A diverse pool of arbitrators—and the same holds true for the judiciary as well—does not ensure adjudication which is sensitive to these concerns, but direct life experience with discrimination cannot be but helpful in adjudication in most instances. An all or nearly-all white and male body of arbitrators sends the same message to the parties which is comparable to what all-white juries have done.¹¹⁹

Consequently, employers have to make sure that a diverse pool of arbitrators is available so that the right message about the fairness of the dispute resolution system is conveyed to the black employees expected to use the system when they bring racial discrimination claims.

III. MERGING MEDIATION AND ARBITRATION WHILE BLACK: THE SLIGHTLY-MODIFIED *PYETT* PROTOCOL ADR IN THE WORKPLACE SOLUTION

In assessing the value of a comprehensive ADR system to resolve workplace disputes, one can learn a great deal from a recent agreement between a union and an employer to resolve their disputes through mediation and arbitration after a recent Supreme Court decision affected their prior dispute resolution agreements. That new agreement, with a few slight modifications, represents an excellent example of a convergence of all the stakeholders' interests in developing an ADR system that can also address race discrimination issues in the workplace in a fair manner.

A. NEGOTIATION: UNIONS LEVEL THE PLAYING FIELD VIA THE *PYETT* PROTOCOL

According to the Supreme Court's April 1, 2009, decision in *14 Penn Plaza v. Pyett*,¹²⁰ a collective bargaining agreement (CBA) between an employer and a union can include a provision requiring arbitration of an employee's statutory discrimination claim that acts as a clear and unmistakable waiver of the employee's right to pursue that claim in court.¹²¹ The specific CBA in *Pyett* provided unusually clear language in a nondis-

118. Gould, *supra* note 113, at 656, 658 (finding “[t]he roster of available mediators and arbitrators should be established on a non-discriminatory basis, diverse by gender, ethnicity, background, experience, etc. to satisfy the parties that their interests and objectives will be respected and fully considered” and arguing that the diversity of the arbitrators is part of an overall “competence issue”).

119. *Id.*

120. 556 U.S. 247 (2009).

121. *Id.* at 260, 274 (“there is no legal basis for the Court to strike down the arbitration clause in this CBA, which was freely negotiated . . . and which clearly and unmistakably requires respondents to arbitrate the age-discrimination claims at issue in this appeal”; “[w]e hold that a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law”).

crimination clause by stating that arbitration was the “sole and exclusive remedy” and that the arbitrator “shall apply appropriate law” in resolving explicit statutory discrimination claims:

30. NO DISCRIMINATION. There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, . . . All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.¹²²

The *Pyett* case left one question unanswered: whether the type of clear and unmistakable waiver in that case would preclude a discrimination claim from being brought in court when the union refused to pursue the claim in arbitration. The Court called it “speculation” to resolve this issue because of factual disputes that had not been fully briefed or covered in earlier proceedings.¹²³ In his dissent, Justice David Souter asserted the *Pyett* decision may have no impact due to its failure to address this issue: “On one level, the majority opinion may have little effect, for it explicitly reserves the question whether a CBA’s waiver of a judicial forum is enforceable when the union controls access to and presentation of employees’ claims in arbitration . . . which is usually the case. . . .”¹²⁴

One might wonder what the implications from *Pyett* have been as of April 1, 2017, eight years after the decision. A review of Westlaw’s Key Cite system as of that date identified forty-five cases establishing a negative treatment of *Pyett*.¹²⁵ Many of those cases reject the finding of a clear and unmistakable waiver via *Pyett* when the CBA arbitration provision

122. *Id.* at 252. I consider this language “unusually clear” because it literally refers to arbitration as the “sole and exclusive remedy” and requires that the arbitrator “shall apply appropriate law” while stating explicit statutes to be covered, which, in my view, is unusual language for a union and employer to agree to with respect to a nondiscrimination clause in a collective bargaining agreement. Such unusual language supported the intent of the parties to waive court access to remedy statutory claims. *See id.*

123. *Id.* at 273–274 (quoting *Green Tree Fin. Corp.—Ala. v. Randolph*, 531 U.S. 79, 90 (2000)) (“Respondents also argue that the CBA operates as a substantive waiver of their [statutory] rights because it not only precludes a federal lawsuit, but also allows the Union to block arbitration of these claims. . . . [W]e are not positioned to resolve in the first instance whether the CBA allows the Union to prevent respondents from ‘effectively vindicating’ their ‘federal statutory rights in the arbitral forum, . . . [because] [r]esolution of this question at this juncture would be particularly inappropriate in light of our hesitation to invalidate arbitration agreements on the basis of speculation.”).

124. *Id.* at 285 (Souter, J., dissenting) (internal citation omitted) (quoting *McDonald v. City of West Branch*, 466 U.S. 284, 291 (1984)).

125. Archive of Negative Treatment of *14 Penn Plaza v. Pyett*, WESTLAW, <https://1.next.westlaw.com/Search/Home.html> (search for “556 U.S. 247”; then open “Negative Treatment” tab) (last visited Sept. 19, 2017).

failed to specifically list the statutes at issue.¹²⁶ In interpreting *Pyett*, one federal district court even noted “that an agreement to arbitrate statutory antidiscrimination claims [must] be ‘explicitly stated’” and found no existence of a clear and unmistakable waiver, as the CBA did not mention the discrimination statute asserted.¹²⁷

Also, in *Mathews v. Denver Newspaper Agency, LLP*,¹²⁸ the United States Court of Appeals for the Tenth Circuit found that the arbitration provision did not preclude a statutory claim from being pursued in court because the language covered only those disputes submitted to arbitration.¹²⁹ Specifically, that provision stated that the arbitrator was “authorized only to resolve the dispute submitted to him or her.”¹³⁰ Because the dispute submitted to the arbitrator was only a contractual dispute, not a statutory dispute, the employee was still able to pursue his statutory discrimination claim in court after an arbitrator issued a decision with respect to the contractual claim.¹³¹

Finally, very few cases involve the same type of language that was present in the CBA from *Pyett*, requiring specific references to statutory claims and stating that the grievance and arbitration process would be the sole and exclusive remedy for violations. Some of the initial New York federal district court cases after *Pyett* addressed the same language and allowed the employee to pursue a claim in court if the union did not pursue the matter in arbitration.¹³² And similar to *Pyett*, those cases were brought by individual employees seeking to get into court to bring their statutory discrimination claims against their employers.¹³³ The union that was a party to the CBA containing the provisions discussed in *Pyett*, Service Employees International Union (SEIU) Local 32BJ, was not a party to these cases.¹³⁴

On February 17, 2010, SEIU Local 32BJ and the Realty Advisory Board on Labor Relations (RAB), the employer association that represents several employers, including the one in *Pyett*, entered into a Post-*Pyett* Protocol agreement (the Protocol)¹³⁵ for handling statutory employment discrimination disputes. That Protocol was agreed to in light of

126. See, e.g., *Lemieux v. City of Holyoke*, 740 F. Supp. 2d 246, 259 (D. Mass. 2010); *Manuele v. City of Springfield*, 718 F. Supp. 2d 939, 947 (N.D. Ill. 2010).

127. *Harrell v. Kellogg Co.*, 892 F. Supp. 2d 716, 720, 724 (E.D. Pa. 2012).

