

FINDING LAWYERS FOR EMPLOYEES IN DISCRIMINATION DISPUTES AS A CRITICAL PRESCRIPTION FOR UNIONS TO EMBRACE RACIAL JUSTICE

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“[T]he use of union dues to pay for anti-affirmative action lawsuits [helps to] fight ‘discrimination levied against our non-minority members.’

‘If you’re going to agree there was discrimination . . . , then you’re punishing the people who had nothing to do with the discrimination in the past. And the ones who were discriminated in the past are not the ones receiving the benefit.’”¹

“The dues should be refunded or put in an escrow account because [the Union] has failed to represent the interests of its minority . . . members

‘We have to be proactive on how we deal with one another And the union should start that process, but they don’t have a program for affirmative action. They don’t have a plan to have us even talk communally . . . , to have some sensitivity training . . . , to address some of the problems we historically have.’”²

1. Glenn Jeffers, *Race Still Divides Firehouses: Bias Often Hidden but can Flare Up, Minorities Assert*, CHI. TRIB., Apr. 4, 2004, at C1, C19 (quoting James McNally, President of Local 2 of the Chicago, Illinois, Fire Fighters Union).

2. Gary Washburn, *Blacks Call For New Fire Union Boss: Protesters Allege Bias in Asking for Refunds on Dues*, CHI. TRIB., May 31, 2002, METRO SECT., at 3 (quoting Nick Russell, Battalion Chief of Chicago, Illinois, Firefighters and head of the African American Firefighters League, a coalition of black firefighters in Chicago). In 2002, the African American Firefighters League marched on the headquarters of their union, Local 2 of the

I. INTRODUCTION

The year 2004 represents a significant point in time for labor unions and their black members. The quotes at the beginning of this article by a white union leader and then a black member of the same union, respectively, highlight the concerns that resonate today with employees of color³ and their unions, as both groups struggle to deal with the issue of racial justice in the workplace.⁴

Black employees who challenge discrimination in the workplace are at the center of this struggle. They usually fight their battles alone and typically have unsuccessful results whether pursuing their claims in courts or through alternative dispute resolution systems. In those rare examples of successful court challenges to employment discrimination, a possible

Chicago Fire Fighters Union, demanded the resignation of the union's then new president, and sought the refund of \$6.5 million in dues paid over the last two decades by minority and female members after new union President James McNally, an outspoken opponent of affirmative action, took office by winning sixty-two percent of the vote in the union election. *Id.* While acknowledging that a separate union might be better to address the concerns of the African American Firefighters League, their leader, Battalion Chief Nick Russell, agreed that he was stopping short of asking for a separate union because only Local 2 can legally represent Chicago firefighters in negotiating wages and benefits. *Id.* But Russell asserted that another group might be able to negotiate racial and human rights issues. *Id.*

3. In this Article, I focus on racial justice in terms of discrimination committed in the workplace primarily against black males. For consistency, I mostly use the term "black" rather than "African-American" when addressing race, but I consider the terms to be synonymous in this article along with the term "Negro," which may also be used with "African-American" when quoting other sources. Similar to the author's discussion in the preface to a rich new exploration of racial justice, I have not "unwittingly reinscribed the so-called black/white binary that permeates so many analyses of race" because I do recognize that "racism in America is not a two-dimensional picture." MICHAEL K. BROWN ET AL., *WHITE-WASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* ix (2003). Rather, I agree with the point recently made by those authors of a 2003 book that examines racial justice, Michael K. Brown, Martin Carnoy, Elliott Currie, Troy Duster, David B. Oppenheimer, Marjorie M. Schultz and David Wellman: "[T]he conservative consensus on race is mostly constructed around the relationship between black and white. . . . [T]he black/white binary persists as a feature of every day life and is crucial to the commonsense understanding of racism." *Id.* at x. For these reasons, I have focused on blacks and whites, and primarily black males versus white males in this Article. See Marion Crain, *Whitewashed Labor Law, Skinwalking Unions*, 23 *BERKELEY J. EMP. & LAB. L.* 211, 215 n.16 (2002) ("[S]ome believe that the racial identity of all groups has been politically and legally defined by the line between blackness and whiteness."). But see Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 10 *LA RAZA L.J.* 1144, 1184 n.127 (1998) (criticizing the black/white binary paradigm in discussing race from an outsider perspective as a Latino, neither white nor black). Also, I may refer to people of color, in general, or other races as it becomes necessary for clarity or depth.

4. A more detailed discussion of the recent racial justice issues occurring for black Chicago firefighters and their majority white male union are explored *infra*, Part III.B.2.

consequence could be the adoption of an affirmative action program to remedy the effects of past discrimination in the workplace. With some unions, especially majority white unions where blacks were historically denied access, affirmative action plans are challenged even up to the point of using union membership dues to fight attempts to provide racial justice for blacks.

Ironically, these same unions argue that seniority and other traditional methods of selection should trump affirmative action efforts to deliver racial justice when it is those very same seniority and traditional selection systems that created discrimination against blacks in the first place and still continue to perpetuate direct discrimination against blacks today.⁵ While disregarding this point, these unions also argue that discrimination against white majority members occurs when employers consider race through an affirmative action plan.

With these unions involved, it all becomes a bitter and vicious cycle where individual black employees first sue the employer for discrimination. As a result, an employer may implement or be ordered to implement some form of affirmative action policy as a response. To close the loop, white employees, especially those in their majority-based union, respond by taking legal action to challenge the implementation of the affirmative action response.

Within this cycle, the need for legal support in pursuing these claims represents a key concern. Individual black employees do not have the financial or legal support of their union to challenge discrimination in the first instance. These black employees then become appalled to find that affirmative action efforts to provide them with some form of justice in the workplace are being challenged in reverse discrimination suits in court by the very union that they support with their union dues. Unions have the financial wherewithal to obtain legal support directly and use it in bringing reverse discrimination claims or other challenges to affirmative action, whereas individual black employees do not have financial or other means to obtain the legal support needed to confront direct discrimination in the workplace.

Possibly, the use of union funds to support legal challenges to affirmative action does not represent a major concern given the relatively small impact that unions now have in the United States. Admittedly, the percentage of workers represented by labor unions in the last fifty years has significantly diminished.⁶ Whatever the reasons for organized labor's

5. See *infra* text accompanying notes 103-108.

6. See Ann C. Hodges, *Mediation and the Transformation of American Labor Unions*, 69 MO. L. REV. 365, 365 (2004) ("The decline of unionization in the United States is a phenomenon that has been well-documented."). See also Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C.

drastic decline,⁷ it has reached a crucial juncture where it can either go forward with successful and measured growth, or it can become extinct.

This year 2004 marks a significant time period in our history for racial justice in and out of the workplace. Many celebrations have occurred in light of the fiftieth anniversary of the Supreme Court's landmark decision in *Brown v. Board of Education*,⁸ which banned the Jim Crow concept of separate but equal in education. Also, just last summer, the Supreme Court issued another landmark decision regarding racial justice in *Grutter v. Bollinger*.⁹ In *Grutter*, the Court found that there was a compelling interest

L. REV. 351, 361-62 (2002) (chronicling the clear decline in American unions over the last fifty years with 31.5% of the non-agricultural labor force being unionized in 1950, 34.7% in 1954, down to 24.7% by 1970, 16.1% by 1990, and 13.5% in 2000 and even more drastic drops in total union membership over this time in the private sector, which is essentially a drop from over thirty percent in 1950 to only nine percent in 2000); William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 262 (2002) (noting that unions are no longer "a major player in most workplaces . . . and represent only about thirteen and a half percent of the workforce and about nine percent of the private sector workforce" in 2000); Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 651-54 (2001) (recognizing diminished labor and making broad proposals that would change the landscape if a citizen union formed to take up employee issues); Paul C. Weiler, *A Principled Reshaping of Labor Law for the Twenty-First Century*, 3 U. PA. J. LAB. & EMP. L. 177, 185-86 (2001) (noting a decline in unionism from about forty percent of the private sector in 1947 down to less than ten percent in the late 1990s, and noting a corresponding reduction of at least twenty percent in wages).

7. See Jame J. Brudney et al., *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1738-39 (1999) (addressing the correlation between judicial hostility and the lack of union growth); Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws,"* 1990 WIS. L. REV. 1, 82 n.222 (suggesting that labor's present inability to expand its base has resulted from its actions that "alienated itself from the great social and protest movements of the 1960s and 1970s"). In 1986, Professor Jack Getman asserted that organized labor may be taking a self-defeatist attitude and blaming too much of its failure on coercive employers and harsh laws instead of confessing its own complacency as a reason for its failures. Julius G. Getman, *Ruminations on Union Organizing in the Private Sector*, 53 U. CHI. L. REV. 45, 76-77 (1986) (discussing criticisms of organized labor). However, in 2002, the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) Union President John Sweeney told a Senate committee that there were several campaign tactics that were used by employers to dissuade workers from supporting union representation and those tactics "lay out the dimensions of problems workers in this country face." Fawn H. Johnson, *Senate Committee Explores Difficulties Workers Face in Organizing Campaigns*, DAILY LAB. REP. (BNA) No. 120, at A-1 (June 21, 2002). More recently, Professor Getman criticized many facets of labor law as being the source of organized labor's decline: "the overall anti-union trend of the law must certainly have some role in the overall difficulty unions face in organizing . . ." Julius Getman, *The National Labor Relations Act: What Went Wrong; Can We Fix It?*, 45 B.C. L. REV. 125, 138 (2003).

8. 347 U.S. 483 (1954).

9. 539 U.S. 306 (2003).

for public universities to consider racial “diversity” in the admissions process when analyzed under the Equal Protection Clause of the Fourteenth Amendment of the Constitution.¹⁰ In *Grutter*, Justice Sandra Day O’Connor acknowledged that “in a society, like our own, . . . race unfortunately still matters.”¹¹

This year 2004 also brings us to the fortieth anniversary of the passage of Title VII of the Civil Rights Act of 1964,¹² which established landmark protections by banning employment discrimination on the basis of race, color, national origin, and sex.¹³ Despite the growth in equal opportunities from the civil rights movement of the 1960s, commentators continue to complain about the difficulties for those seeking to obtain racial justice today through an individual claim under Title VII.¹⁴ As an example of this dissatisfaction with Title VII, a “myriad of civil rights and social justice organizations” have all supported a recent bill introduced in Congress on February 11, 2004, FAIRNESS: The Civil Rights Act of 2004, H.R. 3809 and S. 2088, which would “counteract the potentially devastating impact of several U.S. Supreme Court decisions” and provide guarantees of “viable remedies for on-the-job discrimination.”¹⁵

10. *Id.* at 328 (“[W]e hold that the Law School has a compelling interest in attaining a diverse student body.”).

11. *Id.* After acknowledging that race matters enough today (in 2003 at the time of the decision), Justice O’Connor expressed the hope that it would not matter as much twenty-five years from now, so race-conscious measures may not be a compelling interest for college admissions by then. *Id.* at 343 (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

12. See Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in pertinent part at 42 U.S.C. §§ 2000e-2 to -17 (2000)).

13. 42 U.S.C. §§ 2000e-2(a)(1) to -(2) (2000).

14. See, e.g., Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 560-61 (2001) (assessing federal court disposition of employment discrimination cases at the pre-trial stage and finding that employers prevailed in ninety-eight percent of those cases).

15. See Ritu Kelotra, *Fairness: The Civil Rights Act of 2004*, 13 POVERTY & RACE: POVERTY & RACE RESEARCH ACTION COUNCIL 5 (Mar./Apr. 2004), available at <http://www.civilrights.org/issues/enforcement/details.cfm?id=22723>. The civil rights and social organizations supporting this legislation included the Leadership Conference on Civil Rights (LCCR), the American Association of Retired Persons (AARP), the Mexican American Legal Defense and Educational Fund (MALDEF), the National Council of La Raza, the National Organization for Women (NOW) Legal Defense and Educational Fund, the National Association for the Advancement of Colored People (NAACP) Legal Defense and Educational Fund, the National Employment Lawyers Association (NELA) and the National Women’s Law Center (NWLC). *Id.* The bill was sponsored by Senator Edward Kennedy, a Democrat from Massachusetts and Congressmen John Lewis, a Georgia Democrat, George Miller, a California Democrat, and John Conyers, a Michigan Democrat. In addition to several items focused on discrimination issues outside of race or employment (such as allowing disparate impact claims for age discrimination and for discrimination by recipients of federal funds, along with allowing states to be sued for various employment claims), this proposed legislation offers more racial justice by providing victims of

At such a crucial time in our history, major concerns exist regarding the viability of labor unions and the capability of employees to pursue racial justice in the workplace with any success. Continued improvement within both movements may depend upon finding a cohesive intersection between them. With the race and class divide affecting relations between organized labor and black workers (a dilemma which must be explored in more detail),¹⁶ this Article offers the thesis that there remains an area of opportunity for justice where interests of unions and black employees may coalesce: providing legal assistance to unrepresented¹⁷ black employees in

employment discrimination with a clear right to sue in court instead of being forced into arbitration as a condition of employment, and it also establishes the clear right to recover attorney's fees, litigation costs, and a full measure of punitive damages rather than being subjected to arbitrary limitations on those forms of financial compensation. *Id.* at 5-7. The key objectives involving racial justice in the workplace from this legislation would be achieved by reversing the effects of the following Supreme Court decisions: *Barnes v. Gorman*, 536 U.S. 181, 189 (2002) (prohibiting the award of punitive damages for private lawsuits alleging disability discrimination when brought against public entities under Section 202 of the American with Disabilities Act or against recipients of federal funding under Section 504 of the Rehabilitation Act); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (enforcing an agreement that forced employees to give up their rights to go to court as a condition of employment and instead resolve their discrimination claims in arbitration); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't. of Health & Human Res.*, 532 U.S. 598, 605, 609-10 (2001) (finding that if a defendant "voluntarily" changes his or her conduct as a result of a plaintiff's lawsuit and thereby circumvents the need for further injunctive relief, the plaintiff may not recover attorneys' fees from the defendant, absent a court judgment, even if the lawsuit was the catalyst for the defendant's change in conduct).

16. See discussion *infra* Part III.C.

17. I have purposefully chosen to use the term "unrepresented" in this Article to mean without legal representation. I use "unrepresented" with the broader understanding that it applies equally to employees represented by a union regarding working conditions and those not represented by a union because individual employees, even in a union environment, tend to pursue Title VII employment discrimination claims separately from and without the direct support of their unions. See Ronald Turner, *Employment Discrimination, Labor and Employment Arbitration, and the Case Against Union Waiver of the Individual Worker's Statutory Right to a Judicial Forum*, 49 EMORY L.J. 135, 201-03 (2000) (describing difficulties for employees if unions were involved in directly handling Title VII claims and why employees should be allowed to go forward without the union being able to waive those rights). Also, "unrepresented" means more in this Article than just operating in a court system without legal representation. It is extended to any situation where an employee has a discrimination dispute with an employer and obtaining legal advice could be helpful, regardless of whether the claim has reached a court or will ever be brought in a court. Although terms like "self-represented" and "pro se" can be considered synonymous with "unrepresented," I use "unrepresented" throughout because "self-represented" and "pro se" may tend to wrongly connote that the employees are proceeding voluntarily without legal representation when it is more than likely not a choice. See Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judge, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1992 n.23 (1999) (stating:

Throughout this Article, I consciously choose the term 'unrepresented litigants' in most cases instead of 'self-represented,' 'pro se,' or 'pro per.' The prefix

pursuing their individual discrimination disputes with their employers.

Individual black employees, whether in unions or not in unions, need legal assistance in navigating the complex requirements to establish an employment discrimination claim under Title VII. As a result, unions can help black employees who are union members and those who are not union members in obtaining legal counsel and providing other assistance needed to pursue their discrimination claims effectively. If a particular union is unable to foster enough support to provide direct legal assistance to individual black employees because of the race divisions within its own ranks, it can allow racial identity coalitions, caucuses and associations within the union to allocate their dues directly for that type of legal assistance. Black union members can receive direct legal assistance from union lawyers, or as part of a general legal assistance plan made available to both black union members and, in general, to black employees who do not work in a union-organized environment. By addressing the legal assistance needs of union workers and the same needs for a significant and growing majority of non-union workers, unions can promote racial justice along a broader spectrum.

Under this thesis, unions and their black members may also obtain a fair balance along the race and class divide. Black union members can capitalize on the value of having their voices heard and their union dues used directly for racial justice through their black identity coalition. They can accomplish this while still working within the general union structure to maintain overall solidarity regarding class and salary issues with their employer.

In exploring this thesis, Part II of this Article reviews the problems for an unrepresented black employee trying to obtain racial justice in and out of the courts. It highlights the significant concern that individuals have in pursuing employment discrimination claims without adequate legal assistance and advice either in the court system or through informal alternatives to court adjudication. Part II also explains how the employees'

'un-' means 'not,' the 'opposite of.' The literal definition therefore is 'not represented,' indicating a 'lack of' representation. . . . Because the focus of this Article is the unrepresented poor, the concept of 'not represented' best captures the plight of indigent litigants who appear without lawyers and who, essentially, are not heard by the court. . . . The concept of 'self-representation' connotes the choice to forego counsel and probably some perceived ability to carry out the representation of oneself. . . . This does not describe the predicament of most of the unrepresented poor and should not form our operating assumptions in attempting to fashion solutions. . . . For similar reasons, and because I prefer English to Latin, I prefer the term 'unrepresented litigants' to 'pro se' ('for himself') and 'pro per' (the abbreviation for 'in propria persona,' California's version of 'pro se,' meaning 'in one's own proper person').

(citations omitted)).

inability to obtain legal counsel in discrimination claims represents a major opportunity for unions to make a contribution to racial justice by establishing a counterbalance to the employer counsel's repeat player advantage in resolving these disputes.

Then, Part III of this Article examines the urgency of the need for unions to embrace racial justice in some important form as the workplace becomes more diverse. Part III discusses the specifics surrounding the historical discrimination against blacks by unions. It also addresses the current concern that unions are taking up the fight in some instances to challenge affirmative action efforts to remedy discrimination. Despite this history and the current racial justice issues in the workplace that call for labor's action, battles about whether class versus race or vice versa should be the focus of organized labor have created stagnation and more division. Nevertheless, unions must face the racial division and harm that occurs as black union members continue to challenge workplace discrimination on an individual basis with little legal or other support from their unions. Some of these unions even exacerbate this lack of legal help and their racial divisions by using their black members' union dues to take legal action to stop affirmative action efforts intended to combat race discrimination against blacks, which were offered for the benefit of those same black union members. With this backdrop, Part III of the Article asserts that it has become of paramount importance for unions to embrace racial justice as they owe it to their black members who have faced such a long history of exclusion.

Part IV of this Article proposes the matching of a black employee's significant need for legal assistance in pursuing an employment discrimination claim with the ability of unions to fulfill this need. With their collective power, unions and their black members can creatively establish legal service plans for black employees needing legal assistance. By taking on this legal assistance, unions can seek racial justice by relying on union dues and support from black identity caucuses, coalitions, and associations within organized labor. This allows a focus on race to exist under a unifying theme for unions and their black members without distracting the union membership from pursuing its general class improvement goals.

In Part V, this Article concludes that offering mechanisms to find lawyers for black employees in individual employment discrimination disputes fulfills a major need for black employees and unions at such a critical time for both groups. It beseeches unions to find a way to make this happen as it may represent a last chance for them to significantly embrace some form of racial justice before their role in the workplace becomes completely diminished.

II. OBTAINING COUNSEL FOR UNREPRESENTED EMPLOYEES: AN EMPLOYMENT DISCRIMINATION DISPUTE RESOLUTION DILEMMA FOR THE TWENTY-FIRST CENTURY

Shortly before the Supreme Court issued its *Grutter*¹⁸ decision, the writer of that opinion, Justice Sandra Day O'Connor, spoke to the 2003 law school graduating class of George Washington University. In that speech, Justice O'Connor recognized that one of the greatest challenges to our system of justice remains the inability of claimants to obtain counsel.¹⁹ She emphasized the importance of that challenge and its implication on racial justice in our society when she stated, "There is sad evidence all across the nation that a substantial number of our citizens believe our legal and judicial system is unresponsive to them because of racial bias, that too often equal justice is but an unrealized slogan."²⁰ She then urged those new law graduates "to volunteer to help people who cannot pay for legal help."²¹

Despite Justice O'Connor's encouragement of new attorneys to work for racial justice,²² the reality remains for most employees pursuing employment discrimination claims that they face little hope of finding an attorney.²³ Only about five percent of those pursuing employment discrimination claims find attorneys to represent them in court.²⁴

18. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

19. See Anne Gearan, *Work for Racial Justice, O'Connor Tells Law School's Grads*, S. FLA. SUN-SENTINEL, May 26, 2003, at 3A.

