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Does Alternative Dispute Resolution Facilitate Prejudice and Bias? We Still Don't Know

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DOES ALTERNATIVE DISPUTE RESOLUTION FACILITATE PREJUDICE AND BIAS? WE STILL DON'T KNOW

Gilat J. Bachar* and Deborah R. Hensler**

ABSTRACT

By the time Professor Richard Delgado and his colleagues wrote their seminal article on the risk of alternative dispute resolution (ADR) facilitating prejudice, ADR programs were well-established in the United States, supported by legislative and court mandates, private contracts, and U.S. Supreme Court decisions. Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution and Delgado's subsequent review article, ADR and the Dispossessed: Recent Books About the Deformalization Movement, were cited hundreds of times by scholars and practitioners but did little to stop the movement to substitute mediation, arbitration, and other dispute resolution procedures for public adjudication. Conflict resolution theorists and practitioners celebrated mediation for its relationship-preserving and restorative potential, judges celebrated ADR in its various forms for its potential to reduce court workloads, and institutional defendants publicly welcomed the possibility of reducing legal expenses and delay by relying on mediation and arbitration in lieu of litigation. Informal dispute resolution was touted by all as an antidote to the presumed burdens court procedures imposed on lay litigants. Privately, many corporate defendants hoped that ADR would diminish claiming rates or diminish the settlement value of claims (or both).

Delgado et al. hypothesized that because ADR procedures frequently incorporate features that social science research has identified as facilitating prejudice, the procedures would produce biased outcomes. Although framed in normative terms, their hypothesis is subject to empirical testing. In the three decades following the publication of Fairness and Formality, a small cadre of socio-legal scholars took up this challenge. Using a qualitative content analysis approach, we identified thirty-eight efforts to test empirically the hypothesis that mediation and arbitration create systematic differences in dispute resolution outcomes by gender, race, ethnicity or socio-economic stratum. Using a variety of methods, including laboratory and field experiments, surveys, and analyses of reported outcomes, empiricists have produced contrary and ultimately inconclusive results. Small samples and lack of methodological rigor reduce the reliability of the pub-

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lished findings. In sum, the answer to the question whether informal dispute resolution facilitates prejudice is “we don’t know.” In an era of increasing economic inequality and ever louder expressions of racial, ethnic, and gender prejudice, we have a responsibility to learn more about how public policies that continue to favor alternative dispute resolution are affecting less powerful groups in U.S. society. At the same time, rather than turning our backs on public adjudication, we should invest in ensuring that our courts truly provide “equal justice for all.”

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I. INTRODUCTION

BY the time Professor Delgado and his colleagues wrote their seminal article on the risk of alternative dispute resolution (ADR) facilitating prejudice, ADR programs were well-established within and outside of courts in the United States, supported by legislative and court mandates, private contracts, and U.S. Supreme Court decisions. Pennsylvania trial courts introduced non-binding arbitration for small dollar value claims starting in the 1950s, and by the 1970s there were similar “court-annexed” programs in other states and a few federal courts.¹ Professor Frank Sander’s speech on “varieties of dispute processing” at the 1976 Pound Conference² spurred the spread of court-connected ADR programs, including non-binding arbitration and mediation.³ Such was

1. Deborah Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 178 (2003).

2. Frank Sander, Varieties of Dispute Processing, Address Before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7–9, 1976), in 70 F.R.D. 79, 1119 (1976).

3. Hensler, *supra* note 1.

the enthusiasm for ADR that in many jurisdictions, litigants with damages below a monetary threshold were required to attempt to resolve their disputes through non-binding arbitration or mediation as a pre-condition for receiving a trial date. Writing around the same time as Delgado et al., Judge Harry Edwards asserted: “The Alternative Dispute Resolution (ADR) movement has seen an extraordinary transformation in the last ten years. Little more than a decade ago . . . [t]he ADR idea was seen as nothing more than a hobbyhorse for a few offbeat scholars. Today . . . the ADR movement has attracted a bandwagon following of adherents.”⁴ During the same era, the U.S. Supreme Court embarked on the construction of a jurisprudential structure supporting the expansion of private ADR outside the courts by extending the reach of the Federal Arbitration Act (FAA) beyond the business-to-business disputes to which it had long been understood to apply. In the mid-1980s, the Court, for most purposes, pre-empted state arbitration laws (some of which restricted arbitration’s reach)⁵ and extended the scope of contractual arbitration to cover statutory claims.⁶

Both legislatures’ and courts’ support for incorporating ADR procedures within the court system and the U.S. Supreme Court’s support for extending the scope of the FAA to statutory claims of all sorts⁷ rested primarily on the decision-makers’ empirical intuitions. Diverting trial-eligible civil lawsuits to court-annexed ADR procedures seemed likely to reduce the number of trials and, consequently, the amount of judicial time required to dispose of civil lawsuits. Although the majority of civil lawsuits already were resolved by settlement, ADR advocates expected that mediation by expert third-party neutrals would further increase settlement rates and enhance the quality of dispute outcomes. By the 1950s, the U.S. Supreme Court Justices had come to regard arbitration in the collective bargaining context as beneficent because of its perceived contribution to the end of violent labor disputes in the United States. To

4. Harry Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 668 (1986). Citing Peter B. Edelman’s *Institutionalizing Dispute Resolution Alternatives*, Edwards reported that there were more than 150 mediation centers for “minor” disputes in about 40 states, and court-annexed arbitration programs in sixteen states and ten federal district courts. *Id.* (citing Peter B. Edelman, *Institutionalizing Dispute Resolution Alternatives*, 9 JUST. SYS. J. 134, 136 (1984)).