128. 649 F.3d 1199 (10th Cir. 2011).

129. *Id.* at 1207.

130. *Id.*

131. *Id.*

132. See, e.g., *Morris v. Temco Serv. Indus., Inc.*, No. 09 Civ. 6194(WHP), 2010 WL 3291810, at *6 (S.D.N.Y. Aug. 12, 2010); *Borrero v. Ruppert Hous. Co., Inc.*, No. 08 CV 5869(HB), 2009 WL 1748060, at *2 (S.D.N.Y. June 19, 2009); *Kravar v. Triangle Serv., Inc.*, No. 1:06-CV-07985-RJH, 2009 WL 1342595, at *3 (S.D.N.Y. May 19, 2009).

133. See *Morris*, 2010 WL 3291810, at *6; *Borrero*, 2009 WL 1748060, at *2; *Kravar*, 2009 WL 1392595, at *3.

134. See *Morris*, 2010 WL 3291810, at *6; *Borrero*, 2009 WL 1748060, at *2; *Kravar*, 2009 WL 1392595, at *3.

135. See Terry Meginniss & Paul Salvatore, *Response to an Unresolved Issue from Pyett: The NYC Real Estate Industry Protocol*, in THE CHALLENGE FOR COLLECTIVE BARGAINING: PROCEEDINGS OF THE NEW YORK UNIVERSITY 65TH ANNUAL CONFERENCE ON LA-

the parties' differing views on the meaning of the *Pyett* decision.¹³⁶ The parties initially implemented the Protocol as a "pilot program" and after recognizing its success, they incorporated its terms into their master agreements at the end of 2011.¹³⁷

As part of the Protocol, the parties agreed to disagree about the consequences if SEIU Local 32BJ chooses not to pursue a statutory claim in arbitration. The RAB asserts in the Protocol that all claims, including those statutory claims not pursued by SEIU Local 32BJ, are subject to final resolution through the arbitration procedures provided in the CBA.¹³⁸ SEIU Local 32BJ disagrees and asserts that the CBA does not offer provisions for the arbitration of disputes when SEIU Local 32BJ does not pursue the dispute, and in those situations, including disputes involving statutory claims, individual employees may pursue a court resolution.¹³⁹ The Protocol provides that either party can seek a resolution of this reserved question in arbitration by giving the other party thirty days' notice.¹⁴⁰ Neither party can seek court resolution of this reserved question.¹⁴¹ The parties also agree that the terms of the Protocol do not advance either party's contention as to how the reserved question should be resolved.¹⁴² The Protocol begins with a detailed mediation process for any claim that an employer violated the CBA's discrimination clause.¹⁴³ Then, the Protocol provides an arbitration program for individual employees who want to pursue claims that SEIU Local 32BJ does not pursue.¹⁴⁴

B. MEDIATION: THE FIRST STEP IN THE PYETT PROTOCOL

The Protocol's first step, the mediation process, is a mandatory step for all claims of discrimination—statutory or contractual—under the parties' CBA, whether brought by Local 32BJ or an individual employee.¹⁴⁵ The Protocol established a panel of mediators selected by the RAB and Local 32BJ from which the parties may choose.¹⁴⁶ All costs of the mediation are shared equally by the RAB and Local 32BJ.¹⁴⁷ The mediators are given the power to require production of evidence and position statements, as well as confer separately with each party in order to vigorously pursue

BOR ch. 11, 11-1, app. at 11-7–11-10, 11-7 n.22 (Michael Z. Green ed., LexisNexis 2013) (providing the specific details of Post-*Pyett* Protocol).

136. *Id.* at 11-7 n.22 (describing Post-*Pyett* Protocol, originally agreed to on Feb. 17, 2010, and incorporated into all subsequent CBAs).

137. *Id.* at 11-4 n.15.

138. *Id.* at 11-7

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 11-8.

143. *Id.*

144. *Id.* at 11-9.

145. *Id.* at 11-8.

146. *Id.* at 11-8, 11-9.

147. *Id.* at 11-9.

settlement.¹⁴⁸ A pre-mediation conference must be scheduled within thirty days of the mediator's appointment.¹⁴⁹ At the conclusion of the mediation, the mediator may make a settlement proposal to the parties.¹⁵⁰ The mediator also has authority to order sanctions if the mediator believes one or both of the parties failed to comply with any directives in good faith.¹⁵¹

The parties' experience with the Protocol over the last few years is such that the majority of claims are resolved in mediation.¹⁵² The parties have asserted that "the Protocol's mediation is a forum where individual plaintiffs have a chance to tell their stories to an interested neutral party—often, the opportunity to be heard is something the individual plaintiff greatly values."¹⁵³ Also, the parties have argued that their inability to resolve the reserved question is useful to the mediation effort because "neither party knows for certain whether the case will be litigated in a judicial forum or in arbitration, and to the extent that this is an issue of significance to the parties, the very uncertainty about the outcome should provide a further incentive to settle the merits in mediation."¹⁵⁴

C. ARBITRATION: THE FINAL STEP IN THE PYETT PROTOCOL

The Protocol also provides for assistance to individual employees and employers seeking to arbitrate claims where mediation has failed and SEIU Local 32BJ has declined to seek arbitration of the claim.¹⁵⁵ Despite the parties' satisfaction with the success of the mediation provisions of the Protocol, the RAB and SEIU Local 32BJ have "recognize[d] that some of [the claims asserting an employer has violated the discrimination clause in the CBA] will be litigated in some forum, and that litigation may raise procedural issues that are of concern" to the parties.¹⁵⁶ The parties expressed concerns about situations where an individual employee demands relief that is inconsistent with the CBA or where an employee advances a construction of the CBA that neither SEIU Local 32BJ nor the RAB believe is correct. As a result, the Protocol provides that "[i]f

148. *Id.* at 11-8 to 11-9. The Mediation Panel is distinct from the Contract Arbitrator Panel. *Id.* at 11-8.

149. *Id.*

150. *Id.* at 11-9.

151. *Id.*

152. *Id.* at 11-5.

153. *Id.* at 11-5, 11-6. See also Donna Shetowsky & Jeanne Brett, *Disputants' Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study*, 41 CONN. L. REV. 63, 72-73 (2008) (noting that "[a]s empirical research has demonstrated, disputants are more likely to comply voluntarily with dispute resolution outcomes when those outcomes are produced by procedures that they perceive as fair" and also when participants "feel respected and treated with dignity"); Nancy Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 187 (2002) (highlighting how "process elements—voice, consideration, even-handedness and dignity"—are important to the participants in mediation).

154. Meginniss & Salvatore, *supra* note 135, at 11-6.

155. *Id.* at 11-9, 11-10.