20. *Id.*

21. *Id.* (quoting Gearan's characterization of O'Connor's speech).

22. *Id.*

23. See Michael Z. Green, *Opposing Excessive Use of Employer Bargaining Power in Mandatory Arbitration Agreements Through Collective Employee Actions*, 10 TEX. WESLEYAN L. REV. 77, 99 n.95 (2003) (describing and citing articles discussing the difficulties for employees in finding legal representation); see also Lewis Maltby, *Paradise Lost—How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.L. SCH. J. HUM. RTS. 1, 2-3 (1994) (noting that most employment cases do not have a potential recovery large enough for plaintiffs' attorneys to take the risk); Ronald Turner, *Compulsory Arbitration of Employment Discrimination Claims with Special Reference to the Three A's—Access, Adjudication, and Acceptability*, 31 WAKE FOREST L. REV. 231, 283 n.400 (1996) (noting that the problem of access to the court system is particularly difficult for employment discrimination claimants).

24. See Theodore J. St. Antoine, *Gilmer in the Collective Bargaining Context*, 16 OHIO ST. J. ON DISP. RESOL. 491, 499 (2001) (noting that only about five percent of plaintiffs seeking counsel with an employment claim in court are able to obtain counsel); see also William Howard, *Arbitrating Claims of Employment Discrimination*, 50 DISP. RESOL. J. 40, 44 (Oct.-Dec., 1995) (describing survey of plaintiff's counsel); Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. REV. 105, 106-107 nn.1-3 (2003) (describing a study finding that "a minimum level of provable damages of \$60,000" is necessary before most plaintiff's counsel will accept an employment case and referring to testimony by plaintiffs' counsel Paul Tobias, a founder of the National Employment Lawyers Association (NELA), in front of the Dunlop Commission, established jointly by the

Nevertheless, the complexities of employment discrimination law require the need for creative and innovative lawyers in this practice area.²⁵

Our “adversary system assumes equally skilled advocates on opposing sides.”²⁶ Little has been written about how a judge can deal with the unrepresented litigant.²⁷ There is no clear mechanism for the judge to “step in on the side of the pro se party to level the playing field.”²⁸ Nevertheless, the judge must be concerned about the unrepresented party having a fair opportunity to be heard without stepping over the bounds required for judicial impartiality.²⁹ As one judicial commentator has explained, this dilemma highlights “the tightrope the judge must walk between giving the pro se litigant a day in court while still remaining a neutral, impartial decision-maker.”³⁰

In addressing this dilemma, one of the most difficult scenarios for a judge occurs when the other side is represented by counsel who advocates for his or her client by seeking to “prevent unrepresented litigants from adducing testimony or other evidence to support their cases.”³¹ Judges must find a fair balance in handling these objections while trying to ensure the unrepresented litigant understands the basis well enough to make a response. These situations tend to arise in employment cases where the employer has counsel and the employee is likely to be unrepresented. In these situations, an employer’s counsel will probably take heed of the comments recently made by Judge Mark A. Drummond:

Secretary of Labor and Secretary of Commerce in 1993 to develop recommendations on workplace improvements, where Tobias acknowledged that because of financial necessity, “the plaintiffs’ employment bar turns away at least 95% of those employees who seek its help”). These findings were also described significantly in a recent empirical study of employment arbitration decisions. See Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 782-83 & nn. 20-25 (2003).

25. See Susan Sturm, *Lawyers and the Practice of Workplace Equity*, 2002 WIS. L. REV. 277, 277-82 (referring to the need for workplace lawyers to be “innovators” and noting that workplace inequities are becoming more complex and moving to a “second generation” requiring collaborative problem-solving skills).

26. Mark A. Drummond, *Pro Se Litigants Pose Challenges: Section and Other Groups Searching for Answers*, LITIG. NEWS, Sept. 2003, at 7 (quoting retired bankruptcy judge C. Timothy Corcoran).

27. *But see* Rebecca A. Albrecht et al., *Judicial Techniques for Cases Involving Self-Represented Litigants*, 42 JUDGES’ J. 16, 16 (2003) (discussing how judges “can deal with self-represented litigants in the courtroom without departing from the judicial role as a neutral, impartial decision maker”).

28. Drummond, *supra* note 26, at 7.

29. Albrecht et al., *supra* note 27, at 45 (arguing that “the trial judge can ensure the self-represented litigant’s right to be heard without departing from the judge’s duty to remain impartial”).

30. Drummond, *supra* note 26, at 7.

31. Albrecht et al., *supra* note 27, at 47.

There is perhaps no greater fear for . . . lawyers than the fear of going against a pro se litigant. What if you lose? It is a long walk back to the office. Our ego is at stake. We justifiably feel proud of our law license. It took a lot of money, hours, and hard work to earn, and now we face an amateur in court.³²

Most lawyer ethical rules do not directly address attorney dealings with unrepresented litigants other than the proscription against giving legal advice to an unrepresented party.³³ Unless legal assistance is meaningless, achieving racial justice without it represents a significant hardship and adds to the perception of an unjust system that is designed only for the “haves” in our society to the exclusion of the “have-nots.”³⁴

A. *Employment Discrimination Litigation and Its Frustrations Without Counsel*

Beyond the inability to obtain legal representation,³⁵ employees bringing race discrimination claims in court face other barriers to achieving success. Those barriers include: difficulties with problems of proof,³⁶ the

32. See Mark A. Drummond, *How Do You Handle the Pro Se Adversary?: “Be Professional” is Often the Best Advice*, LITIG. NEWS, Sept. 2003, at 7.

33. See Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers’ Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79, 80-81 & n.6 (1997) (citing Model Rules of Professional Conduct Rule 4.3 (1993)); see also MODEL RULES OF PROF’L CONDUCT, R. 2.4(b) (2004), available at http://www.abanet.org/cpr/mrpc/rule_2_4.html (last visited Nov. 18, 2004) (requiring that a lawyer mediator make sure any self-represented party understands the lawyer mediator’s role in mediation and that the lawyer mediator cannot give the self-represented party legal advice).

34. See generally Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974).

35. See Julie Davies, *Federal Civil Rights Practice in the 1990’s: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 239 (1997) (describing disincentives in the law and overall difficulties for plaintiffs’ attorneys undertaking representation of clients in civil rights litigation and noting from a survey of plaintiffs’ attorneys that the economics involved may make it hard even for someone with a good case to find an attorney if the person does not have the resources to pay a retainer or legal fees).

36. See Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577 (2001); see also Robert Belton, *Burdens of Pleading and Proof In Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1280-85 (1981) (criticizing the burdens that are placed on plaintiffs to prove discrimination and the limited burden on the employer to disprove it); Deborah A. Calloway, *St. Mary’s Honor Center v. Hicks: Questioning the Basic Assumption*, 26 CONN. L. REV. 997, 1008-09 (1994) (assessing the difficulties in meeting the burden of proof requirements established by the Supreme Court in proving race discrimination under Title VII); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-53 (1978) (questioning the Supreme Court’s race discrimination jurisprudence, which focuses on the mindset and acts of the alleged perpetrator rather than the consequences and conditions for the victim); Deborah C.

requirements of showing intentional discrimination versus discriminatory impact,³⁷ agency enforcement issues,³⁸ and grant of summary judgment.³⁹

Maybe these difficulties reflect a general decline in sympathy for blacks or other victims of discrimination.⁴⁰ On the other hand, this may indicate a judiciary that appears to be somewhat hostile to these claims. Although “[p]laintiffs lawyers admit it’s tough to beat employers in discrimination cases. . . . even some of them are surprised by a study that shows plaintiffs fare worse in federal appellate job bias cases than in any other kind of civil case.”⁴¹ The authors of that study, Theodore Eisenberg and Stewart J. Schwab, found that federal appeals courts “reversed nearly 44 percent of plaintiffs’ victories in employment discrimination cases between 1988 and 1997.”⁴² The “courts reversed fewer than 6 percent of

Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2230-32 (1995) (noting the Supreme Court’s shifting burden of production and overall proof requirements for Title VII claims); David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1657 (1991) (suggesting that because Title VII litigation is costly and its scheme of proof makes it difficult to discover discriminatory motives, employers should be required to hire minorities in proportion to their percentage in the national population).

37. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach To Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1245 & n.343 (1995) (discussing some forms of discrimination that are unconscious); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987) (noting that much of racism is unconscious and irrational); see also Alfred W. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 70 (1972) (arguing that a disparate impact theory of discrimination which does not require a showing of intentional discrimination is necessary to prevent employers from perpetuating the societal discrimination of the past).

38. See Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 307 (2001) (arguing that the EEOC “has never met the intended goal of becoming a key mechanism in eradicating discrimination in the workplace”); Maurice E.R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL’Y REV. 219, 219 (1995) (“This Article argues that Congress should relieve the EEOC of its duty to process individual charges so that the agency can concentrate on combatting broader unlawful practices.”); Michael Selmi, *The Value of the EEOC: Reexamining The Agency’s Role In Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 2 (1996) (exploring the value of the EEOC); Ronald Turner, *A Look at Title VII’s Regulatory Regime*, 16 W. NEW ENG. L. REV. 219, 222 (1994) (discussing the efficacy of antidiscrimination laws).

39. See, e.g., Selmi, *supra* note 14, at 560-61 (assessing federal court disposition of employment discrimination cases at the pre-trial stage and finding that employers prevailed in nearly ninety-eight percent of those cases).

40. See Michael J. Zimmer, *Systemic Empathy*, 34 COLUM. HUM. RTS. L. REV. 575, 583-92 (2003) (discussing “a decline in sympathy for victims of discrimination in the judicial system and why that might be so”).

41. See Susan Mandel, *Equal Treatment? Study Shows a Wide Gap Between Worker, Employer Wins in Job Bias Appeals*, 87 A.B.A. J. 24 (Nov. 2001).

42. *Id.*

employers' victories during the same period," and this "plaintiff-defense disparity was greater than in any of 24 other categories of civil cases."⁴³ In commenting on this study, prominent plaintiffs' employment discrimination lawyers, Johnnie L. Cochran, Jr. and Cyrus Mehri, found that the results indicate that federal appellate courts ignore their obligation to defer to fact-finders in these cases:

It would appear that employment discrimination plaintiffs are treated as second class citizens in the workplace and as second class litigants in the federal courts of appeals. For example, when a plaintiff appeals a defendant's victory at trial, she has no more than a 5% chance of reversing the defendant's victory on appeal; but if a defendant appeals a plaintiff's trial victory, the defendant has an incredible 43% chance of reversing the plaintiff's victory. The 43% success rate for defendants who appeal is particularly troubling when one considers that these are cases in which plaintiffs typically have already overcome difficult summary judgment motions, prevailed at trial, and survived post-trial motions. Further, employment discrimination cases that reach trial are almost always fact-intensive, and appellate courts are obligated to defer to the district court fact-finders with respect to factual determinations.⁴⁴

Because of the harsh results for employees, some commentators now believe that the court system provides little refuge and may even create false hope about the eradication of racial problems in our society.⁴⁵

43. *Id.*

44. See Johnnie L. Cochran, Jr. & Cyrus Mehri, *Empirical Study Suggests Bias in U.S. Appellate Courts*, available at <http://www.findjustice.com/ms/civil-just/joint-statement.htm> (last visited Nov. 18, 2004).

45. See, e.g., John O. Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 OR. L. REV. 201, 223 (1982) ("Thus, through symbolic gestures, imbued with a feigned impotence, the law is able to render protest for real change quiescent, while preserving the dominant status quo. In light of the foregoing discussion, the limits of antidiscrimination law become depressingly clear."). Professors Derrick Bell and Richard Delgado are also proponents of this approach. See Derrick A. Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992) (suggesting that civil rights leaders should abandon efforts to use the law and the legal system to remedy the effects of discrimination in our society by coming to the racial realism or acknowledgment that discrimination has survived and will continue to survive and cause frustration within a legal system that endorses racism) (hereinafter, Bell, *Racial Realism*); Derrick Bell, *Racism is Here to Stay: Now What?*, 35 HOW. L.J. 79, 84 (1991); Richard Delgado, *Zero-Based Racial Politics and an Infinity-Based Response: Will Endless Talking Cure America's Racial Ills?*, 80 GEO. L. J. 1879, 1881-82 (1992) ("Racism is deeply ingrained in our culture, affecting how we see ourselves and others, and how we organize social life."); Richard Delgado, *On Taking Back Our Civil Rights Promises: When Equality Doesn't Compute*, 1989 WIS. L. REV. 579, 583

Accordingly, a labor and employment law professor, Ronald Turner, counsels us to be wary about the prospects for justice through employment discrimination law by concluding that “Title VII cannot reach or bring about the avowed and ever more distant statutory goal of ending the exclusion of African-Americans and other protected groups from the changing economic mainstream.”⁴⁶ By seeking to find a way to bridge the significant gap in legal representation, this Article does not purport to rest upon some “litigation romanticist” notion that racial justice can only be achieved by court resolution of employment discrimination claims.⁴⁷ Obviously, providing legal counsel, alone, does not overcome the significant hurdles that plaintiffs must endure to prevail in an employment discrimination claim. Nevertheless, the opportunity for legal representation by victims of employment discrimination should be a reasonable expectation of the racial justice process and not a rare surprise or a virtual impossibility.

B. Alternatives to Employment Discrimination Litigation and Its Frustrations Without Counsel

Given the dismal results from the court system regarding employment discrimination, the possibilities of Alternative Dispute Resolution (ADR), in particular, arbitration and mediation, warrants some discussion. In a recent study commissioned by the American Bar Association, “The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Court,” Marc Galanter found that “although 11.5 percent of all civil cases went to trial in 1962, a mere 1.8 percent go to trial today, even though five times as many civil actions are filed.”⁴⁸ Also, in 1962, the

(“The circle of redressable racism shrank as courts required proof of intent to discriminate . . .”).

46. Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 479-80 (1995). While I agree with this concern, I remain a bit of a litigation romanticist (albeit a frustrated one) in that I still believe with some skepticism that there is a major role for the law and the court system in shaping racial justice in our society. See Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807, 807 (1994) (“[T]he law will come to favor the more concentrated class of parties with an interest in the law.”). But see Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared To Settlement*, 44 UCLA L. REV. 1 (1996) (discussing how it is difficult to even use the adjudication or litigation system when it is geared to force parties to settle). The *Brown v. Board of Education* and *Grutter v. Bollinger* cases are examples of those admittedly rare but crucial roles for the law and the court, and there are other examples. See, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948) (prohibiting states from enforcing racially restrictive covenants under the Fourteenth Amendment).

47. See Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2669 (1995).

48. See John Austin, *Jury Trials May Be Headed to Vanishing Point*, 29 LITIG. NEWS 1,

“average federal judge conducted 39 trials a year, including both civil and criminal cases” as compared to now when “federal judges average 13.”⁴⁹

Today, the federal courts face significant Congressional budget and staffing cuts that leave the federal judiciary “with \$267.2 million less than it indicated was necessary to maintain services” for fiscal year 2004.⁵⁰ These cuts place “pressures on the courts regarding juror usage.”⁵¹ This does not bode well for increasing access to the federal courts.⁵² Rather, it appears that with these limitations we have reached a significant transformation in our legal system, where the reality has become that most disputes in the twenty-first century are going to be resolved by some process that is an alternative to the courts’ trial process.

Beyond direct resolution by settlement, a great number of employment discrimination disputes are being funneled into the arbitration or mediation process for resolution.⁵³ One could question whether employers have made informed judgments in pursuing these alternatives when the court system provides such overwhelming results in their favor.⁵⁴ Despite the fact that “employees lose employment discrimination claims on average ninety percent of the time, . . . employers are so fascinated with the prospect of preventing those ten percent from getting to a jury that they are devising mandatory arbitration agreements.”⁵⁵ Likewise, employers,

1 (ABA May 20, 2004).

49. *Id.* at 2.

50. Katerina M. Eftimoff, *Staffing Cuts Expected in Federal Courts: Budget Shortages Threaten “Justice for All”?*, 29 LITIG. NEWS 1, 1 (ABA May 20, 2004).

51. *Id.*

52. *Id.*

53. See Hope Viner Samborn, *The Vanishing Trial: More and More Cases are Settled, Mediated or Arbitrated Without a Public Resolution. Will the Trend Harm the Justice System?*, 88 A.B.A. J. 24, 26 (Oct. 2002) (describing how the major decrease in trial rates has come as a result of using private forms of adjudication including arbitration and mediation).

54. See generally Michael Z. Green, *Debunking the Myth of Employer Advantage From Using Mandatory Arbitration For Discrimination Claims*, 31 RUTGERS L.J. 399, 443-62 (2000) (questioning the increasing use of arbitration by employers for handling employment discrimination claims when they handily win in courts as a disconnect between employers and their counsel over fees).

55. Green, *supra* note 23, at 96 n.86 (citing Theodore O. Rogers, Jr., *The Procedural Differences Between Litigating in Court and Arbitration: Who Benefits?*, 16 OHIO ST. J. ON DISP. RESOL. 633, 640 (2001)) (suggesting that because of the uncertainty of litigation, employers may still choose to arbitrate even though there may be better results for them in court because arbitration is more predictable in terms of “knowing in advance how much a case might cost and how long it might last”). Some are turned off by the use of the word “mandatory” when referring to arbitration agreements entered into by employees as an adhesion contract and required by the employer as a condition of employment because they feel “mandatory” somehow labels the process as unfair or possibly illegal. See Hill, *supra* note 24, at 780 n.10 (stating that the “term ‘mandatory’ implies that the employee has no real choice” and “‘pre-dispute agreement’ is used to describe the same agreements, but lacks

government agencies, and a number of private professional organizations have started to prefer the use of mediation in resolving employment discrimination disputes.⁵⁶

One concern from the court system that translates into ADR is the question of a repeat player advantage for employers.⁵⁷ Lisa Bingham explained that one possible reason for this repeat player advantage for employers might be that “many employees are going into employment arbitration hearings without the benefit of counsel.”⁵⁸ Similarly, Samuel Estreicher, a labor and employment law professor, recently noted that to the extent there is any repeat player effect in employment arbitration, it is likely that “the real repeat players in arbitration are not the parties themselves but the lawyers involved.”⁵⁹ Given the complexity of

the implication that the employee has no choice but to agree to arbitration” so “the term ‘promulgated agreement’” was chosen to stay out of the “debate over the legality of the pre-dispute, pre-hire agreement to employment arbitration”). I consider this debate about the wording to be semantics, but I recognize that there are some who are upset about the term “mandatory.”

56. See 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, 392 (2002) (highlighting the preference for mediation in employment discrimination claims); see also Green, *supra* note 38, at 330-34 (describing the effectiveness of the Equal Employment Opportunity Commission (EEOC) program which mediates employment discrimination claims).

57. See 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, 234 (1998) (finding that when one-shot employees face arbitration with repeat player employers, the employees win only about sixteen percent of the time as opposed to a seventy percent win rate when employees are not involved with repeat player employers); Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 LAW & SOC'Y REV. 767, 768-69 (1996) (regarding repeat player effect in mediation). See generally Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19 (1999) (commenting on the effects of repeat players in ADR).

