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McKinney: The ACLU and the Propriety of Dispute Resolution in Civil Rights

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# The ACLU and the Propriety of Dispute Resolution in Civil Rights Controversies

Amber McKinney*

## INTRODUCTION

An extensive body of civil rights law exists in the United States today. However, civil rights law would have little value if not for judicial interpretation and judicial guidance concerning its application. Several private organizations throughout the 20th century have been created with the sole purpose of helping poor individuals and minorities enforce civil rights law through the adjudicative system. One of these organizations is the American Civil Liberties Union, which prides itself on litigating claims which will yield great precedential value in the civil rights arena, thus effecting widespread civil rights reform. However, with the increasing popularity of informal means of resolving conflict, referred to as Alternative Dispute Resolution, the American Civil Liberties Union has been faced with the possibility that some civil rights disputes may be forced to resolution through such informal processes; processes which lack the precedential value required to make dramatic advancements in the field of civil rights law. This paper addresses the broad question of whether Alternative Dispute Resolution is an appropriate means by which civil rights controversies should be resolved, and asks whether the use of Alternative Dispute Resolution by the American Civil Liberties Union can be reconciled with the objectives of the organization.

Section I examines the history, purpose, and methodology of the American Civil Liberties Union. Section II discusses the historical development and use of Alternative Dispute Resolution. Section III, Part A provides examples of its use in environmental controversies, Americans with Disabilities Act disputes, and employment conflicts. Section III, Part B explains the arguments for and against the use of Alternative Dispute Resolution in Civil Rights Controversies. Section IV, Part A looks at examples of the use of Alternative Dispute Resolution by the American Civil Liberties Union, while Part B provides insight into the interplay of



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Alternative Dispute Resolution and the mission of the American Civil Liberties Union.

## I. HISTORY, PURPOSE, AND METHODOLOGY OF THE AMERICAN CIVIL LIBERTIES UNION

The American Civil Liberties Union ("ACLU") was founded in 1920 by Roger Baldwin, Crystal Eastman, and Albert DeSilver.[1] The development of this public interest organization centered around a concern for preserving basic civil liberties that individuals perceived as threatened by the government.[2] Civil rights violations were rampant in American society during this time period "as activists were . . . jailed for distributing anti-war literature," summary deportation of foreign-born individuals suspected of "political radicalism" was commonplace, racial segregation was acceptable practice, sex discrimination was essentially institutionalized, and the Supreme Court had not yet addressed the issue of First Amendment violations.[3] In preserving these basic liberties for the public as a whole, the ACLU initially relied on enacting change primarily through the judicial branch.[4] In fact, the ACLU has been involved with some of the most notorious cases in the history of American civil rights jurisprudence, and has had much success.[5]

Today, the stated mission of the ACLU is "to defend and preserve the individual rights and liberties guaranteed to all people in this country by the

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1. *Freedom is Why We're Here* (ACLU, New York, N.Y.) (Fall 1999), http://www.aclu.org/about/aboutmain.cfm (follow "Freedom Is Why We're Here" hyperlink).

2. *Id.* at 4. The ACLU originally sought to defend free speech during World War I. SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 3 (Oxford Univ. Press 1990). Later on, during the period of its founding, the ACLU shifted its focus from the inappropriate suppression of anti-war literature, the automatic deportation of immigrants who expressed politically radical views, racial segregation, and discrimination against women. *Id.*

3. *Freedom is Why We're Here*, *supra* note 1, at 2.

4. *See* WALKER, *supra* note 2, at 3-4. In the 1920s alone, the ACLU was involved in several infamous cases, among which were the 1925 Scopes trial, in which charges brought against biology teacher John T. Scopes for "violating a [state] ban on the teaching of evolution" were dropped, and the 1933 *Ulysses* case in which the ACLU supported a successful anti-censorship battle waged against a "U.S. Customs Service ban on the sale of the James Joyce novel *Ulysses* . . . ." *Freedom is Why We're Here*, *supra* note 1, at 2-3.

5. *Freedom is Why We're Here*, *supra* note 1, at 2-3. The ACLU was involved with the *Scopes* trial, the *Ulysses* case, protesting the internment of Japanese Americans, *Brown v. Board of Education*, and more recently, the flag burning cases. *Id.* In fact, the ACLU was involved with more than 80% of the "landmark" cases cited in constitutional law textbooks, and many Supreme Court opinions have been influenced by ACLU briefs. WALKER, *supra* note 2, at 4.

Constitution and laws of the United States."[6] Namely, the ACLU seeks to preserve the protections and guarantees of the Bill of Rights from overreaching by the majority.[7] The ACLU achieves this goal by both lobbying Congress and by selecting to take on only those lawsuits which will establish new precedents, thereby having the greatest impact in the preservation of civil liberties.[8] However, only a limited number of the cases selected will actually make it to trial, and the ACLU will often be forced to resolve such controversies through some process of alternative dispute resolution. When the lawsuits which the ACLU represents do not make it to the final stages of the judicial process and are instead resolved through the process of dispute resolution, an issue is raised as to whether the mission of the ACLU is truly served.[9]

## II. THE DEVELOPMENT AND USE OF ALTERNATIVE DISPUTE RESOLUTION

Alternative Dispute Resolution has evolved over the years to become a widely accepted and commonly used form for resolving disputes outside of the adjudicatory setting. This section looks at the historical development of Alternative Dispute Resolution and examines some forms of dispute resolution and their uses.

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6. *Freedom is Why We're Here*, *supra* note 1, at 1. The ACLU characterizes itself as one of this "nation's most conservative organization[s]," believing that its "job is to conserve America's original civic values—the Constitution and Bill of Rights—and defend the rights of every man, woman, and child in this country." *Id.*

7. *See id.* at 1-2. Some examples of the rights which the ACLU fights to protect include First Amendment rights (freedom of speech, association, and assembly, as well as freedom of press and religion), Equal Protection rights (the right to "equal treatment, regardless of race, sex, religion, or national origin"), the right to Due Process (ensuring the "fair treatment by the government [where] the loss of one's property or liberty are at stake"), and the right to privacy (protecting the individual from "unwarranted government intrusion into [one's] personal and private affairs"). *Id.* at 2.

8. *Id.* at 4. The infrastructure of the ACLU consists of a national board of directors, which establishes policy, a legislative office in Washington D.C. whose function is to lobby Congress, and a legal department located in New York that oversees Supreme Court litigation. *Id.* In addition, the ACLU has a 50-state network of affiliate offices that are fully staffed and operate autonomously on a local community level. *Id.* While collectively referred to as the "ACLU," the organization is actually "comprised of two separate entities, the American Civil Liberties Union and the ACLU Foundation." *American Civil Liberties Union and the ACLU Foundation: What's the Difference?* (2004), http://www.aclu.org/about/acluf.html. Legislative lobbying is engaged in by the ACLU, while litigation and communications operations are supervised by the ACLU Foundation. *Id.*

9. For example, the use of Alternative Dispute Resolution is often compelled in employment discrimination cases, or may occur in the form of settlement conferences. 4 AM. JUR. 2D *Alternative Dispute Resolution* § 3 (May 2005).

*A. The Development of Alternative Dispute Resolution*

The phrase "Alternative Dispute Resolution" ("ADR") refers to the use of methods other than traditional adversarial proceedings in the judicial forum to resolve disputes.[10] From a historical perspective, the process of ADR is not a revolutionary concept, as several groups in society have preferred to settle disputes outside of the litigational setting.[11] Hebrew and Christian traditions have always been of the belief that one should not be allowed into court unless one has first attempted some sort of reconciliation—"the [preferred] procedure involves, first, conversation; if that fails, it involves mediation; if mediation fails, it involves airing the dispute before representatives of the community."[12] The Puritans, Quakers, and Dutch settlers in early America practiced mediation, arbitration, and conciliation, resorting to use of the legal system only when these methods of ADR failed.[13] Mormons and Chinese and Jewish immigrants received much societal hostility during the nineteenth century, and in response, formed their own methods of community ADR so as to avoid involvement in the general legal system.[14]

In the 1970s, ADR was seen as an effective means of "providing [more affordable] and less formal methods [of] resolving disputes for . . . the poor and middle-class by alleviating the often inaccessible nature of the judicial system."[15] Lawyers and scholars alike took part in a momentous movement towards the incorporation of ADR procedures into an "overburdened" legal system, which they viewed as incapable of addressing the legal disputes of

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10. 4 AM. J. JURIS. 2D *Alternative Dispute Resolution* Summary (May 2005). *See also* Allison Balc, *Making It Work at Work: Mediation's Impact on Employee/Employer Relationships and Mediator Neutrality*, 2 PEPP. DISP. RESOL. L.J. 241, 241-42 (2002) (citing Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651 (Supp. 2000)) ("[D]efines ADR as including any 'process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, mini-trial, and arbitration.'").

11. Corinne Cooper, *Justice Without Law? A Search Through History for Contemporary Solutions*, 48 ALB. L. REV. 741, 741-62 (Fall 1983).

12. Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1666 (1985).

13. *See* JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 4-6 (Oxford Univ. Press 1983) (1976).

14. *See id.* at 6.

15. *Dispute Resolution*, 88 YALE L.J. 905, 906 (1979). At an American Bar Association Conference, Chief Justice Warren Burger stated that "the notion that ordinary people want black-robed judges, well-dressed lawyers and fine-paneled courtrooms as the setting to resolve their disputes isn't correct. People with problems, like people with pains, want relief and they want it as quickly and inexpensively as possible." *Id.* at 905 n.1. Similarly, consumer advocate Ralph Nader noted that "the legal system must be designed to encourage the nonlegal resolution of disputes, and public participation in planning processes. . . ." *Id.* at 905 n.2.

the less powerful and affluent in society.[16] This movement was sparked by the Pound Conference, convened by Chief Justice Warren Burger to commemorate a famous 1906 speech by Dean Roscoe Pound, which called for solutions to a justice system that was overextended and inefficient.[17] The Pound Conference issued some rather influential recommendations advocating the increased use of alternatives to traditional methods of dispute resolution.[18]

By 1980, Congress passed the Dispute Resolution Act to provide for inexpensive means to settle basic disputes.[19] The Reagan Administration was extremely enthusiastic about the possibility of using less formal means of dispute resolution, presumably because a lesser degree of confrontation experienced between the government and the people meant "an amelioration of the so-called heavy hand of government and greater acceptance by the

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16. Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482, 494 (1987).

17. *Id.* at 493 n.72. In his famous 1906 address entitled *The Causes of Popular Dissatisfaction With the Administration of Justice*, Dean Roscoe Pound stated:

> [O]ur system of courts is archaic and our procedure behind the times. Uncertainty, delay and expense, and above all, the injustice of deciding cases upon points of practice, which are the mere etiquette of justice, direct results of the organization of our courts and the backwardness of our procedure, have created a deep-seated desire to keep out of court.