156. *Id.* at 11-6.

mediation does not resolve the matter, the individual employee or employees, regardless of whether they are represented by counsel, may pursue their claims as they see fit in arbitration."¹⁵⁷

Under this dispute resolution program, SEIU Local 32BJ and RAB have "elicited from the American Arbitration Association a list of arbitrators who (1) are attorneys, and (2) are qualified to decide employment discrimination cases" to handle disputes that SEIU Local 32BJ declines to pursue in arbitration.¹⁵⁸ If an employee and an RAB-member employer seek arbitration of an employment discrimination claim, the list of arbitrators will be provided to the individual employee and the RAB-member employer.¹⁵⁹ The process for selecting the arbitrator and paying the arbitrator's costs shall be decided between the employee and the RAB employer.¹⁶⁰ Any arbitration conducted shall proceed according to the American Arbitration Association's National Rules for Employment Disputes.¹⁶¹

The individual employee hearings held pursuant to this dispute resolution program may be held at the Office of Contract Arbitration used for disputes under the CBA.¹⁶² However, it is understood that use of the Office of Contract Arbitration under this Protocol is not a forum provided by the CBA.¹⁶³ Also, pursuant to the Protocol, SEIU Local 32BJ will not be a party to any individual employee arbitration pursued under the Protocol, and "the arbitrator shall not have authority to award relief that would require amendment of the CBA or other agreement(s) between [SEIU Local 32BJ] and the RAB or conflict with any provision of any CBAs or other such agreement(s)."¹⁶⁴ Finally, the Protocol concludes by stating that "[a]ny mediation and/or arbitration outcome shall have no precedential value with respect to the interpretation of the CBAs or other agreement(s) between [SEIU Local 32BJ] and the RAB."¹⁶⁵

D. IMPLICATIONS AND ANALYSIS OF THE PYETT PROTOCOL

There are several issues that would be of concern if parties decided they wanted to follow the Protocol's terms in developing a dispute resolution system for handling employment discrimination claims brought by employees.

First, the Protocol's adoption of a broad mediation process to help its diverse employees resolve statutory discrimination claims is a wonderful response by the parties to *Pyett*. Professor Ann Hodges suggested many years ago that there was a major opportunity for unions to embrace social

157. *Id.* at 11-5.

158. *Id.* at 11-9.

159. *Id.*

160. *Id.*

161. *Id.* at 11-9 to 11-10.

162. *Id.* at 11-10.

163. *Id.*

164. *Id.*

165. *Id.*

justice in the workplace through negotiating an agreement to mediate statutory employment discrimination claims.¹⁶⁶ Unions benefit from these arrangements because the union can create more solidarity within its members and strengthen overall support for the union.¹⁶⁷ Employees benefit from receiving broader and more creative options to resolve workplace disputes without having to pursue difficult litigation options and endure poor morale in the workplace.¹⁶⁸ Employers have started embracing mediation on a broader level as a workplace dispute resolution tool and the better morale and prevention of litigation also benefits employers, especially in a union environment.¹⁶⁹

Second, I am admittedly already on the record as supporting the benefits of an agreement to have a union pursue statutory discrimination claims on behalf of employees in a labor arbitration process.¹⁷⁰ As a result, I am mostly supportive of the Protocol that the parties from the *Pyett* case have implemented with respect to providing for arbitration of discrimination claims, especially when SEIU Local 32BJ processes those claims and represents the worker alleging workplace discrimination.¹⁷¹ As SEIU Local 32BJ asserted in its brief in the *Pyett* case, the value of providing diverse arbitrators and fair dispute resolution processes for women and people of color represents a significant motivation for establishing SEIU Local 32BJ's right under the CBA to pursue statutory claims on behalf of employees through labor arbitration:

This agreement was based on our joint commitment to diversify the panel of arbitrators to better reflect the Union's membership, to develop procedures appropriate for such cases, and to evaluate our experience in connection with these claims at the conclusion of this agreement and in light of any subsequent court decisions.¹⁷²

166. Ann Hodges, *Mediation and the Transformation of American Labor Unions*, 69 MO. L. REV. 365, 385-404 (2004) (describing the benefits for employees, unions, and employers to mediate employment discrimination claims).

167. *Id.* at 387-91.

168. *Id.* at 391-96.

169. *Id.* at 396-400.

170. Green, *supra* note 6, at 403-04 n.198.

171. See Michael Z. Green, *A Post-Pyett Collective Bargaining Agreement to Arbitrate Statutory Discrimination Claims: What Is It Good For—Could It Be Absolutely Nothing or Really Something?*, in THE CHALLENGE FOR COLLECTIVE BARGAINING: PROCEEDINGS OF THE NEW YORK UNIVERSITY 65TH ANNUAL CONFERENCE ON LABOR ch. 12, 12-1, 12-10-12-11 (M. Green Ed. LexisNexis 2013) (“Accordingly, any agreement (including the Post-Pyett Protocol) that continues to allow unions to pursue statutory discrimination claims on behalf of employees as a process to value the increasingly diverse workforce has merit and should be applauded. Furthermore, it is laudatory that the parties have found that involving mediation as a requirement had led to satisfactory results from all those involved.”).

172. Brief of the Serv. Emps. Int'l Union, Local 32BJ as Amici Curiae in Support of Respondents, 14 Penn Plaza v. Pyett, 556 U.S. 247 (2009) (No. 07-581), 2008 WL 2724312, App. B, at *4a (quoting Letter from Michael P. Fishman, Trustee, SEIU Local 32BJ, to James Berg, President, Realty Advisory Board (April 19, 2000)); see also Larry Engelstein & Andrew Strom, *Now That the Court Has Spoken, What's Next?*, N.Y.U. LAB. & EMP. L. NEWS, Fall 2009, at 5, 5-6 (offering comments from SEIU Local 32BJ representatives asserting that its agreement with the Realty Advisory Board in *Pyett* does not act as a clear and unmistakable waiver, that court decisions since *Pyett* show that employees may still go

This result appears to be quite favorable for bargaining unit employees, especially given the difficulties individual employees face in resolving their discrimination claims in the courts. Unfortunately, it is not clear why SEIU Local 32BJ agreed to the development of the individual employee arbitration process in the Protocol rather than just staying with the status quo after the *Pyett* decision and continuing to pursue statutory claims in arbitration when it desired. It still could have asserted that employees could pursue relief in court when SEIU Local 32BJ declined to process the claim. As a result of the Protocol, SEIU Local 32BJ's only involvement when it has decided not to pursue arbitration will be the fact that it helped pick the statutory arbitrator panel that is made available to the individual employee who pursues the statutory claim in arbitration.

Unfortunately, one of the key problems for individual employees in pursuing discrimination claims in the courts is finding legal representation.¹⁷³ Black employment discrimination plaintiffs, in particular, are much less likely to have attorneys.¹⁷⁴ The same concern—lack of legal representation—is just as palpable in ADR.¹⁷⁵ Jean Sternlight has explained the value of having a lawyer in ADR as follows:

Once the neutral is selected, the lawyer can be very helpful in coaching the client in such matters as what to expect in mediation or arbitration, who to bring as participants or witnesses, or what strategic moves might be desirable in either process. In arbitration, whether binding or non-binding, attorneys can make the same kinds of decisions they make in litigation, such as which witnesses to use and whether and how to present documentary evidence.

The strategy in mediation is a form of negotiation strategy, and great thought should be given to how and whether to present information, solicit information, ask questions, make apologies, or make offers/demands. Although aspects of mediation may sometimes be confidential, depending upon relevant statutes, rules and contracts, information exchanged in mediation may nonetheless be very important to litigation that later transpires if the dispute is not resolved. Attor-

to court if the union does not pursue the case in arbitration, and that one benefit of pursuing discrimination claims in labor arbitration is that “low-wage workers often have trouble finding employment discrimination specialists who are willing to take their cases to court”).

