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Mediation and the Transformation of American Labor Unions

*Ann C. Hodges**

The decline of unionization in the United States is a phenomenon that has been well-documented. The shift in workplace regulation from collectivization to individual regulation has been suggested as both a cause and an effect of the reduction in unionization.¹ This transformation from a collective contractual to a more individual statutory regime is now undergoing another change—a return to contractual or privatized regulation, not through unions or collective bargaining but through alternative dispute resolution (“ADR”) of legal claims.

Scholars observing this phenomenon have bemoaned the decrease in unionization, because of the loss of power and the loss of voice for working Americans. Many thoughtful proposals for changes that would revitalize the labor movement have resulted. Suggestions range from changes in the law to changes in the structure and approaches of unions. Among the more prevalent recommendations for legal change are more effective remedies for violations of the National Labor Relations Act (“NLRA”), mandatory arbitration of first collective bargaining agreements, removal of restrictions on employer-initiated or dominated employee organizations, and permitting recognition of, and bargaining with, nonmajority unions. Other scholars have focused on changes in union orientation and structure. Among the recommendations are providing services to members who are not represented for collective bargaining, moving to occupationally-based unions with a focus on professionalization and training for the new workplace, emphasizing employee skill development rather than career employment with one employer, and increasing collaboration with other groups focusing on social justice.

Another branch of scholarly research has focused on the trend toward privatization through ADR. While a large group of scholars commends the move as creating a positive alternative to litigation by allowing interest-based problem solving and quicker, cheaper resolution of disputes, another group focuses on the loss of legal rights and power resulting from compulsory ADR. Employees forced to arbitrate legal claims may lose remedies, the right to a jury trial, and the right to consolidate claims in class actions. Arbitration may, in fact, be more costly than litigation for some employees. Another concern vocalized

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1. WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* 55-56 (1993).

about the more informal dispute resolution of ADR is the potential for disadvantage to less powerful groups. In response to this concern, scholars have recently suggested the use of employee caucuses and outside social justice organizations to represent employees in dispute resolution forums.

In a recent article, Professor Marion Crain and Ken Matheny suggest that unions should focus not only on economic justice but also on social justice, eliminating the artificial divide between the two.² To enhance this focus in the changing workplace, Crain and Matheny urge changing the law to impose on unions an affirmative duty to battle discrimination and allowing unions to negotiate arbitration provisions that waive employee rights to litigate discrimination claims.³ They suggest that the combination of these changes would broaden the identity of labor unions as social justice organizations.⁴

This Article urges an incremental step toward the goal of trade union revitalization which incorporates the benefits of expanded identity and enhanced dispute resolution. Unions should negotiate provisions in collective bargaining agreements that offer mediation as an option for claims not covered by the agreement,⁵ including legal claims and other disputes such as interpersonal conflicts or communication difficulties. Such provisions would enable unions to make progress toward many of the goals suggested by other scholars, while at the same time providing a voluntary option for dispute resolution that bestows some advantages on employers, employees and unions and offers promise for reducing the power differentials between employees and employers involved in legal disputes.

First, the Article analyzes in more detail the changes in the workplace that have led to various proposals for reform. Then the Article looks at the potential for mediation of claims that do not arise out of the collective bargaining agreement, analyzing the possible benefits from the point of view of employers, employees and unions. Next, some of the issues and obstacles to mediation are reviewed. Ultimately the Article concludes that the benefits of mediation outweigh the disadvantages and that in most collective bargaining relationships the obstacles should not prevent either negotiation of such provisions or their successful use for at least some cases.

2. See Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CAL. L. REV. 1767 (2001).

3. *Id.* at 1839-45.

4. *Id.* at 1846.

5. Some unions and employers have negotiated provisions for mediation of grievances arising under the collective bargaining agreement. See Peter Feuille, *Grievance Mediation*, in EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE 187, 190-92 (Adrienne E. Eaton & Jeffrey H. Keefe eds., 1999) (documenting the use of grievance mediation).

I. THE CHANGING WORKPLACE

A. *The Decline of Unionization*

The changes in the workplace and in regulation of the workplace have been documented convincingly by scholars and commentators. Unionization of the workplace has declined from a high of thirty-five percent in 1954 to 12.9 percent today.⁶ The decline has been attributed to a multiplicity of factors including globalization and the consequent relocation of many industries, the related transition from an industry-based economy to a service-based economy, employers' increasingly active opposition to unionization and the ineffectiveness of legal regulation of employer anti-union tactics, and the changing demographics of the workforce.⁷ While some scholars view the reduction in unionization with factual agnosticism, others have sounded alarms, suggesting that the result is despotic corporate power, loss of a vehicle for democratic training, and loss of voice for workers, leading to disenchantment and reduced productivity.⁸ Freeman and Rogers have documented the representation gap between the much larger percentage of workers who desire a workplace representative and the very small percentage who have it.⁹ Moreover, as the unionization level has decreased, the number of employees protected from unjust discharge by union contracts has decreased, leaving more employees vulnerable to termination at will.

6. See Press Release, United States Department of Labor, Bureau of Labor Statistics, Union Members in 2003 (Jan. 21, 2004), available at <http://www.bls.gov/roford/3280.pdf>; see also Charles B. Craver, *The Clinton Labor Board: Continuing a Tradition of Moderation and Excellence*, 16 LAB. LAW. 123, 148 (2000).

7. For discussions of union decline and the factors contributing thereto, see, for example, CHARLES B. CRAVER, CAN UNIONS SURVIVE? THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT 34-55 (1993); GOULD, *supra* note 1, at 35-61; Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 579-81 (1992).

8. See, e.g., CHARLES C. HECKSCHER, THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION 251-52 (1996); Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 401-02 (1992); Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1822-27 (1983).

9. See RICHARD FREEMAN & JOEL ROGERS, WORKER REPRESENTATION AND PARTICIPATION SURVEY: FIRST REPORT OF FINDINGS (1994).

B. *The Move to Individual Rights*

Along with the decline of unions, however, has come the increasing regulation of the workplace through laws providing individual rights.¹⁰ Antidiscrimination laws have developed increasing significance, beginning with the Equal Pay Act¹¹ and Title VII of the Civil Rights Act of 1964,¹² continuing with the Age Discrimination in Employment Act,¹³ and most recently the Americans with Disabilities Act¹⁴ and the 1991 Civil Rights Act.¹⁵ Other federal laws have provided individual rights to employees, including the Occupational Safety and Health Act (“OSHA”) in 1970,¹⁶ the Employee Retirement Income Security Act (“ERISA”) in 1974,¹⁷ the Employee Polygraph Protection Act (“EPPA”) in 1988,¹⁸ the Worker Adjustment and Retraining Notification Act (“WARN”) in 1988,¹⁹ the Family and Medical Leave Act (“FMLA”) in 1993,²⁰ and the Health Insurance Portability and Accountability Act (“HIPAA”) in 1996.²¹ In addition to the growth of federal statutory law, common law exceptions to the doctrine of employment at will at the state level have increased exponentially in recent years. The lack of protection by union contract has led workers to challenge terminations perceived as unjust through legal action. The overwhelming majority of states have recognized a common law cause of action for wrongful discharge in violation of public policy.²² Most states have also

10. See GOULD, *supra* note 1, at 55-58; James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1571-72 (1996) (documenting the shift in Congress’s regulatory focus from collective action to individual rights).

11. 29 U.S.C. § 206 (2000).

12. 42 U.S.C. §§ 2000e-e-17 (2000).

13. 29 U.S.C. §§ 621-634 (2000).

14. 42 U.S.C. §§ 12101-12213 (Supp. 2001).

15. Pub. L. No. 102-166, 105 Stat. 1074 (codified in scattered Sections of 2 U.S.C., 16 U.S.C., 29 U.S.C., and 42 U.S.C.).

16. 29 U.S.C. §§ 651-678 (Supp. 2001).

17. *Id.* §§ 1001-1461.

18. 29 U.S.C. §§ 2001-2009 (2000).

19. *Id.* §§ 2101-2109.

20. 29 U.S.C. §§ 2601-2654 (Supp. 2001).

21. Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered Sections of 18 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C.). There has also been a resurgence in claims under some older federal statutes including the Fair Labor Standards Act (“FLSA”), 29 U.S.C. §§ 201-219 (2000), enacted in 1938. See *Attorneys Discuss Strategies for Bringing, Defending FLSA Collective Action Lawsuits*, Daily Lab. Rep. (BNA) No. 156, at C-1 (Aug. 13, 2002).

22. See *Employment at Will: State Rulings Chart*, 9A Lab. Rel. Rep. (BNA) (Indiv. Emp. Rts. Man.), at 505:51-52 (Jan. 20, 2004) (showing that forty-four states and the District of Columbia have recognized the claim for wrongful discharge in violation of

allowed employees to sue for breach of implied contracts with their employers.²³ Employees have also used the covenant of good faith and fair dealing to combat terminations.²⁴ Additionally, various other common law causes of action have been increasingly used in the employment setting, including defamation, intentional infliction of emotional distress, invasion of privacy, and tortious interference with contract. Montana passed the only statute expressly requiring cause for termination²⁵ and many other states have enacted statutes protecting individual employee rights.²⁶

Employment and labor litigation has ballooned to a significant percentage of the federal court docket²⁷ and has also substantially increased in many state courts. Employers bemoan the numerous and often overlapping legal claims available to employees, particularly those with potential for large jury awards. One employer response has been to move toward ADR.²⁸ Internal dispute

public policy).

23. *Id.* (showing that forty-five states and the District of Columbia have recognized implied contract claims).

24. *See, e.g.*, *Reed v. Municipality of Anchorage*, 782 P.2d 1155, 1158 (Alaska 1989); *Foley v. Interactive Data Corp.*, 765 P.2d 373, 374 (Cal. 1988); *see also Employment at Will*, *supra* note 22, at 505:51-52 (showing that eleven states have recognized the claim for breach of covenant of good faith and fair dealing).

25. MONT. CODE ANN. § 39-2-904 (2001).

26. *See, e.g.*, IDAHO CODE § 44-201 (Michie 1997) (prohibiting an employer from maintaining a black list containing names of employees for the purposes of preventing them from obtaining employment); KY. REV. STAT. ANN. § 351.127 (Michie Supp. 2002) (requiring an emergency medical technician on site at every coal mine “engaged in the extraction, production, or preparation of coal”); MASS. GEN. LAWS ANN. ch. 151B, § 3A (West Supp. 2003) (requiring employers to adopt sexual harassment policies and encouraging employers to conduct education and training sessions concerning sexual harassment); MINN. STAT. § 181.941 (1993) (requiring employers with twenty-one or more employees to provide up to six weeks of unpaid leave to new parents following birth or adoption); N.J. STAT. ANN. § 10:5-12 (West 2002) (making it unlawful for an employer to discriminate against prospective employees on the basis of their genetic information or refusal to submit to genetic testing); N.Y. LAB. LAW § 212 (McKinney 2002) (requiring growers and processors to provide safe and accessible drinking water at all sites where farm laborers are working); VA. CODE ANN. §§ 40.1-51.4:5 (Michie 2002) (providing immunity to workers who report threatening workplace conduct).

27. *See* Federal Judicial Caseload Statistics, Tables B-7 (courts of appeals) and C-2 (district courts) (Mar. 31, 2002) (showing 36,979 labor and employment cases out of 265,091 total civil cases in the federal district courts, about fourteen percent of the caseload and 4,224 labor and employment cases out of 35,732 total civil cases in the courts of appeals, about 11.8 percent of the caseload), at <http://www.uscourts.gov/caseload2002/contents.html>.

28. *See* Alexander J.S. Colvin, *Institutional Pressures, Human Resource Strategies, and the Rise of Nonunion Dispute Resolution Procedures*, 56 INDUS. & LAB. REL. REV. 375, 387 (2003) (finding based on empirical research in telecommunications industry that

resolution mechanisms range from open door policies for any issue to mandatory arbitration of legal claims. While many scholars applaud the move to ADR as beneficial because of its focus on quicker, cheaper and frequently interest-based solutions, others complain that employees are deprived of legal rights by employers who compel them to participate in fora without the judicial protections otherwise available.

Much of the criticism of ADR has been directed at mandatory arbitration of legal claims. As Professor Malin has ably pointed out, the crux of the criticism is that compulsory arbitration permits employers to contract out of statutory compliance unilaterally.²⁹ Unlike voluntary post-dispute arbitration, employees don't actually bargain for predispute arbitration systems imposed by the employer.³⁰ Employers can structure the systems to shorten limitations periods, limit remedies, avoid juries, restrict discovery, preclude employee representation, impose substantial arbitral cost on the employee, or require use of a non-neutral arbitrator.³¹ Even where the arbitrator is jointly chosen by the parties, the repeat player effect might result in arbitral decisions more favorable to the employer.³² These concerns have led to widespread criticism of mandatory arbitration.³³ Despite the criticism, employers continue to adopt arbitration

litigation threats are associated with the adoption of arbitration for nonunion employees but not with adoption of peer review procedures, which are prompted by threat of unionization).

29. Martin H. Malin, *Privatizing Justice—But by How Much? Questions Gilmer Did Not Answer*, 16 OHIO ST. J. ON DISP. RESOL. 589, 592 (2001).

30. *Id.* at 596-97.

31. Michael H. LeRoy & Peter Feuille, *When Is Cost an Unlawful Barrier to Alternative Dispute Resolution? The Ever Green Tree of Mandatory Employment Arbitration*, 50 UCLA L. REV. 143, 143 (2002); Malin, *supra* note 29, at 598-99.

32. Malin, *supra* note 29, at 603-05. See generally Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMP. POL'Y J. 189 (1997) [hereinafter Bingham, *Employment Arbitration*]; Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998).

33. For criticisms of mandatory arbitration see, for example, Sarah Rudolph Cole, *Incentives & Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449 (1996), Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L.J. 1 (1996), Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395 (1999), David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996), and Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990's*, 73 DENV. U. L. REV. 1017 (1996).

systems and the Supreme Court has endorsed arbitration of statutory claims.³⁴ Moreover, the Court's recent ruling that the Federal Arbitration Act encompasses employment arbitration has provided a boost to employers desiring to enforce arbitration provisions.³⁵ The litigation focus has shifted from whether the FAA applies to employment arbitration to challenges to particular arbitration agreements. Employees resisting arbitration argue that the arbitration agreement precludes effective enforcement of statutory rights³⁶ or is unenforceable based on general contract defenses, such as duress, fraud or unconscionability.³⁷

Dispute resolution methods other than arbitration have been less controversial. Nevertheless, other alternative methods have not been without their critics. Settlement by any method may inhibit development of the law and

34. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991) (holding that a "claim under the Age Discrimination in Employment Act of 1967 . . . [could] be subjected to compulsory arbitration . . . in a securities registration application"); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 482-83 (1989) (finding claims under Securities Act of 1933 arbitrable); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985) (finding statutory antitrust claims arbitrable).

35. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (interpreting the Federal Arbitration Act to apply to all employment contracts except those of transportation workers).

36. See *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89-92 (2000); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1060, 1062 (11th Cir. 1998) (refusing to require arbitration of Title VII claims where statutory damages unavailable); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1468 (D.C. Cir. 1997) (interpreting arbitration agreement to require employer to pay all arbitrators' fees in order to uphold the agreement; finding that employees cannot be required to pay fees to enforce statutory rights in arbitration if such fees would not be required for judicial enforcement).

37. *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 784-87 (9th Cir. 2002) (finding unilaterally imposed arbitration agreement unconscionable where it required the employee to pay half of the costs, covered claims that employees are likely to bring but excluded those that employers are likely to bring, and contained discovery provisions favorable to the employer); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893-95 (9th Cir. 2002), *cert. denied*, 535 U.S. 1112 (2002) (finding unconscionable an arbitration agreement imposed as a contract of adhesion which limited plaintiff's statutory remedies); *Hendrix v. Countrywide Home Loans, Inc.*, No. B153848, 2002 Cal. App. LEXIS 6598, at *9-10 (Cal. Ct. App. 2002) (finding unconscionable and unenforceable arbitration agreement that covered claims employees likely to bring but excluded those employers likely to bring, required employees to pay half the cost of arbitration after the first hearing day, and allowed arbitrator to impose all costs on employees who lose claims). For an analysis of unconscionability and arbitration, see Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001 (1996).

legal norms, particularly where a statute is relatively new.³⁸ Informal dispute resolution methods do not contain some of the judicial system's safeguards that protect litigants from bias.³⁹ Accordingly, persons with less power, frequently men of color and women, may be disadvantaged in informal processes.⁴⁰ While some scholars have cautioned against use of such processes on this basis,⁴¹ others have suggested that alternative processes may be well-suited to members of disadvantaged groups because of their greater focus on relationships and resolution.⁴²

C. *The Result of Workplace Changes*

These changes in the workplace and the regulation of the workplace have caused or exacerbated certain problems. While statutory and common law protections have expanded, many employees' ability to access these protections is limited. In the unionized workplace, unions provide not only representation in contractual disputes, but often representation in legal disputes as well. In the nonunion workplace, employees must find legal representation or represent themselves. Pro se representation in complex legal disputes is extraordinarily difficult. Attorneys are rarely available except to employees with financial means, or those with very strong cases that make contingency fee representation

38. Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 671-72 (1986); Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085-86 (1984); Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REV. 1, 30 (1990); Daniel Misteravich, *The Limits of Alternative Dispute Resolution: Preserving the Judicial Function*, 70 U. DET. MERCY L. REV. 37, 39-40 (1992).

39. Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1367-75.

40. See *id.* at 1390-99; Trina Grillo, *The Mediation Alternative: Process Danger for Women*, 100 YALE L.J. 1545, 1600-07 (1991); see also Margaret F. Brinig, *Does Mediation Systematically Disadvantage Women?*, 2 WM. & MARY J. WOMEN & L. 1 (1995) (reviewing empirical evidence and suggesting that any disadvantage comes from power differential rather than characteristics such as altruism and risk aversion, which some suggest are associated with gender).

41. See Delgado et al., *supra* note 39, at 1387-91; Grillo, *supra* note 40, at 1607-10.

42. See generally Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55; Eve Hill, *Alternative Dispute Resolution in a Feminist Voice*, 5 OHIO ST. J. ON DISP. RESOL. 337, 338, 370-76 (1990). See also Deborah M. Kolb & Linda L. Putnam, *Through the Looking Glass: Negotiation Theory Refracted Through the Lens of Gender*, in WORKPLACE DISPUTE RESOLUTION: DIRECTIONS FOR THE TWENTY-FIRST CENTURY 231, 231-57 (Sandra E. Gleason ed., 1997); Kate McCabe, Comment, *A Forum for Women's Voices: Mediation Through A Feminist Jurisprudential Lens*, 21 N. ILL. U. L. REV. 459 (2001).

financially feasible.⁴³ While attorneys' fees are awarded under many statutes when the employee prevails, a lawyer will be willing to risk representation only in a case that appears very strong.⁴⁴ While some statutes hold potential for representation by a government agency, the overworked, underfunded agencies accept a limited number of cases for litigation.⁴⁵ Accordingly, many employees simply lack the means to enforce their statutory rights.

As set forth above, many employers have responded to the proliferation of legal rights by mandating use of ADR. Most of the same representational concerns are present. While some have suggested that arbitration may provide a low cost alternative for employees to enforce their rights,⁴⁶ there has yet to develop a legal bar or other source of relatively low cost representation for employees in the alternative forum. Indeed, the plaintiffs' bar has been a strong opponent of arbitration, fearing a move to an unlevel playing field with limited remedies and attorneys' fees.⁴⁷ Evidence suggests that where one party has an attorney and the other does not, the party with the attorney is more likely to prevail.⁴⁸ Moreover, despite its reputation as a less expensive forum, arbitration

43. Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 58 (1998).

44. *Id.*

45. See 42 U.S.C. § 2000e-5(b)-(c), (f) (2000) (establishing the Equal Employment Opportunity Commission's ("EEOC") duty to investigate charges and file litigation where necessary). In 2001 the EEOC filed 430 lawsuits alleging employment discrimination in violation of statutes such as the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, and the Equal Pay Act of 1963. See U.S. Equal Employment Opportunity Commission, *EEOC Litigation Statistics, FY 1992 to FY 2001*, at <http://www.eeoc.gov/stats/litigation.html> (last modified Feb. 6, 2003).

46. See Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 562-63 (2001) (arguing that most employees will be better off in arbitration); Theodore J. St. Antoine, *The Changing Role of Labor Arbitration*, 76 IND. L.J. 83, 91-93 (2001) (suggesting that arbitration with appropriate protections for employees may be "the most realistic hope of the ordinary blue-or pink-collar claimant").

47. See Brief for National Employment Lawyers Association, *EEOC v. Waffle House*, 534 U.S. 279 (2002) (No. 99-1823); Brief for National Employment Lawyers Association, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (No. 99-1379); Brief for National Employment Lawyers Association, *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000) (No. 99-1235); Cliff Palefsky, *The Civil Rights Struggle of the '90s: From 'Separate but Equal' to 'Just Another Forum'*, THE RECORDER, May 1999, at S35.

48. Data demonstrates that employees who are represented in unemployment compensation proceedings are more likely to be awarded benefits. Rick McHugh, *Lay Representation in Unemployment Insurance Hearings: Some Strategies for Change*, 16 CLEARINGHOUSE REV. 865, 866 (1983) (citing the 1979 study by National Commission on Unemployment Compensation). Where employers used attorneys and employees had

can actually cost more than litigation because the arbitrator charges fees while the judge does not.⁴⁹

The decline of unionization has weakened the labor movement as a whole. While there is debate about the cause and effect relationship, there is no doubt that the labor movement is less powerful than in the past when more of the workforce was unionized. If a union cannot organize all of the major employers in an industry, it is difficult to sustain high wages and benefits for unionized employees. In addition, the unions' political power is reduced because they have less money and fewer voting members. It has been many years since unions have been able to obtain any significant legislative victories which directly affect unions, in contrast to the workforce in general.⁵⁰ The strike, long thought to be

no representation, the employees' success rate in obtaining unemployment compensation was thirty percent, but where both parties were represented the employees' success rate improved to fifty percent. Ann C. Hodges, *The Preclusive Effect of Unemployment Compensation Determinations in Subsequent Litigation: A Federal Solution*, 38 WAYNE L. REV. 1803, 1830 n.138 (1992) (citing a 1979 study). In a study of discharge cases in arbitration, Block and Stieber found that where one party was represented by an attorney and the other was not, the party with legal representation had a greater chance of prevailing, but the odds of prevailing were the same where either both or neither were represented. See Richard N. Block & Jack Stieber, *The Impact of Attorneys and Arbitrators on Arbitration Awards*, 40 INDUS. & LAB. REL. REV. 543, 548, 553 (1987). Some employment arbitration systems provide that if the employee foregoes legal representation, the employer will do so as well. JOHN T. DUNLOP & ARNOLD M. ZACK, *MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES* 83 (1997) (describing arbitration policies of The Travelers Group and Brown & Root). Others fund some portion of the employee's legal fees. *Id.* (describing arbitration policies of Brown & Root and ITT). Such features offer employees greater potential for access to justice.

49. See LeRoy & Feuille, *supra* note 31, at 164-65 (noting that arbitration costs can be higher than the cost of litigation in some cases, but also pointing out that the forum and arbitrator fees may be balanced by other costs that are relatively cheaper in arbitration). The lower cost often comes from more limited discovery, which may disadvantage employees who have less access to information than the employer, and the decision not to use legal representation, write briefs or transcribe the proceedings. *Id.* at 162. *But see* Samuel Estreicher & Matt Ballard, *Affordable Justice Through Arbitration: A Critique of Public Citizen's Jeremiaad on the "Costs of Arbitration"*, 57 DISP. RESOL. J., Jan. 2003, at 8, 10.