5. *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

6. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 238 (1987) (extending the scope of the FAA to security claims); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985) (extending the scope of the FAA to anti-trust claims). In *Mitsubishi*, the majority held that the test of whether the scope of a properly negotiated arbitration agreement can extend to statutory claims is whether the arbitration proceeding provides an effective mechanism for vindicating rights. 473 U.S. at 638. In 2013, the *American Express Co. v. Italian Colors Restaurant* majority essentially abrogated this requirement. 133 S. Ct. 2304, 2310 (2013).

7. Having already endorsed the use of arbitration for securities and anti-trust claims, in 1991 in *Circuit City Stores v. Adams*, 532 U.S. 105, 119 (2001), the Court endorsed the use of arbitration for Title VII civil rights claims. More recently, the Court has upheld mandatory pre-dispute arbitration clauses that preclude any form of collective proceeding; as a result, employers as well as consumer service providers can avoid class actions altogether. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

these Justices, it seemed reasonable to assume that individually-negotiated arbitration contracts would have similarly-beneficent consequences for investors, consumers, and workers outside of the collective bargaining context. Moreover, private contractual arbitration seemed to have the potential to reduce court workloads by diverting cases from court altogether.

In reality, there was little empirical evidence to support any of these intuitions. Systematic evaluations of court-annexed ADR programs found they had little impact on civil trial rates or time to disposition, most likely because, by the time most courts introduced such programs, trial rates had already declined to an irreducible minimum.⁸ Meanwhile, arbitration was attracting critics as well as advocates in the corporate world, as it arguably became more expensive and time-consuming and as appellate courts narrowed the grounds for appealing arbitrators' decisions.⁹ Nonetheless, by the time of Delgado et al.'s article, court-annexed ADR was a well-established feature of the civil litigation landscape, and corporate enthusiasm for private dispute resolution was continuing to grow. Appellate justices' assumptions about the virtues of contractual arbitration went untested.¹⁰

Delgado et al.'s critique introduced a new element into the scholarly discourse on ADR. As they noted, they were scarcely the first scholars to criticize the introduction and spread of ADR generally, nor the first to query its impact on less powerful groups in society, although the latter issue had received less attention and was associated with a particular ideological perspective. However, Delgado et al. were the first to support their critique with reference to theoretical and empirical social science research on the etiology of racial, ethnic, and class prejudice.

More recent cognitive psychology research on implicit bias adds support to Delgado et al.'s proposition that ADR facilitates prejudicial outcomes. "Implicit bias" is the term adopted to refer to stereotypical

8. Hensler, *supra* note 1, at 178–81. A persistent empirical finding was that parties and lawyers liked the new ADR procedures, which was likely responsible to a large degree for the continuation of the court-connected programs. See also Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 514–15 (2004); Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549, 562 (2008) (noting that while ADR has undoubtedly had an impact on declining trial rates, "the empirical evidence to-date offers little support for the idea that ADR reduces docket overload or promotes court efficiency"); Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"* 1 J. EMPIRICAL LEGAL STUD. 843, 843 (2004).

9. Deborah Hensler, *The Private in Public, the Public in Private: The Blurring Boundary Between Public and Private Dispute Resolution*, in FORMALISATION AND FLEXIBILISATION IN DISPUTE RESOLUTION 59–60 (Joachim Zekoll, Moritz Bälz & Iwo Amelung eds., 2014).

10. As a formal matter, appellate decisions upholding arbitration are grounded on contract law and interpretation of the FAA. However, judicial opinions on arbitration often recite the "strong public policy in favor of arbitration" and sometimes articulate the judges' belief that private arbitration is just as good, if not better than, public adjudication for resolving most disputes.

associations that are automatically activated by the mere presence of the attitude object (i.e., the target group).¹¹ These associations reflect unconscious bias, of which people are largely unaware.¹² Importantly, because people are unaware of these biases, they do not engage in the sorts of internal thought processes that people who oppose judging others on the basis of personal or group identity might adopt to counter their own biases.¹³ Carol Izumi argues that implicit bias research has important implications for ADR, particularly mediation.¹⁴ Specifically, she suggests that even well-meaning mediators who espouse egalitarian views may influence mediation processes and outcomes in ways that reflect implicit bias against minorities.¹⁵