173. See Michael Z. Green, *Finding Lawyers for Employees in Discrimination Disputes as a Critical Prescription for Unions to Embrace Racial Justice*, 7 U. PA. J. LAB. & EMP. L. 55, 64–77 (2004) (describing the pressing need for attorneys to represent employees in discrimination claims, both in courts and in ADR).

174. Amy Myrick, Robert L. Nelson, & Laura Beth Nielsen, *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 705, 713 (2012); Vivian Berger, *Employment Mediation in the Twenty-First Century: Challenges in a Changing Environment*, 5 U. PA. J. LAB. & EMP. L. 487, 500 (2003) (referring to difficulties for employees in finding a lawyer for discrimination claims).

175. See Jean R. Sternlight, *Lawyerless Dispute Resolution: Rethinking a Paradigm*, 37 FORDHAM URB. L. J. 381, 383–84 (2010) (lamenting that “lawyerless ADR is problematic” and a “pervasive issue” where “the reality is that participants often do not or cannot retain counsel”).

neys can help with these tasks.¹⁷⁶

Moreover, it is not clear that the mediation or arbitration process offered by the Protocol provides employees with assistance in obtaining legal representation to process these claims, especially when SEIU Local 32BJ will not be involved in the arbitration. While personally working with the attorneys from the RAB and SEIU Local 32BJ on various presentations about the Protocol, I have learned that the parties' motivations have been to provide the fairest dispute resolution process for employees covered by their CBA. Additionally, the attorneys highlighted how much the mediation process employed by the Protocol had further enhanced the opportunities for employees to resolve fairly their disputes with their employers without even getting to the arbitration stage.

Some court decisions since the Protocol was adopted have required individual employees to arbitrate their claims because the court seems to have read the Protocol as requiring arbitration.¹⁷⁷ As I feared when I first analyzed the Protocol, one of the potential consequences of providing a procedure that specifies how individual employees may pursue mediation and arbitration without Local 32BJ's involvement is that this action would lead to a court finding that individual employees could not pursue statutory discrimination claims in court, even when Local 32BJ chose not to pursue the matter.¹⁷⁸ In recent cases, New York federal district courts have adopted this position.¹⁷⁹ For example, in *Germosen v. ABM Indus. Corp.*, the court found that the Protocol resolved the question about what happens when an employee attempts to pursue a statutory claim in court after Local 32BJ does not pursue the statutory claims in arbitration.¹⁸⁰ Therein, the Court found:

[I]f Plaintiff still had unresolved statutory claims, the CBA clearly provided him with access to an arbitral forum, either through the Union or, if the Union chose not to arbitrate, on his own. It is his failure to exhaust *those* avenues, not anything the Union did, that renders his federal lawsuit premature. Nothing in the Amended Complaint indicates what redress, if any, Plaintiff sought from the

176. *Id.* at 406; see also Brunet, *supra* note 8, at 45–47 (describing the importance of legal representation in ADR); Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Non-Adversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 269–70 & n.3 (1999) (suggesting the importance of lawyers being involved in mediation); Gould, *supra* note 113, at 659 (criticizing the lack of attorney representation in arbitration as a problem for employees in making informed decisions about the arbitrator selection process).

177. See *Regonja v. Vernado Realty Trust*, 159 F. Supp. 3d 402 (S.D.N.Y. 2016); *Favors v. Triangle Servs., Inc.*, 207 F. Supp. 3d 197 (S.D.N.Y. 2016); *Germosen v. ABM Indus. Corp.*, No. 13-CV-1978(EC), 2014 WL 4211347, at *3 (S.D.N.Y. Aug. 26, 2014).

178. See Green, *supra* note 171, at 12-1, 12-11 (“On the other hand, the Post-Pyett Protocol appears to agree to something that was not clearly required after *Pyett* and may even end up in supporting an argument that SEIU Local 32BJ has agreed to waive an individual employee's right to pursue statutory claims in court when the Union has declined to pursue the claim.”).

179. See *Begonja*, 159 F. Supp. 3d at 402; *Favors*, 207 F. Supp. 3d at 197; *Germosen*, 2014 WL 4211347, at *3.

180. *Germosen*, 2014 WL 4211347, at *3.

Union with respect to his termination or his more general allegations of workplace discrimination—and there is certainly nothing suggesting that he took any efforts to pursue arbitration on his own if and when the Union declined to act. Thus, Plaintiff’s claims are subject to mandatory arbitration pursuant to the terms of the CBA. . . . If Plaintiff wishes to proceed with those claims, he is directed to submit to the mediation and arbitration procedures contemplated by the CBA and the Protocol.¹⁸¹

Another New York federal district court case covering the implications for employees covered by the Protocol is *Favors v. Triangle Services, Inc.*¹⁸² Therein, the court reviewed what it referred to as an apparent inconsistency between the CBA’s discrimination clause and the Protocol when the Union declined to arbitrate a dispute.¹⁸³ Even though the court determined that it did not have to address the issue because the facts suggested there was still a possibility that Local 32BJ might pursue the claim, the court nevertheless concluded, citing *Germosen*, that an employee would still be required to pursue the statutory discrimination claim through the mediation and arbitration processes under the Protocol rather than in the courts, even if Local 32BJ chose not to bring the case forward to arbitration.¹⁸⁴

In *Begonja v. Vornado Realty Trust*, the court discussed the terms of the Protocol and how it leaves open the “reserved question” about what happens when Local 32BJ chooses not to pursue a statutory claim in arbitration.¹⁸⁵ The court noted that the RAB takes the position that the individual employee must arbitrate the statutory claim, and Local 32BJ takes the position that the individual employee can pursue the statutory claims in court.¹⁸⁶ However, the court also noted that Local 32BJ and the RAB agreed in the Protocol that this unanswered and “reserved question” would be resolved in arbitration if either Local 32BJ or the RAB initiated it.¹⁸⁷

Although the employee had not submitted her claims to arbitration under the Protocol, the court cited other decisions—addressing essentially the same CBA language and finding arbitration mandatory whether Local 32BJ pursued the claims or not—as support for the order that Begonja must arbitrate her statutory claims.¹⁸⁸ As a result of these cases and despite Local 32BJ’s argument to the contrary, court decisions have arguably led to a de facto finding that the mediation and arbitration procedures provided to individual employees by the Protocol have effectuated a clear and unmistakable waiver of the employees’ rights to pursue

181. *Id.* at 7 (footnotes omitted).

182. 207 F. Supp.3d 197 (E.D.N.Y. 2016).

183. *Id.* at 201.

184. *Id.* at 203–05.

185. 159 F. Supp. 3d 402, 407 (S.D.N.Y. 2016).

186. *Id.* at 411.

187. *Id.* at 407, 410–11.