50. No major amendments to the NLRA have been enacted since 1959. In 1977, a major reform effort failed. CRAVER, *supra* note 7, at 32. Since that time labor has achieved no significant legislative victories at the federal level. By way of contrast, major employee protection legislation directed at the workforce as a whole has been enacted regularly including Title VII of the Civil Rights Act in 1964 with major amendments in 1972 and 1991, 42 U.S.C. § 2000e-e-17 (2000); the Age Discrimination in Employment Act in 1967 with major amendments in 1974, 1978, 1986, and 1991, 29 U.S.C. §§ 621-634 (2000); the Americans with Disabilities Act in 1990, 42 U.S.C. §§ 12101-12213 (2000); the Employee Retirement Income Security Act in 1974 with major

labor's most important weapon, is used sparingly because of the difficulty in prevailing and the potential loss of jobs and public support.⁵¹ Labor has searched for new tools for organizing employees and putting economic pressure on employers, with limited success.⁵²

The labor movement has long been criticized for its failure to appeal to the growing portion of the workforce—people of color, many recent immigrants, and

amendments in 1984, 1985, 1986, 1989 and 1996, 29 U.S.C. §§ 1001-1461 (2000); the Occupational Safety and Health Act in 1970, 29 U.S.C. §§ 651-678 (2000); the Family and Medical Leave Act in 1993, 29 U.S.C. §§ 2601-2654 (2000); the Health Insurance Portability and Accountability Act in 1996, 42 U.S.C. § 300gg-gg-2 (2000); the Employee Polygraph Protection Act in 1988, 29 U.S.C. §§ 2001-2009 (2000); the Older Workers Benefit and Protection Act in 1990, Pub. L. No. 101-433; and the Worker Adjustment Retraining and Notification Act in 1988, 29 U.S.C. §§ 2102-2109 (2000). While organized labor has been a major supporter of most employee protective legislation, such legislation also has broader support from other advocacy groups for workers, consumers and retirees including the AARP, the NAACP, the National Organization for Women, various disability rights groups, and the National Partnership for Women and Families.

51. See U.S. Department of Labor, Bureau of Labor Statistics, *Bureau of Labor Statistics Data*, at <http://www.bls.gov> (last visited Mar. 29, 2004) (showing substantial decline in both number of work stoppages and number of employees participating in work stoppages since 1960). For example, there were more than two hundred work stoppages involving one thousand or more employees each year from 1960 to 1979, and in some years more than four hundred. See *id.* In 1980 and 1981 there were more than one hundred stoppages and since that time the number has never been greater than one hundred. See *id.* In most years there have been fewer than fifty and in some years as few as seventeen or nineteen. See *id.* Unable to use the strike effectively, many unions have gone long periods without a collective bargaining agreement in effect.

52. See Cent. Ill. Pub. Serv. Co., 326 N.L.R.B. 928, 928-29, 947-48 (1998) (describing "inside game" tactics used by union including refusals to work voluntary overtime, working to the rule, and filing of grievances as a group); STEPHEN FRANKLIN, *THREE STRIKES: LABOR'S HEARTLAND LOSSES AND WHAT THEY MEAN FOR WORKING AMERICANS* 27-37 (2001) (describing the use of corporate campaigns by labor unions); PAUL OSTERMAN ET AL., *WORKING IN AMERICA: A BLUEPRINT FOR THE NEW LABOR MARKET* 105-19 (describing new organizing efforts in the telecommunications industry, for professional and managerial employees and for low income and contingent workers); Crain & Matheny, *supra* note 2, at 1785 (describing the AFL-CIO's new emphasis on organizing); Christopher L. Erickson et al., *Justice for Janitors in Los Angeles: Lessons from Three Rounds of Negotiations*, 40 BRIT. J. INDUS. REL. 543 (2002) (describing the Justice for Janitors campaign which successfully organized janitorial workers in Los Angeles office buildings using public protests, coalition building, and strategic pressure, and has maintained the union through three negotiating cycles); Nathan Newman, *Union and Community Mobilization in the Information Age*, PERSPECTIVES ON WORK, Aug. 2002, at 9, 9-10 (describing the use of the Internet as an organizing tool for widely dispersed workers and for publicizing negative information about employers to pressure them to recognize unions).

white women—many of whom are in service rather than manufacturing jobs.⁵³ Some unions have a history of overt discrimination, while others historically have made efforts to eliminate discrimination and increase inclusiveness.⁵⁴ The failure to include these groups as an integral part of the labor movement has been cited as a cause for the decline of unions.⁵⁵ While unions have made some efforts to bridge this gap in recent years,⁵⁶ the hierarchy of most unions remains

53. Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality & Labor Speech*, 82 GEO. L.J. 1903, 1942-46 (1994) [hereinafter Crain, *Between Feminism*]; Marion Crain, *Critical Race Studies: Colorblind Unionism*, 49 UCLA L. REV. 1313, 1322-23 (2002) [hereinafter Crain, *Colorblind*]; Marion Crain & Ken Matheny, "Labor's Divided Ranks": *Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542, 1594-96 (1999); Charles B. Craver, *The Vitality of the American Labor Movement in the Twenty-First Century*, 1983 U. ILL. L. REV. 633, 648-49; Theodore J. St. Antoine, *Federal Regulation of the Workplace in the Next Half Century*, 61 CHI.-KENT L. REV. 631, 645 (1985).

54. See Michael J. Goldberg, *Affirmative Action in Union Government: The Landrum-Griffin Act Implications*, 44 OHIO ST. L.J. 649, 652-53 (1983) (discussing the history of discrimination in the labor movement); Steven H. Kropp, *Deconstructing Racism in American Society—The Role Labor Law Might Have Played (But Did Not) in Ending Race Discrimination: A Partial Explanation and Historical Commentary*, 23 BERKELEY J. EMP. & LAB. L. 369, 380-85, 398 (2002) (detailing history of discrimination by railroad unions against African-Americans but also noting important labor support for the 1964 Civil Rights Act); Lowell Turner & Richard W. Hurd, *Building Social Movement Unionism: The Transformation of the American Labor Movement*, in REKINDLING THE MOVEMENT: LABOR'S QUEST FOR RELEVANCE IN THE TWENTY-FIRST CENTURY 15 (Lowell Turner et al. eds., 2001) (noting that although labor supported civil rights legislation and some unions were active in the civil rights movement, Hispanic and black workers were excluded from many high paying union jobs, often with the support of unions). See generally WILLIAM B. GOULD, *BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES* (1977) (discussing the history of unions and race).

55. Craver, *supra* note 53, at 648-49; Ruth Needleman, *Comments*, in WOMEN AND UNIONS: FORGING A PARTNERSHIP 406, 410-11 (Dorothy Sue Cobble ed., 1993) (highlighting ways in which "union culture discourages female participation and leadership"); St. Antoine, *supra* note 53, at 645; Stone, *supra* note 7, at 581.

56. See Crain & Matheny, *supra* note 2, at 1784-85, 1829-30 (describing the AFL-CIO's recent initiatives to appeal to women, people of color and immigrant workers and to focus on social justice); Ruth Milkman & Kent Wong, *Organizing Immigrant Workers: Case Studies from Southern California*, in REKINDLING THE MOVEMENT, *supra* note 54, at 99-128 (describing and analyzing successful and unsuccessful efforts to organize immigrant workers); Stone, *supra* note 7, at 581-82 (arguing that unions have appealed to women and people of color).

predominantly white and male.⁵⁷ For most unions, the attempt to become more inclusive has been sporadic and tentative.

D. Proposals for Change

Proposals to address the above-identified problems abound.⁵⁸ Among the early proposals were changes in the National Labor Relations Act to make remedies for anti-union conduct more effective and union representation easier to obtain.⁵⁹ Comparisons with Canadian law, which is more protective of

57. GOULD, *supra* note 54, at 16 (noting the relative absence of African-Americans from policymaking positions in unions); Crain, *Between Feminism*, *supra* note 53, at 1944 (noting the underrepresentation of women in leadership and organizing positions, even in unions where women predominate); Goldberg, *supra* note 54, at 653-55 (citing underrepresentation of women and people of color in union leadership positions); Lois S. Gray, *The Route to the Top: Female Union Leaders and Union Policy*, in WOMEN AND UNIONS, *supra* note 55, at 378-93 (Dorothy Sue Cobble ed., 1993) (noting the relative lack of women in the top leadership of unions and analyzing reasons therefore).

58. Of course, not every observer or scholar views all of the changes as problematic. Some perceive the reduction of unionization as beneficial to the economy and others see the increase in individual rights as advantageous to workers. See, e.g., BARRY T. HIRSCH & JOHN T. ADDISON, *THE ECONOMIC ANALYSIS OF UNIONS: NEW APPROACHES AND EVIDENCE* 211-15 (1986) (concluding that unionization decreases profitability, which is likely to impact negatively on investment behavior and long-run economic performance); MORGAN O. REYNOLDS, *MAKING AMERICA POORER: THE COST OF LABOR LAW* 192-94 (1987) (arguing that privileged treatment of unions, especially the rule of exclusive representation, hurts workers by taking away their freedom to "search out the highest bidder for their labor services"); Charles Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and its Prospects*, 51 U. CHI. L. REV. 1012, 1027-29 (1984) (questioning whether the high price individuals must pay in order to unionize, in terms of money and loss of freedom, is worth any benefits that might arise from unionization); John A. Litwinski, *Regulation of Labor Market Monopsony*, 22 BERKELEY J. EMP. & LAB. L. 49, 86-92 (2001) (arguing that unions create economic inefficiencies and harm consumers). Others see the move toward ADR in lieu of litigation as a positive trend. Raymond J. Broderick, *Court-Annexed Compulsory Arbitration: It Works*, 72 JUDICATURE 217 (1989) (arguing that success of court-annexed ADR programs suggests enlarging and expanding the practice); Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982) (arguing that arbitration should be utilized to complement courts); Carol J. King, *Are Justice and Harmony Mutually Exclusive? A Response to Professor Nadar*, 10 OHIO ST. J. ON DISP. RESOL. 65 (1994) (responding to critique of mediation); Judge Dorothy Wright Nelson, *ADR in the Federal Courts—One Judge's Perspective: Issues and Challenges Facing Judges, Lawyers, Court Administrators, and the Public*, 17 OHIO ST. J. ON DISP. RESOL. 1 (2001).

59. See, e.g., CRAVER, *supra* note 7, at 152-53 (proposing that the National Labor Relations Act be amended to provide for immediate reinstatement of illegally terminated union supporters, to allow the NLRB to order an employer to bargain with the union

employee and union rights in a similar economy with a much higher unionization rate, supported many of the proposals for change.⁶⁰ There followed other recommendations for changes in the law. Some commentators urged elimination or restriction of Section 8(a)(2) of the NLRA, which outlaws company unions, to allow additional opportunities for employee voice through organizations created or influenced by the employer.⁶¹ This recommendation frequently was accompanied by suggestions that the German system of Works Councils be adopted in the United States, providing another vehicle for employee voice in employer decision-making.⁶² Others contended that a narrower exclusion for

which was unlawfully prevented from gaining majority support by egregious employer unfair labor practices, and to provide "make-whole relief" to employees where the employer unjustifiably refused to bargain with the union); GOULD, *supra* note 1, at 151-80 (suggesting, among other amendments, adoption of measures to shorten the delay in resolution of unfair labor practice proceedings, double or triple back pay awards to employees unfairly discharged, and "first-contract" arbitration as a solution to the erosion of support during the union-employer bargaining process); PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 243-52 (1990) (recommending accelerating the process of reinstating workers illegally discharged during a union representation contest by providing interim judiciary relief pending a final verdict); *see also Report and Recommendations of the Commission on the Future of Worker-Management Relations*, Daily Lab. Rep. (BNA) Special Supp. No. 6 (Jan. 10, 1995) [hereinafter *Dunlop Commission Report*]. President Clinton appointed the Commission to consider and make recommendations designed to "build more cooperative and productive workplace relations." *Id.* at 10. The Commission recommended, inter alia, expedited union representation elections, injunctive actions to remedy discriminatory discharges occurring during organizing campaigns and negotiations for first contracts, and dispute resolution systems to assist unions and employers in achieving first contracts. *Id.* at 12-13.

60. Weiler, *supra* note 8, at 1805-06 (explaining that Canadian unions have the right to bargain for employees once a majority of employees have signed authorization cards).

61. *See Dunlop Commission Report, supra* note 59, at 25 (urging both revision to, and interpretation of, Section 8(a)(2) to render lawful nonunion employee participation programs if discussion of terms and conditions of work is incidental to the purpose of the program); Craver, *supra* note 8, at 430-31 (recommending interpretation of Section 8(a)(2) to permit employee participation programs not designed to deprive employees of union representation rights); Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 86-87 (1993) (urging that Section 8(a)(2) be interpreted to restrain employee participation in the nonunion workplace only where an organizing campaign is ongoing or has occurred within the prior two years). *But see* Michael C. Harper, *A Framework for the Rejuvenation of the American Labor Movement*, 76 IND. L.J. 103, 110-15 (2001) (expressing skepticism about the adverse impact of Section 8(a)(2) on opportunities for employee voice).

62. *See* WEILER, *supra* note 59, at 283-95.

supervisors and managers would provide more employees with the opportunity to unionize.⁶³ Still others advocated that nonmajority unions seek to bargain for their members, with or without a change in the law to eliminate the requirement of majority representation.⁶⁴ Professor Finkin has suggested that state law might be used to fill the representation gap.⁶⁵ Professor Harper has offered a creative proposal for two-tier representation, a modification of the German Works Council system with the two levels of union representation differing in both scope of the bargaining unit and negotiating authority.⁶⁶ Professor Stone has suggested a number of changes in the NLRA that would make the statute more relevant to the changing workplace, including allowing bargaining units to be determined by employee desires rather than rigid employer boundaries, allowing peaceful secondary boycotts and closed shops, broadening the definition of "employee," and requiring multi-employer bargaining when sought by the union.⁶⁷ Many of these proposals are thoughtful and worthwhile suggestions that might accomplish some, if not all, of their intended objectives. Yet the prospect for legal change more supportive of unionization is dim.⁶⁸

Professors Gottesman and Estreicher have suggested that unions might become service providers to employees without majority representation, offering

63. See GOULD, *supra* note 1, at 141-42; *Dunlop Commission Report*, *supra* note 59, at 27-28.

64. See Crain & Matheny, *supra* note 53, at 1616-24; Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 CHI.-KENT L. REV. 195 (1993); Alan Hyde et al., *After Smyrna: Rights and Powers of Unions that Represent Less than a Majority*, 45 RUTGERS L. REV. 637 (1993); George Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished?*, 123 U. PA. L. REV. 897 (1975); Clyde Summer, *Unions Without Majority—A Black Hole?*, 66 CHI.-KENT L. REV. 531 (1990).

65. Matthew W. Finkin, *Bridging the "Representation Gap"*, 3 U. PA. J. LAB. & EMP. L. 391, 408-19 (2001) (suggesting that states could legislate representational and employee participation requirements short of exclusive bargaining).

66. Harper, *supra* note 61, at 124-27. Under this proposal, first tier representatives would be chosen by a majority of employees at a single employer by either a card check or a representation election in which the employer could not participate. *Id.* at 124-25. First tier representatives could negotiate agreements with just cause protection for discipline and grievance and arbitration procedures, and could help enforce external laws, but could not negotiate economic terms or use economic pressure such as strikes. *Id.* Second tier representatives, which would have the authority to negotiate economic terms and strike after an employee authorization vote, would be selected in broader bargaining units, including those with existing first tier representatives. *Id.* at 126.

67. Katherine Van Wezel Stone, *Employee Representation in the Boundaryless Workplace*, 77 CHI.-KENT L. REV. 773, 816-18 (2002).

68. For an interesting discussion of the source of many current problems with the NLRA and the prospects for legal change, see Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).

to employee/members bargaining expertise on complex issues such as pensions and insurance, and enabling them to negotiate for collective goods.⁶⁹ Under this proposal, unions would represent employees (or provide lawyers for employees) in contractual negotiations or in cases ranging from discrimination claims to wrongful discharge lawsuits to claims for family or medical leave.⁷⁰ One focus of these proposals has been representation of employees in dispute resolution systems imposed by nonunion employers.⁷¹ This provision of services may increase the power of unions and perhaps allow them to grow into majority representation.⁷²

Because of the changes in the workplace from a career-employment model based on internal labor markets to one where employees move more frequently among employers and are urged to structure their own careers, scholars have recommended changes in union structure to represent employees more effectively in such labor markets.⁷³ Union organization on a multi-employer

69. Gottesman, *supra* note 61, at 81-82; Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827, 833-34 (1996).

70. Robert Rabin recognized early the possibility of an expanded role for unions in enforcing public rights of employees who were not part of traditional bargaining units. See Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F. L. REV. 169 (1991).

71. Although scholars initially suggested that there was no legal impediment to providing such service where the union is not the majority representative of employees, several recent decisions from federal appellate courts have found provision of legal services to be an unlawful preelection benefit which warrants setting aside representation elections won by unions. See *Freund Baking Co. v. NLRB*, 165 F.3d 928 (D.C. Cir. 1999); *Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578 (6th Cir. 1995). Although the NLRB has not agreed, the decision by the D.C. Circuit, an appeal venue for any Board case, makes the Board's retention of its position permitting such assistance futile. Catherine L. Fisk, *Union Lawyers and Employment Law*, 23 BERKELEY J. EMP. & LAB. L. 57, 60-61 (2002). Fisk argues persuasively in favor of the Board's position. *Id.*

72. Gottesman, *supra* note 61, at 81-83.

73. See, e.g., HECKSCHER, *supra* note 8, at 155-231 (recommending a new form of unionism, more flexible and decentralized, which he denominates "associational unionism"); OSTERMAN ET AL., *supra* note 52, at 95-129 (discussing various strategies for unions facing substantial changes in the workplace); Daniel Cornfield, *Labor Union Responses to Technological Change: Past Present and Future*, PERSPECTIVES ON WORK, Apr. 1997, at 35, 38 (advocating that unions respond to corporate changes by becoming suppliers of labor and establishing union-controlled consulting systems for employees facing technological change, which would provide employees with both a knowledge base for changing jobs and a job referral network); Charles Heckscher, *Living with Flexibility*, in REKINDLING THE MOVEMENT, *supra* note 54, at 59, 68-69, 75-78; Stone, *supra* note 67, at 802-03 (discussing union strategies for the boundaryless workplace including "new craft unionism," in which unions bargain for minimum standards and training and allow individual bargaining above the minimum).

occupation or craft basis, like that which exists in the construction industry, would permit unions to serve workers by providing training, portable benefits, and perhaps even referrals for jobs with unionized employers.⁷⁴ Like other recommendations for change, union restructuring would be facilitated by changes in the law that would permit, inter alia, multi-employer bargaining where requested by the union, bargaining units determined by the desires of the employees, inclusion of independent contractors under the NLRA, and secondary boycotts within a network of related employers.⁷⁵

Other scholars have taken a slightly different route, focusing on the need for unions to appeal to the increasing portion of the workforce composed of persons of color and white women. Professor Marion Crain, frequently writing with Ken Matheny, has been a leading advocate for this approach. In a series of articles, she has suggested that unions have focused on class consciousness to the exclusion of other relevant aspects of worker identity such as gender, race and ethnicity.⁷⁶ A transformation of the labor movement is required to enable it to effectively represent all workers and combat the employers' strategy of "divide and conquer."⁷⁷ Crain and Matheny suggest legal reforms to enforce this basic shift in labor movement ideology. Like other scholars, Crain and Matheny advocate elimination of the majority rule and exclusive representation requirement, suggesting that it will permit advocacy by nonlabor groups and allow organization around multiple identities, such as race and gender.⁷⁸ Further,

74. See OSTERMAN ET AL., *supra* note 52, at 118 (discussing the South Bay Labor Council's program in Silicon Valley creating a temporary employment agency to raise wages and improve employment stability for temporary workers); Dorothy Sue Cobble, *Lost Ways of Unionism: Historical Perspectives on Reinventing the Labor Movement*, in REKINDLING THE MOVEMENT, *supra* note 54, at 82, 84-87 (describing occupational unionism of the past and current efforts to revive that form of unionism); Cornfield, *supra* note 73, at 38; Heckscher, *supra* note 73, at 68-69, 75-78 (describing the foci of unions in the increasingly mobile workforce and examples of organizations working toward such a model); Stone, *supra* note 67, at 802-10 (describing "new craft unionism").

75. Stone, *supra* note 67, at 816-18.

76. Crain, *Between Feminism*, *supra* note 53, at 1906-08; Crain, *Colorblind*, *supra* note 53, at 1313; Crain & Matheny, *supra* note 53, at 1543-45; see also Michael Selmi & Molly S. McUsic, *Difference and Solidarity: Unions in a Postmodern Age*, in LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES 429, 431-33 (Joanne Conaghan et al. eds., 2002) (criticizing unions for failure to focus on race, gender and ethnicity).

77. Crain & Matheny, *supra* note 53, at 1609-13.

78. *Id.* at 1617-19. Crain and Matheny suggest that the change would make economic tactics such as boycotts and picketing both more effective and perhaps lawful in contexts currently prohibited, such as secondary boycotts. *Id.* at 1623. More recently, Crain has advocated making race and ethnicity factors in determining appropriate bargaining units because ignoring racial and ethnic identity perpetuates racial disadvantage. Crain, *Colorblind*, *supra* note 53. For another critique of the legal

they urge imposition of a requirement that unions work affirmatively to eliminate discrimination rather than merely decline to participate in it.⁷⁹ In conjunction with this recommendation, they suggest that arbitration of statutory discrimination claims should be a mandatory subject of bargaining and that arbitration of such claims through a union negotiated procedure should preclude later litigation.⁸⁰ Crain and Matheny argue that there is far less risk of disadvantage to workers in arbitration of statutory claims where the procedure and representation are negotiated by the union.⁸¹

Critics have suggested identity-based organizing as a tool to broaden the appeal of unions.⁸² The proposals vary from recommendations that union organizing campaigns focus on multiple aspects of employee identity,⁸³ to suggested organization of caucuses as precursors to unions or within unions,⁸⁴ to arguments that racial and ethnic identity be a factor in deciding the appropriate bargaining unit in union organizing campaigns.⁸⁵

Virtually all of the proposals recommend significant changes in the law to enable achievement of their objectives. While some incremental change can occur without legal alteration, and indeed most scholars offer current or historic examples to support their recommendations,⁸⁶ in the end legal change will be

system's impact on subordinated groups, see Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. Not!*, 28 HARV. C.R.-C.L. L. REV. 395 (1993) (criticizing the courts and Board for interpreting Title VII and the NLRA in ways that continue the subordination of women of color).

79. Crain & Matheny, *supra* note 2, at 1839-41.

80. *Id.* at 1841-46.

81. *Id.* at 1842-45.

82. See, e.g., Crain, *Colorblind*, *supra* note 53, at 1331-34; Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149, 158-62 (1993) (suggesting use of caucuses inside the union); Iglesias, *supra* note 78, at 478-88 (advocating self-representation for women of color); Maria L. Ontiveros, *A New Course for Labor Unions: Identity-Based Organizing as a Response to Globalization*, in *LABOUR LAW*, *supra* note 76, at 417, 417, 422-24; see also Selmi & McUsic, *supra* note 76, at 434-35 (describing various proposals for identity organizing).

83. Ontiveros, *supra* note 82, at 417-21.

84. Marion Crain, *Women, Labor Unions, and Hostile Work Environment Sexual Harassment: The Untold Story*, 4 TEX. J. WOMEN & L. 9, 61, 66-76 (1995) (recommending use of identity caucuses to represent women within the union, particularly in the context of sexual harassment grievances); Ruben J. Garcia, *New Voices at Work: Race and Gender Identity Caucuses in the U.S. Labor Movement*, 54 HASTINGS L.J. 79 (2002) (supporting identity caucuses within unions); Hyde, *supra* note 82, at 160-62.

85. Crain, *Colorblind*, *supra* note 53, at 1331-32.

86. OSTERMAN ET AL., *supra* note 52, at 105-22 (citing various examples of union responses to changes in the labor market, including successful efforts at organizing professionals and managers, low income workers and contingent workers); Cobble, *supra*

essential to transformation. Change in the law may come about, however, because of demonstrated efficacy of new models on a small scale. One recommendation for change that necessitates no change in law is negotiation of a mediation provision in current contracts that applies to issues not covered by the agreement. The analysis below demonstrates that use of mediation may be an incremental change that may help to achieve some of the important broader goals articulated above.