Even prior to this new strand of research, though, *Fairness and Formality: Minimizing the Risk of Prejudice in ADR* attracted great attention when published and has been cited hundreds of times since. As the title suggests, the authors' purpose was (seemingly) not to discourage the use or spread of ADR but rather to call attention to its features that might promote bias and invite reforms to minimize that risk.¹⁶ Although Delgado et al. did not call for empirical research to investigate whether and to what extent ADR procedures facilitate bias, the fact that their critique rested on empirical social science research in related contexts seemed to invite empirical investigation of bias in the ADR arena. But was this the case? Did a robust field of empirical inquiry about whether ADR facilitates bias emerge in subsequent years? We set out to answer this question for this symposium. Our goal was to identify, count, describe, and assess empirical studies published since 1985 that investigate racial, ethnic, gen-

11. John F. Dovidio, Kerry Kawakami & Kelly R. Beach, *Implicit and Explicit Attitudes: Examination of the Relationship Between Measures of Intergroup Bias*, in BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY: INTERGROUP PROCESSES 175 (Rupert Brown & Sam Gaertner eds., 2003).

12. Measures of implicit bias can detect bias despite social desirability tendencies in responding to psychological tests because the bias is beyond both intentional control and awareness. *Id.*

13. Miles Hewstone, Mark Rubin & Hazel Willis, *Intergroup Bias*, 53 ANN. REV. PSYCHOL. 575, 577 (2002). Some of the most compelling research in this area has demonstrated the perilous implications of automatic stereotypical associations between black men and crime. This work, employing a variety of paradigms, finds that black men are more likely than their white male counterparts to be misperceived as holding dangerous objects (e.g., guns versus tools). Further, priming individuals with the concept of crime seems to increase the extent to which they unknowingly direct their attention toward the faces of black men and away from the faces of white men. See Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876-77 (2004); B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181 (2001).

14. Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J. L. & POL'Y 71, 85-87 (2010).

15. *Id.* at 96-99.

16. In this respect, Delgado et al.'s critique contrasts sharply with Owen Fiss's equally well-known paper from the same era, *Against Settlement*, 93 YALE L. J. 1073 (1984). Fiss was explicitly pushing back against the ADR movement that had been set in motion by Sander's presentation at the Pound Conference and the legal profession's and legal academy's embrace of the ADR movement. See also Sander, *supra* note 2.

der, class, and other group differences in ADR outcomes, including subjective as well as objective outcomes. We searched for systematic empirical analyses (as contrasted with normative analyses or anecdotal accounts) that investigated differences in subjective and objective outcomes of various types of ADR processes¹⁷ by participants' race, ethnicity, gender, or class. The subjective outcomes that researchers investigated were perceived procedural and outcome fairness and general satisfaction. The objective outcomes included whether plaintiffs prevailed on the merits (for arbitration) and monetary outcomes. As a result of our search, we identified a total of thirty-eight empirical studies that were published during the three decades extending from 1985 to 2015. Because the number of studies was so small, we were able to read each one and describe its details. Section II describes our approach. Section III reports our findings on the types of research that were conducted. Section IV discusses the substantive findings of these studies. Section V discusses the implications of our findings.

II. METHOD

We identified the studies we report on through a two-stage process. *First*, we conducted a general search in the leading journal databases, including Hein Online, Westlaw, Lexis Nexis, and JSTOR. For this search, we used key words, including "ADR," "arbitration," "mediation," "race," "ethnicity," "gender," "class," "status," and "empirical," to identify relevant work. It is important to note that the work we identified included studies that did not focus on group differences but still reported some findings on such differences. We cast our net widely, including research relating to gender or race differences in conflict management, not just research on a particular ADR procedure.¹⁸ We used frequently-cited empirical work, like the MetroCourt study,¹⁹ to refine our key word string as well as to identify additional studies. By using a diverse set of databases, rather than only Westlaw or Lexis Nexis, we also were able to identify

17. We included both mediation and arbitration in the confines of the research. Though arbitration is arguably not necessarily "informal" per the original terminology used by Delgado et al., and can take different forms in different contexts, it is a private process that is not managed by the state. In this sense, the examples provided by Delgado et al. (e.g., no judge, no official setting) fit the description of arbitration, despite its formality relative to mediation.

18. However, we did not include the vast literature on the impact of personal identity characteristics on negotiation performance, including, e.g., Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991); Charles B. Craver & David W. Barnes, *Gender, Risk Taking, and Negotiation Performance*, 5 MICH. J. GENDER & L. 299 (1999); Charles B. Craver, *The Impact of Gender on Clinical Negotiating Achievement*, 6 OHIO ST. J. ON DIS. RESOL. 1 (1990).

19. MICHELLE HERMANN, THE METROCOURT PROJECT FINAL REPORT: A STUDY OF THE EFFECTS OF ETHNICITY AND GENDER IN MEDIATED AND ADJUDICATED SMALL CLAIM CASES AT THE METROPOLITAN COURT MEDIATION CENTER (1993); see also Gary LaFree & Christine Rack, *The Effect of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 L. & SOC'Y REV. 767 (1996).

relevant studies beyond the realm of legal scholarship, in areas such as political science and psychology.