*Id.* Chief Justice Burger further expounded on this principle in a 1982 address to the American Bar Association, stating, "[e]ven when an acceptable result is finally achieved in a civil case, that result is often drained of much of its value because of the time lapse, the expense, and the emotional stress inescapable in the litigation process." Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982). And the Chief Justice even quoted Abraham Lincoln, who urged the public to "[d]iscourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time." *Id.*

18. *See* Silver, *supra* note 16, at 494 n.72 (citing William H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 280 (1978)). The *Pound Conference Recommendations* suggested that the overburdened court system was unable to give the requisite amount of attention required by each case, and that alternative dispute resolution procedures might provide the justice system with an opportunity to examine certain substantive areas with a greater level of expertise, while simultaneously providing an inexpensive and less time consuming method of resolving disputes. *See id.*

19. *See* 28 U.S.C. § 2(a). "It is the purpose of this Act to assist the States and other interested parties in providing to all persons convenient access to dispute resolution mechanisms which are effective, fair, inexpensive, and expeditious." 28 U.S.C. § 2(b). Such dispute resolution mechanisms were defined to include "a forum which provides for arbitration, mediation, conciliation, or a similar procedure. . . ." 28 U.S.C. § 3(4)(B). The Act was intended to give the states and the private sector incentives to create new approaches to dispute resolution. However, Congress never provided funding for the statute, so its passage was in vain. *See* AUERBACH, *supra* note 13, at 136-37.

electorate of ultimate results."[20] The Administration also believed that informal dispute resolution could increase the efficiency and decrease the expense involved in the justice system.[21] In addition, as early as 1983, around thirty-eight law schools offered courses in interviewing, counseling, and negotiation.[22] Today, more than ninety-four percent of law schools offer courses in dispute resolution,[23] and the Alternative Dispute Resolution Act of 1998 requires all federal district courts to provide for at least one form of ADR.[24] Thus, ADR has become a widely accepted alternative to more traditional, adversarial courtroom procedures.

*B. Forms of Alternative Dispute Resolution and Their Uses*

While various methods of ADR exist, all ADR processes share similar characteristics. Generally, ADR is defined as any "process or procedure other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as . . . mediation . . . and arbitration . . . ."[25] Most obviously, ADR was developed as a reaction to the shortcomings of the formal litigation process.[26] However, beyond this, all methods of ADR have the goal of resolving disputes through more efficient and less costly means than litigation.[27] Also, most ADR methods may be facilitated without a judge and with minimal judicial involvement.[28] In addition, ADR shifts the focus

20. Silver, *supra* note 16, at 496. The motivations for the support provided by the conservative Reagan Administration for informal dispute resolution did not go without great scrutiny: "It has also been suggested that some of these people who promote ADR as a means to serve the poor and oppressed in society are in fact principally motivated by a desire to limit the work of the courts in areas affecting minority interests, civil rights, and civil liberties." Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 668-69 (1986). However, such criticism was somewhat unfounded. *See id.*

21. *See* Silver, *supra* note 16, at 496.

22. *See* Martha Middleton, 69 A.B.A. J. 881, 884 (July 1983). By 1983, Harvard Law School was even offering seven courses in mediation, a negotiation workshop, and interdisciplinary approaches to settling disputes. *See id.*

23. *See* Richard N. Pearson, *ABA Analysis of the Agenda for Civil Justice Reform in America*, 432 PRAC. LAW. INST. 11, 16 (Mar.-Apr. 1992).

24. *See* Barbara Chvany, *Using Mediation Effectively*, 625 PRAC. LAW. INST. 745, 747 (Mar. 2000). By the time 28 U.S.C. § 651 was passed, over half of the ninety-four district courts nationwide already had mediation programs in place. *See id.* at 747. *See also* 28 U.S.C. § 651(b).

25. Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651 (Supp. 2000).

26. *See* Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 11 (1987).

27. *See id.*

28. *See id.* at 11-12. Instead of a judge, most methods of ADR use a mediator or facilitator to help the parties reach a mutual agreement. However, a judge may determine those questions of law or fact that arise during the ADR process and which require judicial resolution. *See id.*

away from attorney representation and places it instead on the client, who is empowered with the ability to control his fate.[29] All ADR mechanisms are informal in nature and involve private proceedings.[30] And finally, ADR places more emphasis on obtaining a resolution to a dispute, as opposed to applying the relevant substantive law to the controversy at hand.[31]

The most common methods of ADR include mediation, arbitration, and settlement conferences.[32] Mediation involves the use of a neutral third party who assists adverse parties in their pursuit of a mutual agreement.[33] However, the power wielded by this third party is limited, as he or she may not impose a decision upon the adverse parties unless those parties reach an agreement on their own accord. This power is also limited by the fact that in a majority of jurisdictions, mediation is engaged in on a voluntary basis.[34] However, if a mediator is able to facilitate an agreement, the mediation may act as a substitute for formal adjudication.[35] Mediation is the most useful in dealing with complex controversies requiring a fact-intensive, case-by-case approach.[36]

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29. *See id.* The rationale behind this movement away from attorney-controlled outcomes stems from a belief that parties involved in a controversy are in the best position to resolve their problems. *See id.* Also, negotiation is seen as a universal skill of which most individuals have a functional understanding of the dynamics involved. *See id.*

30. *See* Brunet, *supra* note 26, at 12-13. ADR lacks the procedural characteristics of formal litigation, including discovery. *See id.* at 13. And ADR is private in that it is often conducted out-of-court and in the office of a mediator, attorney, or even the litigant; in fact, various ADR procedures require that ADR meetings and decisions remain private and confidential. *See id.*

31. *See id.* at 13-14.

32. *See* 4 AM. JUR. 2D *Mediation; Role of Mediators* § 3 (May 2004).

33. *See id.* The mediator will often be responsible for helping the parties identify the major issues in dispute, suggesting alternative agreements, explaining the consequences that will ensue from not settling, and will encourage settlement between the parties. *See id. See also* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1363 (1985) ("In mediation, a neutral, noncoercive, nonadversarial third party coordinates and facilitates negotiations between disputants").

34. *See* Brearton, *supra* note 32. In addition, the powers of a mediator are limited in that he or she may not compel production, and must be invited to intervene by the parties to the dispute themselves. *See id.*

35. Judith L. Maute, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 GEO. J. LEGAL ETHICS 503, 521 (1991).

36. Judith Cohen, *The ADA Mediation Guidelines: A Community Collaboration Moves the Field Forward*, 2 CARDOZO ONLINE J. CONFLICT RESOL. 1 (2001). Mediation is an interest-based process, and is thus ideal for use in cases dealing with ADA complaints, whose fact patterns vary extensively according to the disabilities involved, and the appropriation remedies to be enacted. *Id.* Mediation is also commonly used in resolving consumer grievances and domestic disputes. Delgado, *supra* note 33, at 1363-64.

Arbitration is a trial-type proceeding conducted in lieu of traditional judicial proceedings, and is a less formal, less expensive, and less time-consuming process than a normal trial.[37] As in mediation, a neutral third party arbitrator is appointed to oversee resolution of the dispute, and this third party is often a reputable lawyer, law professor, or formal judge with expertise in the area of dispute.[38] The process of arbitration may vary depending on whether it is private or judicial arbitration,[39] but, in general, the arbitrator may wield much more power than a mediator; most importantly, the decision rendered upon the parties by the arbitrator is binding in all future judicial proceedings.[40] However, the trend among academics and practitioners is a preference for the use of more flexible, mediation-like approaches to ADR, while the courts continue to encourage the proliferation and use of arbitration in such areas as "consumer, banking, health, employment, securities, and franchise contracts."[41]

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37. 4 AM. JUR. 2D *Alternative Dispute Resolution* § 8 (1995). Arbitration usually lasts around four to five months, versus the average of several years required to resolve a dispute via the litigation process. *Id.* Also, the American Arbitration Association only requires that the parties pay for a small filing fee, and the arbitrator will often work without compensation to enhance his professional experience. *Id. Compare* Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1888 (1997) ("Indeed, practitioners of arbitration still debate whether arbitration is a settlement device that ensures earlier trial dates and forces the parties to focus on their cases or an adjudication process (providing the satisfaction of a third-party hearing and ruling, with a 'day in court')").

38. 4 AM JUR. 2D *Alternative Dispute Resolution* § 8 (1995).

39. Private or contractual arbitration is the most common form of arbitration, which only relies upon the judicial system for enforcement of decisions rendered by the arbitrator. 4 AM JUR. 2D *Alternative Dispute Resolution* § 9 (1995). Thus, the adverse parties may fashion the arbitration proceedings according to their preferences (i.e., they may limit the issues to be heard). *Id.* On the other hand, judicial arbitration is prescribed by the court, and is thus not a true form of ADR. 4 AM JUR. 2D *Alternative Dispute Resolution* § 10 (1995). It differs from private arbitration in that the final decision is not binding on the parties unless they wish for it to be. *Id.* In addition, a much broader scope of discovery is allowed, and evidentiary rules are much stricter than in private arbitration. *Id.*

40. 4 AM JUR. 2D *Alternative Dispute Resolution* § 8 (1995). *See also* Delgado, *supra* note 33, at 1363 ("In arbitration, disputants submit their disagreement to an impartial third party and agree to be bound by the arbitrator's decision, a decision that a court may enforce").

41. Menkel-Meadow, *supra* note 37, at 1889. Support for more malleable forms of ADR, such as mediation, is due in part to "the greater party control involved and the possibility of more responsive and individually crafted outcomes (as well as the nonbinding quality of mediation)." *Id.* at 1888. While the United States and California Supreme Courts continue to view arbitration as the preferred method of ADR, the lower courts have grappled with the issue of employees or consumers subject to arbitration clauses which they did not understand the meaning of when giving their signature. *Id.* at 1889. However, "while arbitration is gaining court approval . . . it is also fostering an anti-ADR climate by promoting nonconsensual, even coercive, forms of dispute resolution." *Id.* at 1889-90.

A settlement conference takes place amidst the period of pretrial proceedings, with the sole purpose of reaching an agreement before trial.[42] During the conference, a settlement conference judge may take an active part in negotiations in order to facilitate a compromise between adverse parties, but the judge may not coerce or pressure the parties into an agreement.[43]

Mediation, arbitration, and settlement conferences are only a few of the available methods of ADR, but they are the most common forms of informal dispute resolution used in the civil rights context. When referencing the methods of ADR applied in the civil rights context, this article will be impliedly referring to these three methods.

## III. THE PROPRIETY AND EFFECTIVENESS OF ALTERNATIVE DISPUTE RESOLUTION IN CIVIL RIGHTS CONTROVERSIES

The civil rights body of law in the United States has gained much force through various judicial decisions throughout the years. However, ADR does not carry the legal force or precedent of a court decision, and thus an issue arises as to whether ADR is indeed an effective tool for obtaining advancements in the area of civil rights. This section details the use of ADR in civil rights controversies, and then examines some of the arguments for and against the use of ADR in the resolution of civil rights controversies.

### A. *Examples of ADR Use in Civil Rights Controversies*

#### 1. Environmental Controversies

The environmental justice movement incorporates a civil rights dimension into the environmental rights forum.[44] The movement stems from the reality that low-income regions and communities of color are forced to deal with greater environmental hazards than their predominantly white and affluent neighbors.[45] Generally, these white and affluent communities are more politically powerful, and thus exert a greater degree of influence on the

42. 62A AM. JUR. 2D *Pretrial Conference* § 34 (1995).

43. *Id.*

44. E. Andrew Long, *Protection of Minority Environmental Interests in the Administrative Process: A Critical Analysis of the EPA's Guidance for Complaints Under Title VI*, 39 WILLAMETTE L. REV. 1163, 1164 (2003).

45. CLIFFORD RECHTSCHAFFEN & EILEEN GAUNA, ENVIRONMENTAL JUSTICE: LAW, POLICY, AND REGULATION 56-64 (2002).

legislative decision-making process,[46] which effectively concentrates a higher degree of environmental hazards in those communities of the politically powerless who are unable to fight this environmental discrimination.[47] The environmental justice movement thus works to correct these inequities and address the problem of recurrent environmental discrimination.[48] One way for communities to seek recourse against those facilitating the environmental discrimination is to challenge actions through the EPA under Title VI of the Civil Rights Act of 1964.