II. MEDIATION OF DISPUTES OUTSIDE THE COLLECTIVE BARGAINING AGREEMENT

A. Contractual Grievance and Arbitration Provisions

Almost all collective bargaining agreements contain grievance and arbitration procedures designed to resolve disputes about the interpretation and application of the agreement. The common structure for such provisions is a series of steps in which progressively higher level officials of the company and union attempt to resolve the dispute, culminating in binding arbitration by a neutral arbitrator.⁸⁷ In most contracts, the arbitrator is confined to interpreting and applying the agreement. A few contracts incorporate disputes outside the agreement into the grievance procedure and some also provide for arbitration of such disputes. In addition, sometimes there is overlap between the provisions of the contract and provisions of law, such that arbitration of a contract dispute may

note 74, at 84-87 (describing efforts to revive occupational unionism); Marion Crain, *Whitewashed Labor Law, Skinwalking Unions*, 23 BERKELEY J. LAB. & EMP. L. 211, 224-28, 228-29 (2002) (describing coalition of traditional union and African-American religious community to address racial discrimination and economic oppression, and union efforts to organize immigrant workers by focusing on their unique needs); Crain & Matheny, *supra* note 53, at 1617-19 (providing examples of nonlabor groups engaged in worker advocacy supporting women and all people of color, in some cases collaborating with traditional unions); Hecksher, *supra* note 73, at 75-78 (describing the efforts of organizations to provide workers with security, power, and voice in the new economy); Ontiveros, *supra* note 82, at 418-21 (describing union campaigns using identity-based organizing); Stone, *supra* note 67, at 804-08, 814-16 (providing current examples of new craft unionism by International Alliance of Theatrical and State Employees ("IATSE"), Justice for Janitors, and several hotel and construction unions, and the historic example of waitress unions. Stone also provides examples of what she calls "citizen unions," community-based organizations that address the issues of workers and citizens across various workplaces.).

87. Some contracts provide for joint arbitration boards composed of equal numbers of management and union representatives, either with or without a subsequent appeal to a neutral arbitrator.

effectively resolve legal issues as well.⁸⁸ The Supreme Court has stated, however, that an employee cannot be precluded from litigating a legal claim by a union contractual provision providing for arbitration unless it clearly and unmistakably waives the employee's right to a judicial forum.⁸⁹ It is not uncommon for arbitrators to deal with legal issues in resolving contractual claims because of the substantial potential for overlap of legal and contractual claims. The law is often used as an aid to interpretation of the collective bargaining agreement.

B. Grievance Mediation

In the past twenty years, there has been a resurgence of interest in grievance mediation, which was more commonly used in the early years of contractual grievance procedures.⁹⁰ Current usage of mediation for contractual disputes adds a mediation step in the contractual procedure prior to arbitration.⁹¹ The parties to the agreement determine which grievances will be mediated. If initial discussions do not result in an agreement, the mediator, who is also an experienced arbitrator, offers a prediction as to how an arbitrator would decide the dispute. The parties can then pursue additional discussions, with unresolved grievances proceeding to arbitration with a different neutral and without use of any information revealed in mediation. The benefits of mediating grievances have been ably articulated by Professors Steve Goldberg and Jeanne Brett, who began experimenting with grievance mediation in the coal industry.⁹² They found that mediation resolved disputes more quickly, with less investment of party resources, and greater participant satisfaction.⁹³ The parties were able to focus on interest-based problem solving rather than taking the win/lose positions

88. In *Alexander v. Gardner-Denver Co.* the Supreme Court found that arbitration of a contractual claim challenging the employee's discharge, which overlapped with a legal claim that the discharge violated Title VII of the Civil Rights Act, did not preclude the employee's lawsuit on the race discrimination claim. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59-60 (1974).

89. *Wright v. Universal Mar. Servs. Corp.*, 525 U.S. 70, 79-80 (1998).

90. See Helen Elkiss, *Alternatives to Arbitration: Are Unions Ready for Change?*, 48 LAB. L.J. 675, 677-80 (1997); Feuille, *supra* note 5, at 187; Stephen B. Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 NW. U. L. REV. 270 (1982).

91. This description of current grievance mediation is based on the model used by Stephen Goldberg and Jeanne Brett in the mediation experiment in the coal industry. Stephen B. Goldberg & Jeanne M. Brett, *An Experiment in the Mediation of Grievances*, 106 MONTHLY LAB. REV., Mar. 1983, at 23.

92. *Id.*

93. *Id.* at 26-27.

typical of arbitration.⁹⁴ In addition, mediation helped preserve the ongoing relationship of the parties and assisted them in developing their own problem solving skills.⁹⁵ Mediation has been successful at resolving contractual grievances at low cost and high satisfaction in those relationships in which it has been adopted.⁹⁶ Although favorable reports about grievance mediation are legion, it has remained limited to a small part of the unionized workforce.⁹⁷

C. Mediation of Claims Not Covered by the Collective Bargaining Agreement

Despite the spread of grievance mediation and mediation of disputes in the nonunion workplace,⁹⁸ there has been little discussion of mediation of noncontractual claims in the unionized workplace. The one significant exception is the Postal Service's REDRESS system.⁹⁹ There has been some effort to require exclusive arbitration of statutory claims in the unionized workplace, however.¹⁰⁰ While I have argued elsewhere that it is risky for unions to waive employees' statutory rights to litigate,¹⁰¹ mediation offers an opportunity for unions to provide a nonbinding forum for resolution of workplace disputes that are not covered by the collective bargaining agreement. Such disputes would include statutory and common law legal claims, such as discrimination or wrongful termination, and nonlegal disputes such as communication problems or interpersonal conflicts. There are benefits to mediation for employees, unions and employers alike which make it a feasible option for collective bargaining.

94. See Stephen B. Goldberg & Jeanne M. Brett, *Disputants' Perspectives on the Differences Between Mediation and Arbitration*, 6 NEGOTIATION J. 249, 253-54 (1990).

95. See Stephen B. Goldberg, *Grievance Mediation: A Successful Alternative to Labor Arbitration*, 5 NEGOTIATION J. 9, 12-13 (1989).

96. Elkiss, *supra* note 90, at 677-80; Feuille, *supra* note 5, at 187, 191-95.

97. Feuille, *supra* note 5, at 197.

98. See *infra* notes 259-68 and accompanying text.

99. Lisa B. Bingham et al., *Exploring the Role of Representation in Employment Mediation at the USPS*, 17 OHIO ST. J. ON DISP. RESOL. 341, 356 (2002).

100. See *Safrit v. Cone Mills Corp.*, 248 F.3d 306, 308 (4th Cir. 2001) (holding that language of collective bargaining agreement clearly and unmistakably waived employee's right to litigate her discrimination claim, leaving arbitration as her only forum); *Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc.*, 199 F.3d 477, 485-86 (D.C. Cir. 1999), *enf'd*, 211 F.3d 1312 (D.C. Cir. 2000) (holding that individual agreements to arbitrate statutory discrimination claims are not mandatory subjects of bargaining and therefore employer could unilaterally impose them on union employees without bargaining with the union).

101. See Ann C. Hodges, *Protecting Unionized Employees Against Discrimination: The Fourth Circuit's Misinterpretation of Supreme Court Precedent*, 2 EMPLOYEE RTS. & EMP. POL'Y J. 123 (1998).

Accordingly, unions and employers should seriously consider an agreement to offer mediation of all workplace disputes.

Mediation of noncontractual claims should be voluntary, at least on the part of the employee.¹⁰² Dispute resolution academics have debated the merits of voluntary versus mandatory mediation.¹⁰³ Voluntary mediation minimizes duty of fair representation concerns for the union, which may be a particular concern when employees mediate legal claims.¹⁰⁴ Because of the risk of fair representation claims, voluntary mediation will be preferable from the union's point of view. While the risk is not as great for nonlegal claims, employers may be reluctant to agree to a mediation procedure which does not cover legal claims.¹⁰⁵ Employees may also resist a system that requires mediation of legal claims. Thus, voluntary mediation is most likely to be adopted.¹⁰⁶ In order for a voluntary system to be effective, however, the union and employer must educate employees about mediation and advocate effectively for the program.¹⁰⁷

The forum should give employees the choice of representation by the union or any other representative selected by the employee. While many employees might choose union representation, others may prefer attorneys or other

102. If the employer has an existing mediation program for nonunion employees, the parties could consider opening it up to union employees on a voluntary basis. Before agreeing to such a program, however, the union should evaluate the program to ensure that it indeed provides a benefit to the employees and permits representation by the union or other chosen representatives. Alternatively, the union-negotiated system could be opened up to nonunion employees to increase utilization and make it more cost effective for the employer. An added benefit for the union would be the prospect of convincing nonunion employees of the benefits of unionization.

103. See SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY & PRACTICE* § 7.3, at 7-11 (2d ed. 2001).

104. See *infra* Part II.G (discussing duty of fair representation issues).

105. See *infra* notes 155-56 and accompanying text.

106. *But see* Goldberg & Brett, *supra* note 91, at 29 (noting the high settlement rates when grievance mediation is required at the option of one party or for all grievances, and recommending further research on mandatory mediation).

107. The REDRESS system has had significant utilization despite its voluntary nature. Cynthia J. Hallberlin, *Transforming Workplace Culture Through Mediation: Lessons Learned from Swimming Upstream*, 18 HOFSTRA LAB. & EMP. L.J. 375, 379 (2001) (stating that twenty thousand cases were mediated in the first two years after full implementation of the program). Of course, most employers do not have the substantial number of potential parties and disputes present at the Postal Service. A pilot mediation program for state employees in Ohio found that a relatively small number of cases were actually mediated. L. Camille Hébert, *Establishing and Evaluating a Workplace Mediation Pilot Project: An Ohio Case Study*, 14 OHIO ST. J. ON DISP. RESOL. 415, 424 (1999). Evaluators suggested that insufficient promotion of the program, supervisor and employee hostility, and administrative difficulties may have contributed to the limited use of the program. *Id.* at 439-42.

advocates. In addition, the process should use outside mediators if at all possible. Outside mediators are preferable to internal mediators because they are perceived as fairer, and the perception of fairness or procedural justice is important to the success of any mediation program.¹⁰⁸

A more complex question is the type of mediation that should be chosen. Before discussing that issue, however, a review of both the potential benefits of such a mediation program and the empirical evidence about existing mediation programs is appropriate.

1. Benefits for the Union

Negotiation of a mediation forum allows unions to provide an additional benefit to represented employees, thereby strengthening the employee support for the union, which will assist the union in continuing as the employees' representative. The employees will not only obtain a forum for vindicating statutory rights without waiver of their right to litigate, but they will also acquire a vehicle for resolving other disputes that may make their work life difficult, but are not covered by the collective bargaining agreement. In addition, the trained and experienced union representatives who serve as advocates in the mediation process can represent employees in other forums.¹⁰⁹ The Equal Employment Opportunity Commission ("EEOC") currently uses mediation in many discrimination disputes.¹¹⁰ The Department of Labor also has begun to use

108. Lisa B. Bingham & David W. Pitts, *Highlights of Mediation at Work: Studies of the National REDRESS Evaluation Project*, 18 NEGOTIATION J. 135, 138-39 (2002) (reporting that participant satisfaction rates for process, outcome and mediator were higher when outside mediators were used as compared to inside mediators, but noting that levels of satisfaction were high with both models); Traci Gabhart Gann & Cynthia J. Hallberlin, *Recruiting and Training Outside Neutrals*, in FEDERAL ADMINISTRATIVE DISPUTE RESOLUTION DESKBOOK 623, 623 (Marshall J. Breger et al. eds., 2001); Jennie Kihnley, *Unraveling the Ivory Fabric: Institutional Obstacles to the Handling of Sexual Harassment Complaints*, 25 LAW & SOC. INQUIRY 69, 73 (2000) (discussing importance of perception of mediator neutrality and concerns that internal mediators may be pressured to reach solutions favorable to the employer); see also Ann C. Hodges, *Mediation and the Americans with Disabilities Act*, 30 GA. L. REV. 431, 485-93 (1996) (discussing the relative merits of using internal versus outside mediators in mediation programs conducted by administrative enforcement agencies).

109. Mediation training may assist advocates in representing employees in investigatory interviews as permitted by *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975).

110. See E. PATRICK MCDERMOTT ET AL., AN EVALUATION OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION MEDIATION PROGRAM (2000), at <http://www.eeoc.gov/mediate/report/chapter2.html> (last modified Oct. 2, 2000); *Equal Employment Opportunity Commission's Alternative Dispute Resolution Policy Statement*, at <http://www.eeoc.gov/policy/docs/adrstatement.html> (last modified Mar. 25, 2002);

mediation in disputes involving ERISA, the FMLA, and various whistleblower laws.¹¹¹ Union representatives could serve as employee advocates in these governmental mediation programs.

Trained union representatives also could provide services to unrepresented employees in employer-adopted dispute resolution systems.¹¹² Advocacy for nonunion employees could enhance the union's prospects for organizing additional workplaces and even growing members where the union does not represent a majority.¹¹³ In addition, the problem solving experience gained through participation in mediation will aid union and employer representatives in resolving disputes in the grievance and arbitration procedure and perhaps even in collective bargaining negotiations, thus improving the collective bargaining relationship to the benefit of the union, the employer, and the employees.¹¹⁴

Because the mediation option will cover both statutory discrimination claims and other statutory claims of strong interest to groups that have historically been perceived as outsiders to the union culture,¹¹⁵ mediation offers unions a vehicle for greater inclusion. The mediation procedure provides a forum for resolution of such disputes, and union representation and support to achieve resolution. In addition, it provides the union with an opportunity to include more employee/members in union activities. Mediation offers an

Dominguez Reports Drop in Charge Inventory, Expanded Mediation Emphasis in Fiscal 2002, Daily Lab. Rep. (BNA) No. 204, at A-6 (Oct. 22, 2002) (reporting on EEOC's expansion of its mediation program in 2002 to become largest workplace mediation program in the U.S.); *Another New Mediation Project at EEOC Expands Efforts to Nine State, Local Agencies*, Daily Lab. Rep. (BNA) No. 79, at A-5 (Apr. 24, 2003) (reporting on EEOC's expansion of mediation program to allow charges filed with the EEOC in nine states to be mediated by state and local agencies with which the EEOC maintains worksharing agreements).

111. See *DOL Seeks to Expand Use of Mediators to Resolve Disputes Under Employment Laws*, Daily Lab. Rep. (BNA) No. 01, at AA-1 (Jan. 2, 2001).

112. Internal employer dispute resolution programs may take on increased importance as the EEOC is beginning a pilot program in which it will defer discrimination charges to certain existing employer programs upon agreement of the charging party. *Dominguez to Intensify Mediation Efforts During Second Full Year at EEOC Helm*, Daily Lab. Rep. (BNA) No. 18, at S-43 (Jan. 28, 2003).

113. *DUNLOP & ZACK*, *supra* note 48, at 163; see also *supra* notes 69-72 and accompanying text. Since the *Weingarten* right to representation at investigatory interviews has been extended to the nonunion workplace, *Epilepsy Foundation of Northeast Ohio*, 331 N.L.R.B. 676 (2000), *enfd in relevant part*, 268 F.3d 1095 (D.C. Cir. 2001), union advocates might provide representation for nonunion employees in such situations. Again, such representation may enhance the union's prospects for selection as majority representative.

114. See *supra* note 95 and accompanying text.

115. One example of such a statute is the FMLA, providing unpaid leave for childbirth, adoption and serious family illness. 29 U.S.C. §§ 2601-2654 (2000).

effective method for resolving Title VII disputes.¹¹⁶ Professor Yelnosky advocates the use of employee identity caucuses to balance power in Title VII mediations.¹¹⁷ Such caucuses, informal networks of employees generally formed on the basis of race, ethnicity or gender,¹¹⁸ are controversial. While some, like Yelnosky, have urged their value in addressing workplace problems unique to, or at least more salient to, group members,¹¹⁹ others have argued that caucuses divide the employees in ways that decrease their power as a unit and enable the employer to divide and conquer.¹²⁰ Those who support identity caucuses suggest that the caucuses can establish collaborative relationships to consolidate power without losing the ability to foster the goals of the identity group.¹²¹

While some might suggest that identity groups must form outside the union structure to be effective, union facilitation of identity groups can further union efforts to include women and men of color.¹²² Interested members of such identity groups or caucuses could be trained to represent employees in mediation. Such a role could be extremely important in discrimination disputes, including harassment issues, which at times involve one union member accused of harassing another.¹²³ In addition to caucuses, the union could facilitate relationships with outside social justice organizations that would be willing to

116. Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U. ILL. L. REV. 583, 597-604 (noting that mediation is often quicker, cheaper, and easier to access, and allows the parties to seek interest-based solutions, which may alter workplace practices).

117. *Id.* at 613-21. Yelnosky argues that unions cannot perform this function because of their history of discrimination, their lack of diverse leadership, and their majoritarian character, not to mention the decreasing rate of unionization. *Id.* at 611-12.

118. *Id.* at 613-14. They may be called identity groups, networks, or affinity groups, but their defining characteristic is organization on the basis of social identity with a goal of addressing workplace issues relevant to their identity. *Id.* For some examples of the work of identity groups within employer organizations, see OSTERMAN ET AL., *supra* note 52, at 120-22.

119. Crain & Matheny, *supra* note 53, at 1617-19.

120. Molly S. McUsic & Michael Selmi, *Postmodern Unions: Identity Politics in the Workplace*, 82 IOWA L. REV. 1339, 1354-58 (1997); *see also* Crain & Matheny, *supra* note 2, at 1783 (citing criticism of identity politics by scholars and activists). Employers also have mixed views of identity groups, with some finding them threatening and others viewing the groups as encouraging employee participation. OSTERMAN ET AL., *supra* note 52, at 121.

121. Crain & Matheny, *supra* note 53, at 1617-19.

122. *See* Garcia, *supra* note 84, at 83; Hyde, *supra* note 82, at 161-62.

123. *Cf.* Mary K. O'Melveny, *Negotiating the Minefields: Selected Issues for Labor Unions Addressing Sexual Harassment Complaints by Represented Employees*, 15 LAB. LAW. 321, 352 (2000) (recommending use of separate union stewards for each employee in cases involving harassment accusations by one union member against another).

provide such representation when requested. Again, such connections could assist the union as well as the employees by creating partnerships that would benefit the union and the social justice organizations in other arenas.¹²⁴ Such organizations might support union organizing efforts and aid the union in economic and legal disputes with employers where representation rights are already established.¹²⁵ They might provide assistance to workers who lose jobs or income because of strikes, or to low wage workers who often have family, educational and financial needs in addition to work issues.¹²⁶ At the same time, the union can support social justice organizations in their efforts to bring about change in the community or to assist poor and working people. For example, the partnership of AFSCME and BUILD, an organization of church congregations in the black community in Baltimore, succeeded in convincing the city to enact a living wage ordinance.¹²⁷ The two groups also created a membership organization for workers, and city contractors agreed to deduct the membership dues from workers' pay.¹²⁸

124. See OSTERMAN ET AL., *supra* note 52, at 131-47 (discussing various newly emerging institutions that play roles that overlap with unions, including workplace advocacy organizations, immigrants' rights groups and living wage coalitions, some of which partner with unions); Michelle Amber, *New, Tax-Exempt Rights-At-Work Group Being Created by Several Unions*, AFL-CIO, Daily Lab. Rep. (BNA) No. 39, at C-1 (Feb. 27, 2003) (describing new organization established by unions to support workers' rights to organize, which includes as one strategy working with Jobs with Justice, the National Interfaith Committee for Worker Justice and other workers' rights and civil rights groups); Janice Fine, *Community Unionism: The Key to the New Labor Movement*, PERSPECTIVES ON WORK, Aug. 1997, at 32 (describing collaboration between an organization of African-American church congregations and AFSCME in Baltimore to organize low income service workers); Dorian T. Warren & Cathy J. Cohen, *Organizing at the Intersection of Labor and Civil Rights: A Case Study of New Haven*, 2 U. PA. J. LAB. & EMP. L. 629 (2000) (urging labor unions to forge alliances with social justice organizations and offering the New Haven Community and Labor Coalition as an example of successful collaboration).

125. See Erickson et al., *supra* note 52, at 563-65 (discussing the importance of coalition-building with politicians, churches and other unions in the Justice for Janitors organizing campaigns, subsequent contract negotiations, and resulting strike).

126. Ruth Needleman, *Building Relationships for the Long Haul: Unions and Community-Based Groups Working Together to Organize Low-Wage Workers*, in ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES 71, 72, 73 (Kate Bronfenbrenner et al. eds., 1998).

127. See Fine, *supra* note 124, at 33, 35.

128. See *id.* at 33, 35. Fine argues that this partnership is an example of community unionism, which "takes account of broad worker identities and interests. . . . some that are connected to occupation or employer, some that are not—but most of which are relevant to organizing." *Id.* at 34; see also Needleman, *supra* note 126, at 74-82. Needleman describes two such cooperative efforts. In California, Asian Immigrant Women Advocates and several labor organizations engaged in a campaign to pressure a

Finally, mediation can provide a forum for resolution of disputes within the union. There is no legal impediment to the union negotiating a voluntary forum for resolving disputes between employees or between employees and the union.¹²⁹ Interpersonal conflicts or communication problems between union members may affect the employees' ability to work together, both in their paid employment and in their unpaid status as union members, and may potentially subject them to employer discipline if the dispute affects their work. Legal issues like harassment may also involve employees as both harasser and harassee.¹³⁰ Resolution of such disputes will benefit the employees involved by preventing discipline and making their work life more pleasant, and will assist the union in building a more cohesive membership to maintain power vis-à-vis the employer. Even if the dispute is not resolved, providing a forum for employee voice may defuse the dispute and, in the long run, pay dividends in other ways, such as improving solidarity among union members. To the extent that legal disputes, such as duty of fair representation claims, disputes over the union's use of dues, or claims of union discrimination, can be resolved fairly, the union will benefit in the same way as the employer from low cost, quick, interest-based settlement.¹³¹

2. Benefits for Employees

Mediation would present employees the opportunity to resolve disputes without litigation, in a forum which is voluntary and nonbinding. Their right to litigate any legal claims would be preserved if no resolution was reached in mediation. Thus, unlike arbitration, the employee would not have to forego any rights and remedies except by voluntary agreement reached in mediation.

garment manufacturer to pay workers back wages unpaid by contractors and to create an education fund and hotline for garment workers. *Id.* at 78-82. Also in California, the nonprofit organization Labor Project for Working Families and the Service Employees International Union obtained grant funding to create centers to provide support for home health workers—social activities, a health clinic, immigration and legal advice, job referrals and opportunities to meet with their union representatives. *Id.*

129. The union may be legally limited in its ability to waive employee rights where there is a possible conflict of interest between the employees and the union. *See, e.g.,* NLRB v. Magnavox Co., 415 U.S. 322, 325 (1974).

130. For additional discussion of issues unique to harassment, see *infra* Part II.F.2.

131. For discussion of conflict issues arising in disputes between employees or employees and the union, see *infra* Part II.G. Some issues, such as discrimination, may involve claims against both the employer and the union. For discussion of issues that may arise in such cases, see Indira Talwani, *Settlement and Mediation of Individual Employment Disputes in the Unionized Workplace*, in ABA SECTION OF LABOR AND EMPLOYMENT LAW, EQUAL EMPLOYMENT OPPORTUNITY COMMITTEE, 2002 MIDWINTER MEETING, PROGRAM MATERIALS (2002).

Mediation may resolve legal disputes early and at low cost.¹³² Such resolution may prevent legal issues from escalating. In harassment cases, for example, evidence indicates that many victims simply want the harassment to stop.¹³³ They do not want to sue their employer and desire to avoid the pain and publicity of a trial, choosing litigation only as a last resort. A mediation forum provides a more private method of dealing with the abuse.

In addition to legal claims, the mediation forum could provide an opportunity to deal with other disputes not covered by contract or law. For example, communication problems and interpersonal disputes often cause significant conflict in the workforce which leads to lost productivity and low morale.¹³⁴ These difficulties are not typically covered by the collective bargaining agreement, although efforts might well be made by employees and unions to fit them under the rubric of the grievance procedure to achieve resolution. Mediation offers a forum to deal with such disputes without the need

132. In a small study of EEO mediation cases before a human rights agency, "early and timely use of mediation . . . appeared as a very significant factor in determining disputants' degree of satisfaction" with both the process and outcome of mediation and with the mediator's skills and abilities. Arup Varma & Lamont E. Stallworth, *Participants' Satisfaction with EEO Mediation and the Issue of Legal Representation: An Empirical Inquiry*, 6 EMPLOYEE RTS. & EMP. POL'Y J. 387, 411 (2002).