Second, to ensure that we did not overlook other types of publications, such as book chapters or published reports, we searched for relevant publications in the footnotes and bibliographies of other works that we had located, and we entered the refined key words list in general search engines, primarily Google and Google Scholar. Such publications were typically not found online but rather in books and reports available through brick-and-mortar libraries. We knew we had exhausted the benefits of this second stage when we began to see the same results come up over and over again without identifying any additional relevant studies. We also cross-referenced the studies we identified with previous literature reviews that covered empirical research on ADR generally or on a specific type of dispute.²⁰ Finally, we also looked at publications that cited both doctrinal and empirical work on ADR's impact on certain groups.²¹

Based on this two-stage process, we are confident that our search identified the majority of empirical studies conducted during the relevant time period that examined relationships between race, ethnicity, gender, or class, and subjective or objective ADR outcomes.²² Furthermore, we believe that since the methods used to identify the studies avoid potential biases (for instance, documenting only studies published in articles or only studies published in legal publications), the trends reported in this Article accurately reflect the relevant literature.

20. *E.g.*, Carrie Menkel-Meadow, *Empirical Studies of ADR: The Baseline Problem of What ADR Is and What It Is Compared to*, in OXFORD HANDBOOK OF EMPIRICAL LEGAL STUDIES 597 (Peter Cane & Herbert Kritzer eds., 2010); Jessica Pearson & Nancy Thoennes, *Divorce Mediation: Reflections on a Decade of Research*, in MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION 344 (Kenneth Kressel & Dean G. Pruitt eds., 1989); Alice F. Stuhlmacher & Amy E. Walters, *Gender Differences in Negotiation Outcome: A Meta-Analysis*, 52 PERSONNEL PSYCHOL. 653 (1999); Roselle L. Wissler, *The Role of Antecedent and Procedural Characteristics in Mediation: A Review of the Research*, in THE BLACKWELL HANDBOOK OF MEDIATION: BRIDGING THEORY, RESEARCH, AND PRACTICE 129 (Margaret S. Herrman ed., 2009).

21. *E.g.*, Laura J. Kray & Leigh Thompson, *Gender Stereotypes and Negotiation Performance: An Examination of Theory and Research*, in 26 RESEARCH IN ORGANIZATIONAL BEHAVIOR 103 (2005); Catherine R. Albiston, Lauren B. Edelman & Joy Milligan, *The Dispute Tree and the Legal Forest*, 10 ANN. REV. L. SOC. SCI. 105 (2014); Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOC. 339, 345 (2008) (noting that "few studies directly tackle the relationship between varieties of formality or informality and race, social class, or gender disparity in access to justice"); Eric K. Yamamoto, *ADR: Where Have the Critics Gone?*, 36 SANTA CLARA L. REV. 1055 (1996).

22. An important caveat in this context is the accessibility of publications, which obviously increased significantly in the last couple of decades. This fact may skew the distribution of studies over time. However, we aimed to overcome this issue by using references to previous research (both articles and other publications) that appeared in later published work.

III. CHARACTERISTICS OF THE EMPIRICAL STUDIES WE IDENTIFIED

Using the methodology discussed above, we identified a total of thirty-eight empirical studies that were conducted over three decades since the publication of Delgado et al.'s seminal article. Several key observations emerged from our review. In this section, we describe the characteristics of the studies themselves, including their distribution over time, the type of ADR procedure the studies investigated, the personal identity characteristics they explored, the methods the researchers used, and the type of dispute that was the focus of the studies.

A. DISTRIBUTION OF STUDIES OVER TIME

Initially, we expected to find that most of the work responding to Delgado et al.'s critique was conducted in the first decade following the publication of Delgado et al.'s article. However, our findings demonstrated that while there were slight fluctuations in the *volume* of studies over time, research on the relationship between personal identity characteristics and ADR outcomes was published throughout our observation period (see Figure 1). Although interest seems to have diminished during the late 1990s, it has picked up again in the last decade. As elaborated below, more changes were found with regard to the focus of the studies and the methods used in them.