58. Bingham, *supra* note 57, at 241-42 n.47 (quoting Lisa B. Bingham, *Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases*, 47 LAB. L.J. 108 (1996)). See also Vivian Berger, *Employment Mediation in the Twenty-First Century: Challenges in a Changing Environment*, 5 U. PA. J. LAB. & EMP. L. 487, 500 (2003) (“in my experience employers in general receive better, or at least more consistent, representation” as the “would-be plaintiff may have trouble hiring any lawyer” and “[w]ithout one, and facing the defendant’s counsel, the worker stands virtually no chance of victory”); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMP. POL'Y J. 189, 198 (1997) (“[American Arbitration Association] case files reveal that a substantial proportion of employees are unrepresented in employment arbitration.”); Helen B. Culliner, *Practical Guidelines for Lawyers Representing Clients in Arbitration Proceedings Today*, 49 DISP. RESOL. J. 48 (Sept. 1994) (describing various legal issues to be aware of in arbitration including challenging the scope of the arbitration clause, basis for seeking judicial challenge of the arbitration award and what laws may apply).

59. Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over*

employment discrimination claims, it is not surprising to see that a lack of a repeat player counsel with innovative, problem solving skills would affect the handling of a claim.⁶⁰

Although critics of arbitration consider it coercive, some commentators have asserted that arbitration may still be better for employees because of their inability to obtain counsel and the difficulty of prevailing in the court system without counsel.⁶¹ This “lesser of the two evils” argument significantly ignores the elephant in the room as the lack of legal representation in the court system also represents a major concern in alternatives to the court system.⁶²

Lewis Maltby initially highlighted the lack of legal representation in court as a reason why arbitration may be a good option for employees.⁶³ He recently addressed the issue of not having legal representation in arbitration and suggested that lawyers may represent employees in arbitration much

Predispute Employment Arbitration Agreements, 16 OHIO ST. J. ON DISP. RESOL. 559, 566 (2001); see also Bingham, *Employment Arbitration: The Repeat Player Effect*, *supra* note 58, at 197-200 (discussing lawyers as repeat players in employment arbitration and noting that it is very unlikely that even a “less able” plaintiffs’ lawyer will become a repeat player lawyer in employment arbitration).

60. Sturm, *supra* note 25, at 277-82.

61. See Roberto L. Corrada, *Claiming Private Law for the Left: Exploring Gilmer’s Impact and Legacy*, 73 DENV. U. L. REV. 1051, 1067 (1996) (distinguishing between the need for legal representation in court versus arbitration, especially given the difficulty of finding an attorney, and assuming that if the process is fair, one of the benefits will be that the employee can be self-represented); Estreicher, *supra* note 59, at 563-64 (describing difficulties for most plaintiffs in obtaining counsel in the court system and suggesting that “lower costs of the forum also mean lower costs for their representatives (which could include unions)”); David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 99-100 (1999) (describing the unattractiveness of arbitration cases to plaintiffs’ lawyers); St. Antoine, *supra* note 24, at 499 (highlighting the fact that only about five percent of plaintiffs seeking counsel with an employment claim in court are able to obtain counsel and suggesting that if parties in arbitration cannot obtain “a first-rate lawyer” due to the low recovery potential, they can represent themselves or be represented by laypersons, similar to labor arbitration where a collective bargaining agent is the representative).

62. See Tina Drake Zimmerman, *Representation in ADR and Access to Justice for Legal Services Clients*, 10 GEO. J. ON POVERTY L. & POL’Y 181, 186 & n.35 (2003) (noting how “as much as eighty percent of the legal needs of the poor go unmet” and describing how a mediator must remain neutral while acknowledging that an unrepresented litigant “may give up rights without knowledge of the legal system”); see also Erica L. Fox, Note, *Alone in the Hallway: Challenges to Effective Self-Representation in Negotiation*, 1 HARV. NEGOT. L. REV. 85, 91-92 (1996) (discussing the deleterious effects for an unrepresented individual negotiating the resolution of a housing matter).

63. See Maltby, *supra* note 23, at 1-3 (enumerating the difficulties employees have in obtaining legal representation). Maltby has continued to raise the concern about being unable to obtain a lawyer as a potential reason to consider arbitration. See Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 57 (1998) (highlighting the financial difficulties in finding representation).

more than in the courts, as “[a]rbitration is much less expensive, allowing attorneys to accept much smaller cases, in terms of the damages”⁶⁴ There is no empirical support for this argument in employment discrimination cases.⁶⁵ In contrast, while asserting that arbitration produces better justice for employees than the courts produce, David Sherwyn and co-authors J. Bruce Tracey and Zev J. Eigen have argued that lawyers are not likely to represent employees in arbitrations because the plaintiffs’ bar has attacked the use of arbitration as coercive, and lawyers have little economic incentive to take cases that go to arbitration.⁶⁶ Until there is more specific understanding and empirical evidence regarding the importance of having legal representation for employees in arbitration,⁶⁷ there must be a

64. See Maltby, *supra* note 24, at 116.

65. Maltby does refer to an empirical study of 200 American Arbitration Association cases as support for his claim. *Id.* See also Hill, *supra* note 24, at 804. However, that study did not have a statistically significant number of employment discrimination cases to offer any real input. Hill, *supra* note 24, at 805. Maltby used this same data set for general employment claims to argue “by definition, half of any data set falls below the median, [so] 50% of the employment claims attorneys took to arbitration [in the Hill study] would not have been filed in court.” Maltby, *supra* note 24, at 116-17.

66. See Sherwyn et al., *supra* note 61, at 99-100 (asserting that because arbitration reduces “the likelihood of settling” it “makes cases less attractive to profit-maximizing plaintiffs’ lawyers”); see also Bingham, *supra* note 59, at 198-201 (finding that experienced lawyers are not likely to take arbitration cases representing highly paid employees due to the fact that their recoveries are less than in court cases or cases representing lower paid employees due to their lesser recovery on the whole and that “even less able” lawyers who know there is less likelihood of settlement with arbitration cases will not take the case due to the time investment even if there is less cost to try the case in arbitration).

67. See Bingham, *supra* note 59, at 198 (noting that “researchers have found that parties fare better in labor arbitration when they have a lawyer and the other side does not” but acknowledging that there is not enough data to make this assessment in employment arbitration cases). However, in the later Elizabeth Hill study, the author asserted that the impact of having an attorney in an employment arbitration proceeding had little effect as unrepresented employees performed just as well as those with counsel. Hill, *supra* note 24, at 818-19. Part of this result was attributed to the fairness of the American Arbitration Association Procedures and the intellect of the employees involved. *Id.* at 819. I am somewhat skeptical of this result which assumes that legal representation does not matter. What supports my cynicism is that most of the disputes assessed were not employment discrimination disputes. *Id.* at 805 (claiming that employment discrimination claims in the sample were too small to be statistically significant). Arup Varma and Lamont Stallworth conducted a limited empirical study about the effects of legal representation in mediation; although their study focused on the perception of satisfaction by the participants depending on whether they were represented by counsel. See Varma & Stallworth, *supra* note 56, at 395-417 (describing methodology for survey of participants who had voluntarily used mediation to resolve their employment mediation disputes). While this information is helpful regarding parties feelings about the selection and qualities of the mediator, to the extent that parties chose to enter into mediation voluntarily with or without counsel probably already reflected their feelings about the effect of having counsel participate. The Varma and Stallworth study did not look at the results in terms of monetary awards and resolutions with or without counsel in mediation or any form of ADR, which is an area that still needs exploration. The few studies that have explored this issue of monetary awards in

concerted focus on how to provide legal services to employees if these disputes will continue to be resolved in arbitration.

In mediation, it is not clear just how much lawyers are participating.⁶⁸ But “lawyers often have an important role to play in protecting their clients during the course of a mediation and ensuring that any agreement that is reached is fair to the client or otherwise appropriate.”⁶⁹ Vivian Berger, an experienced employment mediator and law professor at Columbia Law School, has recently highlighted the concerns about lack of legal representation in mediation:

[T]he company frequently profits from being a ‘repeat player’ in mediation and from its ability to hire superior legal assistance.

....

An even more salient equalizer would be counsel for the complainant. Thus, the company should allow the employee to have an attorney represent him in the mediation session and any related negotiations. Yet that minimalist approach does not help the employee who wants, but cannot afford, a lawyer.⁷⁰

Similar to judges, many experienced neutrals acting as mediators or arbitrators have struggled with the ethical implications that can occur in an employment discrimination claim when the employee is unrepresented and the employer has legal counsel.⁷¹ For those neutrals who are lawyers, new

mediation have noted a racial bias without addressing the effect of attorneys or lack of legal counsel. *See, e.g.*, LaFree & Rack, *supra* note 57, at 778-80 (describing findings concluding that female and male claimants of color received less in mediation than similarly situated white claimants in litigation based upon the actual percentages of the amounts obtained); Christine Rack, *Negotiated Justice: Gender & Ethnic Minority Bargaining Patterns in the MetroCourt Study*, 20 HAMLINE J. PUB. L. & POL’Y 211 (1999) (describing data from prior studies and analyzing the disparate outcomes in bargaining for ethnic minorities, women and those with limited bargaining power in mediation).

68. *See* Jean R. Sternlight, *Lawyers’ Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 269-70 & n.3 (1999) (asserting that “lawyers are frequently accompanying their clients to mediation” but acknowledging that the “extent to which lawyers attend mediations varies according to both the nature of the dispute and the culture of the jurisdiction” and that “[l]awyers are far more likely to attend those mediations in which a great deal is at stake than they are, for example, to attend mediations of small claims type disputes”).

69. *Id.* at 345.

70. Berger, *supra* note 58, at 533-35.

71. *See* David A. Hoffman & Natasha A. Affolder, *Mediation and UPL: Do Mediators Have a Well-Founded Fear of Prosecution?*, 6 DISP. RESOL. MAG. 20 (2000) (discussing potential implications for mediators of being prosecuted in some states for the unauthorized

Rule 2.4 of the Model Rules of Professional Conduct identifies some ethical responsibilities for dealing with the unrepresented participant:

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.⁷²

Beyond the ethical concerns about the practice of law and trying to get the unrepresented claimant to seek counsel, if the neutral does too much to help the unrepresented employee bridge the lack of legal representation gap, the neutral will face the problem of being no longer perceived as impartial by the employer.⁷³ Because of the dilemma for a third party neutral in dealing with an unrepresented employee, Lamont Stallworth, a labor and employment arbitrator and mediator and a human resources professor, has expressed serious concern about the "practical implications related to claimants and plaintiffs representing themselves in mediation" of an employment discrimination claim.⁷⁴ At the center of this concern is the "imbalance of power" that might exist" and which could lead to the unrepresented employee expecting the "mediator to 'level the playing field' and provide legal advice."⁷⁵ He also noted that although there is "no systematic empirical study contrasting the difference in mediated settlements in represented and unrepresented situations. . . . [i]t certainly seems fair to hypothesize that an inexperienced claimant or plaintiff

practice of law when helping unrepresented litigants in mediation through evaluative mediation or the drafting of settlement agreements).

72. See MODEL RULES OF PROF'L CONDUCT R. 2.4 (2003), available at http://www.abanet.org/cpr/mrpc/rule_2_4.html (last visited Nov. 18, 2004).

73. See Berger, *supra* note 58, at 536 ("This type of asymmetry also creates difficulties for the mediator" because "[i]f he attempts to compensate for the inequality by assisting the employee, he risks the loss, real or perceived, of his neutrality" and "[d]espite disclaimers, the worker will tend to see the neutral as her own attorney; and if the mediator is not careful, so will the employer.").

74. See Lamont E. Stallworth, *Finding a Place for Non-Lawyer Representation in Mediation*, 4 DISP. RESOL. MAG. 19, 19 (1997).

75. *Id.*

generally will not fare well in mediation against an experienced employment lawyer.”⁷⁶

Stallworth’s suggested solution to this dilemma is to allow non-lawyers to represent employees in mediation of employment disputes.⁷⁷ For example, he identified a “union representative, [a] civil rights advocacy organization, friend or relative” as possible non-lawyers who may represent the claimant.⁷⁸ He also suggested that non-lawyer representatives may come from the ranks of “third-year law students who are in clinical mediation programs.”⁷⁹

Historically, individuals in the traditional labor setting have been able to handle the role of representation in arbitration and mediation proceedings without raising unauthorized practice of law concerns.⁸⁰ But with the broad growth of ADR and its substitution for the courts,⁸¹ many states have started to scrutinize the unauthorized practice of law question in ADR proceedings.⁸²

Any non-lawyers or even lawyers not authorized to practice law in a particular state should seriously consider the ramifications before deciding to represent individual employees with discrimination disputes in ADR. As described in Part IV, this Article proposes that unions, and in particular

76. *Id.* at 20. See also Berger, *supra* note 58, at 500 (agreeing that an unrepresented employee facing experienced counsel of an employer has “virtually no chance of victory”).

77. Stallworth, *supra* note 74, at 19.

78. *Id.* He specifically referred to using non-lawyer members from “organized labor or civil rights advocacy groups, such as the Leadership Conference on Civil Rights, Urban League, Women Employed, Mexican American Legal Defense and Education Fund, disabilities organizations, etc.” *Id.* at 20.

79. *Id.*

80. See Sandra E. Purnell, Comment, *The Attorney as Mediator – Inherent Conflict of Interest?*, 32 UCLA L. REV. 986, 1000-01 (1985) (describing cases where courts found that the practice of industrial relations and the act of serving as a labor consultant to negotiate and draft a collective bargaining agreement did not constitute the practice of law).

81. See Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U.S.F. L. REV. 17 (2003) (describing the growth of arbitration as a substitute for the courts and criticizing this substitution as being coerced by companies as adhesion agreements rather than out in the open as a legal discussion of the waiver of the right to a jury trial).

82. See Matthew W. Finkin, *Employee Representation Outside the Labor Act: Thoughts on Arbitral Representation, Group Arbitration, and Workplace Committees*, 5 U. PA. J. LAB. & EMP. L. 75, 88 n.55 (2002) (identifying the issue of whether non-lawyer union members representing individual employees in arbitration would raise unauthorized practice of law concerns and suggesting the use of a legal service plan as a mechanism to circumvent this problem); Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U. L. REV. 153, 156-57 (1999) (discussing concerns about unauthorized practice of law by mediators during a mediation proceeding); Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 256-58 (2002) (describing and citing articles regarding the growing number of practitioner and academic debates as to whether mediation involved the practice of law).

black caucuses, coalitions and associations within those unions, can establish legal service plans to assist individual employees in discrimination disputes. Then the unauthorized practice of law concern would not apply as the legal service plan would employ licensed attorneys to represent the individual in the discrimination claim against the employer. Given the significant need of employees for legal help in resolving their disputes with employers and the vast skills that unions bring to bear, it is a major opportunity area for unions to bridge the gap in legal representation.

III. A PRESSING NEED FOR UNIONS TO STRIVE FOR RACIAL JUSTICE

Given its diminishing density,⁸³ organized labor must explore creative ways to expand its membership. With increasing numbers of people of color entering the workplace, the time is now for organized labor to capitalize on the diversity of the increasing number of workers. A number of commentators have explored the difficult dynamics for unions in attempting to achieve racial justice given organized labor's poor civil rights history.⁸⁴ Historically, many white male dominated unions in the twentieth

83. See Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CAL. L. REV. 1767, 1767-68 (2001) ("Labor union density has been declining since the 1950s.").

84. A symposium, "Activism and the Law: The Intersection of the Labor and Civil Rights Movements," even explored the issue of coalitions with labor unions and community organizations and generated a series of articles discussing coalitions between labor and civil rights/community activist groups. See Susan Sturm, *Introduction: Reconnecting Labor and Civil Rights Advocacy*, 2 U. PA. J. LAB. & EMP. L. 617 (2000). Those articles include: Penda D. Hair, *Prayer and Protest: Bringing a Community Vision of Justice to a Labor Dispute*, 2 U. PA. J. LAB. & EMP. L. 657, 662 (2000) (describing a coalition between unions and the religious community); Benjamin Hensler, *Building a Coalition for Workers' Rights at Kmart*, 2 U. PA. J. LAB. & EMP. L. 687, 693 (2000) (explaining that race provided a lens that highlighted the moral aspects of the struggle for the larger community); Elizabeth M. Iglesias, *Institutionalizing Economic Justice: A LatCrit Perspective on the Imperatives of Linking the Reconstruction of "Community" to the Transformation of Legal Structures that Institutionalize the Depoliticization and Fragmentation of Labor/Community Solidarity*, 2 U. PA. J. LAB. & EMP. L. 773 (2000) (contextualizing case studies in which effective labor/community coalitions were indispensable to the success of union organizing and collective bargaining efforts in a way that reflects some of the advances that currently are converging in the Latino Critical Legal Theory movement); Reverend Nelson Johnson, *Reflections on an Attempt to Build "Authentic Community" in the Greensboro Kmart Labor Struggle*, 2 U. PA. J. LAB. & EMP. L. 675 (2000) (reflecting on the way the struggle at the Kmart distribution center in Greensboro was defined to be one that involved the whole community and not just the individuals that were directly affected); Martha R. Mahoney, *Constructing Solidarity: Interest and White Workers*, 2 U. PA. J. LAB. & EMP. L. 747 (2000) (analyzing the intersection of class and whiteness); Thomas J. Sugrue, *The Power of Unlikely Coalitions*, 2 U. PA. J. LAB. & EMP. L. 737, 739 (2000) (describing various case studies involving union-community coalitions, including the Janitors for Justice Program in Los Angeles); 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, 629-30 (2000) (arguing that labor must focus on community-based organization in communities of

century have openly discriminated on the basis of race.⁸⁵ Those historical actions, as well as recent acts of racism, affect unions, especially those dominated by white males, in their dealings with black employees and the civil rights and community-based groups that advocate for racial justice today.

Also, group dynamics have impeded successful coalitions between organized labor and black employees because organized labor has focused on class justice whereas black employees have sought racial justice.⁸⁶ Navigating this race and class divide requires skill and commitment.⁸⁷ In

color not only to increase membership but as a form of community-based activism). Other authors have also discussed the parameters of coalitions with organized labor. *See, e.g.*, LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 75-82, 101-03 (2002) (describing problems while advocating broad-based coalitions between whites and black workers); Leroy D. Clark, *Movements in Crisis: Employee-Owned Businesses—A Strategy for Coalition Between Unions and Civil Rights Organizations*, 46 *HOW. L.J.* 49 (2002) (identifying the struggles in creating coalitions between labor and civil rights movements and the problems they both face).

85. *See* Orly Lobel, *Agency and Coercion in Labor and Employment Relations: Four Dimensions of Power in Shifting Patterns of Work*, 4 *U. PA. J. LAB. & EMP. L.* 121, 162 & nn. 167-68 (2001) (“Up until the New Deal, and in some cases even after, unions widely practiced overt exclusion of minorities, women and immigrants” and before then “almost all labor unions engaged in race discrimination, ranging from complete exclusion to internal segregation.”); *see also* Herbert Hill, *Black Workers, Organized Labor, and Title VII of the 1964 Civil Rights Act: Legislative History and Litigation Record*, in *RACE IN AMERICA: THE STRUGGLE FOR EQUALITY* 263, 277, 283-84, 298 (Herbert Hill & James E. Jones, Jr. eds., 1993) (describing the exclusion of blacks from unions prior to passage of Title VII of the 1964 Civil Rights Act); 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, 404 (1993) (explaining the lack of fair representation for black firefighters prior to *Steele v. Louisville*); Michael Jordan, *The NLRB Racial Discrimination Decisions, 1935-1964: The Empiric Process of Administration and the Inner Eye of Racism*, 24 *CONN. L. REV.* 55, 58-63 (1991) (describing the pervasive level of discrimination against blacks from 1935-64); *accord* Molly S. McUsic & Michael Selmi, *Postmodern Unions: Identity Politics in the Workplace*, 82 *IOWA L. REV.* 1339, 1346 (1997).

86. *See* Crain & Matheny, *supra* note 83, at 1785-88 (describing the race and class conflict and how the historical problems and conflicts with unions and civil rights groups raises a concern, and questioning the resolve of organized labor to have a social justice focus rather than a class focus given a recent effort by organized labor to “put aside race and gender interests”).