Section 601 of Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or ethnic origin in any program or activity that receives federal funding.[49] In effect, communities may challenge state environmental decisions through the EPA because state environmental agencies not only receive federal funding, but any authority which these agencies exercise has been delegated to them by the EPA.[50] This is critical, because while private parties cannot challenge Title VI violations, such as environmental discrimination, in court, the EPA's complaint process affords individuals and communities the opportunity to challenge state environmental agency action.[51]

46. Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 646-47 (1992).

47. LUKE W. COLE & SHEILA FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 74-78 (2001). *See also* RECHTSCHAFFEN & GAUNA, *supra* note 45, at 27-53 (discussing political and other factors contributing to environmental discrimination). For example, studies examining the correlation between racial demographics and toxic waste siting reveal a strong correlation between economically disadvantaged and communities of color and the presence of a high degree of environmental hazards. Long, *supra* note 44, at 1166.

48. Long, *supra* note 44, at 1167.

49. Civil Rights Act of 1964, 42 U.S.C. § 2000d (2000). The EPA promulgated regulations under Title VI which state that "[n]o person shall be excluded from participation in, be denied the benefits of, [or] be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, or national origin . . . ." 40 C.F.R. § 7.30 (2004). In addition, recipients of federal funding may not use discriminatory criteria or methods in choosing a site or the location of a facility. 40 C.F.R. § 7.35(c) (2004).

50. Long, *supra* note 44, at 1170. The Civil Rights Restoration Act of 1987 subjects all operations of a state agency reliant upon federal funds to Title VI. *Id.* at 1171.

51. *Id.* at 1167. The United States Supreme Court has stated that Title VI, Section 601 "prohibits only intentional discrimination" and has held that Title VI does not create a "freestanding private right of action to enforce regulations promulgated under [Section 602]." Alexander v. Sandoval, 532 U.S. 275, 280, 293 (2001). Title VI, Section 602 requires that agencies empowered to allocate federal funds must "effectuate the provisions" of Section 601. 42 U.S.C. § 2000d-1 (2000). In addition to statutory protection against environmental discrimination, the EPA created the National Environmental Justice Advisory Council ("NEJAC") to advise the EPA regarding environmental justice concerns; the NEJAC holds public meetings nationwide in an attempt to both gain a better understanding of environmental discrimination in local communities and to find solutions. RECHTSCHAFFEN & GAUNA, *supra* note 44, at 49. NEJAC is comprised of 25 members

The EPA regulations promulgated under Title VI provide an outline for informal complaint investigation procedures.[52] One of these promulgations, the Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits ("Investigation Guidance"), provides a structure for "[the EPA's] Office of Civil Rights ("OCR") to process complaints filed under Title VI . . . and EPA's Title VI implementing regulations alleging discriminatory effects . . . [caused] by recipients of EPA financial assistance."[53] The Title VI complaint process includes seven steps, all of which encourage the use of informal dispute resolution and voluntary compliance: the EPA will (1) acknowledge the complaint, (2) decide whether to accept, reject, or refer the complaint, (3) investigate the complaint, (4) make a preliminary finding of whether the recipient is in compliance following investigation, (5) if necessary, will issue a formal finding of noncompliance, (6) will allot a ten-day period, during which voluntary compliance or agreement with the EPA may occur, and (7) afford a hearing/appeal process to those who fail to voluntarily comply.[54]

It is before the third step, investigation of an accepted complaint, that the EPA Investigation Guidance states that "[w]henever possible, OCR [shall] attempt to resolve complaints informally."[55] This "[I]nformal resolution may occur through one of two approaches; under the first approach, the complainant and the alleged offender may reach an informal agreement.[56] In order to reach this informal agreement, the OCR encourages

who do not come from the EPA, and thus provides a fresh prospective for the agency concerning the discrimination problems faced by the people in disadvantaged communities. *Id.*; *see also* U.S. Environmental Protection Agency, *Environmental Justice* (2005), http://www.epa.gov/compliance/environmentaljustice /index.html (Feb. 19, 2005).

52. 40 C.F.R. § 7.120 (2002).

53. Environmental Protection Agency, Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits, 65 Fed. Reg. 39,668 (June 27, 2000) [hereinafter EPA Guidance Document]. This guidance document includes an explanation of how the EPA determines whether to accept a complaint, how the EPA will attempt to address and resolve the complaint, how the complaint will be investigated, how the EPA will conduct an "adverse disparate impact analysis," and how the EPA determines whether there has indeed been noncompliance with Title VI and EPA regulations. Long, *supra* note 44, at 1174-75.

54. Long, *supra* note 44, at 1175-80.

55. EPA Guidance Document, *supra* note 53, at 39, 696. In other words, prior to investigating a complaint that it has accepted, the OCR of the EPA will make an initial attempt to resolve the dispute informally. Long, *supra* note 44, at 1177; *see also* 40 C.F.R. § 7.120(d)(2) (2002) and 42 U.S.C. § 2000d-1 (1994).

56. Long, *supra* note 44, at 1177.

the use of ADR techniques,[57] and the EPA will provide support should the parties decide to use ADR techniques.[58] In the second approach, informal resolution of the complaint may be carried out in the absence of the complainant.[59] The EPA Investigation Guidance provides that participation from the complainant will be sought where the "facts and circumstances" deem such participation necessary and appropriate, and thus provides significant leeway for the OCR and the alleged offender to resolve the complaint without the complainant's participation or consent.[60]

However, there are potential problems with addressing community complaints through the use of ADR. It has been argued that the EPA's Investigation Guidance (1) fails to account for the "resource and power disparities between a state environmental agency" and aggrieved community, (2) restricts community participation in the resolution process, and (3) exacerbates the difficulty of addressing minority interests in the environmental justice arena.[61]

Substantial disparity exists between the powerful position of the state environmental agency and that of low-income regions and communities of color.[62] Poor or impoverished communities do not have the resources (financial or otherwise) required to conduct the comprehensive scientific studies needed to support a claim of an environmental violation amounting

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57. Long, *supra* note 44, at 1177 (citing EPA Guidance Document, *supra* note 53, at 39,673). "ADR includes a variety of approaches including the use of a third party neutral acting as a mediator or the use of a structured process through which the parties can participate in shared learning and creative problem solving to reach a consensus." EPA Guidance Document, *supra* note 53, at 39,673.

58. EPA Guidance Document, *supra* note 53, at 39,673.

59. Long, *supra* note 44, at 1177 (citing EPA Guidance Document, *supra* note 53, at 39,673).

60. *Id.* (citing EPA Guidance Document, *supra* note 53, at 39,673-74). However, an additional safeguard is provided in that "before any agreement between the recipient and OCR can be reached, an investigation may be needed to determine the appropriate relief and/or corrective action necessary to eliminate or reduce to the extent required by Title VI the adverse disparate impacts." EPA Guidance Document, *supra* note 53 at 39,673. In addition, the Investigation Guidance suggests that, "while the plan may be developed without consulting with complainants or others, EPA expects that informal resolution will be more successful if recipients work with OCR, complainants, and other appropriate parties to develop a plan for eliminating or reducing the alleged adverse disparate impact." *Id.* at 39,674.

61. Long, *supra* note 44, at 1189. In fact, the National Environmental Justice Advisory Council (NEJAC) (which advises the EPA on civil rights matters) criticized the Investigation Guidance, stating "[b]ecause the Guidance is a significant step backward by EPA, and would virtually ensure that no Title VI civil rights complaint filed with EPA would ever be successful, we request that EPA scrap the current Guidance and begin again." *Id.* at 1188-89 (citing NEJAC, Comments of the National Environmental Justice Advisory Committee Title VI Task Force, at 2 (2002), *available at* http://www.eps.gov/ocrpage1/docs/t6com2000_021.pdf (last visited Jan. 13, 2005) [hereinafter NEJAC, Comments].

62. Long, *supra* note 44, at 1189.

to discrimination,[63] and thus do not have as much "evidence" to bring to the bargaining table as do state environmental agencies, which specialize in obtaining information about environmental issues.[64] Unfortunately, the EPA Investigation Guidelines do not provide for a means of assisting complainants in data compilation,[65] which could effectively place the complainant in a bargaining position comparable to that of the other parties involved. This relates to the issue of whether ADR successfully protects the civil rights of those communities suffering from environmental discrimination. ADR is a confidential process, and thus any discriminatory or unfair events that occur during the negotiation proceedings may be hidden from public scrutiny and investigation, leaving the disadvantaged community with "little or no redress."[66] ADR is thus extremely inappropriate in civil rights cases, such as those dealing with environmental discrimination, "because of the high level of public interest and concern in the issues involved and its outcome,"[67] and because ADR, unlike adjudication, does not keep a formal record. Thus the public has no way of accessing all proceedings, decisions, or events of the case.[68] In addition, ADR tends to narrow its focus on the resolution of individual disputes, instead of addressing the overall pattern of discrimination that may be practiced by the offender, and thereby fails to fulfill the goal of the EPA's Title VI: to prohibit discrimination on the basis of race, color, or ethnic origin in any program or activity that receives federal funding.[69] Each

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63. Long, *supra* note 44, at 1189-90. Even where a community is able to produce scientific data, it is unlikely that this information will be viewed as credibly as information provided by the state.

64. *Id.* at 1190-91. An unequal bargaining position is created where a disparity of resources exists between complainant and the alleged offender, especially where the offender is the only party in a position to provide scientific data, and the negotiations must then rely solely upon the information provided by the offender. *Id.* *See also* Bradford C. Mank, *The Two-Headed Dragon of Siting and Cleaning up Hazardous Waste Dumps: Can Economic Incentives or Mediation Slay the Monster?*, 19 B.C. ENVTL. AFF. L. REV. 239, 280 (1991) ("for many citizen groups, individual citizens, and even municipalities, the costs of obtaining technical information or hiring an experienced negotiator may be too great, leaving most [offenders] with a distinct advantage.").

65. *Id.* at 1192.

66. Mank, *supra* note 64, at 280-81.

67. NEJAC, Comments, *supra* note 61, at 24 (2002). In contrast to a civil rights case addressed through the use of ADR, "[i]f formally adjudicated in the administrative process, the public may have full access to all proceedings, decisions, and events of the case." *Id.*

68. Long, *supra* note 44, at 1193. If a record were made available to the public, as in formal adjudication, "the EPA could receive comments on how to improve future results or the community could point to the decision it challenges." *Id.*

69. NEJAC, Comments, *supra* note 61, at 23.

community must negotiate its own position, with whatever insufficient resources that it may have at its disposal, and without the benefit of the uniformity or precedent that are typical of judicial decisions.[70] To make matters worse, ADR lacks the procedural safeguards included in the more formal dispute resolution methods, processes which are intended to protect the rights of minorities.[71]

Thus, the use of ADR in environmental justice disputes brought before the EPA is marked by a disparity in the relative resources and bargaining power of the parties involved. This amounts to the creation of discrimination within the context of attempting to resolve a civil rights controversy. Unfortunately for the disadvantaged parties or communities involved, there is no opportunity to build upon precedent and previous successes, as in the civil rights movements of the past. Instead, ADR forces the community to engage in a "case-by-case" system of negotiation with an alleged offender who is in a much greater position of influence.[72] In effect, the use of ADR in environmental controversies may be deemed inappropriate, or at the very least, insufficient.