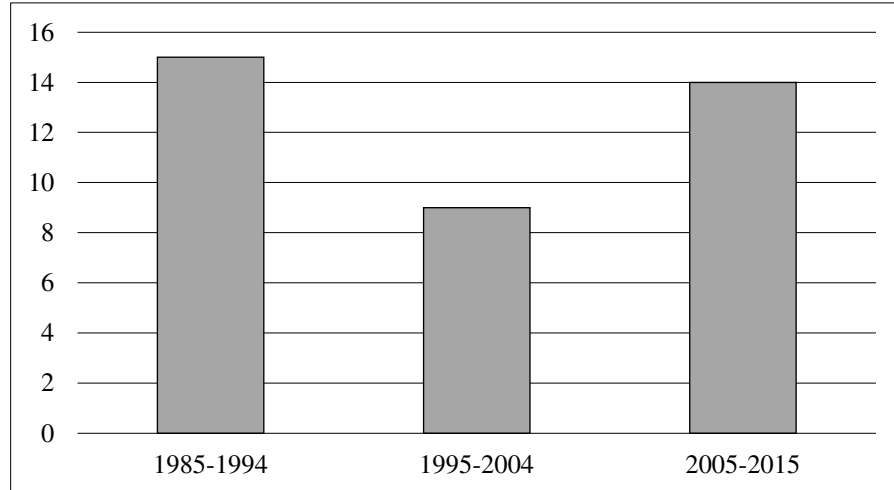


Figure 1: Number of Studies per Decade

B. METHODS

A variety of research methods were used over the years, from experimental designs, to surveys, to quantitative analysis of reported results (see Figure 2). However, it is interesting to note that some methods were more popular at one point than another. For instance, while in the first

decade laboratory experiments were used quite often, this method had all but vanished in the last decade. By contrast, the use of qualitative research methods such as interviews became more popular in the last decade.

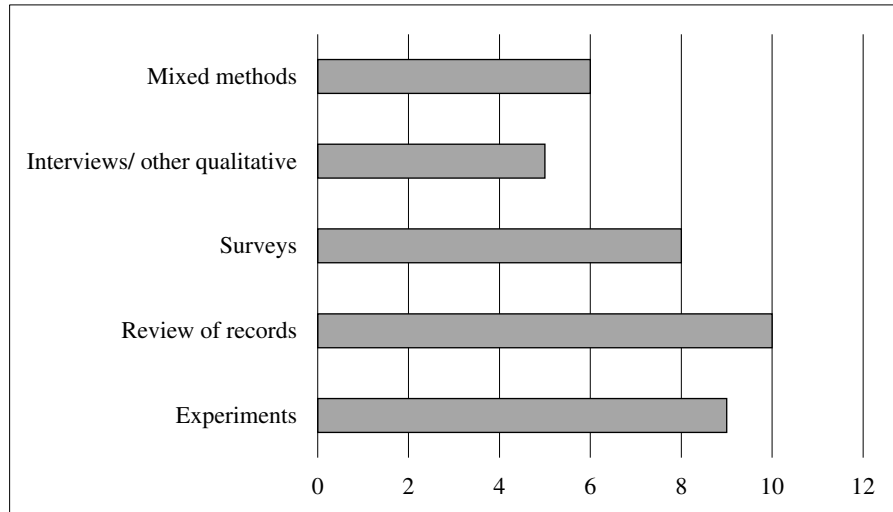


Figure 2: Number of Studies per Methodology

C. TYPE OF ADR PROCEDURE INVESTIGATED

Our review found a general tendency to focus on mediation rather than on other forms of ADR, perhaps due to heightened concerns regarding the informality of this form of dispute resolution (see Figure 3). There has been renewed attention to arbitration in recent years,²³ as well as other forms of ADR in the workplace.²⁴ This may be related to increased attention in recent years to the prevalence of mandatory arbitration clauses in consumer and employment-related disputes, as well as concern about the consequences these proceedings may have for weaker parties.

23. See, e.g., Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 72–73 (2014); David B. Lipsky, J. Ryan Lamare & Abhishek Gupta, *The Effect of Gender on Awards in Employment Arbitration Cases: The Experience in the Securities Industry*, 52 INDUS. REL. 314, 316–17 (2013).

24. See, e.g., Elizabeth A. Hoffmann, *Dispute Resolution in a Worker Cooperative: Formal Procedures and Procedural Justice*, 39 L. & SOC'Y REV. 51, 51–52 (2005).

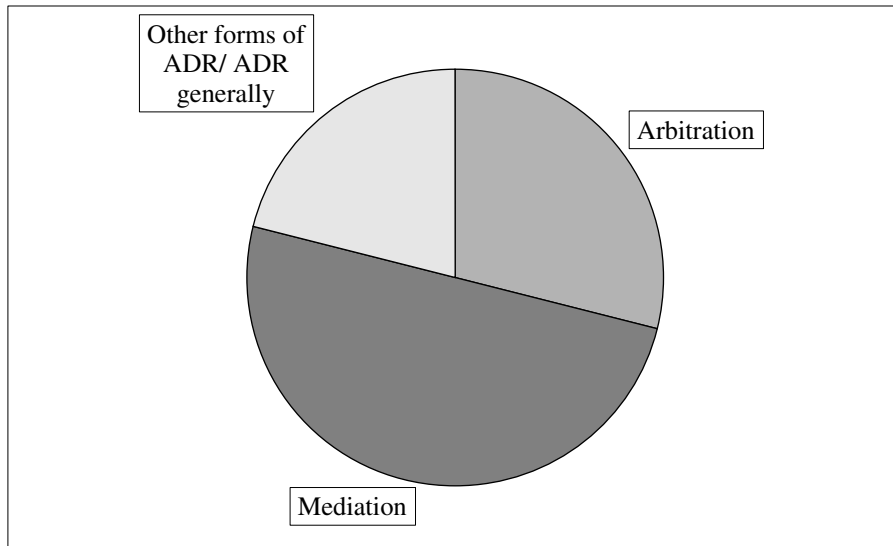


Figure 3: Number of Studies per Type of ADR Procedure

D. PERSONAL IDENTITY CHARACTERISTICS

Although Delgado et al.'s primary focus was racial and ethnic prejudice, gender differences in outcomes attracted the most attention from empirical researchers, either as a sole focus or alongside other characteristics (see Figure 4).