87. The general debate about race and class is a significant and complex one. *Compare* TODD GITLIN, *THE TWILIGHT OF COMMON DREAMS: WHY AMERICA IS WRACKED BY CULTURE WARS* (1995) 223-37 (describing the careless use of energy related to focusing on racial identity politics and the consequences of creating more divisions in our society between the wealthy and the lower class and creating a political structure where white males have no option than to rebel against identity) *with* ROBIN D.G. KELLEY, *RACE REBELS: CULTURE, POLITICS, AND THE BLACK WORKING CLASS* 25-43 (1994) (describing the importance of dignity and empowerment through racial identity amongst black workers which transcended into an overall value of race-consciousness for both black and white members of the working class). Also, Professor Sheryll Cashin has recently explored in

addition, some aspects of labor law create conflicts for organized labor when dealing with individual employees who may seek racial justice.⁸⁸

A. *Labor's Unremarkable Civil Rights History*

Organized labor does not have a good civil rights record.⁸⁹ From the early 1900s, when black activist A. Philip Randolph organized the Brotherhood of Sleeping Car Porters to address the concerns of black railroad employees, unions and black workers have not necessarily worked in concert to address civil rights.⁹⁰ Under a concept that has developed as a matter of labor law, unions have a duty to fairly represent *all* employees.⁹¹

some depth the impact of segregation on race and class and highlighted the urgency of not accepting our segregated society. Sheryll Cashin, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* (2004). Because this is a debate that could swallow the entire focus of this Article, I will only recognize the debate and explore its implications within the limited situations posed by the thesis of this Article in Part III.C. See Marion Crain, *Colorblind Unionism*, 49 *UCLA L. REV.* 1313, 1320-25 (2002) (describing how efforts by organized labor to organize and develop a colorblind class ideology ignores the role of race in constructing class identity and how seeking a class focus while seeking to deny the implications of race is merely perpetuation of white privilege and economic oppression of blacks). Professor Crain has recently noted: "A law that severs race and class oppression from one another does violence to workers' experience and produces manifest injustice. . . . Insisting on a unity in which difference is erased only results in the further exclusion of those who are different." *Id.* at 1341 (footnotes omitted). For a thoughtful and more in-depth discussion of class and race, see Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 *S. CAL. L. REV.* 799 (2003) and Jennifer M. Russell, *The Race/Class Conundrum and the Pursuit of Individualism in the Making of Social Policy*, 46 *HASTINGS L.J.* 1353 (1995).

88. Crain, *supra* note 3, at 229-42 (describing doctrine adopted by the National Labor Relations Board which originally was intended to find it unlawful to prevent employers from making inflammatory racial appeals to divide workers and how that doctrine has been expanded to ban appeals to racial pride by the union also so that the law now requires colorblind organizing).

89. See generally Herbert Hill, *The AFL-CIO and the Black Worker: Twenty-Five Years After the Merger*, 10 *J. OF INTERGROUP REL.* 5, 60 (1982) ("[T]he distribution of wealth and income in the United States has not changed during the past twenty-five years" from 1955-1980 and the "AFL-CIO did not take the required action to eliminate racial discrimination within its ranks, an issue the union leadership regarded mainly as a public relations problem and 'handled' as such.").

90. See 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, 384 (2002) (discussing early 1900s discrimination by labor against blacks by stating: "Throughout the 1900's, the railroad craft unions practiced virulent racism [and] frequently engaged in blatant forms of discrimination, often seeking to exclude African Americans from employment altogether" while also describing how the railroad unions, "at least through 1950, had terrible records on racial issues.").

91. The courts have attempted to address the concern about union conflicts and improper acts that disadvantage certain employees on the basis of race under section 301 of the Labor-Management Relations Act by requiring that a union owes a duty of fair

The significance of enforcing this duty arose in the first half of the 1900s as unions were notoriously effective in protecting the rights of white male workers while openly discriminating against black male workers.⁹²

When the National Labor Relations Act (NLRA)⁹³ was being considered in the 1930s, it originally “included a clause prohibiting union discrimination against Blacks,” but “strong AFL resistance caused Senator Wagner to eliminate the clause in order to secure organized labor’s support for the bill.”⁹⁴ However, many “Black leaders at the NAACP and the National Urban League considered the clause essential to further Black employment in unionized workplaces; since most union constitutions denied union membership to Blacks, implementation of the closed shop blocked access to Blacks.”⁹⁵ Unfortunately, “[w]hite leaders at the AFL prioritized job protection and racial privilege for white members, taking the position that they would prefer to see the entire statute defeated rather than suffer the inclusion of an anti-discrimination clause.”⁹⁶ The NLRA passed

representation to all its members and that it may be sued by members for breaches of that duty. 29 U.S.C. § 185 (2004); *see also* James E. Jones, Jr., *The Development of The Law Under Title VII Since 1965: Implications of the New Law*, 30 RUTGERS L. REV. 1, 24-28 (1976) (discussing the duty of fair representation in relationship to Title VII race discrimination claims). However, challenges to these breaches are limited by the requirement that the Plaintiff prove the union’s actions were arbitrary and capricious. *See Vaca v. Sipes*, 386 U.S. 171 (1967) (explaining arbitrary and capricious requirement and how the judicially-created duty developed in response to a series of cases involving alleged discrimination by unions against individual members on the basis of their race, as found in *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944)); *see also* Marion Crain & Ken Matheny, “*Labor’s Divided Ranks*”: *Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542, 1562-66 (1999) (describing the duty of fair representation and its potential for exploiting black workers’ rights to the exclusion of white male dominated unions).

92. *See* Herbert Hill, *Race and Ethnicity in Organized Labor: The Historical Sources of Resistance to Affirmative Action*, 12 J. OF INTERGROUP REL. 5, 11 (1984) (describing early 1900s hostility to black workers by white immigrant-led unions and describing one writer’s assessment of the discrimination in a black journal in 1902 that “labor unions constituted ‘a gigantic closed corporation—a greedy, grasping, ruthless, intolerant, overbearing, dictatorial combination of half-educated white men.’”). The “white worker and his trade union displaced black labor on the street railways, removed Afro-American firemen on railroads, took the jobs of black switchmen and shop workers, replaced blacks in construction work and shipbuilding and forced them out of tobacco manufacturing and other industries” and when “employers wished to hire blacks, white workers frequently protested” so that “[b]etween 1882 and 1900 there were at least fifty strikes by whites against the hiring of blacks.” *Id.* at 19-20.

93. 29 U.S.C. §§ 151-169 (2004).

94. Crain, *supra* note 3, at 229; *see also id.* at 229-30 & n.106 (describing the history of the NLRA, also called the Wagner Act after its main proponent, Senator Wagner, and citing David E. Bernstein, *Roots of the “Underclass”: The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85, 95 (1993)).

95. *Id.* at 229-30.

96. *Id.* at 230.

without the clause.⁹⁷

When Title VII arrived in the 1960s, it led to a workplace revolution by ushering in a focus on individual rights instead of collective rights.⁹⁸

Under the individual rights model, claims are filed with the Equal Employment Opportunity Commission (EEOC) rather than with a union representative, and today federal statutes protect workers from discrimination based on race, gender, national origin, religion, age, and disability—the very categories around which identity groups are often formed.⁹⁹

Organized labor did not play a major supporting role in getting Title VII passed, and it has not led the efforts to improve Title VII through amendments.¹⁰⁰ Specifically, Title VII included unions along with employers as the entities to be regulated and banned them both from discriminating against employees on the basis of race.¹⁰¹ Because of labor's spotty civil rights record, the march for racial justice in the workplace has continued without organized labor playing a leading role.¹⁰²

97. *Id.*

98. Crain & Matheny, *supra* note 83, at 1781-82 (describing the development of anti-discrimination laws in response to labor law's failure to respond to identity politics); McUsic & Selmi, *supra* note 85, at 1351 (finding that "federal law effectively encouraged employees to define their grievances at the workplace, and to organize themselves, through reference to personal or group identity rather than through a union.").

99. McUsic & Selmi, *supra* note 85, at 1351.

100. See Hill, *supra* note 89, at 35 (noting: that leadership of the AFL-CIO did not actively support proposals for Title VII; that the AFL-CIO was not part of the national coalition that emerged to sponsor the 1963 March on Washington even though it was coordinated by labor leader, A. Philip Randolph, and although the United Auto Workers with its substantial black membership did participate; and that once it became necessary to testify in front of Congress about the pending Title VII legislation in 1964, AFL-CIO President George Meany begrudgingly supported it and said it was necessary because the AFL-CIO was helpless to stop union discrimination as its organization operated in a democratic way and could not impose its will on union dues payers). Similarly, after Title VII passed, unions challenged it based upon application of seniority provisions in union contracts and sometimes entered into court battles against its own black members. *Id.* at 38, 53. Also, when the opportunity came to amend Title VII in 1972 and give the EEOC more power, organized labor fought it and successfully stopped efforts to give the EEOC authority to issue cease and desist orders. As a result, the EEOC was only allowed to file a private suit for enforcement instead. *Id.* at 53-54.

101. See 42 U.S.C. § 2000e-2(c) (2004) (making it illegal for labor organizations to discriminate).

102. See David L. Gregory, 53 GEO. WASH. L. REV. 680, 691 n.71 (1985) (reviewing RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? (1984) and MORGAN O. REYNOLDS, POWER AND PRIVILEGE: LABOR UNIONS IN AMERICA (1984)) (describing how unions have deliberately perpetuated racial discrimination, in some instances). See also William B. Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PA. L. REV. 40, 40 (1969) (describing how Title VII was necessary because of union

B. Labor's Recent Racial Concerns: Reverse Discrimination vs. Affirmative Action

Once Title VII became effective and banned race discrimination in the workplace, the effects of the historical and still present union-based discrimination created concerns for employers. In response to the law, or as a result of lawsuits filed pursuant to the law, employers adopted affirmative action plans to correct past discriminatory practices. The historical perspective and any concerns about perpetuating the racism of the past would seem to support efforts to achieve a racial balance in the workplace that resembles the communities in which employees work. However, if unions take on the concerns of affirmative action, their majority constituencies will likely view it as coming "at the expense of senior nonminority males."¹⁰³ This would lead to what has been referred to as "reverse discrimination" claims, where white males sue employers for taking measures to respond to and improve racial justice in their workplaces.¹⁰⁴ David Schwartz has explained this form of lawsuit:

Reverse discrimination cases have arisen in three situations. First, a white (or male) employee or applicant complains that a minority (or female) employee or applicant received preferential treatment on the basis of race or gender pursuant to a voluntary affirmative action plan. In a second setting, typically in employment, a white/male employee challenges involuntary affirmative action: a court-ordered remedy that results in some preferential treatment to compensate minority/female employees for judicially proven discrimination. In both instances, the question of race- or sex-based decision making – usually the crux of dispute in most discrimination cases – is undisputed. The reverse discrimination claim is thus a challenge to the affirmative action plan. In a third setting, the complaining white/male employee alleges only that the minority/female employee was treated more favorably; there is not necessarily an affirmative

failures).

103. Gregory, *supra* note 102, at 691 n.72 (highlighting the significant tension between union seniority systems and affirmative action principles).

104. Angela Onwuachi-Willig, *When Different Means the Same: Applying a Different Standard of Proof to White Plaintiffs Under the McDonnell Douglas Prima Facie Case Test*, 50 CASE W. RES. L. REV. 53, 53-54 & n.3 (1999) (defining "reverse discrimination" as "discrimination against persons belonging to groups that have traditionally been privileged by their race and/or sex . . ." and finding that "[w]hile only 16 percent of white individuals claim to know someone who has been the victim of reverse discrimination, more than 70 percent of Whites are convinced that reverse discrimination is a rampant problem.").

action plan or even a 'benign' motivation.¹⁰⁵

To the extent reverse discrimination cases have developed, James Jones "has traced the origin of the term 'reverse discrimination' to some marginally relevant dicta in very early Title VII cases in the lower courts" that used the term to "express concern for the impact of discrimination remedies on existing seniority rights of white employees."¹⁰⁶ "Thus, a seniority system launched when . . . people of color were systematically excluded from the competition for particular jobs later became the institutionalized mechanism whereby white men were granted continued racial . . . privilege."¹⁰⁷ Accordingly, racial conflicts regarding affirmative action principles and traditional seniority systems for white males have created a significant dilemma in employment discrimination law, particularly as the law relates to black employees represented by unions.

1. Private Sector: *Weber* and its Progeny

The Supreme Court has deferred to the union seniority system over affirmative action and employment discrimination concerns in many instances.¹⁰⁸ In one major case, the Court did not defer to seniority when it was used to try to attack an affirmative action plan. It is not surprising that the leading Supreme Court case on affirmative action under Title VII, *United Steelworkers of America v. Weber*,¹⁰⁹ arose because of problems where craft unions had historically discriminated against blacks.¹¹⁰ The Court stated that "[j]udicial findings of exclusion from crafts on racial

105. David S. Schwartz, *The Case of the Vanishing Protected Class: Reflections on Reverse Discrimination, Affirmative Action, and Racial Balancing*, 2000 WISC. L. REV. 657, 662 (footnotes and citations omitted).

106. *Id.* at 662 n.13 (citing James E. Jones, Jr., "Reverse Discrimination" in *Employment: Judicial Treatment of Affirmative Action Programs in the United States*, 25 How. L.J. 217, 224-25 (1982)).

107. *McUsic & Selmi*, *supra* note 85, at 1347-48.

108. *See, e.g.*, *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 403-404 (2002) (finding that a company-imposed seniority system normally takes precedence over any accommodations required by federal law banning employment discrimination on the basis of disability); *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber*, 461 U.S. 757, 767 (1983) (finding that Title VII and collective bargaining do not conflict with each other); *see also* David L. Gregory, *Conflict Between Seniority and Affirmative Action Principles in Labor Arbitration, and Consequent Problems of Judicial Review*, 57 TEMP. L.Q. 47, 54-55 (1984) (discussing conflicts with affirmative action and union seniority). Also, the Supreme Court has recognized that seniority systems are generally protected from challenge under Title VII through the statutory exception for bona fide seniority systems. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 356 (1977). This bona fide seniority system exception can be found at 42 U.S.C. § 2000e-2(h) (2004).

109. 443 U.S. 193 (1979).

110. *Id.* at 198 & n.1.

grounds are so numerous as to make such exclusion a proper subject for judicial notice."¹¹¹ The result from the case was positive in terms of achieving justice for black workers who had historically been denied certain jobs by allowing the employer and the union to agree to rectify the situation through an affirmative action plan.

In *Weber*, Kaiser Aluminum entered into a collective bargaining agreement with the United Steelworkers of America Union (USWA) that established an affirmative action plan for the employees at fifteen of Kaiser's plants in 1974.¹¹² Brian Weber, a white male, worked at one of those plants in Gramercy, Louisiana.¹¹³ The intent of the plan was to remedy the effects of the craft union discrimination which had led to the almost exclusively white skilled craft workforce at Kaiser with only 1.83% (5 out of 273) of the craft workers being black at the Gramercy plant.¹¹⁴ The affirmative action plan provided that Kaiser would no longer hire experienced craftsmen to fill vacant craft positions because those craftsmen had to get their experience from outside craft unions that had discriminatory practices.¹¹⁵ Instead, Kaiser created a training program to develop its own craft workers from a pool of its own production employees.¹¹⁶ Trainees were selected for the craft program based on seniority as long as fifty-percent of those selected for the training were black.¹¹⁷ This fifty-percent black requirement for the training program was intended to increase the pool of black craft workers from only 1.83% until it approximated thirty-nine percent, the percentage of blacks in the local labor force for the Gramercy area.¹¹⁸ When thirteen craft trainees were selected from Gramercy's production workforce in 1974, seven of them were black and six were white.¹¹⁹

However, the "most senior black selected into the program had less seniority than several white production workers whose bids for admission were rejected [including that of Brian Weber.]"¹²⁰ Weber subsequently

111. *Id.* (citing to studies along with the following cases: *United States v. Int'l Union of Elevator Constructors, Local 5*, 538 F.2d 1012 (3d Cir. 1976); *Associated Gen. Contractors of Mass., Inc. v. Altshuler*, 490 F.2d 9 (1st Cir. 1973); *Southern Ill. Builders Ass'n v. Ogilvie*, 471 F.2d 680 (7th Cir. 1972); *Contractors Ass'n of E. Pa. v. Sec'y of Labor*, 442 F.2d 159 (3d Cir. 1971); *Insulators & Asbestos Workers, Local 53 v. Ogler*, 407 F.2d 1047 (5th Cir. 1969); *Buckler v. Goodyear Tire & Rubber Co.*, 339 F. Supp. 1108 (N.D. Ala. 1972), *aff'd without opinion*, 476 F.2d 1287 (5th Cir. 1973)).

112. 443 U.S. at 198.

113. *Id.* at 199.

114. *Id.* at 198.

115. *Id.*

116. *Id.* at 199.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

filed a class action claim under Title VII on behalf of himself and all similarly situated white employees.¹²¹ He alleged that the affirmative action program had resulted in junior black employees receiving the craft training in preference to senior white employees, which discriminated against the white employees on the basis of race in violation of Title VII.¹²²

In finding that discrimination under Title VII had not occurred in *Weber*, the Court noted that its decision did not encompass an alleged violation of the Equal Protection Clause of the Fourteenth Amendment because this was a private matter with no state actors.¹²³ Also, because the affirmative action plan was voluntarily adopted by the employer and the union, as opposed to being a court ordered remedy for past violations, the Court limited its inquiry to “whether Title VII *forbids* private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser-USWA plan.”¹²⁴

The intent of Title VII, as shown in the legislative history through the remarks of the Congressmen involved, was to address “the plight of the Negro in our economy,” and the fact that “[t]he rate of Negro unemployment has gone up consistently as compared with white unemployment for the past 15 years. . . . is one of the principal reasons why the bill [passed].”¹²⁵ The law contains no prohibition on allowing the private sector to take effective steps to accomplish the goal that Congress had hoped Title VII would achieve through the voluntary adoption of affirmative action plans to rectify discrimination in the workplace. Instead, the Court found that Title VII was “intended as a spur or catalyst to cause ‘employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country’s history.’”¹²⁶

In addressing the parameters under which race-conscious affirmative action plans are permissible or impermissible, the Court acknowledged that the Kaiser-USWA plan was a permissible plan.¹²⁷ It was permissible because “[t]he purposes of the plan mirror those of the [Title VII] statute” as it was designed “to break down old patterns of racial segregation and hierarchy” and “open employment opportunities for Negroes in

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 200 (original emphasis).

125. *Id.* at 202 (quoting remarks of Senator Humphrey and Senator Clark in the Congressional Record related to the passage of Title VII of the Civil Rights Act of 1964).

126. *Id.* at 204 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)).

127. *Id.* at 208.

occupations which have been traditionally closed to them."¹²⁸ The Court also found that "the plan does not unnecessarily trammel the interests of the white employees" because it "does not require the discharge of white workers and their replacement with new black hires."¹²⁹ Furthermore, the plan did not "create an absolute bar to advancement of white employees" because "half of those trained in the program will be white."¹³⁰

Finally, the Court found that "the plan is a temporary measure . . . not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance" because after the percentage of black skilled craftworkers in the workforce at the Gramercy plant approximates the percentage of blacks in the Gramercy labor force, the preferential selection under the affirmative action plan would end.¹³¹ Thus, the white males used seniority to create a wedge between the employer's and the union's efforts to rectify the historical discrimination in the craft positions at Kaiser. This so-called reverse discrimination claim highlights the parameters for challenging an affirmative action plan as a mechanism to discriminate against whites on the basis of their race.¹³²

All employers and unions seeking to achieve racial justice by adopting race-conscious affirmative action plans should require that the plan: (1) be intended to correct a manifest racial imbalance in the workplace by either breaking down old patterns of segregation or hierarchy, or by opening up employment opportunities to those who have been traditionally closed out of these opportunities based on race; (2) be structured to guarantee that the interests of the white employees are not unnecessarily trammelled through creation of absolute bars to advancement or selection for white employees; and (3) be temporary and designed to last only as long as necessary to correct a manifest racial imbalance, and not be a permanent effort to maintain a specific racial make-up in the workforce.

Despite the pervasive divisions in our country about race, affirmative action still remains a viable mechanism under Title VII for private employers to remedy the effects of discrimination in the workplace.¹³³ The issue for unions with majority white male memberships is that they see no reason to agree to an affirmative action plan and will likely view such a

128. *Id.* (quoting 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey)).