One manner in which minority rights may be protected to a greater degree would be to provide for "administrative adjudicative processes under Title VI," instead of ADR.[73] Most importantly, administrative proceedings would not only be open to greater public participation than ADR proceedings, but they would also afford complainant communities with a body of precedent upon which decisions could be based, and upon which the environmental justice movement could be built.[74] In fact, the establishment

70. *Id.* at 24. *See also* Long, *supra* note 44, at 1192 ("ADR is essentially a private resolution of a single case and does not ordinarily dictate that similar cases should be decided on the same principles. Therefore, each complainant must negotiate its own position without relying on earlier solutions to the same problem, which may not even be made public. In this way, repeated discriminatory actions by a single [offender] may be more easily obscured.").

71. Long, *supra* note 44, at 1193. For example, ADR processes are informal, "and, aside from arbitration, cannot impose penalties on the parties. The informality . . . may encourage the recipient to take advantage of its stronger bargaining position." *Id.* This inhibits a community's battle for its civil rights in that "[an offender] may attempt to take advantage of the complainant, knowing that if it fails, it can simply refuse to settle with the complainant and deal with the EPA instead." *Id. See also* Mank, *supra* note 64, at 280 ("An important issue in this controversy has been the extent to which . . . mediation . . . can overcome differences among parties in monetary, technical, and informational resources . . . the informal atmosphere of mediation may fool less sophisticated parties . . . and lead them to accept a less favorable resolution than they could have achieved through litigation.")

72. Long, *supra* note 44, at 1194.

73. Tseming Yang, *The Form and Substance of Environmental Justice: The Challenge of Title VI of the Civil Rights Act of 1964 For Environmental Regulation*, 29 B.C. ENVTL. AFF. L. REV. 143, 219 (2002).

74. Long, *supra* note 44, at 1207. "The dangers of a case-by-case approach would be reduced with a significant body of precedent on which to base each decision." *Id.*

of clear rules and principles may even provide an opportunity for communities to ensure uniformity and consistency in future cases where their civil rights have been violated, an opportunity that is not created where ADR is used to address civil rights controversies in the environmental arena.[75]

2. Americans with Disabilities Act Controversies

The Americans with Disabilities Act ("ADA") protects the civil rights of the disabled. "The ADA prohibits discrimination against persons with disabilities in employment (Title I), governmental programs and services (Title II), public accommodations and services (hotels, restaurants, retail stores, service establishments and other public facilities) (Title III), and telecommunications (Title IV)."[76] The ADA is also the first civil rights statute to expressly encourage the use of ADR in the settlement of disputes under its purview.[77] The text of the ADA actually references a wide array of ADR techniques, including mediation, arbitration, and mini-trials.[78]

Congress incorporated a variety of ADR methods into the ADA due to its belief that informal dispute resolution could alleviate the potential overflow of disability cases into the already overburdened court system.[79] In addition, a variety of disabilities require a case-by-case approach, which makes "interest-based" processes, such as mediation and other ADR

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75. *Id.*

76. Lawrence P. Postol & David D. Kadue, *An Employer's Guide to the Americans With Disabilities Act: From Job Qualifications to Reasonable Accommodations*, 24 J. MARSHALL L. REV. 693, 694 (1991).

77. Cohen, *supra* note 36, at 3. *See also* Loren K. Allison & Eric H.J. Stahlhut, *Arbitration and the ADA: Do the Two Make Strange Bedfellows?*, 37 RES GESTAE 168 (1993) ("The text of the ADA, and its legislative history, reflects the intent of its drafters that alternative dispute resolution be used to resolve allegations of disability discrimination.").

78. 42 U.S.C. § 12212. *See* H.R. Rep. No. 101-485 pt. 3 at 76-77 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 499-500 (stating in part that this ADR provision was adopted by the Committee while considering the ADA in order to encourage the use of alternative dispute resolution in addressing ADA controversies. The Committee reiterates that this ADR provision is consistent with the Supreme Court interpretation of Title VII of the Civil Rights Act of 1964; Title I of the ADA incorporates the remedial provisions of Title VII by reference). *See also* The Civil Rights Act of 1991, 42 U.S.C. § 1981 (1991), where Congress encouraged the use of ADR in various other civil rights statutes.

79. Cohen, *supra* note 36, at 5 (citing U.S. Equal Employment Opportunity Commission, Americans with Disabilities Act of 1990 (ADA) Charges FY 1992-FY 1999, *available at* www.eeoc.gov/stats/ada-charges.html (last visited Feb. 9, 2006)).

techniques, more appropriate for parties than adjudicatory processes.[80] However, ADR often fails to sufficiently address legal and public policy interests, thereby rendering it an ineffective way to deal with civil rights complaints brought by the disabled.[81] In addition, ADA dispute issues may arguably be considered public policy concerns, and thus the private proceeding so characteristic of ADR may be an inappropriate manner in which to address concerns which may be relevant in the lives of various individuals.[82]

The ADA Mediation Guidelines ("Guidelines") were developed by a group of twelve mediators known as the ADA Mediation Guidelines Work Group, and stemmed from informal discussions regarding the lack of standardized procedures in ADA mediations.[83] Such guidelines were necessary given the ambiguity with which entities were faced when attempting to mediate ADA claims. Going back to the early 1990s, when the ADA was enacted, agencies were forced to develop their own standards for applying ADR to ADA claim settlement. The Equal Employment Opportunity Commission ("EEOC") launched the first ADA mediation program in 1991,[84] however, the ADA had just been passed and the EEOC could not be expected to have experience dealing with the provisional requirements of the ADA. Also, the U.S. Department of Justice ("DOJ") started a training program for instructing experienced mediators to mediate claims under Titles II and III, and was successful in providing support for mediators where they had questions pertaining to the legal aspects of the ADA.[85] Eventually, agencies responsible for enforcing civil rights statutes,

80. *Id.* at 6.

81. *Id.* "[ADR] providers and users must be aware of risks to the rights of disputants, plaintiffs and defendants alike, when safeguards and quality control measures are not established." *Id.* For example, many mediators who handle ADA cases lack either legal experience in dealing with disability claims or knowledge of disability issues; even those mediators with experience and expertise in the area of disability law may not understand the unique issues involved in this newly developed field of mediation. *Id.*

82. Cohen, *supra* note 36, at 9.

83. *Id.*

84. U.S. Equal Opportunity Commission, History of EEOC Mediation Program, *available at* http://www.eeoc.gov/mediate/history.html (last visited Jan. 23, 2005); *see also* Ann C. Hodges, *Mediation and the Americans With Disabilities Act*, 30 GA. L. REV. 431, 442-451 (1996).

85. Hodges, *supra* note 84, at 453-54. The article explains that the purpose of the DOJ program is:

> [T]o train a select number of professional mediators nationwide about Title III of the ADA, refer Title III cases to these mediators for mediation, monitor the outcome of mediation efforts, and evaluate and disseminate the evaluation of the project to mediators and other interested parties nationwide, so that the project can be effectively replicated in other areas of the country.

*Id.*

including EEOC, DOJ, and some state and local agencies, instituted more formal ADR programs during the early 1990s. These programs typically provided for in-house mediators and "external pro bono mediators."[86] However, while these agencies were established to investigate and advocate in the civil rights field, conflicting interests arose due to a preoccupation with settlement numbers.[87] Feeling the pressure to settle cases, these agencies, whose traditional duties included enforcing the law and public policy, were oftentimes faced with the reality of compromising the civil rights of complainants for the sake of expediency and efficiency.

To help avoid this conflict of interest, cases were often referred from the agency to more traditional mediation organizations, which had begun to offer ADA mediation in the mid-1990s.[88] In addition, the federal court mediation programs addressed ADA mediation cases in addition to their regular caseload.[89] Unfortunately, while many of these independent programs provided training to mediators in the areas of civil rights and disability law, many mediators handling ADA cases were inept when dealing disability claims or issues. Even those mediators who were capable of dealing with disability cases still lacked experience in addressing the issues that arose under the provisions of the newly enacted ADA.[90]

Despite these flaws in the use of ADR in ADA disputes, several federal agencies began to provide for mediation to resolve ADA controversies.[91] It was the passage of the Administrative Dispute Resolution Act and the EEOC's revision of its rules governing ADA complaints that encouraged agencies to incorporate ADR mechanisms into its ADA dispute resolution process.[92] However, still lacking were clear guidelines as to how to utilize ADR in settling ADA disputes, and thus the civil rights of the disabled

86. Cohen, *supra* note 36, at 10.

87. *Id.*

88. *Id.* Such traditional mediation organizations included community mediation and private mediators, whose programs "focused on ADA mediation and offered specialized training." *Id.*

89. *Id.* at 11.

90. *Id.* at 12. As Franck Scardilli, Senior Staff Counsel and Chief Circuit Mediator for the United States Court of Appeals for the Second Circuit stated, "[w]ith ADA cases, specific criteria have to be met . . . [i]t is important that the mediator understand this and be aware of the elements of a cause of action under the ADA and case precedent." *Id.*

91. *Id.* Examples of agencies who made extensive use of ADR techniques in the resolution of ADA controversies included the Department of the Air Force, the Department of Veterans Affairs, the U.S. Postal Service, the General Accounting Office, the Department of Energy, the Internal Revenue Service, the Federal Deposit Insurance Corporation, and the Department of Health and Human Services. *Id.*

92. *Id.*

individual were protected to different degrees depending on the agency mediating the individual's claim.

The ADA Mediation Guidelines Work Group ("Work Group") formulated the ADA Mediation Guidelines in an attempt to clear up the ambiguity associated with the use of ADR techniques in civil rights controversies, such as those arising under the ADA. In developing the Guidelines, the Work Group met with mediation leaders to obtain advice and ideas, and made a draft of the Guidelines available on both the internet and in various periodicals.[93] Before finalizing the Guidelines, the Work Group revised them to account for the substantial number of written and verbal comments received in response to publication of the rough draft.[94] This tedious drafting process was designed to ensure that all issues involved with the use of ADR in ADA disputes were adequately addressed.

The Guidelines ensure that several safeguards are in place to protect the civil rights of the disabled complainant in ADA disputes. For instance, the Guidelines discuss those characteristics that a mediator should look for in assessing whether a complainant has the capacity to be included in the mediation process, or whether the complainant is of an impaired capacity and thus requires some level of accommodation before he or she may be able to participate.[95] In addition, the Guidelines also provide that in ADA mediation practice, a resource person or neutral expert should be brought into the ADR process where the parties and their representatives do not have the resources required to provide all information that is necessary regarding the severity of the disability involved.[96] However, the Guidelines do have several shortcomings in terms of civil rights protection. For one thing, no suggestion is made that the mediator should research the disability at issue in an attempt to gain a better understanding of the overall dispute, and ultimately gain an adequate level of competency in resolving the issue under the provisions of the ADA.[97] An uninformed mediator could encourage an inadequate remedy for the disabled individual whose civil rights have been violated. Also, the Guidelines are unclear as to whether a mediator should or should not provide information to the parties relating to the legal aspects of the dispute or the disability involved, which could prove crucial to the

93. *Id.* at 24 n.22. A rough draft of the Guidelines was published in such periodicals as the New York Law Journal, Employment in the Mainstream, The Journal of Alternative Dispute Resolution in Employment, and Alternatives to the High Cost of Litigation. *Id.*

94. ADA Mediation Guidelines, http://www.mediate.com/articles/adaltr.cfm? (last visited Jan. 3, 2005).

95. ABA Commission on Law and Aging, *available at* http://www.abanet.org/ (last visited Jan. 3, 2005).

96. Cohen, *supra* note 36, at 9.

97. *Id.*

disabled individual who is completely unfamiliar with the process of negotiating an ADA claim.[98] The Guidelines may also be inadequate in addressing the role of the mediator where representatives, legal or otherwise, do not accurately represent the interests of the disabled complainant with a diminished capacity.[99] Such a complainant surely suffers a civil rights violation in such an instance.