188. *Id.* at 411 n.8 (quoting *Bouras v. Good Hope Mgmt. Corp.*, No. 11 Civ. 8708 (WHP), 2012 WL 3055864, at *4 (S.D.N.Y. July 24, 2012)).

court claims even if Local 32BJ chooses not to pursue the claims.¹⁸⁹

Because of this de facto finding from the federal district courts in New York, as described by cases like *Germosen*, *Favors*, and *Begonja*, the courts have done what the parties to the Protocol had hoped the Protocol would prevent: decided the “reserved question” of what should happen when Local 32BJ decides not to pursue a statutory claim in arbitration.¹⁹⁰ As a result, my suggestion is that Local 32BJ and the RAB should seek an arbitration resolution to address the “reserved question.” This is necessary because court cases such as *Germosen*, *Favors*, and *Begonja* appear to be providing an answer to that question despite the parties’ intention to have it resolved via arbitration.¹⁹¹

Another option that would support Local 32BJ’s position but would be contrary to the RAB’s position on the reserved question is to add language to the Protocol that follows the decision by the United States Court of Appeals for the Tenth Circuit in *Mathews*.¹⁹² There, the court found the arbitration waiver limited to those claims actually submitted to the arbitrator by the union.¹⁹³ However, obtaining such language is easier said than done, as the RAB clearly wants to address individual employees’ statutory claims through the arbitration process rather than in the courts, whether the employee pursues the claims as an individual or through Local 32BJ. Only the parties to the Protocol will know what tweaks to their CBA will be right for their constituencies in light of the continued federal district court decisions interpreting the Protocol. One should also note that it is individual employees who are bringing these claims to the federal courts, not SEIU Local 32BJ or the RAB. If SEIU Local 32BJ obtained any other benefits for its members not readily ascertainable in agreeing to the *Pyett* Protocol, then those benefits should be identified and examined.

E. SLIGHT MODIFICATIONS: DIVERSE NEUTRALS, LEGAL REPRESENTATIVES, AND APPEALS

To reach the level of fairness and address concerns about prejudice, the Post-*Pyett* Protocol would have to add a few slight modifications. First, the parties would have to commit to finding a core and critical mass of black ADR professionals to be listed both on their roster of mediators

189. See *Begonja*, 159 F. Supp. 3d at 402; *Favors*, 207 F. Supp. 3d at 197; *Germosen*, 2014 WL 4211347, at *3.

190. See *Begonja*, 159 F. Supp. 3d at 411 (“Indeed, the CBA expressly provides procedures for arbitration by an individual employee in the event that the Union denies representation. See CBA Art. XXI § 24(B)(3).”); *Favors*, 207 F. Supp. 3d at 197; *Germosen*, 2014 WL 4211347, at *3.

191. See *Begonja*, 159 F. Supp. 3d at 402; *Favors*, 207 F. Supp. 3d at 197; *Germosen*, 2014 WL 4211347, at *3.

192. *Mathews v. Denver Newspaper Agency LLP*, 649 F.3d 1199, 1206–07 (10th Cir. 2011).

193. *Id.*

and as their contract arbitrators.¹⁹⁴ The parties should be taking affirmative steps to find and train ADR professionals of color who can serve on their roster of mediators and their list of contract arbitrators.

Second, the parties should adopt some form of a legal service plan as an employee benefit so that those employees who desire legal representation are allowed to find attorneys to represent them in the arbitration process.¹⁹⁵ For instance, some employers provide funds for employees to pay for legal services.¹⁹⁶ Since the SEIU Local 32BJ and the RAB pay for the mediation, the employer and union would not have to pay for legal representation or allow use of the legal service plan for representation in mediation as a suggested modification.¹⁹⁷ However, an employee could be allowed to obtain an attorney to represent him during the mediation if he pursued the legal representation at his own cost.¹⁹⁸

Finally, some disputes should still be allowed to go to court. If the SEIU Local 32BJ chooses not to arbitrate a dispute, but the individual employees desire to pursue further resolution because the dispute involves constitutional or public policy concerns that may be of an important precedent-setting nature,¹⁹⁹ the employees should be able to appeal the matter to court.²⁰⁰ A court could review the arbitrator's decision

194. See Michael Z. Green, *An Essay Challenging the Racially Biased Selection of Arbitrators for Employment Discrimination Claims*, 4 J. OF AM. ARB. 1, 4–5 (2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=939452 [<http://perma.cc/55QV-GZRX>].

195. See Lisa B. Bingham et al., *Exploring the Role of Representation in Employment Mediation at the USPS*, 17 OHIO ST. J. ON DISP. RESOL. 341, 344–45 (2002) (“Representation is one element of dispute system design, an element that is judged to be fundamental to fairness,” and “[a]n employment dispute resolution program that promotes employee direct participation, with any representative of his or her choice, might similarly have a positive effect on how employment disputes get processed.”).

196. See Michael Z. Green, *Ethical Incentives for Employers in Adopting Legal Service Plans to Handle Employment Disputes*, 44 BRANDEIS L. J. 395, 401–04 (2006); Green, *supra* note 173, at 61–62 (suggesting unions provide lawyers for helping non-union employees).

197. See Berger, *supra* note 174, at 536; Green, *supra* note 79, at 354 n.148 (describing situations where employers have provided legal representation for employees in an ADR process); Green, *supra* note 196, at 401–04; Green, *supra* note 173, at 114–15.

198. See Hodges, *supra* note 166, at 386–87 (describing how employees may want “attorneys or other advocates” rather than a union for representation in mediation).

199. An example of such a case might be a sexual harassment case where “[p]ublic vindication might be particularly important for the accuser and the accused where the allegations resulted in a one on one encounter unobserved by witnesses” or “cases involving repeated or serial harassment” where “public litigation and liability could be essential to deter continued harassment.” *Id.* at 424; Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 671–72 (1986) (referring to public disputes that warrant court resolution rather than ADR).

200. See Berger, *supra* note 174, at 538 (noting certain cases ought to go through trial and appeal to create significant law to guide and bind interested persons in the future). There are some dispute resolution processes where the parties may arbitrate a dispute and the employee may still pursue the matter in court. See Green, *supra* note 79, at 356 (describing Shell's RESOLVE program, which “allows arbitration as an optional choice where the employee may still file suit in court afterwards”). One possible result of allowing non-binding arbitration as a form of procedural justice for employees is that attorneys may prefer to pursue mediation instead. See Deborah R. Hensler, *A Research Agenda: What We Need to Know About Court-Connected ADR*, 6 DISP. RESOL. MAG., Fall 1999, at 15, 16–17 (discussing why lawyers may view mediation as more preferable than non-binding arbitra-

under a de novo standard of review.²⁰¹ Although an employer may balk at opening up its arbitration process to something more than a completely deferential review, the Supreme Court stated in a 1974 decision, *Alexander v. Gardner-Denver*, that an arbitration decision can be given “great weight” in the court proceeding if “[r]elevant factors” were present:

Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee’s Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should ever [be] mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum.²⁰²

Since the Supreme Court in *Pyett* allows the parties to a CBA to agree to resolve statutory discrimination claims under its grievance and arbitration process, and it explicitly stated that it was not overruling *Gardner-Denver*,²⁰³ this approach of allowing de novo review in the courts is consistent with current law.²⁰⁴ Some employers already allow appeal of arbitration decisions as part of a comprehensive and fair dispute resolution process.²⁰⁵ If the parties have established an excellent record in support of resolving the dispute in arbitration, the de novo review, with great weight placed on the arbitrator’s decision given the relevant factors from *Gardner-Denver*, should give the employer great comfort that the result

tion despite procedural justice theorists’ preference for non-binding arbitration and its initial high satisfaction ratings when it was first used as part of court-connected ADR).

201. See *Alexander v. Gardner-Denver*, 415 U.S. 36, 60 (1974) (“We think, therefore, that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII. The federal court should consider the employee’s claim de novo.”).

202. *Id.* at 60 n.21.