129. *Id.*

130. *Id.*

131. *Id.*

132. See Schwartz, *supra* note 105, at 657 ("While the notion that we are all in one big protected group, safe from discrimination, sounds comforting, what it really means is that white males can bring 'reverse discrimination' cases and that 'reverse civil rights' lawyers are on the ascendency in attacking affirmative action.").

133. The application of *Weber* to affirmative action plans based on gender was later confirmed. See *Johnson v. Transp. Agency*, 480 U.S. 616 (1987).

plan as reverse discrimination.¹³⁴ In the private sector, the mechanism to prevent the union from agreeing to pursue affirmative action is to sue the union under Title VII as the plaintiffs did in *Weber*. The more likely option for the white male majority in a union is to use its majority power voting bloc to prevent the union from even agreeing to affirmative action in the first instance. Then the union may use the resources of its dues-paying members, including black members, to challenge an employer's personnel actions made pursuant to an affirmative action plan.

2. Public Sector: *Wygant*, *Grutter*, and the Chicago Firefighters

"Today the highest rates of unionization in the public sector are in local government employment (43.2 percent in 2001), with police, teachers, and firefighters leading the way."¹³⁵ In the public sector, employers are subject to the additional constitutional concerns posed by the Equal Protection Clause of the Fourteenth Amendment. As became evident in the Supreme Court's decision in *Wygant v. Jackson Board of Education*, an affirmative action plan involving a public employer is subject to strict scrutiny pursuant to the Equal Protection Clause of the Constitution.¹³⁶ In *Wygant*, the union brought suit against the employer school board because the board had not followed the affirmative action plan contained in the collective bargaining agreement. That plan allowed black teachers to be retained over white teachers with more seniority, and it was intended to remedy societal discrimination based on the need for black role models as teachers.¹³⁷ The Supreme Court under its strict scrutiny analysis rejected that as a compelling interest and denied the use of the race-conscious plan in *Wygant*.¹³⁸

However, when considering its most recent decisions regarding affirmative action and the Equal Protection Clause in *Grutter v. Bollinger*¹³⁹ and *Gratz v. Bollinger*,¹⁴⁰ the Supreme Court received substantial and

134. McUsic & Selmi, *supra* note 85, at 1348-49 ("Unions . . . frequently opposed affirmative action plans.").

135. JOSEPH E. SLATER, PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900-1962, 10 & n.25 (2004).

136. 476 U.S. 267, 271 (1986).

137. *Id.* at 270-71.

138. *Id.* at 284.

139. 539 U.S. 306, 342 (2003) (holding that the University of Michigan Law School's affirmative action policy was valid and that its use to improve racial diversity in public universities was a compelling interest warranting a legitimate consideration within the scope of the Equal Protection Clause as long as it is not the sole factor).

140. 539 U.S. 244, 275 (2003) (holding that the University of Michigan's undergraduate affirmative action policy was unconstitutional in that it placed considerations of race above a sufficient and individualized manner of selection of candidates as is necessary under the Equal Protection Clause).

significant evidence from key businesses, educational institutions, and the military asserting that affirmative actions programs are necessary in attracting customers, workers, and military leaders.¹⁴¹ With greater numbers of people of color entering the schools, the military, and the workplace, the constituencies for unions and the customers and communities they serve will all demand that unions play a major role in racial justice.

Even recently some public sector unions have become plagued with schisms over racial issues. The prospect of affirmative action has led to some very heated debates in the public sector in “a country where approximately twenty-one million people work for public sector entities” and “37.4% of public sector workers are union members.”¹⁴² Police and firefighter unions have been at the forefront of a number of challenges to affirmative action plans as being so-called reverse discrimination on the basis of race.¹⁴³ Considering the racial diversity in communities that many firefighters and police officers serve, it has become incumbent upon their unions to balance the needs of majority white members with the need to improve community race relations.

“[W]hen Title VII was applied to state and local governments in 1972, it pried open police and fire departments across the country—among the most notorious public bastions of white privilege—for working class African Americans.”¹⁴⁴ Firefighters and police officers have brought a large number of reverse discrimination cases challenging affirmative action

141. *Grutter*, 539 U.S. at 330-331 (stating that “American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints” and noting that “[h]igh-ranking retired officers and civilian leaders of the United States military” had argued that a “racially diverse officers corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security.”) (quoting Brief for Julius W. Becton, Jr., et al., *Amicus Curiae* 27).

142. Vijay Kapoor, *Public Sector Labor Relations: Why It Should Matter to the Public and to Academia*, 5 U. PA. J. LAB. & EMP. L. 401, 401 (2003).

143. See generally Donald T. Kramer, Annotation, *What Constitutes Reverse or Majority Race or National Origin Discrimination Violative of Federal Constitution or Statutes—Public Employment Cases*, 168 A.L.R. FED. 1 (2001) at §§ 3, 7, 8[b]-10[a], 12 (describing reverse discrimination cases involving firefighters), and at §§ 35[b], 7, 9, 10[b], 11[a], 12[a], 13[b], 14a (describing reverse discrimination cases involving police and law enforcement employees); see also Cynthia L. Fountaine, *Due Process and the Impermissible Collateral Attack Rule in Employment Discrimination Cases: An Analysis of Section 108 of the Civil Rights Act of 1991*, 58 U. PITT. L. REV. 435, 436-43 (1997) (discussing the Supreme Court’s decision in *Martin v. Wilks*, 490 U.S. 755 (1989), which allowed white firefighters filing a reverse discrimination claim against the City of Birmingham to challenge an affirmative action plan that resulted as part of a consent decree agreement entered into by the City in response to earlier discrimination litigation brought by black employees).

144. BROWN ET AL., *supra* note 3, at 187.

efforts in the workplace.¹⁴⁵ Many of these suits have been led by or supported by unions or associations despite the presence of a number of black and Hispanic members.

The racial divisions among some members of public sector firefighter and police unions and the effect on the communities they serve is highlighted by a recent example involving firefighters in the city of Chicago. Known for its predominantly white staffing and detailed history of racism,¹⁴⁶ racial tensions in the Chicago Fire Department reached a

145. See, e.g., *Martin v. Wilks*, 490 U.S. 755 (1989) (finding that City of Birmingham white firefighters could challenge enforcement of affirmative action consent decree); *United States v. Paradise*, 480 U.S. 149 (1987) (finding affirmative action order did not unnecessarily trammel on the rights of non-minority police troopers); *Petit v. Chicago*, 352 F.3d 1111 (7th Cir. 2003) (rejecting individual white police officer's argument by applying *Grutter* and concluding that their Union's collective bargaining agreement with the City did not prohibit the affirmative action promotions); *Dallas Fire Fighters Ass'n v. Dallas*, 150 F.3d 438 (5th Cir. 1998) (challenging implementation of affirmative action plan on behalf of white and Native American firefighters who had been passed over for promotions); *Alexander v. Estep*, 95 F.3d 312 (4th Cir. 1996) (finding against a county's discriminatory firefighter hiring practices); *Aiken v. Memphis*, 37 F.3d 1155 (6th Cir. 1994) (discussing Memphis police and fire departments and deciding that summary judgment in favor of defendant was improper because there was an issue of material fact as to whether the policy of favoring racial minorities was narrowly tailored); *Maryland Troopers Ass'n v. Evans*, 993 F.2d 1072 (4th Cir. 1993) (holding that affirmative action programs must present more than just a general history of societal discrimination and must specify the racial discrimination it is targeting to be valid); *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 979 F.2d 721 (9th Cir. 1992) (finding in favor of the city in a reverse discrimination suit by police union because the affirmative action policy in question was remedial in nature); *Barfus v. Miami*, 936 F.2d 1182 (11th Cir. 1991) (allowing firefighters and police officer to bring a suit for reverse discrimination); see also Debra Baker, *Backdraft*, 86 A.B.A. J. 48, 49-51 (Apr. 2000) (describing lawsuits filed by police and firefighters challenging affirmative action plans, charting developments to end affirmative action consent decrees within: the fire and police departments in Greenwood, Mississippi, the Boston Police Department, the Pennsylvania State Police Department, the Miami Police Department, the San Francisco Fire and Police Departments; and the New Orleans Police Department, while noting that "the strongest opponents of [affirmative action] consent decrees are unions" and highlighting the concerns of San Francisco's black fire chief that his efforts to continue to attract qualified black candidates had made him the target of unions).

146. Andrew Martin, *U.S.: Race Bias Still Rules in Fire Department*, CHI. TRIB., Aug. 6, 1998, at 1 ("City officials readily admit there was blatant discrimination at the Chicago Fire Department for decades."); James Hill & Andrew Martin, *Color Still Defines Chicago's Firehouse: A Culture of Racism Divides Firefighters*, CHI. TRIB., Jan. 11, 1998, METRO SECT., at 1. See also John Eig, *White Heat*, 47 CHI. MAG. 80 (May 1998) (describing two decades of attempts at affirmative action and how white firefighters still predominate but claim they are being discriminated against in the Chicago Fire Department).

Difficulties for blacks in Chicago unions are not limited to the fire department or public sector unions. See T. Shawn Taylor, *Blacks Find Progress Slow in Joining Trade Unions*, CHI. TRIB., Aug. 1, 2004, at 1 (finding that "[d]espite government efforts and court orders to diversify unions dating back to the 1960s, blacks have made only halting progress in Chicago's trade unions and in some cases have lost ground" because "[f]or years, trade unions functioned like whites-only fraternal organizations where insiders helped ease the

fevered pitch in March 2004 as a result of “a spate of radio transmissions over department frequencies” involving repeated racial slurs.¹⁴⁷ This controversy started February 2, 2004 when firefighter John Scheuneman allegedly made comments involving racial epithets.¹⁴⁸ Scheuneman worked in a predominantly black neighborhood in Chicago.¹⁴⁹ He was transferred out of his firehouse as a result of the incident.¹⁵⁰ He “allegedly made racial slurs directed at an African-American motorist he encountered in traffic.”¹⁵¹ Those slurs “were broadcast over a [fire] department vehicle’s radio that was inadvertently left open to transmit.”¹⁵² The “firefighter received a 90-day suspension in that incident, but those responsible for slurs broadcast in five subsequent transmissions have not been found.”¹⁵³

In response to the failure of the Fire Department to discover the source of these continuing racial slurs over department frequencies, the Chicago Tribune editorial page published a cartoon showing three firefighters flushing their hoses on the backs of three black men who were pressed up against a wall when another firefighter approaches and says, “No, guys—the fire’s over there!”¹⁵⁴ Chicago Mayor Richard Daley criticized the cartoon as focusing on the bad acts of a few.¹⁵⁵ The public editor of the Chicago Tribune, Don Wycliff, explained that the cartoon did highlight some of the racial realities going on in Chicago regarding its firefighters while noting that the problem is probably limited to a “few . . . but it doesn’t take many to poison a city’s atmosphere and corrode public confidence in the services they deliver.”¹⁵⁶

Tensions were exacerbated when Nicholas Russell, the head of an association and caucus of black firefighters called the African American League, received a death threat.¹⁵⁷ Also, the Fire Department discovered an unofficial firefighters’ web site that contained racist epithets.¹⁵⁸ In

way for certain applicants.”).

147. Gary Washburn, *Daley Blasts Editorial Cartoon: Apology Sought for Firefighters*, CHI. TRIB., Mar. 18, 2004, METRO SECT., at 7.

148. Gary Washburn & Dan Mihalopoulos, *3rd Slur Heard Over Fire Radio: Alderman Says She Received Harassing Call*, CHI. TRIB. Mar. 2, 2004, METRO SECT., at 1.

149. *Id.*

150. *Id.*

151. Gary Washburn, *Joyce, Ministers Vow to Ease Rift From Slurs: Ward Meetings Being Considered*, CHI. TRIB., Mar. 19, 2004, METRO SECT., at 1.

152. *Id.*

153. *Id.*

154. Washburn, *supra* note 147, at 7.

155. *Id.*

156. Don Wycliff, *Did Marlette Cartoon Capture or Distort Chicago’s Racial Reality?*, CHI. TRIB., Mar. 19, 2004, § 1, at 27 (discussing analysis of the cartoon and the “number of letters that have come from white Chicago firefighters and their families” in protest of the cartoon).

157. Jeffers, *supra* note 1, at 1, 19.

158. Gary Washburn & Glenn Jeffers, *City Tries to Shut Off Web Site: Firefighter Chat*

response, Russell stated:

The atmosphere [for blacks] is, “We don’t like you.”

....

[Therefore, out of fear of retaliation], “I can’t ask a recent [black] guy coming out of the academy to put himself in harm’s way. . . . That’s why I’m more willing to speak. If I don’t get another promotion, I just don’t get another promotion.”

....

“I’m sure the white guy who Jackie Robinson replaced was upset.”¹⁵⁹

The Fire Commissioner at the time, James Joyce, supported meetings with local residents and firefighters to bridge the gap between them “in the wake of a series of racially offensive transmissions over Fire Department radio frequencies.”¹⁶⁰ Joyce attempted unsuccessfully to discover the source of the other transmissions as the Fire Union President, James McNally, a devout opponent of affirmative action, asserted that black firefighters might have been behind the racist broadcasts.¹⁶¹ In response to Union President McNally’s allegations, a number of community leaders protested and “[m]any black firefighters also criticized McNally’s past insensitivity to black firefighters, which included showing up in the late 1980s at a firehouse in blackface to protest affirmative action.”¹⁶²

Many of Chicago’s firefighters of color have “also denounced the union’s use of the member dues, including those from black firefighters, to pay for lawsuits that fight affirmative-action promotions.”¹⁶³ As Lieutenant Annette Nance-Holt, a thirteen-year veteran and black firefighter recently explained: “‘If you’re going to use my money against me, you should take some of my money and put it in escrow so I can use it to sue you.’”¹⁶⁴ Likewise, Lieutenant Charles Vazquez, a Hispanic, stated: “‘They [the white union leadership] use our money [union dues] to fight us [and our promotions in court]’ . . . ‘It makes you mad, but they’re in the majority.

Room Called “Hateful”, CHI. TRIB., Mar. 6, 2004, at 13.

159. Jeffers, *supra* note 1, at 1, 19.

160. See Washburn, *supra* note 151, at 3.

161. See Glenn Jeffers, *Fire Union Chief Challenged: Protesters Blast McNally’s Doubt Over Radio Slurs*, CHI. TRIB., Mar. 24, 2004, METRO SECT., at 1.

162. *Id.*

163. *Id.*

164. *Id.*

Even if every Hispanic and black banded together, it wouldn't make a dent in the [union] electorate."¹⁶⁵ Nevertheless, McNally views union efforts to combat affirmative action as the fair way to prevent discrimination against white firefighters.¹⁶⁶

Operating under this climate, on April 2, 2004, Mayor Daley announced the retirement of Joyce, a white male, and introduced his replacement, a black male, Cortez Trotter, as the new Commissioner of the Chicago Fire Department.¹⁶⁷ Trotter vowed to "work aggressively to diversify the department with qualified people of all races and genders" and "serve notice to those who wrongfully believe the department is a haven for small-mindedness, offensive behavior and stagnation."¹⁶⁸ The Chicago Fire Department represents a key and present example of how race matters for unions and how the failure to embrace racial justice has not only caused problems for the relationship between the union and its black members, but also the relationship with black members of the public communities that they serve.

C. *Dissecting the Race and Class Divide*

The AFL-CIO's focus on class consciousness has unfortunately ignored the effect of racism's impact on class.¹⁶⁹ Although organized labor has touted coalitions with civil rights groups, its focus has been on economic solidarity rather than racial justice.¹⁷⁰ In a key example of this approach in 1995, then newly-elected President of the AFL-CIO, John Sweeney, in addressing worker issues for unions, stated:

[A] union has to find a way to bring together all workers. That means putting aside anything divisive or offensive and making appeals that are unifying. Once working people understand that the only way to protect their paychecks is to stand together, they're likely to look past their prejudices to their shared goals. . . . [S]uccessful organizers and union leaders must find ways to emphasize the things that unite us, not divide us.¹⁷¹

165. Jeffers, *supra* note 1, at 1, 19.

166. *Id.*

167. See Gary Washburn, *Joyce Exits: Daley Taps 1st Black Chief; New Leader Lays Down Law*, CHI. TRIB., Apr. 2, 2004, at 1.

168. *Id.*

169. See Crain & Matheny, *supra* note 83, at 1768-69 & nn. 4 & 103 (describing the AFL-CIO's and its President John Sweeney's focus on class).

170. *Id.* at 1786-87.

171. *Id.* at 1787 & n.118 (quoting from JOHN J. SWEENEY, AMERICA NEEDS A RAISE: FIGHTING FOR ECONOMIC SECURITY AND SOCIAL JUSTICE at 58, 153 (1996)).

When adopting this form of paycheck-only focus, any attempt to acknowledge race as a possible problem for workers is met with a response that race should not matter. Efforts to raise racial implications are considered divisive and fall under the derogatory label of “playing the race card,” as if raising concerns about race represents an attempt by those of color to obtain unwarranted and undeserved benefits at the expense of white males.¹⁷²

Even with organized labor’s current leadership deciding to focus on organizing and being more inclusive, the race and class divide continues to represent a major obstacle to unions being able to play a more active role in achieving racial justice in the workplace.¹⁷³ Some employers and others with conservative agendas aimed at preventing the rise of unions and racial justice in the workplace are quite happy to keep organized labor and their black employees at loggerheads. This approach of divide and conquer based on race and class has worked for years.¹⁷⁴

As early as the 1600s, employers in America used race to divide workers seeking to band together on class issues.¹⁷⁵ As one commentator put it in looking at the development of racism through slavery in the colonial beginnings of Virginia and dealing with the poor English who migrated to America at that time: “[F]or those with eyes to see, there was an obvious lesson. . . . Resentment of an alien race might be more powerful than resentment of an upper class. For men bent on the maximum exploitation of labor the implication should have been clear.”¹⁷⁶ This resembles “Orthodox Marxist theory[, which] views racism as an instrument of the capitalist class, intended to divide the working classes of blacks and whites through ‘superexploiting’ black workers, diminishing the

172. See Kimberle Crenshaw, *Playing Race Cards: Constructing A Pro-Active Defense of Affirmative Action*, 16 NAT’L BLACK L.J. 196 (1999) (discussing the offensiveness of equating the negative use of race by referring to it as “playing race cards” and then using the playing cards metaphor to analyze the affirmative action debate). Even when the CIO unions first started to organize more black workers, it encouraged them to deny their race and forget about being “advocates” for those who suffered racial discrimination even though they were union dues paying members. Crain & Matheny, *supra* note 83, at 1779.

173. See Crain & Matheny, *supra* note 83, at 1788-1802 (discussing labor law doctrines that limit union identity and direct organized labor’s focus away from racial justice issues and towards economic, worksite-specific organization and representation); George Feldman, *Unions, Solidarity, and Class: The Limits of Liberal Labor Law*, 15 BERKELEY J. EMP. & LAB. L. 187, 201 (1994) (describing how labor law limits organized labor’s efforts to go beyond class conflict).

174. See Crain, *supra* note 3, at 258 & n.248 (noting the implications of “divide and conquer” strategies by employers even recently involving a labor dispute of Kmart workers in Greensboro, North Carolina where race was allegedly used to try to break the solidarity of workers seeking class and wage improvements). See generally Rogers, *supra* note 7.