Given the extensive amount of research and thorough evaluation that went into the development of the Guidelines, and the fact that the Guidelines are still lacking adequate safeguards to protect the civil rights of the disabled complainant, it seems likely that the ADR guidelines promulgated by individual civil rights enforcement agencies are also inadequate in ensuring the civil rights of the disabled ADA complainant are not further violated during the mediation process. To remedy these shortcomings, agencies and organizations engaged in ADA mediation could establish basic qualifications for mediators (in terms of what mediators can contribute to the process (i.e., knowledge of ADA mediation, experience dealing with disabilities), create procedures for determining whether conflicts of interest exist for external ADA mediators who depend on the employer for repeat business, and determine how to engage parties in informed decision-making, among other things. Such procedures could help ensure that the civil rights of disabled complainants are not violated in the resolution of ADA claims.

3. Employment Controversies

The workplace is a common setting in which civil rights complaints arise. "Civil rights law, namely Title VI of the Civil Rights Act of 1964 ("Title VI"), creates numerous methods for an aggrieved employee to seek redress regarding equal employment opportunity ("EEO") or affirmation action ("AA") complaints."[100] However, while these formal procedures are

98. *Id.* at 8. A major concern of the Work Group dealt with the fact that a mediator's choice of what information to provide to participants "may constitute the unauthorized practice of law, as the mediator makes conscious decisions about what information applies to the case." *Id.*

99. Ellen Waldman, *The ADA Mediation Guidelines: Providing Direction in an Emerging Field,* MENTAL & PHYSICAL DISABILITY L. REP. May/June 2000, at 523-24. Waldman argues that problems arise where "surrogates can[not] effectively put themselves in the shoes of the incapacitated party and make decisions that mirror those that would have been made by the party . . . [i]t may be better to simply call for an end to the mediation process when party capacity cannot be achieved." *Id.*

100. Lauren B. Edelman, et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497 (1993).

available to the employee whose civil rights have been violated, many employers have established internal informal dispute resolution procedures for resolving employment discrimination disputes. Employers internalize the resolution of employment controversies in an attempt to avoid lawsuits, liability, and the involvement of any civil rights regulatory agencies.[101] In fact, a majority of EEO and AA complaints do not even reach the court system or even administrative agencies charged with civil rights enforcement, and thus employment controversies are often resolved through the internal dispute resolution procedures established by employers.[102]

In using internal ADR procedures, personnel within the employer's organization are charged with handling discrimination complaints.[103] These "complaint handlers" go into ADR with the goal of achieving and maintaining good employee relations, which, in turn, employers believe will ensure efficiency and productivity in daily operations.[104] In so doing, the complaint handlers effectively shift the focus of ADR from the law to managerial goals.[105] In other words, allegations of civil rights violations are merely seen as a "typical managerial problems" which must be resolved to maintain "smooth functioning of the organization."[106] As a result of this narrow outlook on resolving civil rights complaints in the employment arena, the focus shifts more to resolving the conflict at hand instead of realizing or defining the legal rights at issue, and a concern over civil rights violations turns into a concern for maintaining highly functional interpersonal relationships.[107]

This conflict between organizational efficiency and adequately addressing violations of the employee's civil rights is fueled by civil rights legislation, which disrupts the "smooth functioning of the organization" by effectively intervening in the relationship between the employer and his employees. Such legislation does so by imposing requirements upon the

101. *Id.*

102. *See generally* Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 540, 563-64 (1981).

103. Edelman et al., *supra* note 100, at 498.

104. *Id.* at 511.

105. *Id.*

106. *Id.*

> One of the major goals of personnel management is to achieve and maintain good employee relations, which, according to managerial lore, helps to assure efficiency and productivity in organizations' core activities. While history has seen many changes in the ideology and techniques of management, the goal of managing employer/employee relations so that they do not disrupt production has remained largely unchanged.

*Id.* (citing CHARLES PERROW, COMPLEX ORGANIZATIONS: A CRITICAL ESSAY (New York: Random House 1986) (1986)).

107. *Id.*

employer and establishing procedures for employees to seek redress where those requirements are not fulfilled.[108] Organizational efficiency is jeopardized by civil rights statutes and judicial interpretations thereof, which provide support for an employee's claim of discriminatory employment practices, and which give weight to such claims through the threat of litigation.[109]

Internal ADR was designed by the employer to resolve disputes, thus keeping them "out of the formal legal system," while at the same time maintaining the status quo of the organization.[110]

Unfortunately, this streamlined approach towards resolving employment disputes may subvert the civil rights of the aggrieved employee. First, complaint handlers are not lawyers, and thus they do not have a complete understanding of the civil rights law applicable to a given complaint situation.[111] Instead, these complaint handlers are of the perspective that fair treatment, and not necessarily strict adherence to the black letter of civil rights law, should rule the day.[112] These complaint handlers place much more importance on procedural fairness than they do on fulfilling the substantive requirements of the applicable civil rights law.[113] In so doing, the complaint handlers, who are evidently given much control over the outcome of the internal ADR process, remove "the focus from legal rights to good organizational governance," and effectively subvert such goals of civil rights legislation as racial or gender equality in the workplace, in favor of corporate efficiency.[114]

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108. *Id.* at 512.

109. Lauren B. Edelman, et al., *Professional Construction of the Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC'Y REV. 47, 78 (1992).

110. Edelman, et al., *supra* note 100, at 512.

111. *Id.* at 513.

112. *Id.*

113. *Id.* at 513-14.

114. Robert Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality*, 59 N.C. L. REV. 531, 540 (1981). As Edelman explains:

> There is a debate over whether antidiscrimination law permits race- and gender-conscious treatment to produce fair outcomes, or requires race- and gender-blind treatment, which assures equality of treatment but not outcome. In both cases, however, there is explicit attention to race and gender issues. The organizational construction of law, on the other hand, emphasizes only the need for consistency, thus reducing (if not eliminating) public attention to the need for race and gender equality.

Edelman et al., *supra* note 100, at 515 n.19.

Second, the due process protections provided in the formal court system to safeguard the rights of the parties are not incorporated into internal ADR processes.[115] Lawyers are very rarely permitted to participate in internal ADR, and complaint handlers do not follow any standardized procedures regarding the admissibility of evidence.[116] Such procedural safeguards are established in the formal legal system to "check bias on the part of decisionmakers and to compensate for power differences between parties."[117] However, because internal ADR lacks these steps, the civil rights of aggrieved employees cannot be protected as adequately as if they had an opportunity to seek redress for discrimination in the formal legal system.

Perhaps the greatest flaw of the use of internal ADR (and ADR in any form, for that matter) is that the process is not concerned with defining discrimination and "articulating a standard to which others can appeal."[118] Rather, emphasis is placed on resolving the dispute at hand in a neat and timely manner, as opposed to focusing on recognizing the civil rights of the complainant and addressing any violations thereof. In the formal legal setting, and especially where the court system is dealing with civil rights, a major objective is to determine the legal right at issue and make a finding as to whether those rights have been violated.[119] This process is often open to public scrutiny, allows for a "public declaration that a challenged behavior is or is not discriminatory," and thus has the potential to establish precedent for future employee complainants seeking to categorize an employer's behavior as discriminatory.[120] This contrasts with the process of internal ADR, whereby all proceedings and determinations of fact are kept confidential. Internal ADR then does not provide a foundation for aggrieved employees to build upon when making their claims, and essentially "each employee must renegotiate the meaning of discrimination."[121] In addition, it could be argued that the lack of precedential value so characteristic of internal ADR does not have the deterrent effect that the precedent of publicized lawsuits

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115. *See generally* Edelman et al., *supra* note 100, at 519-21.

116. *See generally* Waldman, *supra* note 99, at 523-24; Edelman et al., *supra* note 100, at 519-21. For example, complaint handlers may allow such thus use of such subjective evidence as hearsay evidence, which is inadmissible in formal legal proceedings. Edelman, *supra* note 100, at 519-21. It is difficult to prove the truth of hearsay statements, and thus where a discrimination case may hinge upon such evidence, it would be unfair to the complainant should such evidence be used against him or her.

117. Edelman et al., *supra* note 100, at 521.

118. Waldman, *supra* note 99, at 524.

119. *Id.*

120. Edelman et al., *supra* note 100, at 524-25.

121. *Id.* at 530.

may have on some employers, and thus internal ADR does nothing to assure employees that their civil rights will not be violated in the future.[122]

However, some aspects of the internal ADR procedure do protect the civil rights of employees, and could even prove to be an excellent model for the use of ADR in other civil rights forums. Internal ADR encourages the resolution of complaints that may not find a remedy under applicable civil rights law—in the formal legal setting, if the decisionmaker determines that the complainant did not present a valid claim, the case is dismissed. In contrast, complaint handlers go into the process seeking to resolve the problem; as a result of this all-encompassing approach, internal ADR ensures that an employee's civil rights concerns will be addressed, as they often address both cases that involve discrimination, and even those that do not, in an attempt to resolve all controversies facing the organization.[123] Also, it may be argued that the focus of internal ADR on mending and maintaining interpersonal relationships may indeed be appropriate where discrimination has been alleged, as "personality clashes, poor communication, or bad management practices" are likely sources of misunderstanding between employer and employee that may amount to a belief that the employer has discriminated against the employee.[124] However, while these are positive aspects of internal ADR, they are clearly outweighed by the negative aspects of the process, which jeopardize the crucial exercise of an employee's civil rights.

### *B. General Support and Criticism of the Use of Alternative Dispute Resolution in Civil Rights Controversies*

While the specific areas of environmental controversies, ADA controversies, and employment controversies provide a good starting point for examining the positives and negatives of the use of ADR in the civil rights context, it may be helpful to delve a little deeper into the pros and cons of the use of ADR in the civil rights context before examining the propriety and effectiveness of the use of ADR by the ACLU.

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122. *Id.* at 529-30.

123. Edelman, et al., *supra* note 100, at 518. However, going back to the reality that complain handlers are mainly concerned with maintaining the smooth operating of the organization, it should be noted that "[i]nsofar as discrimination complaints stem from illegal discrimination, the redefinition of legal issues in organizational terms tends to draw attention away from violations of law," thus subverting the civil rights of the complainant for the sake of organizational efficiency. *Id.* at 519.

124. *Id.* at 522-23.

1. Support for the Use of ADR in Civil Rights Controversies

The use of ADR is generally endorsed by the American Bar Association, federal and state legislators, corporate counsel, and some legal educators.[125] These proponents of ADR believe that it is a much more efficient process when compared with the formal legal system, resulting in saved time and money.[126] According to these supporters, ADR is less time-consuming than formal legal procedures because it "eliminates many formalities of judicial proof . . . , decisionmakers often are familiar with the subject matter of the dispute, and because jurors need not be selected and educated."[127] Costs are reduced because mediators and arbitrators are typically paid less than judges or other formal decisionmakers,[128] and ADR does not require the extensive support system of clerks, court reporters, bailiffs, and other law enforcement personnel associated with the adjudicatory system.[129] Also, the parties involved in ADR may save money, as attorney representation is not required, and in some cases, attorney representation may not even be permitted.[130]

These savings in time and money make ADR mechanisms much more accessible for a claimant.[131] It is argued that complainants who cannot afford the expense or delay associated with filing a claim through the formal litigation process may be able to use ADR mechanisms to seek redress.[132]

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125. Delgado, *supra* note 33, at 1366.