203. See *14 Penn Plaza v. Pyett*, 556 U.S. 247, 265 n.8 (“today’s decision does not contradict the holding in *Gardner-Denver*”).

204. But see Mark S. Mathison & Bryan M. Seiler, *What 14 Penn Plaza LLC v. Pyett Means for Employers: Balancing Interests in a Landscape of Uncertainty*, 25 ABA J. LAB. & EMP. L. 173, 185–86 (2010) (arguing that the standard for review by a court of an arbitrator’s decision made in compliance with the *Pyett* clear and unmistakable waiver process is unclear and murky and suggesting it would be a deferential review either under Federal Arbitration Act analysis or Labor Management Relations Act analysis).

205. Green, *supra* note 79, at 356 (arguing that Shell’s RESOLVE dispute resolution program, focused on mediation but also allowing for arbitration while providing the employee the right to appeal the arbitration decision in court, is just the “type of program [that] can allow a fair and quick result” for “those rare situations where a public and formal adjudication is necessary,” and this system provides court access for “an employee who needs that formal judicial forum to obtain justice”).

will likely be affirmed on appeal.²⁰⁶ But in those rare circumstances where an important court precedent must be set, the employee will be able to seek court resolution. Professor William Gould has suggested how such an arbitration procedure might work based upon an arbitration he conducted many years before the *Gardner-Denver* decision:

I was appointed as an arbitrator in two of the early cases: Weyerhaeuser Co., which involved a special procedure negotiated in advance of *Gardner-Denver*, and Basic Vegetable Products Company Inc., which may have been the first such procedure. A conciliation settlement agreement was part of the submission along with the collective bargaining agreement; though the union represented the grievant, “the individual grievant [was] also represented by counsel of her own choosing because there [were] alleged violations of Title VII” and the conciliation and settlement agreements called for such representation. What was particularly interesting about Basic Vegetable was that it provided for third-party representation by the individual in his own right along with the union and employer lawyers. This seemed to be a proper response to the *Gardner-Denver* Court’s footnote nineteen reference to the fact that traditional arbitration’s “manner and extent to which an individual grievance is presented [is] a further concern [when] the union [possesses] exclusive of control.”²⁰⁷

IV. DISPUTING WHILE BLACK AT WORK MATTERS

Several years ago, Professor Derrick Bell suggested a quite masterful approach to developing mechanisms to achieve racial justice: “The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”²⁰⁸ The *Pyett* Protocol, as modified in this Article, is consistent with Bell’s interest-convergence thesis; it attempts to address all the interests of the key players in workplace dispute resolution: unions, workers, and employers.²⁰⁹ All of these groups have an interest in not letting racial hostilities in the workplace become a major problem. Providing a comprehensive dispute resolution process that offers quick and effective resolution of disputes can resonate and converge with the interests of all the key stakeholders.

206. See *Gardner-Denver*, *supra* note 201, at 60 n.21.

207. Gould, *supra* note 113, at 627–28.

208. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980); see also Richard Delgado, *Explaining the Rise and Fall of African American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369, 371 (2002) (noting “an impressive insight by Derrick Bell that gains for blacks coincide with white self-interest and materialize at times when elite groups need a breakthrough for African Americans, usually for the sake of world appearances or the imperatives of international competition”).

209. See Bell, *supra* note 208.

A. BLACK LIVES MATTER AT WORK: MAKING THE LABOR MOVEMENT GREAT AGAIN

In some Black Lives Matter at Work materials, there is a statement made by Martese Chism, RN Case Manager at John H. Stroger, Jr. Hospital of Cook County, Chicago that captures the importance of organized black labor joining with the Black Lives Matter movement: “If the Labor Movement wants to be great again, the Labor Movement must understand that Black Lives Matter. Either we all fight together, or we all get destroyed together.”²¹⁰ By negotiating the terms of a dispute resolution process that embraces racial justice concerns, unions can deliver a lifeline to their black workers given the increasingly diverse private sector workplace.²¹¹ Black workers tend to favor unions more than any other workers.²¹² High levels of union representation correlate with better access to justice.²¹³

However, as of 2016, a little less than 11% of the United States workforce, and a little more than 6% of the private sector workforce, is unionized.²¹⁴ Nevertheless, unions, such as Unite Here in Philadelphia, have actively embraced the synergies between union representation and concerns about the plight of black workers through Black Lives Matter.²¹⁵ In recognizing the power of the Black Lives Matter movement, unions can provide black workers with a valuable ally who can effectively

210. Greg Chern, *Black Lives Matter at Work: New Report Offers Resources for Labor Activists to Fight White Supremacy*, WORKING IN THESE TIMES (Sept. 24, 2015), <http://in-thesetimes.com/working/entry/18447/black-lives-matter-labor-movement> [<https://perma.cc/HSX8-DMS8>].

211. See *id.*; Marion Crain, *Colorblind Unionism*, 49 UCLA L. REV. 1313, 1330–34 (2002); Marion Crain & Ken Matheny, *Labor’s Identity Crisis*, 89 CAL. L. REV. 1767, 1834–46 (2001) (proposing reforms to encourage unions to embrace racial justice and fight employment discrimination on behalf of employees); Charlotte Garden & Nancy Leong, *So Closely Intertwined: Labor and Racial Solidarity*, 81 GEO. WASH. L. REV. 1135, 1174–1209 (2013) (suggesting synergies between unions and workers of color); Green, *supra* note 6, at 368–71, 405–08 (describing opportunities for racial justice in the workplace and the need for unions to capitalize on increasing diversity in the workplace); Green, *supra* note 173, at 77–100 (discussing opportunities and the need for unions to embrace racial justice); Rev. Terry L. Melvin, *Black Lives Matter to Labor*, HUFFINGTON POST (Apr. 29, 2015), http://www.huffingtonpost.com/rev-terry-l-melvin/black-lives-matter-to-lab_b_6770384.html [<https://perma.cc/D6AL-A27F>] (commentary by President of Coalition of Black Trade Union affirming Black Lives Matter movement is important to organized labor while describing how union density has steadily decreased and wage gap has increased).

212. U.S. DEP’T OF LAB., BUREAU OF LAB. STAT., ECON. NEWS RELEASE, UNION MEMBERS 2016 (Jan. 26, 2017, 10:00 AM), <https://www.bls.gov/news.release/union2.nr0.htm> [<https://perma.cc/6ELL-26E8>] (“Black workers were more likely to be union members than were White, Asian, or Hispanic workers”).

213. Christopher David Ruiz Cameron, *The Rule of Law Goes to Work: How Collective Bargaining May Promote Access to Justice in the United States, Canada, and the Rest of the World*, 20 U.C. DAVIS J. INT’L L. & POL’Y 211, 226–227 (2014) (matching high union density rates with high levels of access to justice).