175. See EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* 269-70 (W.W. Norton & Co. 1975).

176. *Id.*

bargaining power of white workers, and frustrating the development of a united working class consciousness.”¹⁷⁷

Twenty-five years ago, William Julius Wilson, a noted black sociologist, claimed that “changes in the structure of the American economy” had created a “growing class division among blacks in which economic class is now of greater importance than race in determining individual black opportunities and life style.”¹⁷⁸ More recently, a labor and employment law professor, Marion Crain, sometimes with her co-author, Ken Matheny, and sometimes by herself, has explored the class and race divide that engulfs organized labor today and excoriated organized labor for its failure to embrace racial justice.¹⁷⁹ Crain does not blame organized labor solely, however, and she has expressed concern that “some may view [her] focus on labor’s internal discord as divisive of solidarity and disloyal to the goals of the labor movement.”¹⁸⁰ She has explained that her critiques

do not seek to place blame on unions or organized workers, but to explore how the structure of the labor market, the operation of race- and gender-privilege, the dynamics of the relation between organized labor and employers, and the labor laws have functioned both to keep less-privileged workers on the economic periphery and to undermine the union power.¹⁸¹

177. Calmore, *supra* note 45, at 210-11 & n. 49 (quoting WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* 5 (1978)) (describing this “Marxist explanation as consistent with the race relations of the antebellum South and its racial caste system”). The other economic theory that explains this division between race and class is a split market theory. *Id.* (describing William Julius Wilson’s discussion of the Marxist and split-market theories regarding race and class). Professor Marion Crain and Ken Matheny have referred to the two theories as dual labor and split labor. *See* Crain & Matheny, *supra* note 91, at 1574-77. Whichever theory applies, the general understanding remains that race and class dynamics allow employers to pit organized labor against individual workers of color. *Id.* at 1577.

178. Calmore, *supra* note 45, at 203 n.15 (citing WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* (1978)).

179. *See, e.g.*, Crain, *supra* note 87; Crain, *supra* note 3; Crain & Matheny, *supra* note 83; Marion Crain & Ken Matheny, *Making Labor’s Rhetoric Reality*, 5 *GREEN BAG* 2D. 17 (2001).

180. Crain & Matheny, *supra* note 91, at 1544 n.6.

181. *Id.* Professor Crain said this in a 1999 article, *id.*, and then she published articles in 2001 and 2002 which continued to criticize organized labor’s focus on class justice while diminishing its efforts at obtaining racial justice. *See, e.g.*, Crain, *supra* note 87; Crain, *supra* note 3; Crain & Matheny, *supra* note 83; Crain & Matheny, *supra* note 179. Similar to Professor Crain, this Article’s discussion of labor’s poor history of race relations, its continued focus on class with the exclusion of race issues as divisive, and the actions of some unions in challenging affirmative action merely highlights the urgency of labor’s need for a racial justice response and does not seek to place blame on organized labor, but instead seeks a solution to the current divisions.

Regardless of her concerns about being disloyal to the goals of the labor movement, Crain's work has added tremendous new sources of analysis that include an indictment of labor's failing efforts at embracing racial justice as a goal, while still trying to find ways to change these results. Crain has also identified that even top black officials within organized labor are concerned about integrating blacks into the equation:

Bill Fletcher, an African-American who serves as an assistant to AFL-CIO President John Sweeney, explained the nuances of labor's ambivalent involvement in racial issues during an interview. . . . Asked whether he is happy with how the labor movement is dealing with issues of race, Fletcher responded: [Black workers are] 'not just supporting what someone else is doing. We need to be at the table. African-Americans, Latinos, Asians, gays and lesbians, women—we all need to be at the table when decisions are being made because we need to reshape the labor movement. . . . A lot of people are going to be shaken by this. Many leaders are comfortable with the idea of more people of color coming into their movement. But they're not so comfortable with the idea that maybe we're going to reorganize things.'¹⁸²

The problem is how to approach the joint issues of race and class without subordinating either side's agenda. This presents a major concern for union leadership. When a majority of the members of a union are white workers, they may view efforts by their union leadership to achieve racial justice (possibly through support of affirmative action in the workplace) as against their interests, especially in a declining economy where jobs are at a premium. Those white members may feel that their agenda of class/paycheck justice is being subsumed by a racial agenda. Also, they may view this as a direct threat to their own economic and job security.

Likewise, black employees seeking the collective support from their unions can feel subjugated by union efforts to deny their racial justice issues.¹⁸³ Unions seek this denial under the guise of focusing on improved wages for all as an agenda and while union leadership tells them that race should not matter. Black employees are asked to deny their identity or reduce any focus on racial identity in an effort to support union aims at

182. Crain, *supra* note 87, at 1333 n.119.

183. See McUsic & Selmi, *supra* note 85, at 1340 (discussing "the need for separation or isolation from the larger group as a way of preserving one's identity or at least of not subverting one's interests to those of the larger group"); see also GUINIER & TORRES, *supra* note 84, at 102 (describing the need for race consciousness in organizing while not blaming white workers).

achieving class justice through the prism of colorblindness.¹⁸⁴ Colorblindness constitutes to some “an absolute imperative, prohibiting race-conscious decision-making in all but the most dire circumstances.”¹⁸⁵ Accordingly, colorblind analysis is based on “disregarding or minimizing—‘whitewashing’ if you will—historic consequence,” and thereby it perpetrates a “new racism” based on a “perverted confirmation” that individuals have a need to believe that this is a just world and people get what they deserve to get.¹⁸⁶ This approach not only ignores current effects from and efforts aimed at intentional discrimination, but it refuses to address the aspect of unthinking, unconscious or unintended discrimination that occurs.¹⁸⁷

This colorblind approach is occurring at a time when most empirical data shows that race still matters in how people are treated in the United States workplace, including the existence of a significant disparity in wages based on race.¹⁸⁸ A recent report by the National Urban League indicated that the mean income of black males is seventy percent the mean income of white males, with a \$16,876 gap. Other factors to consider in this overall class and race divide include: fewer than fifty percent of black families own their home as opposed to seventy percent of whites; blacks are denied

184. See Pauline T. Kim, *The Colorblind Lottery*, 72 FORDHAM L. REV. 9, 9 (2003) (finding that although the Supreme Court upheld the Michigan Law School’s affirmative action admissions policies in *Grutter*, the multiple opinions in the case revealed the deep divisions that remain in our society over the legitimacy of race-conscious policies and the meaning of equal protection because of debates about the concept of “colorblindness”); BROWN ET AL., *supra* note 3; see also Calmore, *supra* note 45, at 207 (describing the argument that “achievements of blacks who rise above society’s lowest strata are viewed with suspicion and seen as a result of the special privilege of affirmative action rather than of merit” when looking at it “according to objective, ‘color blind’ criteria”); Schwartz, *supra* note 105, at 685-86 (“The main thrust of the colorblind approach to affirmative action cases is to restrain the actions of private and governmental entities to protect, primarily, white males.”).

185. Kim, *supra* note 184, at 10 & n.9 (stating the opinions of Supreme Court Justices Clarence Thomas and Antonin Scalia in *Grutter* (Thomas, J. dissenting)); see also GUINIER & TORRES, *supra* note 84, at 32-66 (critiquing the use of colorblindness in society).

186. Calmore, *supra* note 45, at 208 & n.32; see also Leonard Pitts, *Affirmative Action’s Big Winners: White Males*, CHI. TRIB., Oct. 21, 2003, at 25 (“We all want to feel that we made it on our own merits On the other hand, there’s a word for those who believe race is not a significant factor in white success: Delusional. It is not coincidence, happenstance or evidence of their intellectual, physical or moral superiority that white guys dominate virtually every field of endeavor worth dominating. It is, rather, a sign that the proverbial playing field is not level and never has been.”).

187. See Calmore, *supra* note 45, at 208 & n.35 (“Beyond consciously held attitudes, racist mentality may also display what Paul Brest has described as ‘racially selective indifference’”).

188. See *African Americans’ Status is 73% of Whites Says New “State of Black America” 2004 Report*, NAT’L URBAN LEAGUE, available at <http://www.nul.org/news/2004/soba.html> (last visited Nov. 20, 2004).

mortgages and home improvement loans at twice the rate of whites; and the only area that blacks measure better than whites is in civic engagement, where blacks serve in the government and become union members more than their white counterparts.¹⁸⁹

As one group of commentators recently exclaimed, “[p]erhaps the most striking evidence that overt discrimination is still practiced is employers’ widespread use of derogatory preconceptions to judge the qualifications of young black men.”¹⁹⁰ In a 2003 study, two young high school graduates with similar qualifications applied for various entry-level jobs advertised in a Milwaukee newspaper.¹⁹¹ The listed jobs included low-skilled positions as waiters, dishwashers, drivers and warehousemen.¹⁹² The only major distinction in the job histories the two individuals provided was that one applicant was white and admitted to having served an eighteen-month jail sentence for possession of cocaine.¹⁹³ The other applicant was black and did not have a criminal record.¹⁹⁴ In this study, these applicants visited 350 potential employers in the Milwaukee area in response to job ads. Their success rates were similar. The white applicant with a criminal record was called back for another interview seventeen percent of the time, and the black applicant with no criminal record was called back fourteen percent of the time.¹⁹⁵ The creators of this experiment concluded that a young black male seeking employment carried the same disadvantage because of his race as a white man carrying an eighteen-month conviction for cocaine possession.¹⁹⁶

189. *Id.*

190. BROWN ET AL., *supra* note 3, at 226. Another example of overt discrimination is the increasing number of incidents in the workplace involving the placement of nooses as a form of racial harassment. See Aaron Bernstein, *Racism in the Workplace: In an Increasingly Multicultural U.S., Harassment of Minorities is On the Rise*, BUS. WK. (July 30, 2001), available at http://www.businessweek.com/magazine/content/01_31/b3743084.htm (last visited Nov. 20, 2004) (describing threatening situations involving nooses).

191. See David Wessel, *Racial Discrimination: Still at Work in the U.S.*, WALL ST. J., Sept. 4, 2003, at A2, available at <http://www.careerjournal.com/myc/diversity/20030916-wessel.html> (last visited Nov. 20, 2004) (describing a study to determine which candidate is more likely to get called back).

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* Another study reported in 2002 had candidates with the same or similar qualifications respond to help-wanted ads in the Boston and Chicago areas with the only difference being the use of white-sounding first names like Emily, Kristen, Brendan, and Greg along with white-sounding last names like Walsh or Baker versus black-sounding first names like Lakisha, Aisha, Jamal and Rasheed along with black-sounding last names like Jackson or Jones. *Id.* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Brendan More Employable than Lakisha and Jamal?: A Field Experiment in Labor Market Discrimination*, (unpublished paper Nov. 18, 2002), available at <http://www.econ.yale.edu/seminars/apmicro/am02/bertrand-021204.pdf> (last visited Nov.

Asking blacks to deny their identity and suggesting that efforts to highlight identity are divisive perpetuates the racist dynamics prevalent in our system. The reality is that racism persists, and asking those who face economic oppression based on their race to deny this existence forces them to either blame themselves or lose self-esteem when it is racism that is really at work. As the old saying goes, there is “strength in numbers,” and acknowledging racial identity presents an opportunity for the “formulation of an effective collective point of view.”¹⁹⁷

More than twenty years ago, John Calmore stated: “For those lawyering on behalf of the black poor, the present state of affairs is particularly distressing because racism so synergistically combines with class oppression.”¹⁹⁸ He also explained:

[A]lthough class status plays a larger role than ever before in the life style and opportunities of blacks, due to ubiquitous racism and the law’s reluctance to confront the issues arising from broad economic inequality, it is imperative that legal advocates treat the black poor as special, unique victims of racism. The error of seeing the plight of the black poor as a consequence of racism alone should not now be transformed into that of viewing their plight as a consequence of classism only.¹⁹⁹

Calmore has eloquently identified the dilemma created by the class and race puzzle and posited a persuasive solution by having legal advocates recognize the class and race dynamic while still treating the black poor in a unique way. His now more than twenty-year old proposition and its concern about racism and the law’s reluctance to confront issues arising from broad economic inequality still applies today.

This Article poses no clear solution to bridging the broad race and class divide that continues to pit black workers seeking civil rights protection against unions with majority white constituents who want class improvement. Meanwhile, union membership continues its rapid decline, and employees seeking to protect their civil rights without the help of unions and in the formal court system or its alternatives also face dismal returns. With these gloomy results, time is running out for unions to unite with black workers for racial *and* class justice. At a time when the

20, 2004). The authors of that study found that applicants with the white-sounding names were fifty percent more likely to be called for job interviews compared to the candidates with black-sounding names. *Id.*

197. Calmore, *supra* note 45, at 219.

198. *Id.* at 203 & n.13.

199. *Id.* at 204.

Supreme Court in *Grutter*²⁰⁰ and employers in amicus briefs therein have touted the need for racially diverse leaders in our workplaces, unions have a pressing need to take the lead in matters of racial justice. Likewise, employees who have to navigate the racial justice system on their own need assistance in pursuing their discrimination claims.

Furthermore, the factor of multiple races further complicates the difficult questions regarding inter- and intra-racial dynamics that the race and class divide presents.²⁰¹ However, if organized labor does not find a way to seek more racial justice as the increasing number of people of color enter the workplace,²⁰² union membership will continue to wane and unions may soon disappear. This decline of labor is also occurring at a time when employees are expressing a preference to have more of a collective voice in the workplace.²⁰³ Those employees face daunting obstacles in obtaining

200. 539 U.S. 306, 341 (2003) (holding that affirmative action is constitutional as long as race is only one of many factors being considered).

201. See Deborah Ramirez & Jana Rumminger, *Race, Culture, and the New Diversity in the New Millennium*, 31 CUMB. L. REV. 481, 486, 501 (2001) (noting "the emergence of a multiracial group whose members do not self-identify themselves within the traditional racial framework" that has developed from the increasing number of interracial marriages and biracial children and that since the 1960s the "[f]rom a dichotomous black/white model, the demographics have shifted to include many groups of people of color."); see also Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705 (2000) (describing the difficulties of dark-skinned blacks versus light-skinned blacks); Tanya Katerí Hernández, "Multiracial" Discourse: *Racial Classifications in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97, 98-99 (1998) (highlighting the debate about the meaning of multiracial categories); Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1489 (2000) (examining the significance of discrimination within racial classifications based on color); Hope Lewis, *Global Intersections: Critical Race Feminist Human Rights and Inter-national Black Women*, 50 ME. L. REV. 309, 311 (1998) (describing unique issues for Jamaican American women).

As interracial marriages increase, even the definition of racial identity becomes clouded as more children with multicultural heritage arrive in the workplace. See Calmore, *supra* note 45, at 218 (describing how "the multiplying claims of 'minorities' are overloading the civil rights enforcement process and beclouding priorities"). Deborah Ramirez and Jana Rumminger have described the rapid growth in interracial marriage as follows: "The rate of black and white marriages has increased seventy-eight percent since 1980, and thirty-eight percent of American-Japanese females, eighteen percent of American-Japanese males, and seventy percent of American-Indians enter into interracial marriages." Ramirez & Rumminger, *supra* note 201, at 486 (citations omitted). Popular golfer Eldrick "Tiger" Woods addressed this identity phenomenon at the time of his rise to stardom by referring to himself as not black but as "Cablinasian," a mixture of Caucasian, Black, Indian, and Asian. *Id.* at 487 n.29 (citing Michael A. Fletcher, *Woods Puts Personal Focus on Mixed-Race Identity*, WASH. POST, Apr. 23, 1997, at A1).

202. See Ramirez & Rumminger, *supra* note 201, at 481 ("By the year 2050, the non-Hispanic white population will diminish to less than fifty-five percent of the entire population, while people of color will comprise greater than forty-five percent of the United States population.").

203. See RICHARD FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 135-36, 150-55 (1999) (describing statistical results from a study of workers and their desires and finding

racial justice without legal representation while unions face the prospect of extermination.

IV. EMBRACING RACIAL JUSTICE BY FILLING THE LEGAL REPRESENTATION VOID FOR INDIVIDUAL EMPLOYEES

A. *Using Union Racial Identity Caucuses to Provide Legal Service Plans*

In some areas of the country, unions are recognizing that they must capitalize on the diverse racial interests of workers, and those unions are successfully organizing those workers.²⁰⁴ Also, through the use of racial caucuses, associations, and coalitions within the organized labor movement, many workers of color are finding their voice.²⁰⁵ Unions' historical exclusion of people of color and women fostered the creation of their own identity caucuses.²⁰⁶ Some employers have even encouraged the formation of employee racial identity organizations.²⁰⁷ Likewise, a number of scholars have argued for the use of employee caucuses organized around racial identity or other sources of common interest.²⁰⁸ Although some

they want more voice in the workplace and would be amenable to some form of representation in dealing with their employers, possibly through an employee committee, although not necessarily by a union).

204. See Christopher David Ruiz Cameron, *The Labyrinth of Solidarity: Why the Future of the American Labor Movement Depends on Latino Workers*, 53 U. MIAMI L. REV. 1089, 1091-92 (1999) (describing high-profile organizing victories, including the "Justice for Janitors" campaign in Los Angeles, and the increasing number of Latinos being organized); Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. REV. 45, 71-95 (2000) (discussing creative strategies to organize domestic and home care workers). "For example, the Service Employees International Union's successful Justice for Janitors campaign in Los Angeles traces its success in significant part to its ability to forge alliances with Black and Latino/a organizations and churches in the community." Crain, *supra* note 3, at 214 n.11.

205. See Ruben J. Garcia, *New Voices at Work: Race and Gender Identity Caucuses in the U.S. Labor Movement*, 54 HASTINGS L.J. 79, 92-94, 140-43 (2002) (highlighting the developments and value of identity caucuses and exploring the voices of power at work); Maria L. Ontiveros, *Forging Our Identity: Transformative Resistance in the Areas of Work, Class, and the Law*, 33 U.C. DAVIS L. REV. 1057, 1061-62 (2000) (identifying the importance of organizing immigrant workers based on identity issues); Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U. ILL. L. REV. 583, 613-21 (describing identity-based caucuses as a means of protecting employees' rights against discrimination under Title VII).

206. McUsic & Selmi, *supra* note 85, at 1346-51 (noting that people of color were "invisible" to organized labor, leading to a focus on identity and individual rights instead of collective rights).

207. See, e.g., Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149, 172-73 (1993) (discussing an employer-sponsored black caucus of employees at Xerox).

208. See Crain, *supra* note 87, at 1331-32 & n.115; Garcia, *supra* note 205, at 108-114 (providing background information on how identity caucuses within unions have helped

supporters of racial identity coalitions have argued for empowerment through separation from the main union, these arguments have also raised concerns about divisiveness.²⁰⁹ Such claims for empowerment through racial identity are sometimes viewed to resemble the divisiveness of “earlier calls for black nationalism” that some feared would create division between blacks and non-blacks.²¹⁰

people of color); Rachel Geman, *Safeguarding Employee Rights in a Post-Union World: A New Conception of Employee Communities*, 30 COLUM. J.L. & SOC. PROBS. 369, 379-89 (1997) (describing how caucuses add value in the non-union setting because they stress community action with benefits going to all workers and by providing a broader stage for collective self-help than is available under individually based statutes like Title VII); Hyde, *supra* note 207, at 160 n.38 (discussing the legal status of employee caucuses in the non-union workplace); Yelnosky, *supra* note 205, at 613-21 (advocating identity-based caucuses as a means of protecting employees' rights against discrimination under Title VII); see also Marion Crain, *Women, Labor Unions, and Hostile Work Environment Sexual Harassment: The Untold Story*, 4 TEX. J. WOMEN & L. 9, 61-80 (1995) (suggesting the formation of identity caucuses organized across occupations in order to protect women workers against discrimination in unionized workplaces, particularly in situations where representing women creates issues of role conflict for the union); Gould, *supra* note 102, at 58-64 (proposing third-party intervention in labor arbitrations when necessary to adequately represent minority interests within the union, particularly those of racial minorities).

209. See McUsic & Selmi, *supra* note 85, at 1340 & n.5 (describing arguments supporting identity coalitions and their separation from the general union). See also Gould, *supra* note 102, at 58-64 (arguing for third party intervention to represent black workers' interests).