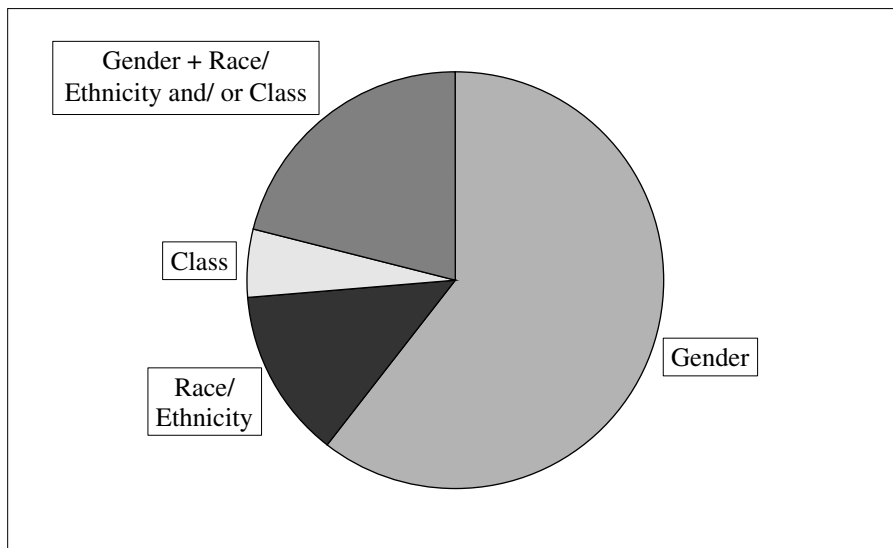


Figure 4: Number of Studies per Personal Identity Characteristic

It is interesting to note in this context that contrary to our original hypothesis that the interest in gender was driven by the gender of the stud-

ies' authors—that is, that the authors of gender-focused studies were primarily women—our review found that interest in gender does not seem to be explained by researchers' gender (see Figure 5).

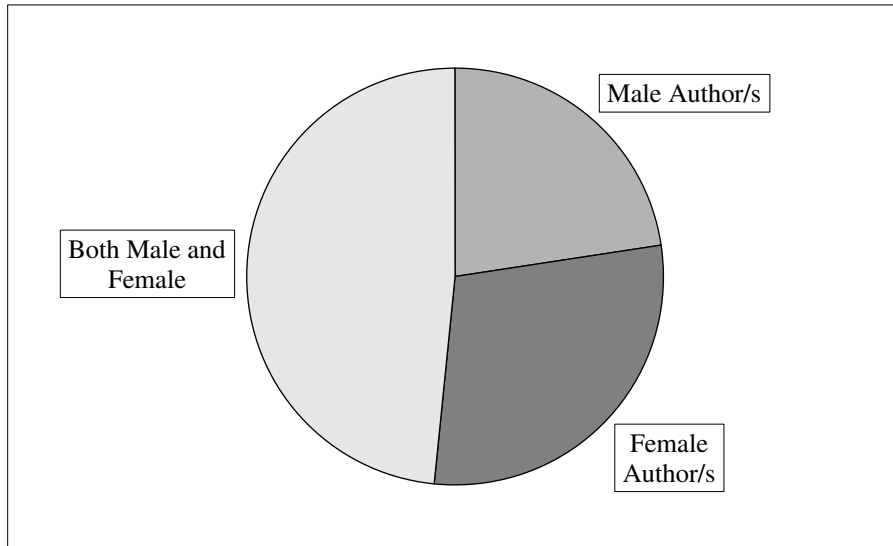


Figure 5: Gender of Author in Gender-Related Research

We found an almost exclusive focus on gender in the first decade we looked at, 1985–1994. This is perhaps related to the fact that mediation was first introduced as an alternative to family courts in divorce and child custody cases, and there was a concern that such mediation processes would adversely affect women (or, alternatively, a desire to prove that they would not).²⁵ By contrast, more attention has been given to race/ethnicity in later years, at least alongside gender if not as a primary focus. Also, our review observed several works on differences by socio-economic status in the last decade, which may mark the beginning of a new trend (see Figure 6).

25. These concerns were most famously raised by Trina Grillo in *The Mediation Alternative: Process Dangers for Women*, 100 *YALE L. J.* 1545 (1991).