214. U.S. DEP’T OF LAB., *supra* note 212 (finding 10.7% unionization in the U.S. and 6.4% in the private sector).

215. See *Black Work Matters: Race, Poverty and the Future of Work in Philadelphia*, UNITE HERE PHILLY at 5, 10–13, <https://www.uniteherephilly.org/wp-content/uploads/Black-Work-Matters-Report.pdf> [<https://perma.cc/6CAM-PE93>] (last visited Sept. 10,

bargain with an employer to provide a fair ADR system that circumvents typical concerns of prejudice. Also, general concerns about lack of information or bargaining power, or limits from stereotype threat or covering that present obstacles for workers negotiating while black on an individual basis—can be overcome by bargaining on a collective basis.²¹⁶

B. PROVIDING DISPUTE MECHANISMS TO GIVE VOICE MATTERS TO BLACK WORKERS

With the current Black Lives Matter climate affecting the workplace, black workers are looking for more voice in expressing their concerns about racial matters.²¹⁷ Scholars have noted the importance of voice for workers and called for more comprehensive workplace law reform to encourage more worker voice.²¹⁸ A desire for voice also feeds into a desire for procedural justice, which “is concerned with fairness of procedures or processes that are used to arrive at outcomes.”²¹⁹ Specifically, the “opportunity for voice” or for parties to “tell their stories themselves” affects how the parties perceive the procedural justice components of a dispute resolution system.²²⁰ In a comprehensive study of worker interests published in 1999, Richard Freeman and Joel Rogers found that most workers want a voice in the workplace.²²¹ Also, their study found that most workers want a cooperative management-employee structure, not necessarily an adversarial one involving a union, where disputes are resolved

2017) (discussing issues for workers in Philadelphia based upon race and the need for improved wages and conditions through union representation).

216. See Schneider et al., *supra* note 78, at 382 (discussing a strategy to defeat stereotype threat by shifting negotiation from a focus on individual approaches to group approaches).

217. See Khanh Ho, *Microaggressions in the Workplace: Black Lives Matter and Politically Correct Speech*, HUFFINGTON POST (Oct. 8, 2016), http://www.huffingtonpost.com/khanh-ho/microaggressions-in-the-w_b_8265564.html [<https://perma.cc/D65F-TBCX>] (describing how most black persons in the workplace feel uncomfortable protesting racism until they feel like they have nothing left to lose, like the Black Lives Matter Movement, and whether the response that All Lives Matter represents a racist statement made as part of a growing backlash to the Black Lives Matter movement).

218. See, e.g., Dau-Schmidt, *supra* note 17, at 800–09; see also Yuval Feldman et al., *What Workers Really Want: Voice, Unions, and Personal Contacts*, 15 EMPLOYEE RTS. & EMP. POL'Y J. 237 (2011). But see Harry G. Hutchison, *What Workers Want or What Labor Experts Want Them to Want?*, 26 QUINNIPIAC L. REV. 799, 816 (2008) (discussing “skepticism” regarding studies that assert employees want more voice without asking what they would give up in return).

219. Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U. L.Q. 787, 817 (2001).

220. *Id.* at 820–828, 835.

221. See RICHARD FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 135–36, 150–55 (1999) (describing statistical results from a study of workers and their desires and finding they want more voice in the workplace and would be amenable to some form of representation in dealing with their employers, possibly through an employee committee, although not necessarily by a union); see Hutchison, *supra* note 218, at 816 (quoting Richard Freeman & Joel Rogers, *WHAT WORKERS WANT* 184 (2d ed. 2006)) [hereinafter Freeman & Rogers, 2d ed.] (stating “[t]here is a major gap in America between what workers want by way of democratic say at their workplace and what they have.”).

through arbitration.²²²

Having “union representation” in ADR can have “benefits for both the employee and the employer.”²²³ The benefits of union representation in ADR include “higher settlement rates for both complainants and respondents and higher satisfaction levels for complainants than occurs with other types of representatives.”²²⁴ Racial identity caucuses within a union can further help address the fairness of the dispute resolution process.²²⁵ Social science research suggests that allowing employees to signal their racial identification and maintain their racial subgroup identity results in a reduction of prejudice in the workplace.²²⁶ As a result, “members of race-based . . . workplace identity committees can reap significant benefits from group identification.”²²⁷

C. RESOLVING BLACK WORKER DISPUTES MATTERS TO EMPLOYERS

Due to a concern for diversity in their ranks, corporations have a strong interest in rooting out workplace discrimination.²²⁸ Employers want to adopt informal dispute resolution systems to address discrimination concerns while also fostering a more productive workplace.²²⁹ A re-

222. Hutchinson, *supra* note 218, at 814 (quoting Freeman & Rogers, 2d ed., *supra* note 221, at 27 (stating “the institution that appeals to most workers, whether they want a union or not, is an independent workplace committee to represent them in workplace decisions.”)).

223. Bingham et al., *supra* note 195, at 376.

224. *Id.* at 377 (suggesting that private sector employers should “rethink opposition to some form of union participation in employment dispute resolution” given the benefits presented to both employees and employers).

225. See Marion Crain & Ken Matheny, *Beyond Unions, Notwithstanding Labor Law*, 4 UC IRVINE L. REV. 561, 581–582 (2014) (describing the value of identity caucuses in addressing workplace discrimination); Ruben J. Garcia, *New Voices at Work: Race and Gender Identity Caucuses in the U.S. Labor Movement*, 54 HASTINGS L.J. 79, 102–110, 153–63 (2002) (arguing for greater role for racial identity caucuses within existing union and labor law structure); Molly S. Mcusic & Michael Selmi, *Postmodern Unions: Identity Politics in the Workplace*, 82 IOWA L. REV. 1339, 1367–73 (1997) (suggesting opportunity for solidarity along with difference via identity caucuses within unions); see also Hodges, *supra* note 166, at 389 (suggesting benefits of using union identity caucuses to help employees of color in processing disputes via ADR); Michael J. Yelnosky, *supra* note 79, at 613–21 (suggesting employee identity caucuses level the playing field in employment discrimination mediations).

226. See Green, *supra* note 75, at 387 (“Taken as a whole, the research reveals the importance of maintaining subgroup identity for reducing prejudice and suggests that greater and more generalized reduction in prejudice will be gained from workplace contact if women and people of color are permitted to signal identification with gender and racial categories.”); see also Marion Crain & Ken Matheny, *Labor’s Divided Ranks: Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542, 1617–1620 (1999) (suggesting value of identity group representation for employees, including groups that work from within the labor movement and some that could work outside of the labor movement with some labor law reforms).

227. See Calhoun, *supra* note 9, at 209.

228. See Michael Z. Green, *Addressing Race Discrimination Under Title VII After Forty Years: The Promise of ADR as Interest-Convergence*, 48 HOW. L.J. 937, 959–63 (2005).

229. See Green, *supra* note 6, at 376 n.41 (citing Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC’Y REV. 497, 508, 511–12, 519 (1993)) (“describing how employers’ efforts to adopt informal grievance procedures to resolve employment discrimination complaints do attempt to ad-

cent blog entry noted that two major businesses, AT&T and Ben & Jerry's, had taken stances in support of the Black Lives Matter movement.²³⁰ With respect to Ben & Jerry's, the company established a Black Lives Matter web page where it not only explained "Why Black Lives Matter" but it also asked that people try to understand experiences of those that are different and recognize the existence of systemic discrimination.²³¹ With respect to AT&T, Chief Executive Officer Randall Stephenson gave a keynote speech on diversity and inclusion to AT&T employees and discussed the importance of the Black Lives Matter movement, and also explained his views as to why a response that All Lives Matter is inappropriate.²³² Other companies have also taken steps to come out in favor of the Black Lives Matter Movement and other workplace discussions about racial unrest.²³³

dress legal concerns while they also subsume the legal concerns in support of management's interests as well as they 'minimize the intrusion of law on the smooth and efficient functioning of the organization').