210. McUsic & Selmi, *supra* note 85, at 1351; see also Harry G. Hutchison, *Reclaiming the Labor Movement Through Union Dues? A Postmodern Perspective in the Mirror of Public Choice Theory*, 33 U. MICH. J.L. REFORM 447, 472-73 (2000) (asserting that efforts at seeking racial identity can correlate with black nationalism and suggesting that unions should not have broad dues collection for all because they may conflict with the interests of subgroups, including those representing identities that have historically been denied and excluded). The issue of “black nationalism” is highlighted by the arguments of Professor Derrick Bell regarding racial realism and the permanence of racism, emphasizing that blacks should accept that racism is permanent and not rely on any help or system that involves whites. See Bell, *Racial Realism*, *supra* note 45. But see Leroy D. Clark, *A Critique of Professor Derrick A. Bell's Thesis of the Permanence of Racism and His Strategy of Confrontation*, 73 DENV. U. L. REV. 23, 29 (1995) (criticizing Professor Bell's view that coalitions cannot be achieved with non-blacks and recognizing the “long history of effective white cooperation with blacks,” including incidents involving white members of the NAACP and the Urban League); Kevin Hopkins, *Back to Afrolantica: A Legacy of (Black) Perseverance?*, 24 N.Y.U. REV. L. & SOC. CHANGE 447, 472-73 (1998) (criticizing Bell's view that “nobody can free us but ourselves” by identifying a number of successful joint black-white coalitions, including a labor coalition formed by Jewish labor leaders and A. Phillip Randolph). Although the black nationalist argument may arise when blacks seek to focus on identity, most coalitions involved with the growth of racial justice issues in organized labor will eventually have to focus on coalitions between blacks and whites even if initially there is a need for separation. See, e.g., ALEX HALEY & MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X* 256 (1965) (describing Malcolm X's encounter with a “little blonde co-ed” who asked him if there was anything she could do to show that some white people were good and could work with blacks for improvement when Malcolm responded, “nothing”). However, Malcolm X later regretted his response and although still

Despite the claims that these racial identity coalitions create divisiveness,²¹¹ a labor and employment law professor, Ruben Garcia, has amply demonstrated through empirical and anecdotal support that coalitions centered on racial identity tend to support the general labor movement and have no desire to separate from it because “numbers mean strength.”²¹² Rather, these groups create empowerment for workers of color who may find it difficult to have their concerns addressed in a majority white union. They allow some voice from these coalitions on racial interests while still providing the overall cohesiveness of having a union to support the general concerns of all workers. The very nature of how these racial caucuses, associations, and coalitions exist successfully within general labor groups suggests the one major area where the potential to bridge the race and class divide may occur. Race and class issues can coalesce in the workplace if organized labor begins assisting individual employees in obtaining legal representation in race discrimination disputes.

The refusal to recognize racial identity and affirm the need for racial justice warrants concern, as “many scholars who stress the importance of identity also emphasize the need for separation or isolation from the larger group as a way of preserving one’s identity or at least of not subverting one’s interests to those of the larger group.”²¹³ As authors Molly McUsic and Michael Selmi have asserted, “The real question, of course, is whether there is an alternative between the twin evils of fragmentation, on the one hand, and sacrificing one’s identity in the pursuit of solidarity, on the other.”²¹⁴

Elizabeth Iglesias has also argued that identity groups should be provided with a form of power to reject certain obligations, namely the duty of fair and exclusive representation by one union for all employees, when involved with unions under a collective bargaining agreement.²¹⁵ A likely result of eliminating the exclusive representation requirement would

not believing that whites could join his organization “as a Black Nationalist,” he did believe they could help him from within their own organizations. *Id.* at 376-77 (suggesting a coalition without denying his black nationalist identity).

211. McUsic & Selmi, *supra* note 85, at 1353 (discussing the “divide and conquer” approach that employers can use as a result of racial identity efforts).

212. *See* Garcia, *supra* note 205, at 148-49, 151-52 (discussing a survey that found that ninety-six percent of those surveyed (or 28 out of 29 subjects) wanted to bargain with their unions, rather than with caucuses or individually).

213. McUsic & Selmi, *supra* note 85, at 1340; *see also* Yelnosky, *supra* note 205, at 620 n.239 (“Denying self-identified subgroups the power of self-representation on the ground that separate bargaining will splinter workers into competing subgroups ignores the fact that the groups have already been constituted and individual interests have already been fragmented across the divisions which discrimination has created.” (emphases omitted) (citing Iglesias, *supra* note 85, at 430)).

214. McUsic & Selmi, *supra* note 85, at 1341.

215. Iglesias, *supra* note 85, at 404-21.

be multiple unions in a single workplace that might represent different groups of workers along identity lines.²¹⁶ Michael Yelnosky, a labor and employment professor, has asserted quite persuasively that racial identity caucuses can help individuals in the mediation of employment discrimination claims.²¹⁷ He suggests having the caucus participate in the mediation with an employee if that employee so desires.²¹⁸ While that is certainly an option, the proposal in this Article is to use the caucus to put its collective financial resources together to obtain legal services for an employee in whatever forum the dispute will be handled: court, arbitration, or mediation.

McUsic and Selmi have criticized the increased prevalence of identity groups as a form of fragmentation of labor where multiple groups develop and individuals who are members of various identity groups can become conflicted when the interests of one group may not mesh with another group.²¹⁹ Also, the criticism of identity groups by McUsic and Selmi emphasizes that some employees do not enter the workplace with a “fixed identity” and that being forced to organize around a particular identity may be limiting.²²⁰ Finally, to highlight their critique, McUsic and Selmi use the racial identity organizations within a number of police and firefighter groups as a reference point and describe a case study to explore the effects of racial identity groups.²²¹

That case study consists of a labor dispute involving firefighters in a southern city and the application of an affirmative action decree related to promotion and hiring.²²² The authors conclude that the identity organizations representing the black firefighters had achieved some gains for the black firefighters.²²³ They also conclude, however, that the two organizations ended up preventing gains where all firefighters could have been “better off” because of the difference in positions of the two groups, the employer to “consciously made use of this fragmentation to its advantage.”²²⁴ One of the authors had acted as counsel for the black

216. *Id.*

217. *See* Yelnosky, *supra* note 205, at 614-21.

218. *Id.* at 617.

219. McUsic & Selmi, *supra* note 85, at 1354-55.

220. *Id.* at 1357-58; *see also* Ramirez & Rumminger, *supra* note 201, at 490 (arguing that with the increasing multiracial culture in our country, being asked to identify racial or ethnic identity through the use of “racial categories [can] limit individuals, because the challenge to determine an identity, in the midst of the outside world imposing external stereotypes, seems unattainable”).

221. McUsic & Selmi, *supra* note 85, at 1361-65 (describing a case study centered on a debate between an organization representing the interests of white firefighters and an organization representing the interests of black firefighters).

222. *Id.*

223. *Id.* at 1363.

224. *Id.* at 1363-64.

firefighter association involved in the case study.²²⁵

Despite the important points raised by McUsic and Selmi, their critique is limited to those who believe that identity groups must function exclusive of and apart from the solidarity interests of all workers. Neither group in their case study “represented a clear majority,” nor was either part of a general group representing the interests of all workers.²²⁶ McUsic and Selmi ultimately conclude there is an opportunity for racial identity groups to exist without becoming divisive and detrimental to overall solidarity of workers.²²⁷ Ruben Garcia has addressed this issue recently in his finding that traditional identity groups formed within existing unionized structures do not have the goal of separating themselves from the general union.²²⁸ Instead, they view their roles as being inclusive and part of the overall goals of the union.²²⁹

Black caucuses and coalitions can establish legal service plans that individual black employees both within and outside of the union may then use to obtain appropriate legal help. Unions can foster racial justice by adopting mechanisms that allow these legal service plans to develop from the dues of black caucus members. Hopefully, organized labor can view this as a way to effectively balance individual rights against discrimination with its primary goal of improving collective rights through better wages for workers.²³⁰ Although it might be difficult to deal with the diverging interests of their multicultural constituencies, unions can and normally do handle the competing concerns of their memberships as a matter of common practice.²³¹

One could still ask why unions and their members should invest their hard-earned money in legal services for employees who are not even members, and especially as a means to promote racial justice. As we have seen, the majority of white male union constituents may view efforts to promote racial justice as in conflict with class justice or as presenting a more direct threat to their individual positions. Consequently, these unions may see no incentive to support racial justice overall, even those in public

225. *Id.* at 1362 n.97.

226. *Id.* at 1364.

227. *Id.* at 1367-73.

228. Garcia, *supra* note 205, at 148-53.

229. *Id.*; McUsic & Selmi, *supra* note 85, at 1369 (“Even on an issue as divisive as affirmative action, workers may find common ground through the realization that it is in their collective interest to play a role in shaping the policy free from outside influence.”).

230. See Crain & Matheny, *supra* note 83, at 1787.

231. This conflict is not limited to race and extends to gender. See Reginald Alleyne, *Arbitrating Sexual Harassment Grievances: A Representation Dilemma for Unions*, 2 U. PA. J. LAB. & EMP. L. 1, 4-8 (1999) (describing the potential conflicts for unions in sexual harassment disputes between employees and describing duty of fair representation issues for unions in processing sexual harassment claims that pit one union member (the female complainant) against another union member (the alleged male harasser)).

sector unions, where race matters significantly in the communities they serve.

The resolution to this concern can be addressed through the racial identity caucuses, associations, and coalitions within the labor union.²³² If those groups collect money to support racial justice claims through their union dues, their unions would have the financial support to provide legal representation directly from the financial sources of the black employees who are members of the union. Another positive byproduct of having unions assist individual black employees by providing legal representation would be that black employee members of the union would see their dues being used by the union directly for the support of racial justice issues rather than being used against them to challenge affirmative action plans by bringing reverse discrimination suits.²³³

Garcia noted that “the AFL-CIO ‘support groups’ include the long-existing Coalition of Black Trade Unionists (CBTU), the A. Phillip Randolph Institute,” and other key black coalitions.²³⁴ These black coalitions within labor unions may need another A. Phillip Randolph to navigate the political waters within their unions to make this use of union dues work in a way in which black coalition members can help individual black employees obtain legal representation in pursuing discrimination claims. Although organized labor has some black members in high level positions, no black figure today provides the voice that A. Phillip Randolph offered in bridging the issues of race and organized labor.²³⁵

232. See McUsic & Selmi, *supra* note 85, at 1373 (“It is likewise clear that unions have strong incentives to make these changes insofar as addressing the interests of those who the union has previously ignored (such as women and minorities) will increase the attractiveness of unions to those groups—groups that are increasingly pervading the workforce. Indeed, it appears that the new leadership of the AFL-CIO is targeting women and minorities as a way to expand and diversify their membership base.”).

233. As noted earlier in Part III.B.2, *supra*, and in the initial quotes at the beginning of this Article, black firefighters in Chicago were concerned that their union dues were being used by the union in efforts to challenge affirmative action programs designed to help them. By following the proposal in this Article, union dues or some percentage of income paid by members of racial identity coalitions could go into a fund that would provide legal representation services.

234. Garcia, *supra* note 205, at 84; see also the AFL-CIO Constituency Groups website, at <http://www.aflcio.org/communitypartners/constituencies/> (last Nov. 20, 2004); the A. Philip Randolph Institute website, at <http://www.apri.org/> (last visited Nov. 20, 2004); the Coalition of Black Trade Unionists website, at <http://www.cbtu.org/2003website/2003home.html> (last visited Nov. 20, 2004).

235. A. Philip Randolph transcended his role as a union leader by becoming a prominent national leader in civil rights. He helped to get the first anti-discrimination laws passed in response to his threat to organize a march on Washington in the 1940s. He was one of the principle organizers of the famous 1963 march on Washington where Martin Luther King gave his “I Have a Dream Speech.” See Green, *supra* note 38, at 317-19 & nn.33-34. Randolph, unlike those very few black leaders of unions today, had a broad influence as a black leader that transcended his union leadership. *Id.*

When issues of race and civil rights in the workplace are being addressed, noted figures like Johnnie Cochran, Attorney; Kweisi Mfume, President of the National Association for the Advancement of Colored People; Reverend Jesse Jackson, President of Operation Push/Rainbow Coalition; Reverend Al Sharpton, Civil Rights Activist; or Tavis Smiley, Author and Radio/TV Personality, come to mind. Each of these individuals were recently listed by black magazine *Ebony* on its list of 100+ Most Influential Black Americans.²³⁶

After listing individuals, *Ebony* identified a list of selected organizational leaders by the following criteria:

1. The nominee must be the chief executive officer of an independent organization that commands widespread influence beyond its field.
2. The organization must be a broad-based national group with a mass membership, a national headquarters and a full-time staff.
3. The nominee and his or her organization must transcend a particular field, occupation or specialty and must have an ongoing program affecting the vital interests of African-Americans.²³⁷

Within that list, only five black union leaders were listed: William Burrus, President of the American Postal Workers Union; William Lucy, President of the Coalition of Black Trade Unionists (CTU); James McGee, President of the National Alliance of Postal and Federal Employees; Gene Upshaw, Executive Director of the NFL Players Association; and Reg Weaver, President of the National Education Association, the largest professional employee organization.²³⁸ Also, Marie Smith, a black woman, has become the President of AARP, an organization that has a major role in employee rights.²³⁹ None of these individuals appear to be recognizable household names that are consistently involved in the public debate about civil rights in the workplace. In fact, they may be relatively unknown outside the labor industry and groups they represent.

If organized labor cultivated a dynamic black leader, that individual, as a modern day A. Philip Randolph, could represent the interests of labor

236. See *100+ Most Influential Black Americans*, EBONY, May 2004, at 128. Individual members were chosen based upon the following criteria: "1. Does the individual transcend his or her position and command widespread national influence? 2. Does the individual affect in a decisive and positive way the lives, thinking and actions of large segments of the African-American population, either by his or her position in a key group or by his or her personal reach and influence?" *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

unions and the rights of black workers with a strong and zesty voice.²⁴⁰ He or she could also lead the efforts of an internal fight within organized labor to start seeking racial justice. Also, this individual could persuade organized labor to allow racial identity coalitions to allocate their union dues toward establishing legal representation plans for the assistance of individual employees in discrimination disputes.

B. *Providing Legal Services to Achieve Racial Justice*

As we have already discovered, “[i]n the majority of all conflict resolutions, individuals proceed without the representation of a lawyer.”²⁴¹ Likewise, unrepresented “parties [also] tend to dominate alternative dispute resolution forums.”²⁴² Therefore, it has become necessary for the legal profession and the organized bar to respond to the growing issue of the unrepresented litigant, whether in the judicial or the ADR forum. The bar has recently tried to respond to issues for the unrepresented by establishing opportunities for legal assistance that involve lawyers in ways that do not encompass full representation, including: (1) establishing a website with referral services; (2) supporting the use of telephone hotlines for giving legal advice and information; (3) allowing unbundled or a la carte delivery of legal services which allow attorneys to provide discrete services for self-represented litigants; and (4) establishing lawyer panels for unbundled services as an alternative to full representation for separate services like advice, negotiations, document preparation, or review.²⁴³ As William Hornsby, a staff counsel for the ABA’s Standing Committee on the Delivery of Legal Services, recently explained, the key to addressing the unrepresented litigant problem in whichever forum chosen should be to focus on allowing “unbundled services” because “it is better for clients, practitioners, and judges for lawyers to be involved in a portion of the litigation rather than none at all.”²⁴⁴

240. I have even thought that the answer for organized labor to embrace racial justice may be to have a key civil rights leader like Kweisi Mfume, president of the NAACP, become the head of the AFL-CIO. However, it would be doubtful that an outsider to the labor movement could take up its leadership, much less a black outsider. But the lack of key black civil rights leaders who also have strong ties to the labor movement has exacerbated the divide between organized labor and civil rights groups and prevented them from establishing significant and lasting coalitions.

241. William Hornsby, *Defining the Role of Lawyers in Pro Se Litigation*, 41 JUDGES’ J. 5, 5 (Fall 2002).

242. *Id.* at 5; see also Crain, *supra* note 208, 79-80 (describing results from a study showing that with the increasing use of dispute resolution in the non-union workplace, the need for representation in those disputes would grow).

243. See Hornsby, *supra* note 241, at 8-10.

244. *Id.* at 9-11 (discussing the concern that self-represented litigants may not need full representation, and if ethics rules, policies and procedures were advanced to allow more

Unions can directly help employees in handling race discrimination disputes by providing legal representation through a firm on retainer to the union, to the caucus, or through a legal service plan. As Matthew Finkin has noted, “[t]he idea of unions as legal service providers is not novel”²⁴⁵ and could work “if the system were organized as a pre-paid legal insurance plan geared to represent only those who have chosen to pay in”²⁴⁶ to the plan. What does present a novel idea is for unions to develop a legal service plan focused on helping their black members or even black non-members in fighting individual discrimination claims.

An example of a legal service plan that groups of employees may use exists in Texas, where police officers may join an organization called CLEAT, Combined Law Enforcement Association of Texas. As part of their membership dues, CLEAT members receive legal representation from a legal service plan.²⁴⁷ Likewise, unions could obtain a similar form of legal services from their dues or through salary reduction that would offer discrete forms of legal representation or unbundled legal services for individual black employees pursuing discrimination claims whether in a court proceeding or through an alternative forum.

1. Addressing Legal Service Needs for Black Non-Union Employees

In the past, unions have used the offer of legal representation as a means of organizing groups of employees in a non-union setting. This may raise some concerns under traditional labor law should the union actually go forward with the organizing efforts and have an election governed by the rules and procedures of the National Labor Relations Board (NLRB). In some instances, the offering of legal services as a means of organizing has been challenged as conferring an improper benefit on voters in an NLRB election campaign process.²⁴⁸

unbundled services, self-represented litigants may be benefited); *see also* Forrest S. Mosten, *Unbundling Legal Services: Servicing Clients Within Their Ability to Pay*, 40 JUDGES’ J. 15 (2001) (describing how most of the public no longer desires a full service legal package of legal advice, fact investigation, legal research, correspondence and pleadings preparation, negotiation, representation at hearings, formal discovery, and trial, so that lawyers ought to be allowed to unbundle those services into discrete provisions of one or more of those services to help prevent the spread of self-represented litigants while navigating potential malpractice and ethical concerns for attorneys attempting to provide these unbundled services).

245. Finkin, *supra* note 82, at 86.

246. *Id.* at 87.

247. *See* CLEAT’s website, at <http://www.cleat.org/philos.html> (last visited Nov. 20, 2004) (describing its legal services plan).

248. *See* Catherine L. Fisk, *Unions Lawyers and Employment Law*, 23 BERKELEY J. EMP. & LAB. L. 57, 60 & nn.13-14 (2002) (describing cases finding that a union can violate labor law when it offers free legal services to the employees who will vote for the union in an

Unions may circumvent concerns about NLRB election procedures by choosing not to actually organize the employees or by deciding to seek direct recognition of the union rather than pursuing an NLRB election as part of its process of offering legal services.²⁴⁹ Despite not having an organizing objective, the offering of legal services to non-union employees would still show that a union can embrace a racial justice cause while the black caucus members of the union can see their union dues or payments being used directly for a racial justice benefit.

Some may question whether black caucus union members or any union members would be willing to donate any portion of their paycheck as an investment in legal services for individuals who are not members of that union and not even in the same workplace, especially if it is not done as part of a direct organizing objective.²⁵⁰ However, individual non-union employees who have been able to obtain legal services through the union and its black caucus will tend to see the benefits of having a union behind them. Then, they may decide to pursue union representation on their own accord at a later time without raising the issue of direct vote buying in a corresponding organizing campaign and election. Although this indirect organizing incentive does not represent a clear and concrete benefit that will result, it represents a better use of union dues for black union members than seeing the money go to fight affirmative action through reverse discrimination disputes.

The AFL-CIO also provides a program where union members can have payroll deductions allocated toward community service projects.²⁵¹ This Article proposes that union members could just directly allocate those funds to develop legal service plans. By focusing the money on providing a legal service plan for individuals who are not union members or even in

NLRB election).

249. *Id.* at 75-79 (describing how unions will have to organize outside of seeking union elections if giving pre-election legal help to employees will set aside a favorable NLRB election result and describing ways unions can service non-union employees in arbitration or other ways outside of an organizing campaign); *see also* Finkin, *supra* note 82, at 81-89 (discussing ways in which a union might help non-union employees in employment arbitrations despite labor law limitations).

250. I thank Professor Cynthia Nance for suggesting this concern to me. A recent study indicates that black workers tend to be much more egalitarian and generous when it comes to solidarity centered on racial justice. *See* GUINIER & TORRES, *supra* note 84, at 89 (describing a study by a sociologist Michele Lamont where she compared a group of blue collar white workers to black workers and found more group loyalty for blacks and individual approaches for whites so that a “black worker defined all black people as his kin and wanted to have enough money to help people” and the people to be helped “don’t have to be our relatives, just be black and need it,” and another black worker said he was “interested in things that are going to help minorities” because he has “always been for the underdog because of [his] upbringing [where he had been] discriminated against”).