126. *Id.* at 1404 n.55 (citing Jim Miranker, *Silicon Valley Courts Alternatives to Lawsuits*, S.F. EXAMINER, Dec. 1, 1985, at D1 (a retired judge, now employed to try ADR cases, believes "a couple of decisions I made saved each side several hundred thousand dollars in attorney's fees")). *See also* Menkel-Meadow, *supra* note 37, at 1871 ("[Proponents] claim that ADR will ensure speedy, less costly, and therefore more efficient case processing. This strand of the [ADR] movement has been called the quantitative, caseload-reducing, or case management side of ADR and is the main reason many jurists and court administrators support ADR."). *Compare* Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983) (arguing that the costs of court-administered litigation is less than many ADR proponents claim); Thomas A. Kochan, *An Evaluation of the Massachusetts Commission Against Discrimination Alternative Dispute Resolution Program*, 5 HARV. NEGOT. L. REV. 233, 241 (2000) ("The 1996 RAND Corporation's Institute for Civil Justice evaluation of six pilot ADR programs . . . [found] no statistical evidence that ADR significantly affected the time, costs, or attorney perceptions of satisfaction and fairness." However, the RAND Corporation did find that ADR programs yielded a greater number of monetary settlements than the traditional adjudicative process.).

127. Delgado, *supra* note 33, at 1366.

128. EARL JOHNSON, JR. ET AL., OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES 86 (Nat'l Center for State Courts 1977).

129. *Id.*

130. JOHNSON, *supra* note 128, at 86.

131. Delgado, *supra* note 33, at 1366.

132. *Id.* *See also* Kochan, *supra* note 126, at, 277 ("A recent report of the Society for Professionals in Dispute Resolution (SPIDR) recommends that agencies implementing ADR

Also, individuals may feel more comfortable using informal procedures such as ADR instead of formal court procedures which may be unfamiliar and intimidating.[133] ADR is beneficial in this sense, as it arguably places more control into the hands of the parties involved, and thus facilitates a greater degree of party participation.[134] This may take on great significance in the civil rights context, where minorities who feel threatened or intimidated by the formal adjudicatory system may be more eager and willing to file a claim alleging a civil rights violation.

In addition, proponents of ADR believe that the formal legal process is not necessarily suited to address certain kinds of disputes. More specifically, where there is an established, long-term relationship between parties, the adversarial process is arguably the least effective means of dispute resolution, "for it focuses only on the symptoms of a problem and makes little effort to delve into its source."[135] However, because ADR procedures have a more holistic approach that focuses on such things as community values, interpersonal relations, and compromise, ADR may be more appropriate for addressing disputes that arise between individuals who must continue to deal with each other long after the dispute is resolved.[136]

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programs [should] make them available to individuals from all economic classes . . . . [A]gencies should guard against creating a two-tiered system in which mediation is available only to the more affluent . . . . [T]he mediation program should be designed to account for disparate abilities to pay.").

133. *Id.*

134. Menkel-Meadow, *supra* note 37, at 1872.

135. Brett Cattani, *From Courthouses of Many Doors to Third Party Intervention*, CHRIS. SCI. MONITOR, Jan. 17, 1979, at 12, 13. Examples of such relationships include marriage, next-door neighbors, and partners in a small business. *Id.* However, it could be argued that the employer-employee relationship is another example, and thus civil rights disputes arising in the workplace may benefit from resolution through ADR as well.

136. Delgado, *supra* note 33, at 1367. *See also* Andrew W. McThenia & Thomas L. Shaffer, *supra* note 12, at 1665:

> These advocates [of ADR] seek an understanding of justice in the way Socrates and Thrasymachus did in the Republic: Justice is not the will of the stronger; it is not efficiency in government; it is not the reduction of violence: Justice is what we discover—you and I, Socrates said—when we walk together, listen together, and even love one another, in our curiosity about what justice is and where justice comes from.

McThenia and Shaffer place great importance on maintaining the relationship between individuals in a dispute. *Id. See also* Menkel-Meadow, *supra* note 37, at 1872 (stating that ADR promotes both "reconciliation" and "better communication" between "disputing parties."). However, this perspective has been criticized, as ADR critics argue that individuals only use the legal system as a last resort—"[p]eople turn to courts when they are at the end of the road," and thus it seems preposterous to be concerned with maintaining good relations between the parties to the dispute. Owen M. Fiss, *Out of Eden*, 94 YALE L.J. 1669, 1670 (1985) ("[T]o disfavor litigation because you

This could prove crucial in cases involving a civil rights dispute between an employer and employee, where the employer wishes to continue employment with the employer after the controversy is resolved. Also, ADR may produce more complex solutions that are perhaps better tailored to addressing the parties' needs than traditional adjudicatory processes.[137] This stems from the fact that in ADR, the mediator or arbitrator can look to the future, as well as the past, and may involve more parties than the traditional legal system will permit—this allows ADR to produce solutions that are more responsive to the needs of both parties and non-parties.[138] This contrasts greatly with the formal legal system, which may only examine past facts in resolving a dispute, despite the fact that it will be attempting to produce a solution for the future.[139] Thus, while the court system may effectively establish precedents for future claimants, ADR may be more beneficial to one whose civil rights have been violated in that it has the potential to provide a more comprehensive and individualized change in the life of the complainant, and perhaps even for those who follow, than would a blanket ruling by the formal legal system.

2. Criticism of the Use of ADR in Civil Rights Controversies

Two main criticisms of the use of ADR in civil rights controversies are the lack of procedural safeguards present in ADR, and the lack of precedent associated with ADR decisions. Both of these shortcomings have the dangerous potential of depriving an aggrieved individual of an appropriate means for redressing any civil rights violations he may have experienced.

*(a.) Lack of Procedural Safeguards in ADR*

One can make several valid arguments against the use of ADR in civil rights disputes. For one thing, opponents of ADR argue that the use of ADR may facilitate racial or ethnic bias in the resolution of disputes, due to the

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hope that social relations between the parties can be restored is like ignoring the dangers of plea bargaining and favoring it over trial because you wish the crime that gave rise to the prosecution had not occurred."). In addition, Fiss argues that "[t]here is no reason to assume either that the despair of blacks over getting justice on their own is unwarranted, or that they sue because they want some high class counseling. The more reasonable assumption is that they turn to the courts because they have to." *Id.* at 1671.

137. Menkel-Meadow, *supra* note 37, at 1872. *See also* Kochan, *supra* note 126, at 260 ("One putative benefit of mediation is that it allows the parties to forge settlements addressing more personalized interests than is possible in agency or court decisions.").

138. Menkel-Meadow, *supra* note 37, at 1872.

139. *Id.*

lack of procedural safeguards in place.[140] The formal legal system has a number of safeguards in place to ensure that the decisionmaker applies justly the applicable rules of law.[141] Judges are appointed for lengthy terms, sometimes for life, and thus are not exposed to outside political or societal pressures which could influence their decision-making process.[142] Also, judges are trained to analyze a lawsuit in terms "of the legal and factual issues presented," rather than based upon the characteristics of the parties to a dispute[143]—"for example, as a pedestrian-intersection accident case, rather than one of a black victim suing a white driver."[144] In addition, the basic concept of *stare decisis* prompts the judge to analyze similar cases in a like manner, and the results of this analysis are subject to appellate review.[145] Finally, judges are required by the Code of Judicial Conduct to disqualify themselves from any case where their impartiality may be at issue, and disqualification is essential where the judge feels animus or prejudice towards a party to the case.[146] In terms of the jury, the process of *voir dire* allows for the removal of jurors, with cause, by the judge and/or the parties to the dispute,[147] while parties may use peremptory challenges to remove jurors suspected of bias without cause.[148] Such procedural safeguards do much in the way of "recogniz[ing] inequality and attempt[ing] to compensate for it by making both parties conform to the same standards."[149]

140. Delgado, *supra* note 33, at 1367.

141. *Id.* at 1368. *See also* Brunet, *supra* note 26, at 27 ("Whenever a [decisionmaker] lacks a clear legal standard, impartiality may be more difficult to attain. Legal principles serve a yardstick or measurement function that allows disputants a way to assess the neutrality of those who decide or facilitate a dispute. In more skeptical terms, legal rules help keep judges or dispute facilitators honest because the rules make impartiality more apparent.").

142. Owen M. Fiss, *Foreward: The Forms of Justice, The Supreme Court 1978 Term*, 93 HARV. L. REV. 1, 14 (1979) (noting that the federal judiciary may act independent from outside influence due to life tenure). *Compare* DAVID STEIN, JUDGING THE JUDGES: THE CAUSE, CONTROL, AND CURE OF JUDICIAL JAUNDICE 3-4, 35-36 (Exposition Press, 1st ed. 1974) (arguing that the judicial appointment system requires judges to become political in order to obtain these appointments).

143. Delgado, *supra* note 33, at 1368.

144. Fiss, *supra* note 142, at 13-14.

145. Delgado, *supra* note 33, at 1368.

146. *Id.* at 1368-69. Note that "if a judge should disqualify himself or herself, but does not do so, recusal statutes enable parties to request a new judge." *Id.* at 1369.

147. *See* Ristaino v. Ross, 424 U.S. 589, 597 (1976) (explaining that voir dire may be used to insure that an impartial jury is impaneled).

148. Delgado, *supra* note 33, at 1369.

149. Mark Lazerson, *In the Halls of Justice the Only Justice is in the Halls*, 1 THE POL. OF INFORMAL JUST. 119, 159 (1982). Lazerson explains his theory that "[a] legal system that

The use of these procedural safeguards stems from the principal that the formal legal system presumes that inequality exists between parties to a suit, and thus implements a matrix of rules and other such mechanisms designed to protect the weaker party.[150] In contrast, the informal procedures implemented in ADR "deemphasize[s] these concerns—they presume 'that the people or entities that interact outside formal legal institutions are roughly equal in political power, wealth, and social status.'"[151] However, the reality is that inequalities do exist, and thus ADR disadvantages the weaker party to a suit[152]—in civil rights controversies, this is often the minority or the poor individual who has been discriminated against. The procedural safeguards entrenched in the formal legal system attack this inequality head-on and force both parties to adhere to the same standards of practice in an attempt to compensate for disparities in power or wealth.[153] However, where these procedural safeguards are absent, such as in ADR procedures, the weaker party in a civil rights controversy, or other such dispute, will have little or no success at redressing the wrongs committed against them.

However, these the likelihood of bias resulting from a lack of procedural safeguards in the ADR setting may be offset,

> [1] by providing rules that clearly specify the scope of the proceedings and forbid irrelevant or intrusive inquiries, [2] by requiring open proceedings, and [3] by providing some form of higher review[, and] [4] the third-party facilitator or decisionmaker should be a professional and be acceptable to both parties . . . .[154]

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encourages conciliation between landlords and tenants—two parties with vastly unequal resources—by curtailing the procedural rights of the weaker can only succeed in amplifying that inequality." *Id.*

150. Delgado, *supra* note 33, at 1394.

151. Delgado, *supra* note 33, at 1394 (citing Abel, *Delegalization*, Jahrbuch Fur Rechtssoziologie und Rechtstheorie 27 (H. Von Erhard et al. 1980).