230. See Nicole Cozier, *Black Lives Matter at Work as Much as Everywhere Else: AT&T and Ben & Jerry's Set Example*, HUM. RTS. CAMPAIGN (Oct. 11, 2016), <http://www.hrc.org/blog/black-lives-matter-at-work-as-much-as-everywhere-else-att-and-ben-jerrys-se> [https://perma.cc/Z9M8-NLQK].

231. See Ellen Powell, *Ben and Jerry's Back Black Lives Matter: Do Ice Cream and Politics Mix?*, THE CHRISTIAN SCIENCE MONITOR (Oct. 8, 2016), <http://www.csmonitor.com/USA/Politics/2016/1008/Ben-and-Jerry-s-back-Black-Lives-Matter-Do-ice-cream-and-politics-mix> [https://perma.cc/26Z7-GLMQ]; *Black Lives Matter*, BEN & JERRY'S (Oct. 6, 2016), <http://www.benjerry.com/whats-new/2016/why-black-lives-matter> [https://perma.cc/HF4N-C2JE].

232. See Joshua Fields, *AT&T CEO Randall Stephenson Addresses the Racial Tension in American Society*, YOUTUBE (Sep. 24, 2016), https://www.youtube.com/watch?v=ThO74-oFt_Q [https://perma.cc/NX7K-NDZ7]; Sabriya Rice, *Citing Black Lives Matter, AT&T CEO Urges Employees to Have Difficult Conversations About Race*, DALLAS MORNING NEWS (Sep. 30, 2016), <https://www.dallasnews.com/business/att/2016/09/30/citing-black-lives-matter-att-ceo-urges-employees-difficult-conversations-race> [https://perma.cc/2ZRH-A648].

233. See Antonio J. Newell, *Facebook Solidarity: Company Shows "Black Lives Matter" Support in a Big Way, Google Too*, INQUISITR (July 9, 2016), <http://www.inquisitr.com/3290595/facebook-solidarity-for-black-lives-matter/> [https://perma.cc/ZC7Y-5Y8H] (discussing CEO Mark Zuckerberg's replacement of regular signage at Facebook with Black Lives Matter signage in response to the shooting of a black male by police in Minnesota and also mentioning Google's twitter response to the same shooting and mentioning Black Lives Matter); Guynn, *supra* note 26 (describing how Facebook CEO Mark Zuckerberg responded forcefully after employees crossed out "Black Lives Matter" and wrote "All Lives Matter" on the walls of the company's campus, launching an investigation and stating that those communications represent a "deeply hurtful and tiresome experience for the black community"); Lily Workneh, *Starbucks CEO Howard Schultz Takes Powerful Step to Discuss Race With Employees* HUFFINGTON POST (Dec. 17, 2014, 9:59 PM), http://www.huffingtonpost.com/2014/12/17/starbucks-howard-schultz-race_n_6344164.html [https://perma.cc/8C9D-FLLQ]; *A Conversation with Starbucks Partners About Race in America* (Dec. 17, 2014), <https://news.starbucks.com/news/schultz-begins-a-conversation-with-starbucks-partners-about-racial-issues> [https://perma.cc/3ZYF-RHLE] (discussing conversations held by CEO Howard Schultz with Starbucks workers about racial tension and unrest after Ferguson, Missouri protests).

V. CONCLUSION: PREJUDICE IN ADR STILL MERITS CONSIDERATION AT WORK

With heightened realities about racial disputes in the workplace arising in the current Black Lives Matter climate, this Article assessed each of the traditional segments of ADR, including negotiation, mediation, and arbitration, to determine the best approach to assist black workers. In recognizing the fallacy of romanticizing litigation as a panacea to resolve workplace discrimination matters based upon unfair racial treatment and the dismal prospects black workers face in the courts,²³⁴ this Article seeks to establish a new common ground where a union-negotiated merger of mediation and arbitration processes can provide workplace justice without prejudice using ADR, a process where all stakeholders can embrace their shared values, and their common interests can converge.

By following the Protocol, with some slight modifications established by a high-profile agreement between an employer and a union to provide a dispute resolution process to help its diverse employees resolve workplace disputes, this Article has asserted that black employees can find racial justice through the use of ADR in the workplace. The concerns about informality and prejudice that Delgado and his co-authors first expressed in 1985 may be addressed in four ways through the modified merger of mediation and arbitration, as described in the Protocol.

First, the union can negotiate fairly the dispute resolution process through its collective bargaining power, especially with identity caucuses negotiating the parameters of any comprehensive dispute resolution program to ensure that black workers' voices are heard.²³⁵ Second, using a mediation process with the opportunity for diverse mediators who are aware of cultural matters and have the competency to facilitate communication within a heightened racial climate, provides black employees with a unique process to navigate traditional stereotypes that hinder fair workplace solutions. Third, the ADR process culminates with a detailed arbitration process that both (i) provides a cadre of diverse professionals to serve as potential decision makers and (ii) offers employees fair legal representation. Finally, as a last matter of procedural justice and allowing voices to be heard as broadly as needed, employees can still go to court with important precedential claims that demand a formal resolution.

234. See Carrie Menkel-Meadow, *Whose Dispute is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2669 (1995) (referring to critics of ADR as having romanticized views of the value of litigation rather than considering the real problems posed by litigation).

235. See Crain & Matheny, *supra* note 226, at 1617 n.374 (identifying several identity groups affiliated with AFL-CIO, including the Coalition of Black Trade Unionists and the A. Phillip Randolph Institute, which seeks racial equality through unionism). The AFL-CIO has established many constituency groups based on identity. See *AFL-CIO Constituency Groups*, A. PHILIP RANDOLPH INSTITUTE, <http://www.apri.org/afl-constituency-groups.html> [<https://perma.cc/7FHZ-L372>] (last visited Sept. 11, 2017) (listing A. Philip Randolph Institute, Asian Pacific American Labor Alliance, Coalition of Black Trade Unionists, Coalition of Labor Union Women, Labor Council for Latin American Advancement, and Pride at Work).

The overall concerns of prejudice in ADR, based upon the informality of ADR systems, can only be evaluated in the context of the results and processes also available in the formal court system. Unless there is a system of collective representation, either formalized by a union or informally via some group similar to an identity caucus, the ADR system in place for a particular employer and its employees may face the same prejudice concerns that Richard Delgado expressed in his 1985 Article.²³⁶ But if the formal court system represents even greater levels of inequality, then black employees may experience less prejudice through the use of ADR for resolving discrimination claims, even if they do not have the overall bargaining power to shape the terms of the system as they would if a union or identity caucus negotiated on their behalf. With the changing racial climate in our society and in the workplace, as exemplified by the Black Lives Matter movement, more negative responses to limit the protections of the formal court system will likely occur. As a result, any ADR system that is being used in the workplace to resolve black employees' discrimination claims must continue to be evaluated in light of the prejudice involved therein while being compared with the prejudice presented in pursuing resolution of those claims through the courts.

236. Delgado et al., *supra* note 1, at 1375–91; see Mabry, *supra* note 29, at 434 (finding “African Americans tend to be collectivists while white Americans tend to be individualists”); Tudy-Jackson, *supra* note 99, at 940–41 (“African-Americans may prefer collectivist or group values more than individualist values.”).