251. *See* the AFL-CIO Union Community Fund description, at <http://www.aflcio.org/communitypartners/ucf/> (last visited Nov. 20, 2004).

the same workplace as the union members, the donations would constitute a clear community service, as most individual black employees who face the obstacle of obtaining legal representation for an employment discrimination claim are not in unions.

Also, by offering legal representation for non-union individual employees in discrimination disputes, either in the courts or alternatives to the courts, unions and their black caucuses can expand their influence on the overall processing and handling of workplace disputes. Unions would bring significant collective power to bear in seeking racial justice for non-union employees because the unions and the legal service providers they offer, would be repeat players who could balance the repeat player advantage that employers and their counsel maintain.

As a result, unions would also be in the position to inspire non-union employers to adopt more proactive steps to improve racial justice, including the adoption of affirmative action policies and fair dispute resolution systems. This would not occur out of a direct union organizing agenda or through collective bargaining representation, but as a result of resolving an individual discrimination dispute where the union provided the individual non-union employee with legal representation. Then, unions can start to gain some of the ground that they have lost over the last fifty years as the workplace has transformed from a strong unionized workforce focusing on collective rights to a mostly non-union workforce concentrating on individual rights including racial justice through discrimination lawsuits.

2. Addressing Legal Service Needs for Black Caucus Union Members

A much more difficult problem could arise for black employees already represented by the union when obtaining support from the union in pursuing individual discrimination claims.²⁵² Labor law prohibits employers from dealing directly with any subgroups of employees, including those organized along racial lines, when those subgroups of employees are represented by a union.²⁵³ However, also under current law,

252. See Reuel E. Schiller, *The Emporium Capwell Case: Race, Labor Law, and the Crisis of Post-War Liberalism*, 25 BERKELEY J. EMP. & LAB. L. 129, 134-65 (2004) (describing difficulties and limitations under labor law for minority groups seeking to address civil rights issues directly with employers when also represented by a union, especially when that union is not ready to embrace affirmative action and civil rights in the belief that it will sacrifice seniority rights).

253. *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 52, 70 (1975); see also Calvin William Sharpe, "Judging in Good Faith" — *Seeing Justice Marshall's Legacy Through a Labor Case*, 26 ARIZ. ST. L.J. 479, 481-93 (1994) (describing the significance of the *Emporium Capwell* case). *But see* Iglesias, *supra* note 84, at 429-30 (arguing that because the workforce in *Emporium Capwell* was already divided along racial lines,

from the Supreme Court's 1974 decision, *Alexander v. Gardner-Denver Co.*,²⁵⁴ a union employee can pursue any individual claim under Title VII in court even if he had already used the grievance and arbitration process provided by the employer and his union pursuant to a collective bargaining agreement.²⁵⁵ According to the Court in *Gardner-Denver*, by processing the employee's grievance through arbitration, the union had not waived the statutory rights of the employee to file a Title VII claim.²⁵⁶ The Court also found that a union cannot agree to waive an individual employee's future pursuit of statutory rights in court.²⁵⁷ Thus, it is assumed that union employees may pursue two bites of the same dispute apple with its employer: one in the union-sponsored arbitration process pursuant to the collective bargaining agreement and the other in the individual-sponsored court process pursuant to the strictures of Title VII.²⁵⁸

In its most recent case on the subject, the Supreme Court in *Wright v. Universal Maritime Service Corp.*²⁵⁹ addressed the issue of whether an agreement for arbitration by a union in a collective bargaining agreement would be enforceable in preventing an individual employee from pursuing a discrimination claim.²⁶⁰ The Court decided that in order for a union to waive an individual employee's right to pursue a discrimination claim in a judicial forum, a clear and unmistakable relinquishment of the right to pursue the statutory claim in question must exist.²⁶¹

Thus, under current law, individual union members are still allowed to pursue their Title VII claims separately unless the union takes the

granting legal protection to the black workers who sought to press their claims with the employer would not create a divide).

254. 415 U.S. 36 (1974).

255. *Id.* at 50 (finding that "[t]he distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence" and noting that "no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.").

256. *Id.* at 51-52.

257. *Id.* at 51. The Court subsequently banned prospective waivers by a union of an individual employee's rights under other statutes in *McDonald v. City of West Branch*, 466 U.S. 284, 292 (1984) (banning waivers under 42 U.S.C. § 1983 (2000)) and *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 745 (1981) (banning waivers under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19 (2000)). *But see* *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (illustrating that in a non-union setting, the Supreme Court has allowed the prospective waiver of a judicial forum in enforcing agreements to arbitrate Title VII claims which were made as a condition of employment).

258. *See generally* Mary K. O'Melveny, *One Bite of the Apple and One of the Orange: Interpreting Claims That Collective Bargaining Agreements Should Waive the Individual Employee's Statutory Rights*, 19 LAB. LAW. 185 (2004) (describing the ramifications of allowing an employee to pursue claims in both the arbitral and the judicial forum and concerns that employers raise about it).

259. 525 U.S. 70 (1998).

260. *Id.* at 72.

261. *Id.* at 79-80.

unlikely action of making a clear and unmistakable waiver of an employee's right to do so.²⁶² Because employees may proceed directly to court or to individual arbitration when the dispute involves an individual employment discrimination claim, there is no concern about violating labor law by having subgroups or racial identity caucuses working with an individual employee in the handling of the Title VII claim.

One decision issued since *Wright* has raised concerns about the *Gardner-Denver* requirement of allowing a union employee to take discrimination claims to court despite the existence of an arbitration process in the collective bargaining agreement. In *Air Line Pilots Association, International v. Northwest Airlines, Inc.*,²⁶³ the United States Circuit Court of Appeals for the District of Columbia applied *Gardner-Denver* and ruled that if a union cannot generally prospectively waive an employee's right to trial, then an employer can negotiate directly with the employees about individual arbitration agreements without having to deal with the union.²⁶⁴

On one hand, this decision seems to disregard the union's role and would normally raise concerns under the National Labor Relations Act (NLRA),²⁶⁵ which the National Labor Relations Board ruled prohibits an employer from dealing directly with employees who are represented by a union.²⁶⁶ It also appears to be contrary to the purpose of the NLRA which recognizes that problems of bargaining power between employees and their employers, and the consequences from that imbalance, require that employees have the legal authorization to use unions as their representative to bridge that bargaining power gap in agreeing to deal with an employment matter.²⁶⁷

262. Cf. Crain & Matheny, *supra* note 83, at 1842 (asserting that "unions will have a powerful disincentive to negotiate for antidiscrimination provisions in labor contracts because they risk waiving unit members' rights to proceed in court with statutory antidiscrimination claims.").

263. 199 F.3d 477 (D.C. Cir. 1999).

264. *Id.* at 484-86. However, Professor Ann Hodges has recently argued that employee efforts to seek individual court actions rather than being coerced into agreeing to arbitrate would invoke rights protected under the National Labor Relations Act as protected concerted activity. See Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled With Section 7 Rights?*, 38 WAKE FOREST L. REV. 173, 217, 228-29 (2003).

265. 29 U.S.C. §§ 151-169 (2000).

266. *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 52 (1975).

267. See National Labor Relations Act § 1, 29 U.S.C. § 151 (2000); see also Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution*, 77 B.U. L. REV. 687, 688 (1997) (stating that "[t]he NLRA was premised on the assumption that the best way to protect American employees was to give them sufficient bargaining power to permit meaningful negotiation over the terms and conditions of employment."). Cf. Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1511 (1981) (asserting that the "industrial pluralist view of labor relations" is "based upon a false assumption: the

On the other hand, this decision highlights the ability of union-represented employees to have their individual discrimination claims operate without some of the limitations of traditional labor law. Under the proposal herein, the union and its caucus will only provide legal services and not actually represent the employee in dealing directly with the employer about the discrimination dispute either in court or arbitration. The individual employee, with separate legal representation provided by the union or caucus, can decide whether to proceed with the discrimination claim in either arbitration by individual agreement or directly in the courts.

As long as *Gardner-Denver* remains viable, it provides the main mechanism for allowing unions to work with individual employees in offering legal services for discrimination suits that are handled separately from their obligations under labor law.²⁶⁸ A union could encourage the individual employee to pursue a race discrimination claim separate from the collective bargaining grievance arbitration process.²⁶⁹ Then, in whatever forum that the discrimination claim precedes (court, mediation or arbitration), the union can help provide legal representation through a legal service plan.

Samuel Estreicher has recently argued that *Gardner-Denver* prevents unions from playing more of a role in brokering individual rights, and that part of the reason is that unions “fear that the costs of broker activity cannot be recouped from membership dues.”²⁷⁰ Yet, Estreicher also recognizes that unions are unlikely to assume the role of agreeing to help prevent employees from seeking independent Title VII claims.²⁷¹ However, his point about unions being in a position to broker for individual employee rights and the fears of recouping dues remains an area of opportunity. Instead of trying to get around *Gardner-Denver* as Estreicher suggests, employers should embrace it. By helping individual black employees pursue their discrimination claims through obtaining legal representation,

assumption that management and labor have equal power in the workplace”).

268. Professor Samuel Estreicher, while not necessarily happy about it, recently acknowledged that the holding in *Gardner-Denver* is still viable in preventing unions from waiving an individual’s separate pursuit of an employment discrimination claim. See Samuel Estreicher, *Living With Gardner-Denver*, PERSP. ON WORK Winter 2004 at 23, 25 n.5 (addressing the holding from *Gardner-Denver* that unions cannot generally negotiate waivers of individual statutory claims and acknowledging that “[e]ven though the Court technically reserved the question in that case, I would argue that the union capacity problem survives *Wright v. Universal Maritime Servs. Corp.*, 525 U.S. 70 (1998).”); see also O’Melveny, *supra* note 258, at 212-14 (describing some of the criticisms of *Gardner-Denver* and arguing for its continued vitality and usefulness).

269. See *Wright*, 525 U.S. at 74 (describing how the union told plaintiff, Wright, that he should hire an attorney and pursue his discrimination claim rather than the union pursuing the claim through arbitration under the collective bargaining agreement).

270. Estreicher, *supra* note 268, at 23-24.

271. *Id.*

the union would have the incentive of supporting racial justice by brokering legal services for those individual employees. Employers could even allow the union to play a more specific role in resolving the discrimination dispute if the union and the individual employee so desired.²⁷²

In that way, the employer folds the individual discrimination claim into an arbitration process that resembles the grievance and arbitration process that it already uses with its unions, rather than a court process. This should benefit employers, as the issue becomes less about allowing individual employees two bites of the apple—by being able to go to court individually and also into arbitration through the union—and more about establishing a fair and quick resolution of discrimination disputes with its employees. Similarly, the individual black employees who are able to obtain legal representation and the black caucus members of the union will see the benefits of achieving racial justice as a direct result of their union dues or payroll deductions. These joint benefits for unions, their black members, and the employers can only occur because of *Gardner-Denver*, not despite it.

Another way in which employers may benefit from this approach of supporting individual employees in these disputes is by accounting for the cost of legal services for the employee up front. The employer could also reimburse the union or the black caucus for the costs incurred as part of a legal service plan created for individual employment discrimination claims. In some ADR plans, employers account for the payment of a flat fee for their employees' legal services by either paying the fees directly or having the payment come out of an employee account that has been established by the employer on behalf of the employee as part of a legal service plan.²⁷³

For example, the Haliburton (formerly Brown & Root) company provides a set amount of money, approximately \$2,500, to use in obtaining legal representation of the employee's own choosing for help in the company's mediation or arbitration program.²⁷⁴ It only costs an employee a

272. See Finkin, *supra* note 82, at 80 (contending that employers have invited unions to become involved in dispute resolution by sweeping public law into their agreements to arbitrate and employers cannot deny unions from getting involved); Eugene Scalia, *Ending Our Anti-Union Federal Employment Policy*, 24 HARV. J.L. & PUB. POL'Y 489, 496-99 (2000) (describing how unions should be in a better position to represent individual employees in discrimination disputes than plaintiffs' lawyers and that the focus of reform should be on integrating a role for unions as advocates related to existing employment laws, especially in handling arbitration of employment discrimination disputes now being implemented through mandatory arbitration agreements).

273. See Lamont E. Stallworth, *Behind the Eight Ball: The Un-Represented Claimant and Employment Dispute Resolution*, ACRResolution, Spring 2002, at 26, 29 (describing the policy of Haliburton (formerly Brown & Root) and the \$2500 that employees may use to retain representation of their choice in the company-sponsored mediation or arbitration program).

274. *Id.*; see also Berger, *supra* note 58, at 536.

maximum of fifty dollars to proceed in that program.²⁷⁵ The role of and payment for lawyers in arbitration under this program is spelled out in “refreshingly candid” language:

The Company has access to legal advice through its law department and outside lawyers. You may consult with a lawyer or any other adviser of your choice. Upon approval of the Program Administrator, Brown & Root will pay the major part of your legal fees through the Legal Consultation Plan, up to a maximum of \$2,500. You are not required, however, to hire a lawyer to participate in arbitration. If you choose not to bring a lawyer to arbitration, the Company will also participate without a lawyer.²⁷⁶

If an employer has a similar kind of plan, it would provide the best situation for addressing the legal representation gap. Although employers may not see the benefit of making sure that employees have legal counsel in helping them resolve an employment discrimination dispute against that very employer, they will realize them eventually. These early stages of the twenty-first century represent a major transitional period in how employment discrimination disputes get resolved. If employers do not take more proactive steps in the nature of providing legal services to its employees or unions fail to pursue legal services as a form of racial justice, then outsiders, including Congress, may have to finally take action to provide employees a mechanism for fair legal representation in employment discrimination matters.

Finally, in those few instances where unions or their identity caucuses cannot offer direct legal services and the issues are of major importance to racial justice, employees can solicit civil rights groups, like the NAACP Legal Defense Fund or the Equal Justice Society, to offer the required legal services. White males seeking to bring reverse discrimination claims certainly have found groups to help them in challenging affirmative action plans.

One such organization, Adversity.Net, Inc.,²⁷⁷ provides information for those white male individuals who want to sue their employers for reverse

275. See *Craig v. Brown & Root, Inc.*, 100 Cal. Rptr. 2d 818, 820 (Cal. Ct. App. 2000) (describing Brown & Root’s arbitration program).

276. *Id.*

277. According to its website, Adversity.Net is a “non-profit, educational organization dedicated to the elimination of prejudice and discrimination—including the elimination of divisive racial preferences and quotas” and its “audience consists of victims and survivors of racial preferences, set-asides, and race-based ‘targets’ and ‘goals’ in hiring, promotion, school admissions, and government contracting.” *About Adversity.Net*, Adversity.Net, Inc., at http://www.adversity.net/about_us.htm (last modified Jan. 31, 2004).

discrimination by claiming that they have been allegedly discriminated against because of affirmative action or racial preferences. It also lists on its website ten different public interest and non-profit firms and twelve private law firms where those seeking to sue their employers or governmental entities for reverse discrimination may be able to obtain legal help.²⁷⁸ Although the site also lists information about cases handled by the firms and whether or not they will charge fees for legal representation, the site states that the sources of legal help listed on its website “do not necessarily endorse the views of Adversity.Net.” and that the “listings are provided free of charge as a public service” without Adversity.Net receiving any “consideration, payment, or referral fee for publication of these listings.”²⁷⁹

As white males develop the wherewithal to pursue reverse discrimination claims either through private organizations or through their unions, black employees need similar mechanisms to confront direct discrimination in the workplace. Unions, through their black identity caucuses or through a majority vote, can allocate union dues or payroll deductions to establish legal service plans that will support the efforts of individual black employees in pursuing discrimination claims. With the dismal prospects of finding legal representation for individual black employees, a union can finally establish a clear mechanism to pursue racial justice without it being a divisive proposition for its membership by providing an opportunity for legal representation to these black employees.

V. CONCLUSION: A LAST CHANCE FOR RACIAL JUSTICE BY UNIONS

Desperate times may call for desperate measures. Unions with their declining membership, and black employees with their limited ability to obtain an attorney for a discrimination claim, have potentially reached the point of no return. Without a winning strategy, it may be time to apply the sports metaphor the “loser goes home.” Under these difficult

278. *Legal Help for Victims of Reverse Discrimination*, Adversity.Net, Inc. at <http://www.adversity.net/legalhelp.htm> (last modified Oct. 14, 2004). The ten public interest organizations listed on the Adversity.Net website are: Atlantic Legal Foundation; Campaign for a Color-Blind America; Citizens for the Preservation of Constitutional Rights, Inc.; Enstrom Foundation; Institute for Justice; Landmark Legal Foundation; Mountain States Legal Foundation; Pacific Legal Foundation; Southeastern Legal Foundation; and Washington Legal Foundation. *Id.* The thirteen private law firms listed on the website are: Bish, Roth & Butler, Ltd.; Ducar, Lorona & Parks, P.C.; Fett & Linderman, P.C.; Gregory A. Hall, Attorney at Law; Glen N. Lenhoff, Attorney at Law; Hanan M. Issacs, P.C.; Harold L. Lichten, Attorney at Law, Pyle, Rome, Lichten & Ehrenberg P.C.; William Piper, Attorney at Law; Rizik & Rizik, P.C., Attorneys at Law; Rubin and Purcell, LLP; Herbert P. Schlanger, Law Offices of Herbert P. Schlanger; Charles L. Wiest, Jr., Attorney at Law; and Tim Willoughby, Willoughby Law Firm. *Id.*

279. *Id.*

circumstances, it is imperative that unions find a way to seek racial justice in the workplace. This Article asserts that by using the help of identity caucuses, unions can embrace justice by establishing legal services for individual employees to help handle their discrimination claims.

Although organizations are developing to address and fill the need for legal representation for white males seeking to file reverse discrimination claims,²⁸⁰ individual black male employees have little chance of obtaining legal representation in employment discrimination lawsuits. The reality is that if they decide to adjudicate in court or choose an alternative to the courts, individual black employees, seeking to obtain justice related to an employment discrimination claim, will have to do so without legal counsel. The consequences for black employees in pursuing discrimination claims without counsel in either the courts or in ADR proceedings are horrendous, as legal counsel for employers maintain a significant repeat player advantage.

Meanwhile, organized labor has a shameful history of discriminating against black workers, and its continuing approach of discounting race demands a positive response by unions to foster racial justice. Also, as some unions openly fight affirmative action efforts to remedy racial discrimination through the pursuit of reverse discrimination lawsuits, these actions add to the immediacy of the need for organized labor to adopt a racial justice agenda. With labor's diminishing capacity, it is crucial that unions embrace some form of racial justice as more people of color enter the workplace and become potential union members. Nevertheless, a union must still balance the needs of its diverse constituents. Issues of seniority and class solidarity can get intertwined with racial justice and racial identity issues. Navigating these intricacies of race and class is essential for unions because employers can capitalize on any fragmentation between organized labor and its black members.

One way to accomplish a fair balance of race and class for unions is by helping to provide unbundled legal services for individual black employees in the processing of their employment discrimination claims either in court or ADR proceedings. By funneling union dues and payroll deductions (with the support of the union and black caucuses within the union) into the development and funding of legal service plans, unions can identify a racial justice service that they are providing. Similarly, members of black union caucuses can see their union dues go directly toward racial justice within the structure of the overall union environment.

In filling the legal representation void for employment discrimination claimants, unions may start to reverse their decline in membership while

280. Schwartz, *supra* note 105, at 657 (noting that legal representation of white males in these claims is becoming a growth industry).

seeking racial justice in the workplace at the same time. There is no time better than the present. Given the declining state of unions and the considerable barriers to successfully litigating employment discrimination claims in 2004, this might be the last chance for unions to seriously attain some form of racial justice. At this critical time for racial justice and while navigating the race and class divide that still permeates in our working class society, providing legal representation to individual employees seeking employment discrimination claims presents a worthwhile and feasible mechanism for unions to finally embrace racial justice.