152. *Id.* Delgado explains that "there is a critical difference between a process like [ADR], which is based on bargaining and accepts inequalities of wealth as an integral and legitimate component of the process, and a process like judgment, which knowingly struggles against those inequalities." *Id.* at 1398. In fact, "[m]inorities recognize that public institutions, with their defined rules and formal structure, are more subject to rational control than private or informal structures." *Id.* at 1391.

153. Lazerson, *supra* note 149, at 159. *Compare* Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 64-65 (1995) (stating that much evidence suggests "continuing discrimination against marginalized groups within the formal legal system" exists; while the formal legal system does provide parties with equal procedural tools to place them on the same level, "it does so largely by requiring the parties to battle through surrogates, i.e., their lawyers, and to use legal arguments and language that does not reflect their authentic voices or perspectives.").

154. Delgado, *supra* note 33, at 1403.

These safeguards may increase the costs of ADR, but, on balance, these costs seem worth the benefit of ensuring the civil rights of aggrieved individuals will be adequately protected.

*(b.) Lack of Precedent Associated With ADR Decisions*

"No discrimination dispute is merely an individual dispute."[155] Where race or gender discrimination is evident, the race or gender of the aggrieved individual is naturally brought into the conflict,[156] and this leads to the involvement of that racial or gender group in the civil rights dispute.[157] In other words, though a civil rights violation "commences as a personal injustice . . . [this] should not obscure the intrinsic group nature of the injustice."[158] Race or gender discrimination should be perceived as a threat to the civil rights of all members of the group, even though only a single individual may be directly affected by the dispute at hand.[159]

Although an apparently isolated act of discrimination seems to affect only the single individual, it in fact affects all members of the individual's racial or gender group—these members are shown that "discrimination is pervasive and that each is a potential target of discrimination."[160] Thus, the whole community has some interest, or even some stake, in the outcome of the civil rights dispute of an individual complainant. The danger lies in the fact that if the individual agrees to a remedy "that leaves discriminatory institutions, structures, procedures, or people in place," the individual may in fact place himself, and his group, at risk of future discrimination.[161]

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155. Emily M. Calhoun, *Workplace Mediation: The First-Phase, Private Caucus in Individual Discrimination Disputes*, 9 HARV. NEGOT. L. REV. 187, 198 (2004).

156. *See id.*

157. *See id.* at 199.

158. *Id.* To further elaborate this point, Calhoun writes that "it is not inappropriate to think about all discrimination disputes—even those in which the group is not a formal party—as involving a 'social enterprise' because of the inherent group presence." *Id.* at 200.

159. *See* Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 283-84 (1995) (discussing how a victim of racial discrimination may find a group identity imposed upon himself). *See also* E. Tex. Motor Freight Sys. v. Rodriguez, 431 U.S. 395 (1977); Equal Employment Opportunity Comm'n v. Printing Indus. of Metro. Washington, D.C., 92 F.R.D. 51, 55 (D.D.C. 1981); Jenson v. Eveleth Taconite Co., 139 F.R.D. 657 (D. Minn. 1992) (all exemplifying how courts acknowledge that individual civil rights claims may have class effects).

160. Calhoun, *supra* note 155, at 200 (citing CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF STATE (First Harv. U. Press 1989) (1991)).

161. Calhoun, *supra* note 155, at 214.

However, what if the remedy obtained by the individual complainant is beneficial, and could prove beneficial for his entire community? Therein lies the problem with ADR—the lack of precedential value garnered by its decisions. This means that any advancements made are done so on an individual, rather than a group, level. This is because an agreement reached through arbitration, mediation, or settlement does not have the same level of legal significance as a court decision, and does not create any sort of jurisprudence for future complainants to build upon and use in effectively forming and shaping their claims. Proof of a pattern of discrimination may be essential to a complainant's level of success, and the existence of this pattern may be critical in establishing "a structure whereby victims can be identified and made whole."[162] However, ADR and its individually tailored remedies do little to provide such proof. But such a pattern of discrimination cannot be established, given the often private or confidential nature of ADR proceedings.[163] In fact, some ADR methods, such as settlement agreements, may subvert the public interest in favor of reaping monetary damages,[164] thereby neglecting to appreciate the legal significance of the issues presented by the claim at hand. By giving the individual claimant the leeway to accept a mediocre compromise at the expense of the group, ADR effectively diminishes the "judicial development of legal rights for the disadvantaged."[165] In other words, the development of law in certain disfavored or unpopular areas would be almost completely stifled. For example, while the civil rights movement made great strides during the 1960s and 1970s, "imagine . . . the impoverished nature of civil rights law that would have resulted had all race discrimination cases . . . been mediated rather than adjudicated."[166] Thus, opponents of ADR argue that some

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162. Brief of Amici Curiae Lawyers' Committee for Civil Rights Under Law et al., at 4, Green Tree Financial Corp. et al. v. Bazzle, et al., 123 S. Ct. 2402 (2003) (No. 02-634).

163. *See* Maute, *supra* note 35, at 524-26. For example, "[m]any settlement agreements routinely include confidentiality provisions, which seal the court records to prevent public disclosure." *Id.* at 525-26.

164. *See* Elizabeth Kolbert, *Chief Judge of New York Urges Less Secrecy in Civil Settlements*, N.Y. TIMES, June 20, 1990, at A1. Provisions included in civil settlement agreements preserve the secrecy of the settlement terms and seal the court records. *Id.* Much focus has centered on how such provisions harm the public interest. *Id.* *See also* Maute, *supra* note 35, at 524-25 ("Private disputes between parties of relatively equal power are good candidates for mediation. If the dispute is truly private, no important public values will be compromised or subverted through settlement.").

165. Edwards, *supra* note 20, at 679. It has been suggested that ADR should not be used (1) "[w]hen the dispute involves important unsettled questions of law affecting the public interest" or (2) "where there are substantial differences in respective power, bargaining ability, or vulnerability of parties . . . ." Maute, *supra* note 35, at 527. Both of these criteria are highly characteristic of civil rights disputes involving race, gender, or disability.

166. *See id.*

hesitation should be used before applying ADR to resolve a civil rights dispute.

This lack of precedent opens the door for the presence of so-called "repeat players."[167] In litigation, repeat players, such as Wal-Mart, have a distinct advantage over adversaries.[168] Namely, these repeat players are more sufficient in the mobilization of legal and other resources, which increases the benefit they receive from engaging in formal adjudication.[169] Such benefits include the ability to develop "advance intelligence" (i.e., an ability to understand how certain issues will play out in court under applicable laws), and the ability to effectively "plan for future engagement."[170] Repeat players may also develop long-term working relationships with "institutional incumbents" such as clerks or judges.[171] If these advantages for the repeat player translate from the litigational to the ADR setting, they could prove extremely detrimental to the complainant citing a civil rights violation. In the ADR context, the repeat player often has the leverage to control the forum, decisionmaker, and rules in order to gain the most favorable outcome.[172] Often this complainant is already in a disadvantaged position when compared to the alleged offender, and the status of the offender as a repeat player could only enhance the disparity between the power and influence which the parties are capable of exhibiting. Thus, due to the lack of precedence associated with ADR procedures, repeat players are often allowed to re-litigate (in some sense) issues addressed in previous ADR proceedings, and the complainant must deal with the fact that he has no previous decisions upon which to mold or shape his claim, in addition to the other disadvantages he experiences (i.e., wealth, community status, etc). In this sense, ADR could prove extremely detrimental in the civil rights context.

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167. Menkel-Meadow, *supra* note 37, at 1905-06 (citing Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974)).

168. *Id.*

169. *See* 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, 26 (1999) (citing Galanter, *supra* note 167, at 98-103).

170. *Id.* at 27.

171. *Id.* (citing Galanter, *supra* note 167, at 100-01, 123-24).

172. Engalla v. Permanente Med. Group, Inc., 15 Cal. 4th 951, 985 (1997). In *Engalla*, Kaiser maintained a self-administered arbitration program, chose the partisan arbitrator and third-party neutral arbitrator, and used its own counsel to manage the entire process. *Id.* at 951. This is an illustrative example of how corporations often control the nature and outcome of ADR disputes, much to the disadvantage to the complainant.

In short, the complainant should participate in ADR if he "wants relief for the immediate problem, and cares little about creating precedent for the future."[173] However, if the complainant is concerned with establishing new precedent in the area of civil rights in an attempt to thwart future discrimination, ADR seems to be an improper choice for doing so.

## IV. USE OF ALTERNATIVE DISPUTE RESOLUTION BY THE ACLU

The stated mission of the ACLU is "to defend and preserve the individual rights and liberties guaranteed to all people in this country by the Constitution and laws of the United States."[174] The ACLU attempts to do so mainly by filing lawsuits on behalf of those who believe their civil rights have been violated. However, several of these lawsuits have not been formally adjudicated but have been settled instead. This section of the article illustrates some examples of cases which the ACLU has resolved using ADR mechanisms, and discusses whether the resolution of civil rights disputes through such mechanisms may truly serve the mission and purpose of the ACLU. More specifically, does ADR actually effectuate a change which can be appreciated by all, even those not involved in the suit at hand?

### *A. Examples of the Use of Alternative Dispute Resolution by the ACLU*

The ACLU has engaged in ADR in the arenas of employment, disability, gender, and educational rights. The form of ADR most commonly used by the ACLU is settlement negotiation.[175]

The use of ADR in the employment setting is supported by the ACLU if it is "voluntary and meets reasonable standards of fairness."[176] More specifically, ADR should only be allowed where sufficient due process protections are present.[177] The ACLU believes that ADR may effectively increase the number of individuals able to obtain a just resolution to their employment disputes, which is essential given the fact that 50,000 of the 200,000 civil rights complaints received by the ACLU annually arise out of

173. Maute, *supra* note 35, at 523. In contrast, if the complainant believes that "the legal principles are of overriding importance, they should move for exclusion from [ADR]." *Id.*

174. *Freedom is Why We're Here*, *supra* note 1.

175. *See generally* Zelin, *supra* note 42.

176. Lewis L. Maltby, *The National Workrights Institute* (Apr. 6, 1994), www.workrights.org/issue_dispute/adr_ statement_4-6-94.html.

177. *Id.* Such due process protections include "notice, access to relevant information, the opportunity to confront ones accusers, and an impartial decision maker can be provided without great cost or delay. Other aspects of due process . . . [include] formal discovery and judicial review." *Id.*

workplace discrimination claims.[178] This is significant, given the fact that a number of individuals cannot afford the $5,000-10,000 cost associated with litigating an employment dispute, and ADR provides a method for redressing the wrongs of a majority of individuals whose cases do not have a large enough economic potential to induce an attorney to take their case based on contingency.[179] The ACLU has focused much of its attention specifically on the practice of employment-at-will. According to the ACLU, about 150,000 employees are fired annually "for no legitimate reason" under the "'archaic 19th century doctrine' of 'employment at-will.'"[180] An ACLU task force on civil liberties in the workplace suggests that only government and unionized employees are protected against these potentially discriminatory firings, thereby leaving 60 million employees vulnerable to a greater potential for having their civil rights violated.[181] These individuals will likely have limited access to the judicial system, and must instead redress the wrongs committed against them through the ADR process. For such individuals, the ACLU has proposed several structural models under which aggrieved claimants could safely exercise their civil rights in the employment forum. Under the first model, an employee who feels wrongly terminated should be entitled to challenge the firing decision before a panel of impartial arbitrators.[182] Allowing the aggrieved an opportunity to be heard before such a panel would cost $2,500 and prove a more expedient alternative to the lengthy $250,000 court case.[183] Under the second model, mediators would be allowed to try and settle disputes, and only if the mediators failed would any form of arbitration be an option.[184] Thus, in the case of employment disputes which will not be aired in the formal legal system, the ACLU is willing to engage in, and actually supports, the use of ADR mechanisms.