133. See Kihnley, *supra* note 108, at 82 (reporting that individuals in universities who handled sexual harassment complaints reported that many complainants simply want harassment to cease); Mary P. Rowe, *People who Feel Harassed Need a Complaint System with Both Formal and Informal Options*, 6 NEGOTIATION J. 161, 164-65 (1990) (finding based on the author's experience as an ombudsperson dealing with approximately six thousand persons over sixteen years that seventy-five percent or more of complainants just want harassment to stop); Carrie A. Bond, Note, *Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace*, 65 FORDHAM L. REV. 2489, 2501 (1997). Evidence also indicates, however, that many victims do not report harassment, making mediation a less viable solution. See U.S. MERIT SYS. PROTECTION BD., *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES* 33 (1995) (finding in a survey of federal workers that only six percent of workers who had suffered from sexual harassment reported their harassment); Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 MINN. L. REV. 305, 305 (1998) (citing NATIONAL COUNCIL FOR RESEARCH ON WOMEN, *SEXUAL HARASSMENT: RESEARCH AND RESOURCES* 10 (1995)) (finding that one to seven percent of women who report having suffered from harassment file a formal complaint).

134. See Katherine Van Wezel Stone, *Dispute Resolution in the Boundaryless Workplace*, 16 OHIO ST. J. ON DISP. RESOL. 467, 481 (2001) (suggesting the use of mediation to resolve disputes relating to miscommunication and disputes where "emotional factors or personality traits prevent parties from resolving differences themselves"). Stone argues that a promise of fair treatment is necessary to recruit and retain employees and to induce them to work cooperatively for the benefit of the employer. *Id.* at 479-80.

to attempt to structure the disagreement to meet the contractual definition of a grievance.¹³⁵ Resolution of such disputes will improve workplace morale for employees and may prevent future discipline problems. For the employees, mediation would provide an opportunity to resolve disputes that previously had no forum.¹³⁶

The solutions available in mediation are more flexible than in court, where remedies are limited by the law. Mediation can provide for interest-based solutions such as apologies, reassignment of employees or supervisors to different jobs or departments, sensitivity or communication training, or simply an end to certain behaviors.¹³⁷ Even in cases where employment has been severed amid allegations of discrimination or other statutory violations, reinstatement might be a viable solution in an early mediation where back pay has not accumulated, positions have not hardened, and the union is present to ease the renewal of the employment relationship.¹³⁸

Mediation may provide a better forum for resolving what Professor Susan Sturm has called "second-generation" discrimination issues.¹³⁹ While intentional

135. In addition to mediation, the parties might consider whether other dispute resolution methods that have been adopted in the nonunion workplace, such as ombuds or peer review, would be useful. Dispute resolution scholars recommend procedures with multiple options so that the forum fits the dispute. *See, e.g.,* Mary Rowe, *Dispute Resolution in the Non-Union Environment*, in *WORKPLACE DISPUTE RESOLUTION*, *supra* note 42, at 79, 84.

136. While "workplace bullying" or harassment that does not come within the statutory discrimination laws is probably not a widespread problem in the unionized workplace due to union protections, mediation might offer a forum for such disputes if not covered by the existing collective bargaining agreement. *See* David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 *GEO. L.J.* 475, 488-89 (2000) (noting that bullying is less likely in the unionized workplace because of contractual protections and informal dispute resolution efforts by the union, but citing example of lawsuit involving bullying of union steward); *see also* Spartan Equip. Co., 297 *N.L.R.B.* 19, 19 (1989) (finding individual employee's filing of criminal charge against employer to be protected concerted activity because he was attempting to further his efforts to act as union spokesperson without intimidation by the employer).

137. Interest-based solutions focus not on legal remedies available by right but on resolutions that meet the interests of the parties. Of course, not all mediation is focused on interests. Mediation can also focus on rights, and legal mediation often does. *See* WILLIAM L. URY ET AL., *GETTING DISPUTES RESOLVED* 4-5 (1988).

138. Available evidence indicates that the reinstatement remedy works more effectively in the unionized environment. *See infra* notes 249-50 and accompanying text. Of course in any termination case there will inevitably be overlap with the just cause provision of the collective bargaining agreement. For a discussion of the overlap issue, *see infra* Part II.F.

139. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 *COLUM. L. REV.* 458 (2001).

discrimination certainly still exists, current discrimination often results from unconscious bias which is embedded in workplace structures and patterns of interaction over time. These structures and patterns exclude from higher paying jobs women and other groups that have historically been subjected to discrimination. Because the exclusion results from structural features rather than intentional discrimination, it is difficult to challenge under existing legal doctrines.¹⁴⁰ Professor Sturm suggests that various actors both within and outside the workplace can play problem solving roles in changing workplace structures that result in discriminatory exclusion or harassment.¹⁴¹ She offers several examples of such change, including one resulting from a mediated settlement of a discrimination case against Home Depot brought by women.¹⁴² The mediation forum, and the availability of the union as an additional interested and knowledgeable actor, may facilitate resolution of discrimination issues that resist conventional judicial solutions.¹⁴³

Perhaps most important, employees obtain the possibility of free or low cost union representation in the mediation process. Representation is viewed as fundamental to fairness in dispute resolution processes.¹⁴⁴ While employees have many statutory rights, their ability to enforce these rights is limited by their

140. *Id.* at 465-78.

141. *Id.* at 479-537. As one example of such structures, she describes the hiring and promotion procedures at Home Depot which used subjective decision-making in an organization with a predominantly male culture, resulting in exclusion of white women and people of color from many jobs. *Id.* at 510-13; *see also* Yelnosky, *supra* note 116, at 601-02 (citing reports of changes in workplace rules, policies and practices resulting from mediation).

142. Sturm, *supra* note 139, at 509-19. The settlement created a new hiring and promotion system to ensure consideration of white women, people of color and older workers for all jobs. *Id.* at 512-19.

143. *See id.* at 533-34 (describing the role of the Harvard Union of Clerical and Technical Workers in creating joint councils to deal with workplace organization and policy. Sturm also recounts the role of representatives of an employee organization in crafting settlement of a race discrimination claim.). Notably, four of ten employers with dispute resolution programs studied by the GAO indicated that such programs alerted management to systemic concerns in the workplace, which in some cases led to changes in company procedures and policies. GENERAL ACCOUNTING OFFICE, ALTERNATIVE DISPUTES RESOLUTION: EMPLOYERS' EXPERIENCES WITH ADR IN THE WORKPLACE 27 (1997) [hereinafter GAO REPORT].

144. *See* American Arbitration Association, *Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship* (May 9, 1995), available at http://www.adr.org/index2.1.jsp?JSPssid=15769&JSPsrc=upload\LVESITE\Rules_Procedures\Protocols\...\focusArea\employment\protocol.html; Bingham et al., *supra* note 99, at 346; Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASH. U. L.Q. 787, 843-44 (2001).

ability to expend the resources necessary to do so. Obtaining legal representation is difficult for employees, other than highly-paid executives, because of the cost relative to the remedy available.¹⁴⁵ And, as noted above, even where the statute provides for employer-paid attorneys' fees for prevailing employees, attorneys are reluctant to accept cases without strong evidence at the outset that a victory is likely.¹⁴⁶ Such overwhelming evidence is rare, particularly prior to discovery. As many scholars have noted, unions may help fill this representation gap.

Union representation also helps balance power.¹⁴⁷ Rather than the lone employee against the employer, the employee has the strength of the union on his or her side. This assistance reduces the disadvantage to employees that might result from the lack of institutional protections to minimize bias.¹⁴⁸ In some situations, of course, the union may be of little assistance in this regard, as the union itself may be a source of bias.¹⁴⁹ The option of other representation, such as employee caucuses, outside social justice organizations or lawyers, will provide an alternative to the employee desiring representation other than the

145. See William M. Howard, *Arbitrating Employment Discrimination Claims: Do You Really Have To? Do You Really Want To?*, 43 DRAKE L. REV. 256, 288-89 (1994) (discussing the difficulties employees face in obtaining counsel); Maltby, *supra* note 43, at 58 (same); St. Antoine, *supra* note 46, at 91 (same).

146. See *supra* notes 43-49 and accompanying text.

147. See National Labor Relations Act § 1, 29 U.S.C. § 151 (2000). Empirical data demonstrate that unionized employees are more likely than similar nonunion employees to obtain benefits and enforce statutory rights. See John W. Budd & Brian P. McCall, *The Effect of Unions on the Receipt of Unemployment Insurance Benefits*, 50 INDUS. & LAB. REL. REV. 478, 488 (1997) (finding that unionized employees are more likely than nonunion employees to collect unemployment compensation benefits, even after controlling for differences in demographics, unemployment compensation systems, and jobs); Barry T. Hirsch et al., *Workers' Compensation Reciprocity in Union and Nonunion Workplaces*, 50 INDUS. & LAB. REL. REV. 213, 218, 233 (1997) (finding that unionized workers were more likely to file workers' compensation claims and more likely to receive workers' compensation benefits); David Weil, *Enforcing OSHA: The Role of Labor Unions*, 30 INDUS. REL. 20, 26-34 (1991) (finding that unions increase enforcement of OSHA in the manufacturing sector, resulting in more frequent inspections, more employee representation on inspections, more intense inspections, greater numbers of violations found and greater penalties). Union status likely enhances the probability of benefit receipt and statutory enforcement because the union provides information about risks, rights and benefits, represents the employees, and offers protection from retaliation. Budd & McCall, *supra*, at 490-91; Hirsch et al., *supra*, at 217, 233; Weil, *supra*, at 20-22. In short, the empirical data suggest that unions improve the prospects for collecting benefits by assisting employees in exercising their statutory rights.

148. See *supra* notes 39-41 and accompanying text.

149. See Crain, *Colorblind*, *supra* note 53, at 1322-25 (discussing the role of unions in exploitation of people of color); Crain & Matheny, *supra* note 53, at 1593-96 (discussing the role of the labor movement in the exploitation of women).

union.¹⁵⁰ The presence of a knowledgeable and trained representative can prevent the employee from being pressured into a settlement that inappropriately waives legal rights.

The union's institutional memory can assist the employee in making her case.¹⁵¹ In many discrimination cases, for example, the most relevant evidence may be the treatment of other employees similar to, and different from, the plaintiff. While the plaintiff may have limited information about the employer's treatment of other employees, the union has far more information and may even be able to persuade other employees to provide evidentiary support for the plaintiff.¹⁵² This information will assist in negotiating a favorable settlement for the plaintiff/employee.

3. Benefits for Employers

One question regarding a recommendation for an additional forum for employee complaints is why an employer should agree to such a forum. One answer is that many employers are already offering mediation unilaterally.¹⁵³

150. See *infra* notes 314-18 and accompanying text. In the nonunion ADR program at TRW, a diversified manufacturing company, employees used attorneys in about half of the cases, but in others employees brought other representatives, such as spouses and, in one case, a priest. Alexander J.S. Colvin, Adoption and Use of Dispute Resolution Procedures in the Nonunion Workplace 28 (2003) (unpublished manuscript, on file with the author). A report on the program indicated that in many cases these non-attorney representatives were forceful advocates for the employee. *Id.*

151. See Talwani, *supra* note 131, at 6. The union can provide this assistance even where it is not representing the employee.

152. The plaintiff may have rumors or hearsay information at best, but the union may have grievance records, union stewards who represented employees in grievances, or greater access to the employees themselves, who may be more willing to share their stories at the urging of the union.

153. A 1997 Cornell University study surveyed corporate counsel from the one thousand largest United States corporations about ADR. David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. PA. J. LAB. & EMP. L. 133 (1998) [hereinafter Lipsky & Seeber, *In Search of Control*]. Eighty-eight percent of respondents reported using mediation at least once in the previous three years. *Id.* at 137. Eighty-four percent indicated that they were likely or very likely to use mediation in the future. *Id.* at 153. And the survey indicated that mediation was being used in almost every industry. *Id.* at 157. More specific data on employment disputes from the same study reveal that mediation is used more often in employment disputes than any other category, and that industries across the board prefer mediation to other forms of ADR for resolution of employment disputes. See David B. Lipsky & Ronald L. Seeber, *Patterns of ADR Use in Corporate Disputes*, DISP. RESOL. J., Feb. 1999, at 66, 68, 69 [hereinafter Lipsky & Seeber, *Patterns*]. Further, survey respondents predicted that the use of mediation in employment disputes would grow significantly. DAVID B. LIPSKY &

Whether the motive is altruistic or self-serving, employer-sponsored mediation is becoming more widely available.¹⁵⁴ The most probable motive of employers adopting mediation is avoiding the cost and publicity of litigation, and perhaps also improving workforce morale and thereby productivity.¹⁵⁵ Indeed, some evidence suggests that unionized workers, and particularly union activists, are more likely to assert statutory rights.¹⁵⁶ If that is the case, then a mediation program for statutory rights may be of particular benefit to unionized employers.

Those employers who have utilized internal mediation or ombuds programs frequently report satisfactory results.¹⁵⁷ Disputes are resolved more quickly and

RONALD L. SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS 30 (1998).

154. See Lipsky & Seeber, *In Search of Control*, *supra* note 153, at 137, 153, 157; Margaret L. Shaw, *Designing and Implementing In-House Dispute Resolution Programs*, in ALI-ABA COURSE OF STUDY, ALTERNATIVE DISPUTE RESOLUTION (ADR): HOW TO USE IT TO YOUR ADVANTAGE! (1999) (listing mediation programs of a number of large employers including McGraw-Hill, Halliburton (formerly Brown & Root), Polaroid, TRW and Shell Oil).

155. In a survey of corporate counsel, cost and time savings were identified as the primary reasons for using mediation. Lipsky & Seeber, *In Search of Control*, *supra* note 153, at 138. In addition, corporations were motivated to use mediation by the control it provided over resolution of the dispute, the satisfactory nature of the process and settlements reached, and the preservation of good relationships achieved from resolving disputes through mediation. *Id.* at 139.

156. See Budd & McCall, *supra* note 147, at 488, 490-91 (finding that union employees are more likely than nonunion employees to receive unemployment compensation benefits); Hirsch et al., *supra* note 147, at 218, 233 (finding that union employees are more likely to receive workers' compensation benefits); Michele Hoyman & Lamont Stallworth, *Suit Filing by Women: An Empirical Analysis*, 62 NOTRE DAME L. REV. 61, 77 (1986) (finding a correlation between union activism and filing of lawsuits); Michele M. Hoyman & Lamont E. Stallworth, *Who Files Suits and Why: An Empirical Portrait of the Litigious Worker*, 1981 U. ILL. L. REV. 115, 134-36 (finding that both union activism and grievance filing were positively associated with filing of lawsuits and discrimination charges); David Weil, *Employee Rights, Unions and the Implementation of Labor Policies*, in PROCEEDINGS OF THE FORTY-FIFTH ANNUAL MEETING, INDUSTRIAL RELATIONS RESEARCH ASS'N 474, 476 (1993) (analyzing various studies and concluding that unions improve enforcement of various laws, including the Fair Labor Standards Act, OSHA, MSHA, certain provisions of ERISA, workers' compensation laws and unemployment compensation laws); Weil, *supra* note 147, at 26-34 (finding that unions increase OSHA enforcement).

157. See GAO REPORT, *supra* note 143, at 3 (reporting positive experiences with ADR by all five private employers and four of five federal agencies studied, with mediation proving most effective in resolving disputes); Colvin, *supra* note 150, at 27 (describing management satisfaction with mediation program at TRW, which resolved disputes quickly and at low cost); Shaw, *supra* note 154 (reporting on Hughes Aircraft and Brown & Root multi-step dispute resolution programs where employee claims were

at lower cost. Resolution may be achieved before positions harden or actions are taken that make resolution more difficult.¹⁵⁸ Resolution can be based on interests rather than legal rights alone, potentially creating a long-term solution and avoiding recurring problems.¹⁵⁹ In addition, participants in mediation, including supervisors and managers, may improve their problem solving skills. As a consequence future disputes, including both contractual grievances and noncontractual disputes, may be reduced or resolved more quickly.¹⁶⁰ For these reasons, mediation has greater potential than arbitration or litigation for preserving the ongoing relationship of employer and employees. Since unionized workplaces generally have lower turnover than nonunion workplaces,¹⁶¹ preserving relationships is particularly important for the productivity of the work force. Although the employer is providing a forum for disputes where none previously existed, the benefit of improved morale, greater productivity and more effective resolution of all disputes may outweigh the cost of providing the forum and spending employee, employer and union time on resolution.¹⁶²

Furthermore, advocates of workplace dispute resolution programs point out that successful programs include input from stakeholders, such as employees, in

resolved quickly to employees' satisfaction at early steps in the process, saving the employers legal fees); *see also* Jeanne M. Brett et al., *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12 NEGOTIATION J. 259 (1996) (finding that mediation settled seventy-eight percent of cases and was cheaper, quicker and more satisfactory to the parties than arbitration because of greater opportunities for voice and outcome control).

158. *See* GAO REPORT, *supra* note 143, at 4, 26; 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, 264-65 (1998) (noting that while mediation can resolve disputes after lawsuits or administrative charges are filed, earlier conflict resolution enhances the benefits of mediation for preserving relationships and preventing future conflict).

159. Shaw, *supra* note 154 (reporting that Hughes Electronics Corporation saw the focus on underlying interests as a key to program success).

160. *See* Jonathan F. Anderson & Lisa Bingham, *Upstream Effects from Mediation of Workplace Disputes: Some Preliminary Evidence from the USPS*, 48 LAB. L.J. 601, 609-10 (1997); Goldberg, *supra* note 95, at 12-13.

161. RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?*, at 20-21 (1984).

162. Shaw, *supra* note 154 (reporting that both Brown & Root and TRW noted that, contrary to expectations, their ADR programs did not result in excessive complaints or abuse by "chronic complainers"). Moreover, some disputes subject to mediation were probably filed in the grievance procedure previously, whether or not they fit the formal definition of a grievance. Thus, the mediation procedure may merely shift costs from one forum to another.

the system design.¹⁶³ The union provides a vehicle for such input, increasing the chances that the mediation system will achieve its goals.

The EEOC has recently established a pilot program that allows employers with preapproved ADR programs the first opportunity to resolve discrimination complaints filed with the agency.¹⁶⁴ The ADR program must be well-established, voluntary and free.¹⁶⁵ It must incorporate statutory claims subject to EEOC enforcement and include judicially enforceable written settlements.¹⁶⁶ Under the program, the agency, at the option of the charging party, will give the parties sixty days to resolve the dispute using the existing internal program. A mediation program with union representation might appeal to the EEOC for inclusion in its new program. The employer could avoid the time and cost necessary to respond to the EEOC investigation if the complaint is settled internally. In addition, as the program's efficacy is established, employees might opt for mediation prior to filing an EEOC charge.

If, as argued above, a mediation forum for noncontractual disputes offers potential for strengthening the union by including individuals who may feel estranged, the resulting increase in union power may suggest that employers should avoid such mediation. The countervailing advantage to the employer, however, is that mediation provides an opportunity to resolve issues relating to gender, race, and ethnicity that might ultimately lead to litigation. As noted above, even if the issues do not result in lawsuits against the employer, festering problems among the workers or between workers and supervisors may reduce morale and productivity. While employee dissatisfaction with the union may ultimately redound to the employer's benefit in some cases, often it will cause difficulties for the employer as well as the union. It may be difficult for the union to resolve matters with the employer if the union is faced with revolt in employee ranks, even where the dissatisfied are merely a vocal minority of

163. Gourlay & Soderquist, *supra* note 158, at 278; Rowe, *supra* note 135, at 85; Sylvia Skratek, *Conflictive Partnerships Under Collective Bargaining: A Neutral's Perspective*, in *WORKPLACE DISPUTE RESOLUTION*, *supra* note 42, at 57, 70 (urging meetings with unions and employers early in design process); John W. Zinsser, *Employment Dispute Resolution Systems: Experience Grows but Some Questions Persist*, 12 *NEGOTIATION J.* 151, 162 (1992) (describing Brown & Root's dispute resolution system and noting the importance of involving employees in system design early in the process); *FMCS Exploring Dispute Systems Design to Meet Emergent Workplace Conflicts*, 41 *Gov't Empl. Rel. Rep. (BNA) No. 2026* (Sept. 23, 2003) (noting that FMCS is working to bring workers and managers to the table to discuss system design because the parties must be involved in establishing a system that works in the organizational culture).

164. *EEOC Launches Pilot ADR Referral Program for Pre-Approved Employers in Philadelphia*, *Daily Lab. Rep. (BNA) No. 57*, at A-1 (Mar. 25, 2003).

165. *Id.*

166. *Id.*

employees.¹⁶⁷ Thus, the contractual grievance process may become saturated. Time spent on grievances or even informal griping is time not spent on production. The union may be forced to arbitrate more grievances. And where the union fails to do so, legal actions against both the employer and the union may result. Thus, the employer should carefully consider whether disruption in the relationship between the workers and the union truly advantages the employer. In fact, a mechanism for resolution of such disputes may benefit the employer as well as the union.

4. Empirical Evidence

One significant example of the use of mediation to resolve noncontractual claims in the unionized workplace is the system adopted at the United States Postal Service, one of the largest unionized employers in the country.¹⁶⁸ The mediation program, known as REDRESS, offers voluntary mediation of employment discrimination disputes.¹⁶⁹ The program uses “transformative mediation,” which has a goal of transforming individuals by assisting them in dealing with conflict.¹⁷⁰ Transformative mediation seeks to promote parties’ control over their own dispute and to empower them to make decisions.¹⁷¹ It also encourages each party to mediation to recognize the needs and interests of the other party.¹⁷² Research indicates participant satisfaction with both the process and the outcome.¹⁷³ In addition, the conflict management skills of supervisors participating in mediation have improved.¹⁷⁴ Evidence from preliminary studies

167. Of course, if a majority of employees are dissatisfied, it is likely that either the union leadership will be defeated in the legally required elections or the union will be decertified as the employees’ representative at the next available opportunity.

168. Lisa B. Bingham, *Exploring the Role of Representation in Employment Mediation at the USPS*, 17 OHIO ST. J. ON DISP. RESOL. 341, 355-56 (2002). Although it is a public employer, the Postal Service is covered by the National Labor Relations Act. See 39 U.S.C. §§ 1202-1203, 1208-1209 (2000). In 2002, 72.5 percent of Postal Service employees were covered by collective bargaining agreements. BARRY T. HIRSCH & DAVID MACPHERSON, *UNION MEMBERSHIP AND EARNINGS DATA BOOK: COMPILATIONS FROM THE CURRENT POPULATION SURVEY 17* (2002). The mediation system is available to all employees, including supervisors and managers who do not have the right to unionize but may belong to associations which provide representational services in mediation. Bingham, *supra*, at 358.

169. Bingham, *supra* note 168, at 355.

170. *Id.* at 356.

171. *Id.* at 356-57.