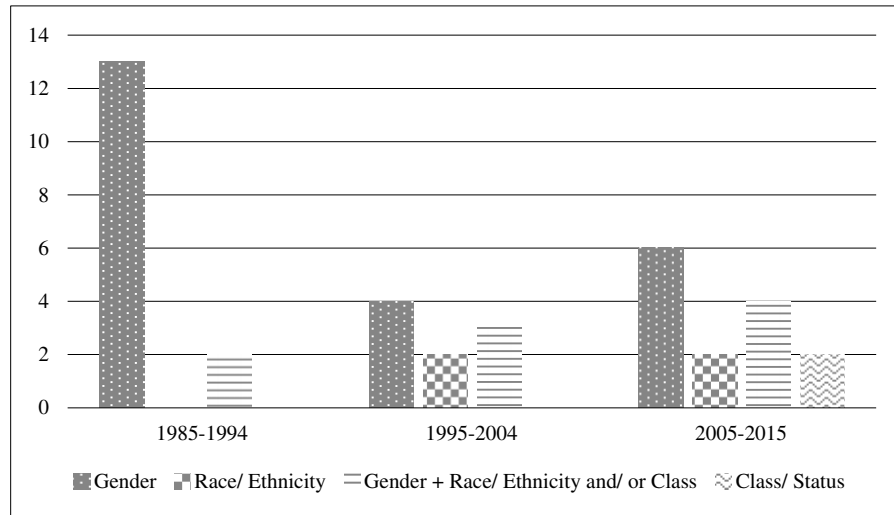


Figure 6: Personal Identity Characteristics by Decade

E. RELATIONSHIP BETWEEN RESEARCH METHODS AND PROCEDURAL FOCUS OF THE RESEARCH

We identified different methodological preferences related to the type of ADR that was the focus of the study. Generally speaking, surveys and mixed methods (in particular, the combination of surveys with observations of proceedings or review of records) were used most frequently in research on mediation, whereas review of decisions or awards was the single most popular method in arbitration-related research. In large part, this is due to the fact that records of mediation proceedings are typically unavailable to researchers, as many of the proceedings are confidential. As a result, researchers often resort to relying on participants' observations regarding the mediation proceedings in which they participated.

	Mediation	Arbitration
Experiments	3	2
Review of records	3	7
Survey of participants	4	2
Interviews/ other qualitative research	3	
Mixed methods (observations of sessions/ review of records + survey)	6	
TOTAL	19	11

Table 1: Distribution of Methods in Arbitration and Mediation Research²⁶

26. Note that mediation and arbitration studies total N=30, as the remainder of the studies looked at other ADR procedures or at ADR more generally.

F. TYPE OF DISPUTE HANDLED BY THE PROCEDURES INVESTIGATED

Our review showed a distinct focus on employment disputes in arbitration proceedings, in contrast to the wide variety of disputes that were addressed by the mediation processes that were investigated. While family and other interpersonal disputes received more attention, we also identified research on small claims, criminal and medical disputes, and disputes that arose in other contexts (see Table 2).

	Mediation	Arbitration
Family (divorce/custody)	6	
Other interpersonal conflict (roommate/neighbor/community)	4	
Criminal (misdemeanors)	1	
Employment	2	10
Fatality and medical injury	1	
Consumer		1
Various (small claims, etc.)	5	
TOTAL	19	11

Table 2: Type of Disputes in Arbitration and Mediation Research

IV. DOES INFORMAL DISPUTE RESOLUTION FACILITATE BIAS AND PREJUDICE?

Based on the studies identified in our review, we cannot conclusively reject or affirm Delgado et al.'s original concerns regarding potential biases in ADR proceedings. The studies we reviewed produced mixed and contradictory results as to the existence and scope of such biases, and only a few of them examined the effects of multiple forms of diversity in tandem (e.g., women of color versus white men). The difficulty in deriving conclusive findings from this body of work is exacerbated by methodological weakness, which characterizes many of the studies we looked at, due, at least in part, to small sample sizes and lack of available data. Given the mixed findings emerging from this body of research and the lack of methodological rigor in many of the studies, it is impossible to draw robust conclusions from the findings of the studies we reviewed. Different readers might interpret the mixed findings differently, depending in part on their predispositions in favor or against ADR procedures.

In our view, research on objective outcomes of mediation suggests that both women and minority males fare worse than white males. Other research on gender and negotiation styles suggests that gender bias in mediation outcomes may be explained by women's negotiation style. Racial and ethnic bias may be explained by explicit or implicit biases of mediators. However, research on gender and race/ethnicity differences in *subjective perceptions* of mediation is not entirely consistent with observed differences in outcomes. Some studies find that women prefer me-

diation, others that women prefer more formal proceedings. Racial/ethnic minority claimants more consistently tend to prefer mediation to adjudication, despite the findings suggesting they fare worse than majority claimants. To us, the most provocative finding is that the *mediator's* personal identity characteristics (i.e., gender or race/ethnicity) may matter most when these characteristics match the opposing party's characteristics and do not match the claimant's. Given the relative dearth of minority mediators,²⁷ this finding—if it were supported by further study—is particularly troubling.