The ACLU also employs the use of ADR techniques to resolve disability discrimination cases. Such claims most often involve allegations of ADA violations, and are commonly resolved through settlement

178. Maltby, *supra* note 176.

179. *Id.*

180. Sherwood Ross, *ACLU Pushes to Abolish Unjust, Arbitrary Firings*, ORLANDO SENTINEL, May 26, 1993, at C5 (quoting Teresa Yates, ACLU field coordinator on unjust firings).

181. *Id.* at C5.

182. *Id.* One way to ensure the impartiality of arbitrators would be to allow a neutral third-party to select any arbitrators used. *See also* Maltby, *supra* note 176.

183. Sherwood, *supra* note 180, at C5.

184. Harry Bernstein, *Dupe Shouldn't Be Used as a Union Label*, L.A. TIMES, Apr. 29, 1987, at Business 4.

agreements.[185] Often these agreements occur at the city, and sometimes even the county, levels.[186] Such settlement agreements are often the product of an intense period of negotiations, and are subject to the approval of the federal district court.[187] The settlement agreements formulated by the ACLU often call for "top-to-bottom changes" in either the city or county "programs and facilities to ensure access for people with disabilities, and awar[d] . . . damages and costs."[188] Often the city or county involved is prepared to take a proactive approach in enacting the goals of the settlement agreement in a manner which could likely serve as a model for other public officials dealing with the same or similar issues in civil rights.[189] The ACLU ensures that such settlement agreements in the disability rights arena specifically provide for: the training of officials on disability issues so that they are better equipped to deal with such conflicts in the future, tangible or physical reforms to be enacted in the immediate future (i.e., construction of ramps for accessibility), a more efficient complaint system, and some sort of procedural structure which may be used to monitor compliance with the standards of the settlement.[190] Thus, the ACLU will engage in dispute resolution in the disability discrimination context if any settlement agreement reached is explicit in the means by which the rights of the complainant will be rectified.

ADR techniques are also used by the ACLU to resolve conflicts in the gender discrimination arena. Settlement agreements are often viewed by the ACLU as a tool for facilitating the initiation of the process through which injustice towards women on the local scale is remedied.[191] Also, the ACLU views the settlement agreement as a means by which the principles of gender equity are expanded to "other public facilities and institutions" within the local area.[192] In order to accomplish these civil rights objectives in the gender discrimination setting, the ACLU includes in its settlement

185. *ACLU Announces Model Settlement in Maryland Disability Rights Challenge* (Dec. 2000), http://www.aclu.org/DisabilityRights/DisabilityRights.cfm?ID=8220&c=70.

186. *Id. See also*, *In Landmark Settlement, ACLU Wins New Guarantees For Mobility Impaired Bus Passengers in Los Angeles* (Aug. 2000), http://www.aclu.org/news/NewsPrint.cfm?ID=8066&c=75.

187. *In Landmark Settlement*, *supra* note 185.

188. *Id.*

189. *ACLU Announces Model Settlement*, *supra* note 185.

190. *Id.* For example, a settlement agreement may provide that "[t]he city agrees that once made accessible, all city buildings and facilities will be maintained in that condition. All new construction, alterations, programs, services, and activities will be carried out in compliance with the ADA." *Id.* at 2.

191. *ACLU-SC & CWLC Announce Settlement of Significant Lawsuit Against City of Los Angeles* (Oct. 27, 1999), http://www.aclu-sc.org/print/News/Releases/100289.

192. *Id.*

agreements the adoption of some sort of program or process which will ensure the equal participation and enjoyment of men and women in currently existing local activities.[193] Oftentimes the ACLU designs the program such that it serves as "a showpiece for the rest of the nation," and closely monitors the program included in the settlement agreement to ensure that it indeed "translates into exciting programs and activities for girls."[194] Thus, the use of ADR by the ACLU in the gender discrimination context focuses more on altering existing structures through new programs rather than changing the underlying system completely.

Finally, the ACLU has employed the use of ADR to resolve disputes in the education discrimination arena. The ACLU is often presented with claims that students have "been denied the most basic educational tools" and are expected to attend class in "minimally acceptable learning conditions,"[195] compared to their counterparts in wealthier, more affluent school districts. To rectify this discrimination, the ACLU has consistently required settlement agreements with extremely stringent requirements which will have a more permanent, long-lasting impact. More specifically, settlement agreements entered into by the ACLU in the education discrimination context often make specific requirements that students have new books and other educational tools, that teachers meet certain qualification standards, that schools are held accountable for delivering all of the demands made in the agreement, and that the district, county, or even the state must provide the funding necessary to accomplish these goals.[196] The settlement agreements endorsed by the ACLU in fact require legislation to create new standards for educational materials and facilities, to collect and verify data on compliance with these standards, to provide for some means of intervention should the school, city, county, and/or state fail to fulfill these standards, and to implement some form of a system for inspecting the quality of educational facilities under the purview of the settlement

193. *Id.* An example of such a program is "Raise the Bar." "Raise the Bar" ensures that girls in the City of Los Angeles will have equal access to all city-sponsored sports and recreation programs, in addition to equal access to all city-owned sports facilities. *Id.* The program resulted from the settlement of a lawsuit in which girls in Los Angeles alleged that they did not have equal access to the athletic and recreational programs, services, and facilities sponsored by the city through the Department of Recreation and Parks. *Id.*

194. *Id.*

195. *Historic Settlement Requires California to Provide Equal Educational Opportunity to Compton Students* (Mar. 21, 2000), http://www.aclu-sc.org/print/News/Releases/100204.

196. *ACLU and State of California Reach Settlement in Historic Williams Education Lawsuit* (Aug. 13, 2004), http://www.aclu-sc.org/print/News/Releases/100740.



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agreement.[197] Thus, ADR in the educational context is expected to produce results of a perhaps more permanent and far-reaching character than ADR in other civil rights settings addressed by the ACLU.

### *B. ADR and the Mission of the ACLU*

The mission of the ACLU is to defend the civil rights "guaranteed to all people in this country by the Constitution and laws of the United States" by selecting to take on only those lawsuits which will establish new precedents, thereby having the greatest impact in the preservation of civil liberties.[198] However, as discussed in the previous section, the ACLU must often settle its lawsuits through the use of ADR mechanisms. In doing so, an issue is raised as to whether the mission of the ACLU is furthered where ADR is applied to resolve civil rights controversies, as ADR does not have the legal force and authority that formal adjudicative decisions have.

ADR used by the ACLU in civil rights disputes may be said to serve private interests at the expense of broader public goals, such as the advancement of civil rights. If such is the case, this will be extremely detrimental to minorities, the poor, women, and other disadvantaged groups "to the extent that they benefit most from the public policies underlying formal legal processes."[199] While the ACLU does provide the poor or minority complainant with more leverage at the bargaining table than he or she would have without such representation, this does not negate the fact that poor individuals or minorities who are not parties to the current action will not necessarily experience an improvement in their civil rights status. Oftentimes the settlement agreements entered into by the ACLU provide an immediate solution or remedy for the given locality in which the civil rights dispute arose, but do nothing to further the civil rights interests of those in other neighboring regions. For instance, the ACLU may enter into a settlement agreement with the City of Los Angeles to eradicate the presence of discrimination in the educational setting by providing the necessary educational tools, resources, and funding required to enact such a change.

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197. *ACLU and State of California*, *supra* note 196.

198. *Freedom is Why We're Here*, *supra* note 1.

199. Delgado, *supra* note 33, at 1398. For example,

> [s]ettlement is unconstrained by the party equality that underlies formal legal processes. An imbalance of power can distort the settlement process in a number of ways: (1) the poorer party will be less able than the wealthier party to predict the outcome of litigation and thus will be in an inferior bargaining position; (2) the poorer party may be in great need of damages and thus willing to settle for a smaller sum rather than wait for a larger recovery through litigation; and (3) the poorer party may be forced to settle simply because she cannot afford to hire counsel or finance litigation, regardless of the merit of her claim.

*Id.*

However, this agreement does nothing to advance the rights of students in any other city in the surrounding region, and thus serves as a narrowly tailored remedy of a civil rights violation which is likely widespread and commonplace in other cities in the same school district as Los Angeles. While the agreement may serve as an excellent model for other cities, school districts, counties, or even states, these localities are by no means obligated or required to adopt similar provisions; in fact, these localities may even make the determination that there is no discrimination present to warrant such civil rights reforms. Without the force of law to support it, ADR is not able to create standards in the areas of civil rights which must be adhered to by all. Rather, ADR remedies individual grievances without regard for the advancement of the rights of all, and further the objectives of the ACLU on a very confined local level.

ADR agreements also lack the precedential value so coveted by the ACLU in its pursuit of the perfect civil rights lawsuit to represent. While those within the affected area may benefit from an ADR agreement that results in more permanent, far-reaching change, for those in other cities, counties, or states, an agreement produced through ADR carries no precedential value and, at best, may only be used as persuasive evidence in proving a civil rights violation. This lack of precedence in the ADR arena is less than desirable. In the adjudicative system, "judgment is not the end of a lawsuit but only the beginning."[200] Involvement of the court may continue "almost indefinitely" as third-party enforcement of a judgment is often necessary (i.e., through the contempt power of the court).[201] However, ADR often does not provide for a manner of enforcing agreements, and parties to a settlement agreement may be left without remedy if one or the other side decides to avoid compliance.[202] In addition, court involvement in a case may continue indefinitely as a body of law is continuing to develop—such is the case in the civil rights arena, where much has been accomplished, but much remains to be done in terms of establishing legal guidelines to protect against discrimination, especially in developing areas like homosexual rights. ADR thwarts the ACLU in its attempt to achieve these goals by effectively preventing cases from reaching the judicial system, a system in which decisions can be built upon and the body of law supporting civil rights may be edified to truly protect the rights of all. In other words, "while

200. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1082 (1984).

201. *Id.* at 1082-84.

202. That is, unless the settlement is the result of a court order, in which case the court may play a role in enforcement.

settlement may produce peace between parties, it fails to further the substantive public goals that shape adjudication."[203] Surely the ACLU's involvement in ADR does little in the long-term to further its goal of "defend[ing] and preserv[ing] the individual rights and liberties guaranteed to all people in this country by the Constitution and laws of the United States" due to the simple fact that ADR processes lack precedential value.

## CONCLUSION

ADR has the potential to decrease the costs and time associated with litigation, thereby increasing the possibility that poor or minority complainants may have a better chance of seeking redress for any civil rights violations which may have been committed against them. However, ADR also carries many risks to not only the poor or minority complainant, but also to those in his or her social class or minority group. Due to the lack of procedural safeguards and the absence of precedential value associated with ADR, ADR may result in gains for the individual with no result for the class discriminated against. For these reasons, the ACLU should proceed with caution when using ADR procedures to remedy civil rights violations, for ADR does not necessarily enact the type of change which the ACLU strives for. However, because the ACLU has the resources to effectively represent the poor or minority claimant in negotiations, and the redress of civil rights violations can occur through the use of ADR (albeit on the individual or local level), ADR is indeed better than no method for addressing the alleged wrong.

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203. Delgado, *supra* note 33, at 1399.