172. Anderson & Bingham, *supra* note 160, at 602.

173. Bingham, *supra* note 168, at 357.

174. Anderson & Bingham, *supra* note 160, at 607-09; Bingham, *supra* note 168, at 357. A much smaller percentage of employees also reported that mediation changed how they handled conflict. Anderson & Bingham, *supra* note 160, at 607.

established that a significant percentage of participants felt both empowerment and recognition by the other party.¹⁷⁵ Like the system recommended here, employees in the REDRESS program are permitted to choose their own representative, who may be a lawyer, coworker, union representative, friend, or family member.¹⁷⁶

An analysis of the role of representation in the REDRESS process demonstrated that settlement was more likely when the complainant/employee was represented.¹⁷⁷ Researchers speculated that representation might balance power and thereby make settlement more likely.¹⁷⁸ Representation of claimants also extended the length of mediation.¹⁷⁹ The parties settled most often when the complainant was represented by a union representative and least often when the complainant's representative was an attorney.¹⁸⁰

Both complainants and respondents reported high levels of satisfaction with the fairness of the REDRESS mediation process.¹⁸¹ Ninety-one percent of complainants represented by union representatives reported being very satisfied

175. Anderson & Bingham, *supra* note 160, at 609-10.

176. Bingham, *supra* note 168, at 358.

177. *Id.* at 361. The data did not distinguish between types of representatives. *Id.*

178. *Id.* at 362. Mediation theorists argue that equality of power makes settlement more likely. *Id.* It is possible, however, that the types of cases in which the parties chose to bring representatives were different, affecting the settlement rate. *Id.*

179. *Id.* at 363. The range between the longest and shortest mediation sessions was only forty-seven minutes, however. *Id.*

180. *Id.* at 365-66. The data does not reveal whether the settlement was substantively positive from the employee's point of view. *Id.* Association representatives for supervisors and managers also made settlement more likely. *Id.* Unlike attorneys for complainants, however, attorney representation for supervisors and managers did not render settlement least likely (as compared to no representation or representation by another person such as a family member or friend). *Id.* at 366. Researchers speculated that the specialized knowledge and experience of the Postal Service attorneys might contribute to settlement or that the type of case in which the employer deemed such representation necessary might be different. *Id.* In another study of representation in mediation, the researchers found that attorney representation in mediation was not correlated with greater satisfaction with mediation. Varma & Stallworth, *supra* note 132, at 402-03, 413. In fact, those represented by attorneys were generally less satisfied, except with the mediation process itself. *Id.* at 402-03, 413, 415. The study, which contained only forty-seven participants, looked only at attorney representation, not representation by nonlawyers, and contained responses from both charging parties and respondents. *Id.* at 397. The authors suggest that the lower satisfaction rate may be explained by tension between participants and their attorneys. *Id.* at 413-14.

181. Bingham, *supra* note 168, at 367-68. Ninety percent of complainants and ninety-three percent of respondents were either very satisfied or somewhat satisfied. *Id.*

or somewhat satisfied with the fairness of the process.¹⁸² An equal percentage of employees without representation reported satisfaction, with a slightly higher percentage indicating they were very satisfied with the fairness of the process.¹⁸³ Not surprisingly, complainants were most satisfied with their own participation level in mediation where they had no representative, but only slightly less satisfied with their own participation when represented by the union.¹⁸⁴

The majority of the issues mediated in the REDRESS program involved parties in ongoing relationships rather than employment terminations.¹⁸⁵ Most of the settlements were noneconomic and they frequently involved apologies and agreements to modify communication methods in the future.¹⁸⁶ Researchers suggested that attorneys might be associated with a lower settlement rate due to their desire to "create a cash pool from which to recover attorneys' fees."¹⁸⁷ They surmised that union officials' status as repeat players with experience dealing with management might explain their higher settlement rate.¹⁸⁸ Alternatively, it is possible that complainants used attorneys in cases that were "stronger on the merits, more contentious and complex" and correspondingly less likely to settle in mediation.¹⁸⁹

The REDRESS program is the closest program to that suggested here that has been subjected to research and analysis. While there is more research to be done, the preliminary results suggest positive effects from union representation in internal EEO mediation for both the employee and the employer.¹⁹⁰ As noted

182. *Id.* at 368-69. Seventy-six percent of those represented by attorneys reported similar satisfaction. *Id.*

183. *Id.* For respondents the satisfaction level was highest with attorney representation (ninety-five percent) and only slightly lower with association representation (ninety-four percent) or no representation (ninety-four percent). *Id.*

184. Ninety-seven percent of employees reported being very satisfied or somewhat satisfied with their own participation level when they represented themselves, while ninety-six percent indicated similar satisfaction levels with union representation. *Id.* at 371. With a lawyer, the satisfaction level was ninety-two percent. *Id.*

185. *Id.* at 372. *But see* Colvin, *supra* note 150, at 27 (describing successful mediation program at TRW, which included cases of layoff and wrongful discharge, and noting that reinstatement of employees was a part of the settlement in some cases).

186. Bingham, *supra* note 168, at 372-73. The TRW mediation program also included a number of non-monetary remedies including reinstatement of discharged employees, changes in application of policies, and employee transfers within the company. Colvin, *supra* note 150, at 27.

187. Bingham, *supra* note 168, at 372. In Professor Ellen Dannin's study of mediation in New Zealand, she found that increasing use of lawyers also added to delay in the mediation process. *See* Ellen J. Dannin, *Contracting Mediation: The Impact of Different Statutory Regimes*, 17 HOFSTRA LAB. & EMP. L.J. 65, 105, 108 (1999).

188. Bingham, *supra* note 168, at 372.

189. *Id.* at 375.

190. *Id.* at 376-77.

above, empirical research on grievance mediation also indicates high settlement rates and high party satisfaction rates, as well as improved ability to resolve future disputes.¹⁹¹

Research on civil legal mediation suggests some caution in optimism about mediation's ability to repair relationships, however. Professor Dwight Golann surveyed mediators to determine how frequently such repairs occurred, limiting his survey to cases where the parties had a prior relationship and a legal claim had been either filed or threatened.¹⁹² A relationship repair was effectuated in only seventeen percent of the cases.¹⁹³ In thirty percent of the cases, the settlement included at least one noneconomic term.¹⁹⁴ Given that repair of relationships and interest-based settlement are two touted values of mediation, one might have expected a higher rate of both. While this is a relatively low rate of repair, it is interesting to note that Professor Golann excluded mediation in unionized workplaces because he believed that the incentive to repair relationships would be significantly greater there than in other civil disputes and inclusion might bias the results.¹⁹⁵

While no empirical test of the factors that influence repair of relationships was incorporated in the study, the survey asked the mediators what factors affected the possibility of relationship repair.¹⁹⁶ The four factors mentioned were the value of the renewed relationship as compared to litigation or separation, the timing of mediation in the progress of the dispute, the attitudes of the parties and their representatives, and whether the mediator had a chance to begin to prepare the parties for a possible repair before the actual mediation session.¹⁹⁷ The REDRESS program is an example of a mediation where relationship repairs

191. See Elkiss, *supra* note 90, at 677-80; Feuille, *supra* note 5, at 190-92; Goldberg & Brett, *supra* note 91, at 26, 27, 28; Skratek, *supra* note 163, at 63-65; *supra* notes 93-96 and accompanying text. The high settlement rate in grievance mediation is particularly impressive given that it is a later step in the grievance process. It is probable that cases where settlement could be reached easily were resolved in the earlier steps of the grievance procedure.

192. Dwight Golann, *Is Legal Mediation a Process of Repair—Or Separation? An Empirical Study, and its Implications*, 7 HARV. NEGOT. L. REV. 301, 303-06 (2002).

193. *Id.* at 311. A repair was defined as a plan for an ongoing relationship. *Id.* at 313. In seven cases, the mediator believed there had been a reconciliation, a willingness to continue to relate voluntarily, which included situations where there was no specific plan for future relations. *Id.* at 313-14.

194. *Id.* at 314. Confidentiality clauses and liability releases were not considered noneconomic terms. *Id.* at 308-09. Noneconomic terms in employment cases included a letter of reference, a change in the employment file, an apology, a noncompetition agreement, and an agreement not to reapply for employment. *Id.* at 315.

195. *Id.* at 320.

196. *Id.* at 318.

197. *Id.*

were more likely because the employees viewed the postal service as their lifetime career, thus providing an incentive to negotiate a satisfactory resolution that allowed parties to continue to work together.¹⁹⁸

In the family law area, the collaborative law movement suggests that mediation outside the context of litigation can preserve relationships.¹⁹⁹ Collaborative lawyers agree to represent clients only for purposes of settlement discussion, eschewing litigation.²⁰⁰ If litigation occurs, the lawyer must withdraw and his or her firm cannot participate in the litigation.²⁰¹ Collaborative lawyers have formed networks around the country and report anecdotally that settlement in many cases comes more quickly, cheaply and with less rancor, both in settlement discussions and subsequently.²⁰² While evidence of use of collaborative law in employment is rare, the importance of ongoing relationships has resulted in recommendations that expansion of the movement into the employment law field might be appropriate.²⁰³

In addition to the literature on mediation, the empirical evidence from the REDRESS program, as well as grievance mediation, suggests that a mediation program for noncontractual disputes in the union workplace may provide benefits to all parties. The two programs use two different models of mediation. The section below analyzes the two models to determine which might be most suited to noncontractual disputes.

198. *Id.* at 320.

199. Elaine McArdle, *Divorce Without the Bloodshed*, LAWYERS WEEKLY USA, Apr. 3, 2000, available at <http://www.lawyersweeklyusa.com/reprints/collaborative.htm>.

200. James K.L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 431, 432 (2002). Critics suggest that a collaborative law attorney might have an incentive to encourage a less desirable settlement to avoid failure of the process, and consequent inability to obtain fees. *Id.* at 433.

201. *Id.* at 433-34.

202. See Lawrence, *supra* note 200, at 432 (describing Collaborative Law Center in Cincinnati, Ohio, and suggesting that collaborative lawyering helps maintain relationships); McArdle, *supra* note 199; The Advocates Network, A Collaborative Law Network of Independent Professionals, at <http://www.advocatesnetwork.com> (last visited Apr. 15, 2004); Collaborative Law Section, at <http://www.mediate.com/collaborativelaw> (last visited Apr. 15, 2004) (archiving and summarizing various articles on collaborative law); Hamline University School of Law Dispute Resolution Institute, Collaborative Law Section, at <http://www.hamline.edu/law/adr> (last visited Apr. 15, 2004) (archiving and summarizing various articles on collaborative law); Massachusetts Collaborative Law Council, at <http://www.massclc.org> (last visited Apr. 15, 2004) (describing benefits of collaborative law and identifying attorneys practicing in the field).

203. See Lawrence, *supra* note 200, at 433; Massachusetts Collaborative Law Council, *supra* note 202, at <http://www.massclc.org/employment.htm>.

D. Choosing the Type of Mediation

1. Transformative Versus Transactional Mediation

There is widespread agreement among mediation scholars that at least two different types of mediation exist. While denomination of the two types varies, one type may be described as transactional and the other as transformative.²⁰⁴ Broadly described, the goal of transactional mediation is settlement.²⁰⁵ In transactional mediation, the mediator facilitates discussion of the issues and assists the parties in their efforts to resolve their dispute. Many scholars also divide transactional mediation into two types. In one form, most often used for rights-based disputes, the mediator's evaluation of how the dispute might be decided in court or arbitration is an important component.²⁰⁶ The mediator typically is chosen for subject matter expertise. The other form of transactional mediation eschews evaluation, instead focusing on interest-based negotiation techniques to facilitate settlement. The mediator tries to encourage communication between the parties to enable the parties to craft their own settlement. This form of mediation has been denominated "facilitative" or "process-oriented."²⁰⁷

In transformative mediation, pioneered by Robert Baruch Bush and Joseph Folger, the primary goals are empowerment of the parties and recognition by each party of the other's concerns.²⁰⁸ To empower the parties, the mediator

204. Robert A. Baruch Bush, *Handling Workplace Conflict: Why Transformative Mediation?*, 18 HOFSTRA LAB. & EMP. L.J. 367, 368, 368 n.4 (2001).

205. The following general description of the two types of mediation is derived from EDWARD BRUNET & CHARLES B. CRAVER, *ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE* 188-92 (2d ed. 2001), Lisa B. Bingham & Lisa-Marie Napoli, *Employment Dispute Resolution and Workplace Culture: The REDRESS Program at the United States Postal Service*, in *FEDERAL ADMINISTRATIVE DISPUTE RESOLUTION DESKBOOK*, *supra* note 108, at 507, 519-24, and Bush, *supra* note 204, at 368-70.

206. This form of mediation might be called "evaluative," Bingham & Napoli, *supra* note 205, at 519, "substance-oriented," BRUNET & CRAVER, *supra* note 205, at 193-94, or "information centered," Norman Brand, *Learning to Use the Mediation Process—A Guide for Lawyers*, *ARB. J.*, Dec. 1992, at 6, 8-12.

207. See BRUNET & CRAVER, *supra* note 205, at 195-97 (describing "process-oriented" mediation); Bingham & Napoli, *supra* note 205, at 519 (describing mediation without an evaluative component or mediation where the evaluation comes only at the end of the process of interest-based negotiation, as "facilitative"). Norman Brand calls this types of transactional mediation "process centered mediation." Brand, *supra* note 206, at 8-12. In process-oriented mediation, the mediator is chosen for expertise in dispute resolution. *Id.*

208. Bush and Folger introduced transformative mediation in the 1994 book, *The Promise of Mediation*. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF*

allows the parties to control the process by setting their own ground rules, proffering their concerns, and making their own decisions. The mediator's primary role is to ask questions to ensure comfort, control, and adequate resources, and to make comments, helping the parties see when recognition of the other parties' concerns has occurred. One of the long-term goals of transformative mediation is to assist the parties in improving their ability to resolve future disputes, thereby changing organizational culture. Settlement is a common byproduct, but not the primary goal, of transformative mediation.

Of the two examples of workplace mediation discussed earlier, one, the REDRESS program, uses transformative mediation, while grievance mediation is commonly transactional or settlement-oriented.²⁰⁹ The REDRESS program chose the transformative model in a deliberate effort to change the workplace culture.²¹⁰ Early evaluations suggest that the parties to mediation, supervisors and employees alike, believe that they are better able to resolve conflicts as a result of their participation in mediation.²¹¹ In addition, both the number of informal complaints and the number of disputes proceeding to the formal complaint stage have been reduced.²¹² Although settlement is not an explicit goal, full or partial settlement is reached in sixty-three to sixty-four percent of cases mediated.²¹³ Eighty percent of cases are closed, which includes settlement during or after mediation, cases where the complainant withdrew the complaint, and those where the complainant did not proceed to the next step of the process.²¹⁴ Employees and supervisors report high levels of satisfaction with the process (ninety percent), and relatively high levels of satisfaction with the

MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994). Brunet and Craver call transformative mediation "relationship-oriented" mediation. BRUNET & CRAVER, *supra* note 205, at 190-92. Earlier, Raymond Shonholtz utilized a similar type of mediation with empowerment as the primary goal in his work with neighborhood justice systems. See STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION 348 (1985); Raymond Shonholtz, *Neighborhood Justice Systems: Work, Structure, and Guiding Principles*, 5 MEDIATION Q. 3, 10-11, 13-16 (1984), reprinted in GOLDBERG ET AL., *supra*, at 364-67.

209. Grievance mediation uses an evaluation, but only late in the process, after initial settlement efforts have failed. See *supra* notes 91-92 and accompanying text.

210. Hallberlin, *supra* note 107, at 378.

211. *Id.* at 377, 380; Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in the USPS REDRESS & TM Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L.J. 399, 402 (2001).

212. Hallberlin, *supra* note 107, at 380. Under the complaint procedure, formal complaints are filed when the complaint is not resolved at the informal stage. *Id.* Formal complaints require investigation and may lead to trial. *Id.*

213. Bingham, *supra* note 168, at 364.

214. *Id.* at 364-65.

outcomes (sixty-five to seventy percent).²¹⁵ The Postal Service has trained about three thousand mediators around the country in the transformative mediation process,²¹⁶ creating a group of mediators that would also be available for other transformative mediation programs.

Because of the reported success of the REDRESS program, which seeks to mediate noncontractual disputes in a unionized environment, it provides an appealing model. The Postal Service is in some ways a unique environment, however. It is one of the largest civilian employers in the world.²¹⁷ The number of EEO complaints was about fourteen thousand per year before the REDRESS program was implemented.²¹⁸ The very size of the organization and the number of EEO cases could justify a substantial investment in a mediation program. Moreover, although it operates as a "semiprivatized independent establishment of the executive branch,"²¹⁹ the level of job security is higher than most private businesses and most employees expect to spend their career with the postal service.²²⁰ Thus, both management and employees are likely to view as worthwhile the investment in transforming culture and repairing relationships.

Transactional mediation is most often used in grievance mediation,²²¹ although the parties to such mediations, the union and the employer, will have an ongoing relationship governed by the collective bargaining agreement. Grievance mediations involve contractual rights under the collective bargaining agreement, although the mediation may reveal underlying interests that are the real source of the problem.²²² The genius of mediation is the ability to focus on such interests. Similarly, many of the disputes in the REDRESS program were phrased in terms of rights, primarily EEO issues. Yet in the transformative mediation process, the resolution often focused not so much on rights, but on interests.²²³ Both the REDRESS program and grievance mediation programs show some evidence of changing workplace culture and improving the ability of

215. Hallberlin, *supra* note 107, at 380.

216. Gann & Hallberlin, *supra* note 108, at 627.

217. Nabatchi & Bingham, *supra* note 211, at 403.

218. Hallberlin, *supra* note 107, at 380.

219. Bingham & Napoli, *supra* note 205, at 510.

220. Golann, *supra* note 192, at 320.

221. Peter Feuille, *Dispute Resolution Frontiers in the Unionized Workplace*, in *WORKPLACE DISPUTE RESOLUTION*, *supra* note 42, at 17, 36; Skratek, *supra* note 163, at 64.

222. Goldberg, *supra* note 95, at 10-11.

223. See James R. Antes et al., *Transforming Conflict Interactions in the Workplace: Documented Effects of the USPS REDRESS TM Program*, 18 HOFSTRA LAB. & EMP. L.J. 429, 435-52 (2001) (summarizing sixteen REDRESS mediations). As proposed here, the mediation program would include not only legal issues, but also disputes that involved neither contractual nor legal rights. Such disputes necessarily focus on interests.

the parties to resolve their own disputes.²²⁴ Perhaps either system would achieve positive results in the unionized environment. A further look at these two forms of mediation in relation to the advantages of the mediation program discussed above may shed more light on the choice of mediation format.²²⁵

For the employer, the primary advantages were resolution of disputes that might otherwise be litigated and improvements in the ability of supervisors and employees to resolve disputes without formal processes. These benefits accrue to the employees and the union as well. Evidence from the REDRESS program demonstrates high settlement rates from use of the transformative model, although settlement is not the primary goal.²²⁶ In addition, there is evidence of improvement in the parties' ability to resolve disputes.²²⁷ Grievance mediation, with its evaluative component, also has a high settlement rate²²⁸ and evidence

224. See *supra* notes 94-96, 173-75, 211-12 and accompanying text.

225. Most of the focus will be on the REDRESS program and grievance mediation because they resemble most closely the program recommended here. The presence of the union generally creates a more stable workforce because of benefits like seniority and job security. Employees who have protection from termination without just cause are more likely to file complaints while still employed. The upstream benefits, like relationship preservation and repair and improvement in dispute resolution skills, will be more important in a stable workforce. Nevertheless, some data from mediation in the nonunion workplace will be reviewed also.

226. See Bingham & Pitts, *supra* note 108, at 143-44 (citing research findings that "implementation of REDRESS corresponded to a statistically significant drop in formal EEO complaints of more than seventeen percent annually"); *Successes of Employment Resolution Through Mediation Discussed at ABA Meeting*, Daily Lab. Rep. (BNA) No. 85, at A-4 (May 2, 2001) (citing REDRESS program closure rates of seventy-eight percent in 2000 and eighty percent in 2001, and a twenty-eight percent decrease in cases filed between fiscal years 1998 and 2001); *supra* notes 213-14 and accompanying text. A small pilot study of mediation in several state agencies in Ohio also found a high resolution rate for cases that went to mediation. See Hébert, *supra* note 107, at 434 (reporting eight of nine mediated disputes resolved). The mediated cases were primarily EEO disputes and interpersonal conflicts. *Id.* at 426-27. The study did not specifically report whether the mediation format was evaluative or facilitative and reports of mediator behaviors were conflicting, although there were some reports of evaluative conduct. See *id.* at 433. Some employees apparently were unionized but no information regarding the role of the union was reported, except that efforts were made to educate the union about mediation and there were some indications that the union was supportive. *Id.* at 425, 427, 429. The small sample limits the ability to generalize from the study, however. *Id.* at 446.

227. See *Successes of Employment Resolution*, *supra* note 226 (citing twenty-eight percent decrease in cases filed at Postal Service between fiscal years 1998 and 2001); *supra* notes 211-12 and accompanying text.

228. See Goldberg, *supra* note 95, at 12 (citing settlement rates both inside and outside the coal industry of approximately eighty percent); *supra* note 96 and accompanying text.

shows later benefits in problem solving ability.²²⁹ As noted above, although limited evidence regarding mediation of legal claims suggests that repair of relationships rarely results,²³⁰ the study excluded mediation in unionized workplaces. The ongoing relationship of the union and the employer can provide both incentive and ability to repair relationships.

Evaluations of employer mediation programs also reveal high settlement rates.²³¹ Additionally, a survey of private employers about ADR use indicated that many choose mediation because it preserves good relationships.²³² Several employers have indicated that dispute resolution programs improved management and supervision.²³³ While governmental discrimination agency programs do not collect data on post-mediation relationships, they, like employer programs, have achieved substantial settlement rates. In the EEOC's pilot mediation program, the settlement rate was fifty-two percent.²³⁴ A later evaluation of the EEOC's program based on a survey of mediation participants showed that the cases of fifty-six percent of charging parties and sixty-one percent of respondents had been resolved at the time of response.²³⁵ The Massachusetts Commission Against Discrimination's mediation program for civil rights cases resolved sixty-three percent of mediated cases.²³⁶

229. See *supra* note 95 and accompanying text.

230. See *supra* note 193 and accompanying text.

231. See GAO REPORT, *supra* note 143, at 3 (reporting that mediation had high settlement rates in nine of ten employer programs studied); Colvin, *supra* note 150, at 26-27 (describing ADR program at TRW, where only three of seventy-two mediated claims in the first three years of the program went to arbitration, all others being either settled or dropped during or after mediation); Homer C. La Rue, *The Changing Workplace Environment in the New Millennium: ADR is a Dominant Trend in the Workplace*, 2000 COLUM. BUS. L. REV. 453, 499 n.58 (describing seventy percent settlement rate of cases in mediation at United Parcel Service); see also Shaw, *supra* note 154 (reporting on high resolution rates in the pre-hearing stages of dispute resolution programs at Hughes Aircraft and Brown & Root).

232. LIPSKY & SEEGER, *supra* note 153, at 18.

233. GAO REPORT, *supra* note 143, at 45, 48, 56; Colvin, *supra* note 150, at 28-29 (indicating that quicker resolution of disputes resulting from mediation enabled the employer to identify and remedy management problems more quickly, preventing further harm to the company).

234. MCDERMOTT ET AL., *supra* note 110.

235. *Id.* ch. 6. Twenty-six percent of charging parties and nineteen percent of respondents had not completed their mediation at the time of the survey, however. *Id.*

236. Thomas A. Kochan et al., *An Evaluation of the Massachusetts Commission Against Discrimination Alternative Dispute Resolution Program*, 5 HARV. NEGOT. L. REV. 233, 257 (2000). Only twenty-one percent of comparison cases settled, but researchers urged caution in interpreting this comparison because some of the comparison cases remained at early stages. *Id.* at 257-58.

Improved employee morale is another benefit. While the evaluations of mediation do not measure this directly, satisfaction with mediation is likely to be a good proxy. The REDRESS transformative mediation program showed that all participants had high levels of satisfaction with the process and, to a somewhat lesser extent, with the outcome.²³⁷ Grievance mediation in the coal industry also resulted in high satisfaction levels, but the grievants were less satisfied than the company and the union.²³⁸ Data from governmental agency mediation programs also indicate relatively high satisfaction levels.²³⁹ Although not definitive, this data may suggest that the transformative model better achieves the goal of employee morale. Also, some studies suggest that parties in legal or court-connected mediation are less satisfied with the fairness of the process and do not perceive themselves as having significant control over the mediation.²⁴⁰ The use of evaluative mediation may exacerbate this feeling of lack of control because of the pressure that disclosure of legal norms may place on the parties for a particular settlement.²⁴¹ Professor Welsh, however, argues that it is not evaluative mediation per se that causes this feeling of lack of control.²⁴² Rather, she argues that it is the timing and presentation of the mediator's evaluation that causes dissatisfaction.²⁴³ An evaluation that comes later in the mediation process, following the pattern of grievance mediation, can address this concern.

237. See *supra* note 215 and accompanying text. The Ohio study, although small, also revealed high satisfaction rates. Hébert, *supra* note 107, at 434-36.

238. Feuille, *supra* note 5, at 190; Goldberg, *supra* note 95, at 12-13. The grievants were more satisfied with mediation than arbitration, however. Goldberg, *supra* note 95, at 13. For further discussion of grievant satisfaction, see *infra* note 247.

239. See MCDERMOTT ET AL., *supra* note 110, ch. 6 (describing participant satisfaction with EEOC mediation). Like participants in the REDRESS program, EEOC mediation participants were somewhat more satisfied with the process than the outcome. *Id.* The EEOC pilot program evaluation reported similar satisfaction levels. *Id.* ch. 2. Outsiders have described the EEOC mediation process as facilitative. See Yelnosky, *supra* note 116, at 602. Participants in the Massachusetts Commission Against Discrimination ("MCAD") mediation program also had relatively high satisfaction levels, but again, they were higher for process than outcome. Kochan et al., *supra* note 236, at 264-65, 274. The MCAD mediation procedure is described as a combination of facilitative and directive. *Id.* at 274. Employers report employee satisfaction with internal programs but such reports are largely anecdotal or the result of company surveys, rather than systematic evaluation by neutral evaluators. See GAO REPORT, *supra* note 143, at 40, 48, 50-51, 59, 71, 75, 79.

240. Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 181-84.

241. Welsh, *supra* note 144, at 847.

242. *Id.*

243. *Id.* at 848-51.

Another benefit of mediation is the opportunity for interest-based, rather than purely rights-based, solutions. Related to this possibility is the greater potential for resolving second-generation discrimination issues. Either form of mediation has the potential to generate agreements based on interests.²⁴⁴ If transactional mediation includes an evaluative component, however, and the mediator is overly focused on the legal norms and potential legal remedies or moves to the evaluation too quickly, exploration of interest-based solutions is likely to be short-circuited. Excessive pressure to mediate and resolve disputes quickly might lead to such tactics.

A primary benefit cited above for incorporating noncontractual mediation is the empowerment and inclusion of union members and connections with outside social justice organizations.²⁴⁵ Transformative mediation, with its explicit goal of giving voice and empowerment to the parties and changing conflictive culture, may best achieve this benefit. Nevertheless, the studies of grievance mediation show that a carefully structured form of transactional mediation does not preclude this benefit in a workplace where the relationships are generally expected to be ongoing.²⁴⁶ In legal or court-connected mediation, where studies have shown that the parties feel less empowered and relationship repairs are rare, the relationship was probably broken, perhaps irretrievably so, before the lawsuit was filed. The explicit goal of such mediation is to settle the case on terms based on legal rights to avoid trial. Docket clearing is an important goal of the court, and legal norms will generally be the driving factor in settlement. Even in grievance mediation, however, the individual grievants demonstrated somewhat less satisfaction than union and management officials.²⁴⁷

244. See Bingham & Napoli, *supra* note 205, at 519 (describing the transformative model as focusing on “interest-based negotiation techniques to help the parties engage in creative problem solving regarding their conflict”); Goldberg & Brett, *supra* note 91, at 23-24 (describing the focus on interests as one of the benefits of the grievance mediation system which has an evaluative component); William L. Ury et al., *Designing an Effective Dispute Resolution System*, 4 NEGOTIATION J. 413, 415 (1988) (discussing the importance of focusing on interests in resolving disputes through mediation and negotiation). *But see* Yelnosky, *supra* note 116, at 600-02 (suggesting that facilitative mediation is better-suited to fashioning solutions to discrimination because it relieves the parties of the need to fit issues into Title VII doctrine).

245. The small Ohio study found no difference in satisfaction with mediation among various racial and ethnic groups or between the genders. Hébert, *supra* note 107, at 435-36.

246. Elkiss, *supra* note 90, at 678-79; Skratek, *supra* note 163, at 65.

247. Employee satisfaction is more likely to be influenced by the outcome of the mediation since employees are one-shot players in the grievance process, while union and employer officials, who have a better sense of the merits of the grievance based on their experience, are likely to assess satisfaction based on the overall process rather than the outcome of a particular dispute. Jeanne M. Brett & Stephen B. Goldberg, *Grievance Mediation in the Coal Industry: A Field Experiment*, 37 INDUS. & LAB. REL. REV. 49, 63-

Reduced employee satisfaction may be a natural result in a system where the union, not the employee, controls the decision about settlement. In the mediation suggested here, the union should be careful not to exert control, except to the extent of ensuring that settlement does not conflict with the collective bargaining agreement. The goal of empowering and including union members and their caucuses is paramount, and should not be sacrificed to the goal of settlement.

Several other factors may be influential in the decision of which form of mediation to adopt. Where the dispute involves employees and supervisors still in the workforce, repair of relationships and transforming the manner of dealing with conflict will be important to employers, unions and employees. Where the dispute involves an employee or employees no longer employed, that goal may be less important.²⁴⁸ In the union workplace, however, it is far more common than in the nonunion workplace for employees to return to work after termination. Arbitrators frequently reinstate terminated employees.²⁴⁹ And evidence demonstrates that in the union workplace, unlike the nonunion workplace, reinstatement often lasts.²⁵⁰ A mediated settlement may provide quicker reinstatement, easing the financial burden on both the employee and the employer, which would have a greater back pay obligation if the employee was reinstated after arbitration or litigation. Where there is clearly no desire to return or no possibility of return, empowerment of the employee and the caucus may still be a worthwhile goal from the union's point of view, as will education of the supervisor. The employer's incentive for transformative mediation under these circumstances may be limited, however.

Finally, an evaluative model may quickly become ineffective where many of the disputes involve employees who have no meritorious legal claim. Evaluators of the REDRESS program noted that in ninety-five percent of

64 (1983).

248. If a supervisor or manager learns a better way to deal with other employees, however, mediation can provide value to the employer and those employees remaining in the workforce.

249. LAURA J. COOPER ET AL., *ADR IN THE WORKPLACE* 300 (2000) (noting that reinstatement is the most common remedy for unjust discharge in labor arbitration).

250. See WEILER, *supra* note 59, at 86 & n.72 (pointing out that seventy to eighty percent of reinstated employees in unionized workplaces continue to work for the employer "for an appreciable period," while reinstatement is far less successful where there is no union); Martha S. West, *The Case Against Reinstatement in Wrongful Discharge*, 1988 U. ILL. L. REV. 1, 28-30, 38-39 (citing empirical studies establishing that in the unionized workplace over eighty-five percent of employees accepted arbitral awards of reinstatement and forty-seven to seventy-five percent of those were still working two years later; in two studies of reinstatement under the NLRA only forty-one percent and less than fifty percent of employees offered reinstatement accepted and of those only eleven percent and thirty percent respectively were still employed there after two years).

discrimination cases at the Postal Service, the evaluation would favor the employer.²⁵¹ Given that the employer established and financed the program and trained the mediators, the authors posit that an evaluative program with such results would have the appearance of bias and thus be unsuccessful.²⁵² It is unlikely that a smaller employer would be able to quantify the validity of discrimination claims as the Postal Service has done and thus tailor the mediation program based on the likely validity of claims. In the absence of evidence about the number of valid legal claims in the workplace, adoption of a mediation model without an evaluative component avoids this concern.²⁵³ Additionally, the REDRESS researchers suggest that mediators in an evaluative program might pressure the parties for settlement based on a belief that settlement is success, which again may have the appearance of bias.²⁵⁴ Where the goal is not settlement, these risks are diminished.

To summarize, it appears that either transformative mediation or transactional mediation can achieve the benefits described above in the unionized workplace.²⁵⁵ If transactional mediation is used, however, care must be taken to structure the mediation to avoid undue emphasis on the length of the sessions or the end result of settlement. In addition, if evaluation is used it should come after other efforts to settle have failed, in order to avoid unduly driving the discussions, limiting the options, and reducing empowerment and satisfaction. In some cases, an employer may have a greater interest in evaluative mediation since the primary benefit for the employer is settlement of legal claims without litigation. The employer should be aware of the potential for decreasing future disputes that may derive from transformative mediation, however. If an employer insists on a more directive form of mediation, it can still provide the necessary benefits to the union and employees if practiced as described above.²⁵⁶

251. Bingham & Napoli, *supra* note 205, at 523.

252. *Id.*

253. Interjecting evaluation only after other efforts to resolve the problem have failed, as in the grievance mediation model used by Goldberg and Brett, is another method of addressing this concern.

254. *Id.* at 523-24.

255. In a study of EEO mediation cases before the Kansas Human Rights Commission, researchers found that the participants in mediation believed that evaluative mediation was more effective than facilitative mediation in resolving workplace rights disputes. Varma & Stallworth, *supra* note 132, at 412. The number of respondents to the survey was small (forty-seven), and it is not clear which type of mediation was used in the mediations in which the participants were involved. *Id.* at 397. The researchers hypothesize that facilitative mediation might be more appealing at earlier stages of the dispute before the parties have entered into the legal enforcement process, where they might be anticipating or seeking some judgment about the case. *Id.* at 412.

256. In theory, there is no reason that the union and employer could not provide in their agreement that the form of mediation would be based on the type of dispute. Such

One option is for the parties to negotiate a trial or pilot program, both to determine whether the suggested benefits of the program are achieved and to evaluate which type of mediation will best fit their needs.²⁵⁷ A pilot program would require an evaluation and assessment to determine whether to extend the program. University dispute resolution programs or the Federal Mediation Conciliation Service ("FMCS") might provide such an assessment at reasonable cost.²⁵⁸

2. The Impact of Grievance Mediation

Despite the widely reported success of grievance mediation programs, they are incorporated in a small percentage of collectively bargained grievance procedures.²⁵⁹ Professor Feuille has evaluated grievance mediation studies to determine the reasons for this limited adoption. A review of his conclusions may assist in determining whether mediation of legal claims has any future in the unionized workplace. In evaluating grievance mediation, Professor Feuille suggests that settlement in mediation is driven by the mediator's assessment of the strength of the grievance and that the cooperative attitudes of the parties to the process are a cause, rather than an effect, of mediation.²⁶⁰ Thus, Feuille argues that grievance mediation works because the parties who choose it are motivated to settle and because the mediator's evaluation of the merits of the grievance pressures the party predicted to lose in arbitration to accept a settlement.²⁶¹ In essence, he contends that mediation offers little that is not already available in the existing grievance system except a preview of the arbitration decision. Feuille offers several explanations for the limited use of grievance mediation. First, he points out that most grievances are settled without arbitration, so that the additional mediation step is unnecessary.²⁶² Second, he

a system would work best if the parties agreed in advance which disputes would fall under which types of mediation and selected the mediator on that basis. Otherwise, the parties might have to resolve a dispute about the type of mediation before getting to the substance of the dispute, reducing the benefits of the system.

257. Professor Dannin's research on two statutory mediation programs in New Zealand demonstrates that context is an important determinant of the success of a mediation system. See Dannin, *supra* note 187, at 106. A pilot or experiment could aid the parties in determining the most effective program for their needs.

258. See *FMCS Exploring*, *supra* note 163 (noting the FMCS initiative, Dynamic Adaptive Dispute Systems ("DYADS"), formed to assist parties in design and assessment of dispute resolution systems for noncontractual disputes in the union and nonunion workplace).

259. Feuille, *supra* note 5, at 197.

260. *Id.* at 196-97.

261. *Id.*

262. *Id.* at 198.

posits that mediation resolves only carefully screened grievances and is dependent on the existence of arbitration and the mediator's prediction of its outcome.²⁶³ Because of these facts, mediation may be most appropriate for troubled relationships, and may be perceived as too limited in effect for the average grievance procedure.²⁶⁴ Feuille also suggests that management has little incentive to agree to grievance mediation because almost all grievances are challenges to management action and thus, mediation provides an additional opportunity for the union to obtain something from the employer, often in grievances that the union does not intend to arbitrate.²⁶⁵ Finally, Professor Feuille posits that many unions and employers may prefer, or at least be more comfortable with, the adversarial relationships that commonly characterize the grievance procedure and arbitration.²⁶⁶

Assuming that Feuille is correct, do these factors indicate that mediation outside the collective bargaining agreement will be similarly limited? The reported success of grievance mediation in some collective bargaining agreements and of the REDRESS program indicates that mediation may provide benefits for at least some unions, employers and employees. Unlike grievance mediation which is part of the existing grievance procedure, there is not another vehicle to achieve settlement for noncontractual claims.²⁶⁷ Thus, the mediation procedure advocated is not merely an additional, and perhaps superfluous, step in an already existing system. It offers something in addition that has benefits beyond settlement of the dispute. Further, even assuming that the union and the employer may prefer the adversarial system for their own contractual disputes, many employers are adopting mediation programs for legal disputes involving nonunion employees, suggesting that there are benefits to such programs.²⁶⁸ Widespread management adoption of mediation procedures for nonunion

263. *Id.* at 199-200.

264. *Id.* at 200.

265. *Id.* at 200-01. Knowing that the union can afford to arbitrate a limited number of grievances, management may prefer to force the union to undertake the costs of arbitration or drop the grievance. *Id.* at 203.

266. *Id.* at 203-04. In addition, he suggests that mediation has no natural advocates because those who participate in arbitration benefit from its use and have little incentive to support a procedure that reduces arbitration. *Id.* at 204-05.

267. It is possible that for the legal claims a court-connected procedure might exist, but it would not involve the union, unless it was a defendant, or identity caucuses. It is also possible that due to overlap between contractual and noncontractual claims, a noncontractual claim might be the subject of a contractual grievance. If, in fact, the overlap is such that most noncontractual disputes are resolved in the contractual grievance procedure, the mediation process advocated here would be superfluous. For further discussion of the overlap of claims, see *infra* Part II.F.

268. Feuille, *supra* note 5, at 205-07 (citing various studies showing frequent use of mediation to resolve disputes in the nonunion workplace).

employees indicates that employers are persuaded that they offer value to the company.

If the success of grievance mediation in achieving settlement is dependent on the existence of arbitration and the arbitration preview, mediation of legal claims has a similar alternative, filing of a claim with an enforcement agency or court. The suggested importance of the preview in compelling settlement would argue for use of evaluative rather than transformative mediation, however. Also, the preview may be a far more important factor in settlement in a situation where experienced negotiators have already attempted and failed to settle the dispute in the earlier grievance process. In addition, the union or the employer may use the preview to explain to their constituencies a settlement that may be unpopular, in order to deflect political repercussions. The union, at least, has less need to be concerned about political ramifications in mediating claims where the claim belongs to the individual and the rights, if any, arise not from a union-negotiated contract, but from the law. Additional experiments with transformative, facilitative and evaluative mediation for noncontractual claims will provide further evidence as to the most appropriate format. The lack of widespread adoption of grievance mediation, however, does not indicate the mediation of noncontractual claims would not accomplish the purposes suggested here.

Previous sections have identified potential benefits of mediation of noncontractual claims in the unionized workplace as well as some empirical research providing cautious optimism about the potential. Nevertheless, there are costs to providing such a program and a number of implementation issues that must be addressed in determining whether such a system would provide sufficient benefits to justify the costs to the parties. It is to these I now turn.

E. Costs

Negotiating a noncontractual mediation system would add some time and cost to collective bargaining negotiations. Such cost would be minimal, however, compared to the cost of establishing and administering the program and providing representation for employers and employees.²⁶⁹ The cost of the program will be greater if outside mediators are used.²⁷⁰ A mediation program

269. The Federal Mediation and Conciliation Service is planning to focus increasingly on employment mediation, which may assist employers and unions in reducing the cost of establishing a program. See *FMCS Head Plans to Create Model, Increase Efforts in Nonbargaining Situations*, Daily Lab. Rep. (BNA) No. 56, at C-1 (Mar. 24, 2002). The agency will create a roster of mediators for individual employment cases, and a mediation model and training programs to help employers implement internal mediation. *Id.* The agency can also direct parties to outside resources and help evaluate mediation systems. *FMCS Exploring*, *supra* note 163.

270. If internal mediators are used, there is still a cost, however, as their time could otherwise be used for other work from which the employer derives benefit.

shared among several employers and/or unions, however, could reduce the administrative cost for each organization. Such a system might enable employees of one employer or union to mediate disputes involving different employers or unions, minimizing the cost of the mediator.²⁷¹ Administration by a university or nonprofit organization could reduce costs also.

To minimize any perception of bias, ideally the cost of the mediator should be shared by either the union and the employer or the aggrieved employee and the employer.²⁷² Even if the full cost is not shared, payment of some fee by the employee, particularly for legal claims, increases investment in the process.²⁷³ Any fee may decrease participation, however, and thus the union and employer need to consider whether the process should be cost free to the employees.²⁷⁴

In addition to the cost of the mediation itself, there is the cost of training mediation advocates.²⁷⁵ To successfully participate in mediation of legal claims,

271. Some government programs have utilized mediators from different agencies to reduce costs. See, e.g., GAO REPORT, *supra* note 143, at 61, 69, 77; Hébert, *supra* note 107, at 418-21; Hodges, *supra* note 108, at 489. Use of union or management personnel might diminish the perception of fairness, however. See *supra* note 108 and accompanying text.

272. See Bingham, *Employment Arbitration*, *supra* note 32, at 215 (discussing the importance of the perception of fairness in dispute resolution). Scholars and courts, most debating in the context of arbitration, disagree about whether payment of the entire cost by one party will actually affect fairness of the process. See Matthew T. Ballenger, *The Price of Justice: The Role of Cost Allocation in the Employment Arbitration Fairness Analysis*, 18 LAB. LAW. 485, 495-97 (2003). Because the union will have fewer financial resources in most cases, imposing substantial cost on the union may remove the incentive, or even the ability, to provide mediation for noncontractual claims.

273. See Stuart H. Bompey & Gary R. Siniscalco, *The Settlement Process in Employment Discrimination Litigation: A New Perspective*, in LITIGATING EMPLOYMENT DISCRIMINATION CASES 31 (PLI Litig. & Admin. Practice Course, Handbook Series No. H-522, 1995)

274. See CRAIG A. MCEWEN, AN EVALUATION OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S PILOT MEDIATION PROGRAM 28 (1994) (noting that payment of cost reduced participation in the program). The Postal Service paid the full cost of mediation and the mediator training costs for the REDRESS program, but it recovered some cost because each mediator was required to perform pro bono mediation as a condition of placement on the system's roster of mediators. Gann & Hallberlin, *supra* note 108, at 628.

275. Training of advocates and, ideally, even potential disputants, is important to the success of the program. See GAO REPORT, *supra* note 143, at 41 (reporting that Brown & Root found that "the effectiveness of a program is directly related to a company's investment in training and to its frequency of communication"); Elkiss, *supra* note 90, at 683 (emphasizing the importance of training advocates in mediation skills); Hallberlin, *supra* note 107, at 382 (discussing the importance of training to the success of REDRESS); Karen A. Intrater & Traci Gabhart Gann, *The Lawyer's Role in Institutionalizing ADR*, 18 HOFSTRA LAB. & EMP. L.J. 469, 470, 472-73, 474 (2001)

representatives should have training not only in negotiation and problem solving,²⁷⁶ but also in the legal issues that will be mediated. Advocates should be able to assess the viability of legal claims in order to advise the parties as to equitable settlements. Even if the mediation itself does not contain an evaluative component,²⁷⁷ the acceptable settlement often will depend significantly on the likelihood of success in litigation.²⁷⁸ If the mediation process is to be effective at improving the inclusiveness of the union, training for many potential advocates will be required. Given the limited resources of most unions, such training could be a substantial obstacle.

In order to minimize the cost, unions must seek opportunities for low cost training from organizations such as universities,²⁷⁹ nonprofit organizations²⁸⁰ and government agencies.²⁸¹ Grants may be available for such training. The union could also negotiate for employer-paid training. If, in fact, mediation reduces litigation-related costs and improves productivity, employer investment in training would be cost-effective.²⁸² Careful assessment of costs and benefits, use

(describing training of Postal Service attorneys in the REDRESS Program and the establishment of a web site for complainants' attorneys); Ury et al., *supra* note 244, at 418 (discussing necessity of training).

276. Union representatives who have been involved in handling grievances under the collective bargaining agreement are often focused on gathering evidence, arguing rights and supporting positions. Elkiss, *supra* note 90, at 686. While such skills will be useful in mediation of legal claims, the representatives also must be able to focus on interest-based problem solving, including creative thinking and effective communication, which furthers collaboration. *Id.* at 686-87.

277. See *supra* notes 91-92 and accompanying text (describing the grievance mediation process in which the mediator, who is also an experienced arbitrator, previews for the parties the predicted outcome of arbitration).

278. Of course, the importance of this factor will depend on the issue being mediated and the goal of the mediation. See *supra* notes 204-09 and accompanying text.

279. For example, the Alliance for Education in Dispute Resolution is a consortium of academic institutions and professional organizations that provides training in dispute resolution.

280. Union federations, such as AFL-CIO affiliates, could offer such training as well.

281. The FMCS is considering implementation of a training program for employment mediation. See *FMCS Head*, *supra* note 269, at C-1.

282. See GAO REPORT, *supra* note 143, at 40-41 (reporting data from Brown & Root indicating substantial cost savings from ADR program despite costs of training and development, as well as payment of some legal fees for employees); Zinsser, *supra* note 163, at 161 (reporting forty percent reduction in legal expenses at Brown & Root after implementation of dispute resolution program). An innovative method of funding the training necessary to spread a broad labor-management partnership throughout a large organization was adopted by Kaiser Permanente and a coalition of unions representing its employees. The parties established a trust fund for this purpose, financed in part by six cents per hour from employee wages, with an escalator clause for the later years of

of pilot projects, and location of low cost sources of consultation, mediators and training will help employers and unions negotiate and implement cost-effective procedures designed for their particular needs.

F. Overlap with the Other Procedures

1. The Grievance Procedure

Most collective bargaining agreements contain provisions that coincide with, or overlap with, legal requirements.²⁸³ Nondiscrimination provisions are incorporated in many collective bargaining agreements.²⁸⁴ Family medical leave provisions are also common.²⁸⁵ Wages, hours, benefits, discipline and discharge are all covered by collective bargaining agreements, as well as statutory provisions and potential common law claims.²⁸⁶ Given this overlap, why should

the agreement. See Robert B. McKersie et al., *Interest-Based Negotiations at Kaiser Permanente 11* (Apr. 2003) (unpublished manuscript, on file with author).

283. David E. Feller, *The Coming End of Arbitration's Golden Age*, in *PROCEEDINGS OF THE TWENTY-NINTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS* 97, 109 (Barbara D. Dennis & Gerald G. Somers eds., 1976).

284. According to a Bureau of National Affairs survey, sixty-eight percent of collective bargaining agreements in force in 2001 and expiring in 2002 contained a nondiscrimination provision and forty-eight percent contained a sexual harassment policy. *2002 SOURCE BOOK ON COLLECTIVE BARGAINING: WAGES, BENEFITS AND OTHER CONTRACT ISSUES* 63 (2002). In addition, forty-one percent contained affirmative action programs and twenty-three percent contained diversity programs. *Id.*

285. The BNA survey indicates that fifty-two percent of contracts contained a pledge to comply with the FMLA. *Id.* In addition, seventy-eight percent had provisions for sick leave and thirty-three percent contained provisions for personal leave. *Id.* at 55. In many situations the sick leave and personal leave provisions would overlap with FMLA leave. See also 29 U.S.C. § 2652 (2000) (addressing the effect of the FMLA on collective bargaining agreements, providing that the agreement cannot diminish statutory benefits but can add to them).

286. Most contracts contain provisions on wages, job security, pensions, and health and life insurance. *2002 SOURCE BOOK*, *supra* note 284, at 35-36, 41-42, 51-52, 59, 67-68 (showing survey data on incorporation of such benefits in contracts). The Federal Mediation and Conciliation Service conducted a study for fiscal year 1997 to determine the breakdown of arbitration subjects. See COOPER ET AL., *supra* note 249, at 249. Of the cases "[f]ifty-six percent involved discipline and discharge, 19% wages and hours, 10% seniority, 3% fringe benefits and 2% subcontracting." *Id.* Legal claims covering these same subjects are also available. See Fair Labor Standards Act, 29 U.S.C §§ 207-219 (2000) (minimum wage and overtime pay); the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 300gg-gg-2 (2000) (health insurance benefits); Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001- 1461 (2000) (pension and welfare benefit plans); CAL. LAB. CODE §§ 1171-1205 (West 1989 & Supp. 2003) (wages and hours of work); 820 ILL. COMP. STAT. ANN. 105/1-15 (West 1999 &

the parties add another dispute resolution procedure instead of simply resolving all disputes through the existing collectively bargained grievance and arbitration procedure?

Some unions and employers may effectively resolve all disputes through the grievance and arbitration procedure. In such cases, a separate mediation procedure might be unnecessary. Even in such situations, however, mediation of noncontractual claims often will provide an opportunity for more union involvement by groups who are often perceived, or perceive themselves, as outsiders. Where people of color and white women have not historically been active in the union, the union may not be meeting their needs effectively. Although union officials may view their current dispute resolution procedure as effective, that perception may not be shared by all, and the union should be cautious about quickly reaching such a conclusion. A separate mediation procedure that provides an opportunity to address issues such as discrimination, harassment, leave opportunities, child care and interpersonal disputes may enhance the union by making it more inclusive, while at the same time resolving disputes in ways that do not fit neatly under the collective bargaining agreement.

Despite the frequent overlap between contractual and legal rights, unions often utilize the courts and administrative agencies to address legal issues,²⁸⁷ and they direct employees to do so as well.²⁸⁸ The rationales for doing so vary from a desire not to overload the grievance and arbitration procedure to a need to

Supp. 2002) (same); MASS. ANN. LAWS ch. 151, §§ 1-22 (Law. Co-op. 1989) (same); VA. CODE ANN. §§ 40.1-28.8-28.12 (Michie 2002) (same); Wrongful Discharge from Employment Act, MONT. CODE ANN. §§ 39-2-901-915 (2001) (providing cause of action for wrongful termination); *Wilson v. Monarch Paper Co.*, 939 F.2d 1138 (5th Cir. 1991) (recognizing employee's claim for intentional emotional distress for demotion and other demeaning treatment at work); *Dean v. Ford Motor Credit Co.*, 885 F.2d 300 (5th Cir. 1989) (same); *Mueller v. Union Pacific R.R.*, 371 N.W.2d 732 (Neb. 1985) (recognizing employee's claim for fraud).

287. For examples of legal claims initiated by unions, see *Int'l Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991) (filing case against employer for sex discrimination); *Cleveland Newspaper Guild, Local 1 v. Plain Dealer Publ'g Co.*, 839 F.2d 1147 (6th Cir. 1988) (acting as plaintiff in sex discrimination case); *Local Union 1888 of the Am. Fed'n of State Employees v. City of Jackson*, 473 F.2d 1028 (5th Cir. 1973) (seeking declaratory judgment that defendants engaged in racial and sexual discrimination in employment practices); and *Wilmington Firefighters Local 1590 v. City of Wilmington*, 632 F. Supp. 1177 (D. Del. 1986) (suing city claiming discrimination against nonminority firefighters). See also *Fisk*, *supra* note 71, at 63 (noting the involvement of unions in enforcing statutory employment laws).

288. See, e.g., *Wright v. Universal Mar. Servs. Corp.*, 525 U.S. 70, 74 (1998); *Safrit v. Cone Mills Corp.*, 248 F.3d 306, 307 (4th Cir. 2001); see also *O'Melveny*, *supra* note 123, at 354 (recommending that unions encourage employees to file complaints with the EEOC and state anti-discrimination agencies when employer does not address and resolve sexual harassment issues).

bring the power of the court or agency to bear in order to resolve the dispute.²⁸⁹ While ultimately resolution by the courts may be required in some of these disputes, the mediation alternative provides a means for resolving the matter short of litigation. To the extent that local union officials are uninterested in the issues, trained advocates from among the union membership can pursue the claim on behalf of the employee(s), providing representation despite the official disinterest.²⁹⁰ Some involvement from high level union officials will be necessary, however, to ensure that any settlement reached does not conflict with the collective bargaining agreement.²⁹¹ In most cases, incompatibility will not be a problem.²⁹² Where there is potential for conflict—a broad structural change in procedures designed to remedy a dearth of women and/or minorities in a particular job classification, for example—the union can be involved in negotiating the necessary changes.²⁹³

Unions and employers should carefully consider whether the grievance and arbitration procedure is effectively resolving both contractual and noncontractual disputes. If mediation is, in fact, duplicative of the grievance procedure, it may drain resources from the union and the employer that could be put to more productive use. Where noncontractual claims are not being resolved in the grievance and arbitration procedure, however, the mediation process can provide benefits to unions, employers and employees. The resources invested will be offset by settlement of claims, a more productive workforce, and, for the union and employees, a more active and involved membership that renders the union a better representative. In addition, the union may benefit from additional organizational successes that result from its ability to provide services to employees in nonunion workplaces.

289. In some cases, the union officials may simply be unconvinced of the merits of the dispute or uninterested in the issues raised. A direction to the employee to utilize legal means is a method of “passing the buck” to avoid expending union resources. This may derive from a lack of sensitivity to the issues, for example, harassment or discrimination, which is one of the problems this proposal is designed to address.

290. Pressure from international unions may encourage some local unions to negotiate mediation procedures even when local officials see little need to do so.

291. *See* W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 771-72 (1983) (enforcing arbitration award under collective bargaining agreement despite its conflict with conciliation agreement negotiated by the EEOC and the employer to settle discrimination claim where union was not included in conciliation and employer and EEOC had no authority to abrogate the collective bargaining agreement).

292. For example, most agreements have generic nondiscrimination clauses that would not be violated by any settlement. *See infra* notes 310-20 and accompanying text (discussing conflicting interests).

293. Of course, where the union officials are resistant to such change, mediation may not resolve the dispute and legal action may be required. In some cases, legal action against the union may be included.

2. The Procedure for Harassment Complaints

Recent Supreme Court decisions in sexual harassment cases have made creation of a complaint procedure for harassment a significant element of an employer's defense.²⁹⁴ In cases alleging a hostile environment, the employer may escape vicarious liability for the actions of its supervisors by establishing a two-pronged affirmative defense:

(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.²⁹⁵

Where the alleged harassment was promulgated by a co-employee, employer liability depends on whether the employer took prompt and effective action to

294. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742, 765 (1998).

295. *Ellerth*, 524 U.S. at 765.

end the harassment once it knew or reasonably should have known of it.²⁹⁶ This defense formulation also impels creation of an effective complaint procedure.

While forcing mediation on a reluctant complainant would certainly be counterproductive, optional mediation can form a part of an effective complaint procedure. Evidence suggests that targets of sexual harassment most often simply want the harassment to stop.²⁹⁷ Most are not interested in litigation or damages, unless the employer is insensitive to the complaint.²⁹⁸ Mediation offers several particular advantages over litigation of sexual harassment claims.²⁹⁹ The

296. Equal Employment Opportunity Commission Guidelines on Discrimination, 29 C.F.R. § 1604.11(d) (2003); *see also* Swenson v. Potter, 271 F.3d 1184, 1192 (9th Cir. 2001) (explaining that employer liability for coworker harassment arises when the employer “knew or should have known about the conduct” and failed to take “prompt corrective action that is ‘reasonably calculated to end the harassment’”) (quoting *Ellerth*, 524 U.S. at 759; *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 875 (9th Cir. 2001)); *Berry v. Delta Airlines*, 260 F.3d 803, 812 (7th Cir. 2001) (explaining that an employer incurs liability for coworker harassment if it “knew or should have known” of the problem and failed to take “appropriate remedial action”) (quoting *McKenzie v. Ill. Dept. of Transp.*, 92 F.3d 473, 480 (7th Cir. 1996)); *White v. N.H. Dep’t of Corr.*, 221 F.3d 254, 261 (1st Cir. 2000) (stating that employer liability for coworker harassment is triggered if the employer “knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action”) (quoting *Blankenship v. Parke Care Ctrs., Inc.*, 123 F.3d 868, 872 (6th Cir. 1997)); *Mikels v. City of Durham*, 183 F.3d 323, 332 (4th Cir. 1999) (stating that employers will be held liable for co-employee harassment for “failing, after actual or constructive knowledge, to take prompt and adequate action to stop it”); *Kunin v. Sears Roebuck & Co.*, 175 F.3d 289, 293-94 (3d Cir. 1999) (explaining that if an employer knew or should have known of the coworker harassment, it will be held liable for failing to take prompt and appropriate measures to stop the harassment).

297. *See supra* note 133 and accompanying text.

298. *See supra* note 133 and accompanying text.

299. For a thorough discussion of advantages and disadvantages, see Jonathan R. Harkavy, *Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes*, 34 WAKE FOREST L. REV. 135, 156-63 (1999). *See also* Reginald Alleyne, *Arbitrating Sexual Harassment Cases: A Representation Dilemma for Unions*, 2 U. PA. J. LAB. & EMP. L. 1, 16 (1999) (suggesting multi-party mediation of sexual harassment disputes in the unionized workplace); Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN’S L.J. 3 (2003) (discussing advantages and disadvantages of mediation of sexual harassment claims); Bond, *supra* note 133 (advocating mediation of sexual harassment disputes); Rajib Chanda, Student Article, *Mediating University Sexual Assault Cases*, 6 HARV. NEGOT. L. REV. 265 (2001) (advocating a mediation option for sexual assault cases at universities). For a contrary view, see Mori Irvine, *Mediation: Is It Appropriate for Sexual Harassment Grievances?*, 9 OHIO ST. J. ON DISP. RESOL. 27 (1993) (rejecting mediation as an appropriate resolution forum for sexual harassment cases). Many, but not all, of the advantages and disadvantages discussed here would also apply to mediation of claims of harassment on the basis of race, national origin, disability

confidentiality of mediation allows the parties to achieve resolution without the public revelation of what may be embarrassing details for both the victim and the harasser.³⁰⁰ Early resolution of the dispute may avoid prolonging the trauma for the person harassed.³⁰¹ Where the harassment claim is the result of differential views about appropriate language and conduct, mediation can educate and lead to greater understanding.³⁰² Finally, mediation has the potential to empower the target, who has more control over the process and the outcome than in litigation.³⁰³

Some sexual harassment cases would be inappropriate for mediation, however. Public vindication might be particularly important for the accuser and the accused where the allegations resulted from a one on one encounter unobserved by witnesses.³⁰⁴ In cases involving repeated or serial harassment, public litigation and liability could be essential to deter continued harassment.³⁰⁵ Finally, mediation and other informal processes may disadvantage less powerful individuals, a concern for the harassed employee confronting the supervisor and the employer.³⁰⁶ This latter argument will be discussed in more detail in Part II.H.

While mediation may not be appropriate for all harassment cases, or indeed, in the view of some commentators, for any cases, it is not inconsistent with the law of sexual harassment. Although employers must take care to ensure that mediation is not utilized in a way that discourages use of the complaint procedure by reasonable employees,³⁰⁷ offering the option may facilitate

or other categories.

300. Harkavy, *supra* note 299, at 157. A mediated settlement may avoid further victimization that might result from a deposition or trial testimony of the complainant, where the harasser's attorney attempts to discredit or blame her, or to explore her psychological history to dispute her claim of damages. *Id.* at 158.

301. *Id.* at 157.

302. *Id.* at 160.

303. *Id.* at 160-61.

304. *Id.* at 161, 162.

305. *Id.* at 162, 163. Mediation of individual cases may allow resolution without a finding as to whether the harassment occurred, and thus may permit a harasser to continue the conduct without punishment. Kihnley, *supra* note 108, at 84-85. A serial harasser may avoid discipline based on repeat violations. *Id.*

306. See *supra* notes 39-42 and accompanying text. This argument applies not only to cases of sexual harassment but more broadly to mediation of all claims involving the generally less powerful employee and more powerful employer. But see Kate McCabe, *A Forum for Women's Voices: Mediation Through a Feminist Jurisprudential Lens*, 21 N. ILL. U. L. REV. 459, 460 (2001) (suggesting that mediation may offer a forum for women's voices to be heard).

307. See *supra* note 295 and accompanying text.

resolution of some harassment cases to the satisfaction of all involved.³⁰⁸ The union or caucus representatives can assist employees in determining which disputes might be most appropriate for mediation, and when litigation is the more appropriate forum.³⁰⁹

G. Potential Conflicts of Interest and the Duty of Fair Representation

One issue that may arise in a mediation procedure for noncontractual claims is potential conflicts of interest for the union. As posited, the procedure would enable mediation of claims that bring employees into conflict with one another, or employees into conflict with the union. The conflict of interest issue is much more salient in the exclusive representation context, however. Once chosen by a majority, the union is the exclusive representative for all employees in the negotiation and administration of the collective bargaining agreement.³¹⁰ The employees cannot separately negotiate with the employer, or settle grievances without the union.³¹¹ The union must reconcile conflicting interests of

308. An example of a situation where a cultural difference resulted in a dispute which was resolved by mediation was offered in an article about the REDRESS program. See Joseph P. Folger, *Mediation Research: Studying Transformative Effects*, 18 HOFSTRA LAB. & EMP. L.J. 385, 395-96 (2001). A Hispanic employee was disciplined for leaving a meeting after his manager slammed a pile of papers on the table. *Id.* The employee complained that the action hurt his ears and filed a discrimination complaint. *Id.* The manager, angry at the suggestion that slamming papers could cause an injury so severe that the employee had to leave the building, relented when the employee explained the concept of "bad wind" from his culture, which he had been uncomfortable explaining earlier. *Id.* His discomfort in explaining the bad wind, which was like a curse on you and your family that you must escape, led him to claim that an injury caused him to leave, rather than the bad wind from the slamming of papers. *Id.* As described by Folger, the employee's revelation led to a lengthy discussion, apologies by the employee and the supervisor, and a withdrawal of the complaint. *Id.*

309. Union representatives must make such recommendations based on objective nondiscriminatory criteria. See *infra* notes 310-41 and accompanying text. Unions and caucus representatives can also monitor the process to ensure that repeat offenders are not avoiding the consequences of harassment through sequential mediated settlements. See Kihnley, *supra* note 108, at 83-84; see also Crain & Matheny, *supra* note 53, at 1604-05 (discussing a sexual harassment case at Mitsubishi, the role of the union, and the difficulties unions face in addressing issues of sexual harassment because of the gendered understanding of class).

310. 29 U.S.C. § 159 (2000).

311. *Id.* § 159(a) (providing that employees can present grievances to the employer without union intervention so long as any settlement is not inconsistent with the collective bargaining agreement and the union is given notice and an opportunity to be present); *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 46 n.8 (1979) (noting union's exclusive bargaining authority); *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 73 (1975) (finding discharge of employees lawful where they sought to bypass

employees in deciding what to press for and what to settle for in negotiations, and which grievances to pursue and which to drop. For example, if an employee grieves denial of a promotion, the union must decide whether to support the grievance which, if successful, would obtain the promotion for one bargaining unit member at the expense of another who actually received the disputed promotion. The duty of fair representation guides the union in its decisions—the union must represent all employees in good faith, without arbitrary or discriminatory treatment.³¹² If the union violates its duty, it is liable to the employees.³¹³ Thus, the union is regularly faced with decisions where it must reconcile the conflicting interests of employees.

In one sense, the decisions are less difficult in the proposed mediation procedure. Because the employees have one or more alternatives to mediation, at least in the case of legal claims,³¹⁴ any employee who believed that union conflict of interest would adversely affect the procedure could decline to participate. Also, an employee could avoid the union and choose alternative representation, such as an attorney or a community organization. The union's only role in such cases, assuming no claim against the union, would be to ensure that any settlement did not violate the collective bargaining agreement.

Potential conflicts might arise, however, where the dispute involved two employees in the bargaining unit and both sought union representation. If one employee complained of harassment by another, for example, both might desire union representation. Employee identity caucuses, either formed as a part of union structure or outside it, provide the union with an option in such situations.³¹⁵ The caucuses, where encouraged by the union to take an active role in mediation, might have more power and influence than they would when

the union and deal directly with the employer to address issues of race discrimination); *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944) (holding that an employer could not bargain directly with employees represented by union even where employees initiated bargaining).

312. *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 76-77 (1991); *Vaca v. Sipes*, 386 U.S. 171, 190 (1967).

313. *Vaca*, 386 U.S. at 195-96.

314. The employee could simply pursue the available legal remedy through the administrative agency or court. Alternatively, if the action also violated the contract, the employee could file a grievance, where the duty of fair representation would clearly constrain the union's action. The duty of fair representation may not apply to the mediation procedure. See *infra* notes 323-39 and accompanying text.

315. To allow such representation and to encourage or allow organization of identity caucuses, the union must be open to recognizing the diversity of interests among its members. Crain & Matheny, *supra* note 53, at 1611. While the modest recommendation here does not go so far as Crain and Matheny in advocating elimination of the law requiring exclusive representation, *id.* at 1614-24, it does require a lessening of the union's grip on exclusive representation of the bargaining unit.

formed without union support.³¹⁶ The most obvious role for caucuses formed along the lines of gender, race and ethnicity would be representing employees in disputes involving discrimination or benefits directly relevant to particular groups, such as childcare or parental leave, but there is no reason that a caucus could not represent an employee/member in other disputes as well.³¹⁷

While union and caucus representation of conflicting employee interests in mediation has the potential for exacerbating intra-union conflicts, mediation is a forum that provides opportunities for settling disputes and preserving relationships. There is no dearth of conflicting interests within the union membership in the absence of mediation. The union is simply charged, under traditional labor law, with reconciling those conflicting interests without discrimination or arbitrary treatment. Channeling those conflicts into mediation offers an alternative method for dealing with the conflicts, one perhaps better designed to resolve them.

When conflicts of interest arise in the traditional labor law context, the union's actions are governed by the duty of fair representation. The duty of fair representation arises from the right of exclusive representation. Because the employee cannot escape the union's representation by dealing directly with the employer, the duty of fair representation is necessary to avoid constitutional issues, according to the Supreme Court's decision in *Steele v. Louisville & Nashville Railroad Co.*³¹⁸ The duty compels the union to represent the employee in good faith and without arbitrary or discriminatory treatment.³¹⁹ Thus a union's decision to represent one employee rather than another where their interests conflict will be tested against the requirements of the duty. For example, if an employee complains of harassment by another employee, who is then disciplined and files a grievance challenging that discipline under the collective bargaining agreement, the union must decide whether to pursue the grievance. If the union's decision is based on a good faith investigation and decision about the merits of the grievance, it will survive challenge, even if the decision is incorrect.³²⁰ Even where there is no conflict of interest between members of the

316. For discussions of the effectiveness of caucuses in particular situations, see Crain & Matheny, *supra* note 53, at 1617-20 (arguing for multiple representatives and coalition building to strengthen both labor and nonlabor groups); and Yelnosky, *supra* note 117, at 615-17 (detailing some specific successes, but noting that results were mixed). Crain and Matheny, however, suggest that employees have the option of choosing separate nonmajority representatives, which would then be free to build coalitions among themselves. Crain & Matheny, *supra* note 53, at 1617-20.

317. It would be essential for the caucuses to be free to advocate for the interests of the employees that they represent without fear of union discipline or reprisal. All employees would have to understand the role of the caucuses.

318. 323 U.S. 192, 204 (1944).

319. See *supra* note 312 and accompanying text.

320. This does not mean, of course, that the employee whose interests are not

bargaining unit or a member of the bargaining unit and the union, the duty of fair representation applies to union actions relating to employee grievances as well as negotiation of the collective bargaining agreement.

In the absence of conflicts of interest, concerns about adequacy of union representation could still arise. However well-trained, union and caucus representatives would not have the equivalent of legal training and bar admission. Their advice to employees in mediation might miss important legal issues and influence employees to give up legal rights in settlement disproportionate to the strength of their claims.³²¹ This concern is mitigated by several facts. Many employees will be faced with the choice of union representation or no representation.³²² In addition, not all lawyers will provide effective representation. While an experienced employment lawyer might be a better choice for a representative, a general practice attorney, however well-intentioned, might give no better representation, and perhaps worse, than a trained union representative familiar with employment issues and the workplace. Thus, employees as a group may be better off with union representation, although it is possible that a few employees might be disadvantaged if they are unaware of the strength of their case and settle for less than possible.³²³ As the procedure is contemplated, however, employees would have the option to get legal representation. Union representatives could be trained to identify cases where legal representation might benefit the employee and recommend retention of an attorney in such cases. The right to retain legal representation where desired will reduce, although not eliminate, the potential for employee disadvantage.

One question that would certainly arise if the union and employer negotiated a voluntary mediation procedure for noncontractual claims is whether the duty of fair representation would apply. Application of the duty, or even uncertainty about its application, might discourage unions from adopting such procedures because it would create potential for liability where none existed. There would be a strong argument, based on the origins of the duty, that it does not apply to a procedure which is optional and allows participating employees to decline to participate or to select any representative of their choosing. The

supported by the decision will be satisfied with the union's decision.

321. See Ellyn Moscovitz & Victor J. Van Bourg, *Carve-outs and the Privatization of Workers' Compensation in Collective Bargaining Agreements*, 46 SYRACUSE L. REV. 1, 51-52 (1995) (raising concern that nonlawyer union representatives in workers' compensation cases may fail to apprise workers of possible third party claims).

322. See *supra* notes 145-46 and accompanying text.

323. With respect to financial settlements, the recovery for employees with legal representation will be reduced by the amount required to pay the attorney. Thus, even if an employee without legal representation obtains less than the maximum potential settlement, the net amount might be equal.

purpose of the duty, ensuring fair representation where the employee cannot represent himself or herself, does not require its operation in this context.

Analogous precedent supports the conclusion that the duty should not apply where the union does not have exclusive representation rights. Several lower courts have addressed the question of whether the duty applies in the context of judicial appeals from arbitration decisions.³²⁴ The most thoroughly reasoned, and the only appellate court decision, is the Seventh Circuit's opinion in *Freeman v. Local Union No. 135, Chauffeurs, Teamsters and Helpers*.³²⁵ The court concluded that there is no duty of fair representation where the "union does not serve as the exclusive agent for the members of the bargaining unit with respect to a particular matter."³²⁶ The court noted that where the union has an exclusive right to represent the employee, the duty of fair representation applies to protect the employee's rights, but where the individual is free to seek relief on his or her own, the union has no exclusive rights.³²⁷ Thus, because the employee could file his own suit to vacate the arbitrator's award, the union owed him no duty to file such a suit.³²⁸

Once the arbitrator denied plaintiff's grievance, the rationale for the duty of fair representation evaporated; Freeman no longer needed the protections provided by the duty of fair representation because he had access to extra-contractual remedies. That being the case, the union owed plaintiff no duty in deciding whether to seek judicial review of the committee's ruling because, with respect to that decision, it was not acting as his exclusive representative. The union was under no

324. For other cases limiting the duty to contexts in which the union operates as exclusive representative, see *Dycus v. NLRB*, 615 F.2d 820, 826 n.2 (9th Cir. 1980) (affirming NLRB's finding that the duty does not apply to union's withdrawal as representative since duty terminates with representation); *Merk v. Jewel Food Stores Div.*, 641 F. Supp. 1024, 1028-31 (N.D. Ill. 1986), *aff'd*, 848 F.2d 761 (7th Cir. 1988) (finding that a union owed no duty to former employees in settling wage claims with employer where they were no longer members of the bargaining unit and their interests conflicted with those of current employees); *Lacy v. Local 287, No. IP77-672-C*, 1979 WL 2008, at *5 (S.D. Ind. Aug. 21, 1979) (finding that a union owed plaintiffs no duty with respect to filing claim for Trade Readjustment Assistance benefits), *aff'd*, 624 F.2d 1106 (7th Cir. 1980); *cf. Roberts v. W. Airlines*, 425 F. Supp. 416, 430-31 (N.D. Cal. 1976) (finding that a union has no legal duty to file lawsuit challenging state laws limiting employment of women); and *Rosenfeld v. S. Pac. Co.*, 293 F. Supp. 1219, 1229 (C.D. Cal. 1968), *aff'd*, 444 F.2d 1219 (9th Cir. 1971) (same).

325. 746 F.2d 1316 (7th Cir. 1984).

326. *Id.* at 1321.

327. *Id.*

328. *Id.*

duty to provide Freeman with more legal assistance than bargained for in the contract or required by law.³²⁹

Additionally, the court reasoned that a decision that the duty of fair representation applied would cause more appeals of arbitrator's decisions, thereby undermining the finality of arbitral awards; this would be inconsistent with federal labor policy.³³⁰

In the mediation procedure advocated here, the employees would have the right to file their own claims or to ignore the procedure altogether and go directly to the appropriate administrative agency or court. Thus, no duty of fair representation is necessary. While the union might owe the employees a duty with respect to negotiation of the procedure,³³¹ implementation of the procedure would be outside the scope of the duty.

There are various arguments for distinguishing the cases finding no duty of fair representation, however. Most of the cases in which courts declined to find a duty involved employee attempts to evade the statute of limitations bar for filing their own claims.³³² In addition, the labor policy supporting the finality of arbitration militated in favor of finding no union duty to appeal unfavorable arbitration decisions. If the union negotiates a procedure in which it offers representation to at least some members of a bargaining unit, perhaps the duty

329. *Id.* at 1321-22; *see Steffens v. Bhd. of Ry. & Airline Clerks*, 797 F.2d 442, 447 (7th Cir. 1986); *Sear v. Cadillac Auto. Co. of Boston*, 501 F. Supp. 1350, 1359 (D. Mass. 1980), *aff'd on other grounds*, 654 F.2d 4, 7 (1st Cir. 1981) (declining to find that failure to appeal could never breach the duty, but suggesting that that the courts should permit such actions "if at all, only in unusual instances where unfairness is blatant"). *But see Local 1902 v. Safety Cabs, Inc.*, 414 F. Supp. 64, 66 (M.D. Fla. 1976) (implying such a duty).

330. *Freeman*, 746 F.2d at 1322.

331. *See Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 77 (1991). So long as the procedure is voluntary and open to all employees, there is little risk of a claim for breach of the duty related to negotiation of the procedure. While the union might make some concession to management to obtain the procedure, given the benefits for the employer, great sacrifice of employee benefits is unlikely to be necessary. In any event, the union has great flexibility in deciding what trade-offs to make in bargaining. *Id.* at 78.

332. *See, e.g., Steffens*, 797 F.2d at 447; *Freeman*, 746 F.2d at 1322; *Lacy v. Local 287*, No. IP77-672-C, 1979 WL 2008, at *12, *aff'd*, 624 F.2d 1106 (7th Cir. 1980).

of fair representation should apply.³³³ In its absence, what is to hold the union accountable to the employees that it represents?

As a democratically elected representative of the employees, the union can be decertified if a majority of the employees are dissatisfied with its representation. Opportunities for decertification are limited, however, to petitions filed during a thirty day period every three years unless the union is unable to negotiate a replacement collective bargaining agreement, in which case a petition can be filed after contract expiration.³³⁴ Additionally, the Landrum-Griffin Act requires regularly conducted elections for union officers, which provide an opportunity to replace unsatisfactory officers.³³⁵ The threat of loss of representation rights and loss of union office provides an incentive to union officials to represent employees fairly. The ability to remove the union or its officers, however, is little consolation to the employee who loses a job as a result of unfair representation. Discrimination law provides a potential cause of action for employees injured as a result of the union's discrimination on the basis of race, gender, religion, national origin, age or disability.³³⁶ This cause of action would not cover every instance of possible injury to employees, however. For example, a union official might pressure an employee to accept an unfavorable settlement in a strong case for improper but not discriminatory reasons, such as a promise of favorable treatment from the employer in another case more important to the union, or even a financial payment to the official. In a less egregious case, inadequate representation might lead an employee to a settlement later regretted. While such conduct might be rare, the absence of the constraints of the duty of fair representation might not discourage the temptation. Application of the duty, however, might discourage the union from creating a procedure that adds to its potential liability.

333. For arguments for a broader union duty, see Crain & Matheny, *supra* note 2, at 1840-41 (urging imposition of an affirmative legal duty on unions to combat discrimination in the workplace); Alan Hyde, *Economic Labor Law v. Political Labor Relations: Dilemmas for Liberal Legalism*, 60 TEX. L. REV. 1, 29 n.74 (1981) (arguing that the duty of fair representation should apply to any representational function the union performs, whether mandatory or voluntary).

334. Gen. Cable Corp., 139 N.L.R.B. 1123, 1125 (1962).

335. Labor-Management Reporting & Disclosure Act, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified as amended at 29 U.S.C. §§ 151-169 (2000)).

336. 29 U.S.C. § 623(c) (2000) (providing that it is unlawful for a labor organization to discriminate against any employee on the basis of age); 42 U.S.C. § 2000e-2(c) (2000) (providing that it is unlawful for any labor organization to discriminate against an individual because of race, color, religion, sex or national origin); 42 U.S.C. §§ 12111-12112 (2000) (providing that no covered entity shall discriminate against an individual with a disability and defining "covered entity" to include labor organizations).

Although the wide range of reasonableness accorded to the union under the duty of fair representation³³⁷ makes imposition of liability a relatively rare occurrence, the cost of defending even unsuccessful claims is not insubstantial. The concern about costs encourages unions to take great care in exercising their representational duties. One might argue that applying the duty of fair representation to a voluntary mediation procedure in the context of egregious union misconduct would be appropriate. On the other hand, the union should have the freedom to decide how best to deploy its limited resources. For example, the union should be able to choose to represent some employees, but not all, in mediation procedures, without fear of lawsuits for breach of the fair representation duty. In addition, the union must be able to advocate for the interests of the bargaining unit by either resisting settlements that violate the collective bargaining agreement or agreeing to modify the agreement where deemed appropriate, without fear of legal challenge. The duty of fair representation, with its wide range of reasonableness, may be a better standard for evaluating union conduct in mediation than other possible claims such as negligence in the performance of a duty or legal malpractice, which would be preempted by the duty of fair representation where it applies.³³⁸

While there is no certainty that unions would escape liability for any action taken in the procedure advocated here, ultimately, if unions are to flourish again, they must find a way to appeal to a broader sector of employees and to overcome the employees' fear of selecting union representation. Although negotiation of a mediation procedure may bring with it some risk of liability, either through the duty of fair representation, discrimination law or other legal action, unions must take some risk in order to grow. The potential benefits for members and the union may outweigh the liability risk of this voluntary procedure.³³⁹ Indeed, the mediation procedure might provide a vehicle for resolution of duty of fair representation or other claims filed against the union.³⁴⁰ Mediation might save

337. *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78 (1991).

338. *See United Steelworkers v. Rawson*, 495 U.S. 362, 371 (1990); *Moscowitz & Van Bourg, supra* note 321, at 51-52 (discussing cases where plaintiffs failed in efforts to hold nonlawyer union representatives liable for legal malpractice).

339. It is worth noting that postal employees reported high levels of satisfaction with the fairness of a similar mediation process, whether they were represented by the union, by another representative or had no representation. *See supra* notes 181-84 and accompanying text. Thus the likelihood of claims against the union might be small. Notably, in the coal industry grievance mediation study no duty of fair representation suits were initiated by employees whose grievances were not arbitrated after mediation. *Elkiss, supra* note 90, at 679.

340. Mediation could be a step in the union's procedure for employees' internal appeals from union decisions not to pursue grievances. While such a procedure is typically a part of the union's constitution and bylaws, the union cannot require exhaustion of such a procedure prior to a lawsuit for duty of fair representation unless the

the union legal costs in defending such claims and ultimately result in employees gaining a better understanding of the union's decisions and the constraints upon those decision and the union's resources.³⁴¹

The mediation procedure might provide a defense in cases seeking to hold the union liable for hostile environment sexual harassment as well.³⁴² As noted above, the Supreme Court has held that an employer can avoid vicarious liability for supervisory sexual harassment if it can establish that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and . . . that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm

appeals procedure can provide complete relief to the employee. *See Clayton v. Int'l Union, UAW*, 451 U.S. 679, 692 (1981). In order to provide for such relief, the union would need to negotiate an agreement with the employer to allow reactivation of grievances or otherwise to enable complete relief if agreed to in a mediated settlement.

341. As in all cases, the employee must be free to choose any representative desired. The potential conflict of interest in union representation is quite clear here.

342. Unions may be liable for harassment under Title VII if the union officials actively engage in harassment or if the union deliberately acquiesces in an employer's harassment. *See, e.g., Agosto v. Correctional Officers Benevolent Ass'n*, 107 F. Supp. 2d 294, 308-09 (S.D.N.Y. 2000) (denying motion for summary judgment based on genuine issue of material fact as to whether the union not only failed to assist plaintiff in her complaints about harassment but also participated in creating the hostile work environment); *Rainey v. Town of Warren*, 80 F. Supp. 2d 5, 18-19 (D.R.I. 2000) (denying union's motion for summary judgment based on genuine issue of material fact as to whether the union deliberately acquiesced in the employer's harassment by failing to file grievances despite knowledge of the severe and ongoing harassment); *EEOC v. Regency Architectural Metals Corp.*, 896 F. Supp. 260, 269 (D. Conn. 1995) (finding union liable for intentionally failing to pursue female employee's hostile environment complaint to cater to the prejudices of the majority of the union's membership), *aff'd sub nom.*, *EEOC v. Shopmen's Local 832*, No. 96-6039, 1997 U.S. App. LEXIS 9570 (2d Cir. Apr. 29, 1997); *Stair v. Lehigh Valley Carpenters Local Union No. 600*, No. 91-1507, 1993 U.S. Dist. LEXIS 8668, at *80-81 (E.D. Pa. June 29, 1993) (finding union liable for sexual harassment where it distributed pornographic calendars with the union's name, address and logo to members and employers, who posted them in the work sites), *aff'd*, 43 F.3d 1463 (3d Cir. 1994). The union may also be liable for breaching the duty of fair representation where it intentionally fails to pursue harassment grievances. *See Woods v. Graphic Communications Union Local 747*, 925 F.2d 1195 (9th Cir. 1991) (finding union liable for breach of duty of fair representation for deliberately refusing to pursue racial harassment grievances). State anti-discrimination law may impose an even higher duty on the union. *See Epstein v. Sonoma County Org. of Public/Private Employees*, No. C-90-3514, 1992 U.S. Dist. LEXIS 6216, at *12 (N.D. Cal. Apr. 28, 1992) (denying union's summary judgment motion because there was a genuine issue of material fact as to whether the union violated the California Fair Employment and Housing Act, which placed an affirmative duty on unions "to take all reasonable steps necessary to prevent discrimination and harassment from occurring").

otherwise."³⁴³ The primary method of meeting this defense is the existence of an effective complaint procedure that the employee unreasonably fails to utilize.³⁴⁴ A strong union policy against harassment, combined with a mediation procedure for disputes between employees and the union which allows employees to choose their own representative, may meet the first prong of the defense. The presence of active and effective caucuses for minority groups within the union may further help to convince courts that the procedure is sufficiently effective that an employee who fails to utilize the procedure is acting unreasonably. If the procedure operates to limit harassment lawsuits against the union, the union will obtain both financial and reputational benefits.

H. Issues of Power

Issues of power predominate in the workplace and the law of the workplace. The National Labor Relations Act was designed to allow employees to combine their power to better combat the power of employers.³⁴⁵ Unions do provide a counterweight to employer power, but even in their heyday unions did not eliminate power imbalances between workers and employers.³⁴⁶ Today, when unions represent 13.5 percent of the nonagricultural workforce, their power is greatly diminished. Employees without unique skills are even less powerful, particularly in slack labor markets. And, as a general rule, white female employees and employees of color have even less power.

Critics of ADR in general suggest that individuals with less power are better off in the court system, with its due process protections and formal mechanisms for equal treatment of litigants, than in more informal systems like mediation.³⁴⁷

343. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998). Several courts have suggested that the same principles of assessing liability for the actions of officials should apply to the employer and the union. See *Woods*, 925 F.2d at 1201; *Agosto*, 107 F. Supp. 2d at 307-08. *

344. *Ellerth*, 524 U.S. at 765.

345. 29 U.S.C. § 151 (2000).

346. This is not to suggest that in a given situation a union, or even an individual employee, may not have more power than an employer, but such situations are uncommon.

347. See Richard Abel, *Informalism: A Tactical Equivalent to Law?*, 19 CLEARINGHOUSE REV. 375, 383 (1985); Delgado et al., *supra* note 39, at 1398-99; William H. Simon, *Legal Informality and Redistributive Politics*, 19 CLEARINGHOUSE REV. 384, 385 (1985). This argument would not apply to mediation systems that do not include legal claims. However, one of the incentives for the employer to agree to such a system is the potential cost savings resulting from settlement of legal claims. An employer is less likely to create a system that incorporates only noncontractual, nonlegal disputes unless it is convinced that mediation of such disputes will substantially raise morale and productivity, as it gives employees a forum for claims where none previously

If this is true, mediation may disadvantage more employees than it helps. Critics suggest that formal mechanisms reduce the chance that bias will affect the legal process.³⁴⁸

One answer to this concern is that the suggested procedure is optional. Employees who view the court system as a better option can decline mediation. Some employees, however, may be convinced by the employer to participate in mediation to their detriment. Free representation by unions, caucuses or community groups will help balance power in mediation. Caucus representatives and social justice organizations should be particularly sensitive to bias issues and can help control bias in mediation. Attorney representation can also add balance, albeit at a substantial cost. The training and experience of these representatives diminishes the possibility that the employee will be disadvantaged. Moreover, the legal system is no panacea. If the employee cannot afford effective legal representation, any benefit from the legal system is limited, if not nonexistent.³⁴⁹

existed with little corresponding benefit to the employer.

348. Delgado et al., *supra* note 39, at 1398-99; Grillo, *supra* note 40, at 1588-90. Additionally, there is some evidence that mediation is more likely to result in agreement when the parties are of relatively equal power. See Kenneth Kressel & Dean G. Pruitt, *Conclusion: A Research Perspective on the Mediation of Social Conflict*, in *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION* 394, 404-05 (Kenneth Kressel et al. eds., 1989). A study of six hundred cases in small claims court in New Mexico evaluated outcomes of cases assigned randomly to mediation and adjudication. The results revealed that women fared better in mediation than in adjudication, although their subjective evaluation of mediation was more negative than their evaluation of adjudication. Minorities, who were predominantly Hispanic, fared worse in mediation than in adjudication and also fared worse in mediation than whites. The differences in mediation outcomes disappeared when both mediators were mediators of color, however. Despite their objective monetary disadvantage, minority disputants were more enthusiastic about mediation than white disputants. James Alfini et al., *What Happens When Mediation Is Institutionalized?: To the Parties, Practitioners, and Host Institutions*, 9 OHIO ST. J. ON DISP. RESOL. 307, 316-17 (1994) (comments of Michele Hermann). One explanation of these differences may be that the parties are more interested in process than outcome. *Id.* at 322 (comments of Robert Baruch Bush). It is possible that parties may be both empowered and disadvantaged by mediation. A party may be empowered (or feel empowered) by the process, yet objectively receive less relief than he or she would have received in litigation. Hodges, *supra* note 108, at 462 n.185. Definitions of empowerment may vary as well. Craig A. McEwen, *Note on Mediation Research*, in *DISPUTE RESOLUTION* 155, 156 (Stephen B. Goldberg et al. eds., 2d ed. 1992). In one view empowerment may come only from legal advocacy, while in another it may come from more direct involvement in the dispute and its resolution. *Id.*

349. SUSAN E. LAWRENCE, *THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING*, at ix (1990) (noting in her preface that "the ability to retain and compensate an attorney is, effectively, a prerequisite to participation in judicial decision making"); Ruth Bader Ginsburg, *In Pursuit of the Public Good: Access to Justice in the United States*, 7 WASH. U. J.L. & POL'Y 1, 2 (2001) ("It remains

Simply put, power imbalances will always affect resolution of disputes in the workplace. At best, their role can be minimized.

Another power concern is that the more powerful employer might use the mediation process solely for the purpose of obtaining discovery for later litigation.³⁵⁰ The employee, of course, could also use mediation for this purpose. There is widespread agreement that confidentiality is crucial for mediation to be successful, particularly where legal claims are involved that may be (or are) the subject of litigation.³⁵¹ Preserving confidentiality, and the perception of confidentiality, is an issue for every mediation procedure. Trained and experienced mediators are well aware of the importance of confidentiality and careful mediator selection will help alleviate this concern. The mediator's selective use of caucuses during the mediation procedure will assist in maintenance of confidentiality as well. State and federal laws control confidentiality in court proceedings and while the results are not always predictable, as mediation grows predictability will grow as well.³⁵² Additionally

true, however, that the poor, and even the middle class, encounter financial impediments to a day in court. They do not enjoy the secure access available to those with full purses or political muscle.”); Robert A. Katzmann, *Themes in Context, in THE LAW FIRM AND THE PUBLIC GOOD 2* (Robert A. Katzmann ed., 1995) (noting that the legal needs of the poor are often unmet); Esther F. Lardent, *Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question*, 49 MD. L. REV. 78, 86 (1990) (noting that several studies have demonstrated the extent to which the legal needs of the poor are unmet); Monica L. Warmbrod, Comment, *Could an Attorney Face Disciplinary Actions or Even Legal Malpractice Liability for Failure to Inform Clients of Alternative Dispute Resolution?*, 27 CUMB. L. REV. 791, 800 n.76, 801 (1996-97) (noting that parties with fewer economic resources do not face a “level playing field” in the courtroom); see also sources cited *supra* note 48 (discussing various studies demonstrating that representation increases odds of prevailing in unemployment compensation and arbitration proceedings).

350. Harkavy, *supra* note 299, at 162.

351. Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. ON DISP. RESOL. 239, 243-45 (2002) [hereinafter Deason, *Predictable Mediation*]. The Uniform Mediation Act, which was recently adopted by the National Conference of Commissioners on Uniform State Laws and the ABA House of Delegates, contains significant confidentiality protections. Ellen E. Deason, *Uniform Mediation Act: Law Ensures Confidentiality, Neutrality of Process*, 8 DISP. RESOL. MAG., Summer 2002, at 7. The Act has been adopted in Nebraska and introduced into other state legislatures, but not yet adopted. See <http://www.nccusl.org/nccusl/pubndrafts.asp> (last visited Apr. 15, 2004). The Act is available online at <http://www.law.upenn.edu/bll/ulc/mediat/UMA2001.htm> (last visited Feb. 12, 2004).

352. For a thorough discussion of confidentiality issues, see Deason, *Predictable Mediation*, *supra* note 351, and Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79 (2001).

the parties can craft confidentiality rules in negotiating the procedure, improving predictability and controlling disclosure.³⁵³

It has been suggested that confidentiality is of particular concern in mediation programs in unionized environments because of the union's statutory right to be present at the settlement of grievances.³⁵⁴ The statutory right is subject to waiver, however.³⁵⁵ Further, the right may apply only to contractual grievances, not to individual legal disputes outside the collective bargaining agreement.³⁵⁶ Nevertheless, both the union and the employer have an interest in ensuring that settlements do not conflict with the collective bargaining agreement.³⁵⁷ To preserve both this interest and the benefits of mediation, the parties must structure the mediation system so that employees can choose their own representatives, eschewing union participation if they so desire, while retaining the union's right to review settlements that may conflict with the collective bargaining agreement. While confidentiality is an important aspect of mediation, union involvement in settlements that necessitate changes in the collective bargaining agreement will enhance the parties' ability to deal with structural discrimination issues.³⁵⁸ Thus, the system must be negotiated to balance these interests to better serve all parties and accomplish the goals of the program.

I. Statute of Limitations Issues for Legal Claims

Finally, any mediation program covering legal claims must address the statute of limitations. The most common legal issues arising out of employment, such as discrimination claims, have a relatively short statute of limitations. For example, under Title VII, an employee must file a charge with the EEOC within

353. Deason, *Predictable Mediation*, *supra* note 351, at 303-08; Goldberg & Brett, *supra* note 91, at 24-25 (describing grievance mediation procedure which precludes use of anything done or said at mediation in subsequent arbitration of the dispute).

354. Stacia Marie Jones, Note & Comment, *Confidentiality in Discrimination-Related Dispute Mediation: Is There a Congressional Mandate for Union Employees to Have an Individual Right to Pursue Mediation Without Union Representation?*, 15 OHIO ST. J. ON DISP. RESOL. 483, 487-88 (2000) (citing 29 U.S.C. § 159(a) (2000)).

355. See *Bethlehem Steel Co., Shipbuilding Div.*, 89 N.L.R.B. 341, 345 (1950).

356. See *U.S. Postal Serv.*, 281 N.L.R.B. 1015, 1018 (1986) (finding that union had right to be present at settlement of EEO disputes where the employees had also filed contractual grievances over the same issue, but making no finding about the right to be present at meetings relating to EEO disputes where no overlapping contractual grievance was filed).

357. See *supra* note 291 and accompanying text.

358. See *supra* note 293 and accompanying text.

180 or three hundred days of the occurrence of the unlawful conduct.³⁵⁹ Mediation must not cause the employee to lose a claim for failure to file a timely charge or lawsuit. At the same time, some of the advantage of mediation would be lost if the parties had to participate in formal agency or court proceedings pending mediation.³⁶⁰ In negotiation and implementation of the procedure, the employer and the union must be aware of statutes of limitations. Generally, the statute of limitations is not tolled during use of an internal dispute resolution program.³⁶¹ The employer and the union could agree, as part of the program, however, to waive the statute of limitations defense for mediated claims.³⁶² Such an agreement will be effective where compliance with the statute of limitations is not a jurisdictional bar.³⁶³ An alternative is to file the claim and ask the court or agency to delay investigation or litigation pending mediation. This alternative depends on the agreement of nonparties, which may not always be forthcoming. Regardless of which alternative is chosen, union and caucus representatives, as well as employees, must be educated about the statutes of limitations for various claims to avoid loss of claims for failure to make a timely filing. In addition, the mediation program should be designed to ensure prompt mediation of claims. Failure to do so eliminates some major advantages of an ADR program.

J. Summary

A mediation program negotiated in accordance with the principles set forth here offers potential to resolve noncontractual disputes in the unionized workplace. Employers and employees will benefit. In addition, the procedure

359. *See* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 105 (2002).

360. In some cases, mediation of a legal claim might be more successful after some discovery of the facts as each party would have a better sense of the viability of the claim. *See* CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS* 57-58 (2d ed. 1986). Quick settlement before positions harden and relationships are more seriously disrupted, however, also has its advantages.

361. *See* Int'l Union of Elec. Workers v. Robbins & Myers, Inc., 429 U.S. 229, 236 (1976). The exception is when an employer fraudulently induces a plaintiff not to file a claim. *See, e.g.,* Sharp v. United Air Lines, Inc., 236 F.3d 368, 372-73 (7th Cir. 2001); Lever v. Northwestern Univ., 979 F.2d 552, 555-56 (7th Cir. 1992).

362. *See* Supinski v. Merrill Lynch & Co., No. 00CV7363, 2001 U.S. Dist. LEXIS 11953, at * 7-8 (E.D.N.Y. Aug. 13, 2001) (finding that Merrill Lynch agreed in its dispute resolution program to tolling of the statute of limitations so long as the employee filed a claim for mediation within the statute of limitations). To avoid the problems of faded memories and lost witnesses that the statute of limitations is designed to address, the program, like the Merrill Lynch program, could require filing a request for mediation prior to the expiration of the statute of limitations.

363. *See* Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) (finding that filing a charge of discrimination with the EEOC under Title VII is not a jurisdictional prerequisite for a lawsuit but rather is subject to waiver, estoppel and tolling).

provides an opportunity for the union to actively engage individual members who have traditionally been considered outsiders. Mediation also offers an additional avenue for cooperation between unions and social justice organizations. Mediation, done right, can be a step on the road to union revitalization.

III. CONCLUSION

Transformation of the system of American industrial relations and revitalization of labor unions or other organizations for employee voice in the workplace will be a lengthy process, characterized by progression and regression. The academic debate has contributed much valuable insight into the possibilities for such transformation. A mediation program for the noncontractual claims of unionized employees could provide a mechanism for effective employee voice, while at the same time providing sufficient benefits to employers to make the program an attractive option. Experiments with such mediation could reveal whether the projected benefits become a reality. Unions and employers should begin such experimentation. Small steps may lead to more substantial changes which make the system of industrial relations more responsive to the realities of today's workplace, better serving the needs of both employers and employees.