Empirical research on arbitration has focused mostly on objective outcomes rather than on parties' perceptions, perhaps due to the availability of arbitration decisions. But this research to date has failed to explore the impact of race and ethnicity. Most of the empirical research on gender and arbitration outcomes indicates that either women grievants tend to receive more lenient treatment than men, or there is no difference at all in arbitration outcomes as a function of gender. However, some recent research indicates that women fare worse than men in arbitration, as do female lawyers compared to male lawyers.

Below we describe the findings of a sample of studies drawn from each decade subsequent to the publication of Delgado et al.'s critique, highlighting those studies that are, in our opinion, most methodologically robust.

A. 1985–1994

In the first decade after Delgado et al.'s article was published, attention was directed mostly towards the effects of gender differences, both in mediation and arbitration. We suspect that, to some degree, this research was motivated by the then-current trend of applying mediation procedures to divorce and custody disputes and the doubts this trend engendered as to whether mediation better serves parties to such disputes than the courts. In this context, Susan Keilitz et al. (1992) examined the relative effects of court-based mediation and traditional litigation on litigants' views and on the outcomes of divorce cases surrounding custody, visitation, and child support issues.²⁸ They combined three sources of data: court and mediation case records; a telephone survey of disputants from the sample of cases; and a mail survey of attorneys from the same sample. On the issue of gender, they found that although both men and women who participate in mediation rate that process more positively than the adversarial process, women gave higher marks to mediation than did men. They also found that women's responses were more favorable on the rules of the mediation process and on the neutrality and qualifications

27. See, e.g., Sharon Press, *Court-Connected Mediation and Minorities*, GPSOLO, NOV.–DEC. 2013, at 72, 73 (recommending more mediator diversity as a way to alleviate inferior results for minorities).

28. SUSAN KEILITZ ET AL., MULTI-STATE ASSESSMENT OF DIVORCE MEDIATION AND TRADITIONAL COURT PROCESSING (1992).

of the mediators. They concluded that these findings should cast doubt on claims that mediation is detrimental to the interests of women.

Relatedly, Robert Dingwall et al. (1998) explored whether the ability of men and women to deal with issues in divorce mediation is affected by traditional sex-linkages attached to those issues and whether mediators and parties categorize themselves in gendered terms.²⁹ The researchers coded 150 hours of audiotaped mediation work, derived from approximately 100 sessions with thirty different mediators. They found that the way in which mediation participants constructed their identities as parents and mediators inhibited the asymmetries of power and participation that have been reported in other interactions between men and women, thus diminishing the role of gender asymmetries in mediation.³⁰ According to the authors, the appearance of gender differences may reflect the fact that men and women tend differentially to find themselves in particular structural positions.

Similarly, with regard to arbitration, early research focused on gender differences, mostly in the employment context. The findings were either favorable towards women or showed no effect whatsoever. In his research, Brian Bemmels (1988a; 1988b; 1988c) found, based on reviews of decisions made in discharge and disciplinary arbitration proceedings, that women fared much better than men in such proceedings.³¹ For instance, other variables held constant, women were twice as likely as men to have their grievance sustained, and in cases where the grievance was sustained, women were 2.7 times more likely than men to receive a full reinstatement rather than a partial reinstatement. Clyde Scott and Elizabeth Shadoan (1989) examined the effect of grievants' and arbitrators' gender on arbitration decisions through a review of 169 labor arbitration awards and concluded that the arbitration process is free of any gender bias, as none of their hypotheses for gender effects were supported by the data.³² Similar findings were reported by Sharon Oswald and Steven B. Caudill (1991).³³

Overall, the body of research from the first decade regarding gender effects in mediation and arbitration seems to have indicated that there is no reason for concern—women are not necessarily adversely affected by such proceedings, and may even do better than men in some contexts.

29. Robert Dingwall, David Greatbatch & Lucia Ruggerone, *Gender and Interaction in Divorce Mediation*, 15 *MEDIATION Q.* 277, 277 (1998).

30. They also found that men and women focused on expressive and instrumental issues in similar ways, but men were more likely to refer to abstract rather than experiential knowledge about children. *Id.*

31. Brian Bemmels, *Gender Effects in Discharge Arbitration*, 42 *INDUS. & LAB. REL. REV.* 63, 74 (1988); Brian Bemmels, *Gender Effects in Discipline Arbitration: Evidence from British Columbia*, 31 *ACAD. MGMT. J.* 699, 705 (1988); Brian Bemmels, *The Effect of Grievants' Gender on Arbitrators' Decisions*, 41 *INDUS. & LAB. REL. REV.* 251, 251 (1988).

32. Clyde Scott & Elizabeth Shadoan, *The Effect of Gender on Arbitration Decisions*, 10 *J. LAB. RES.* 429, 429 (1989).

33. Sharon L. Oswald & Steven B. Caudill, *Experimental Evidence on Gender Effects in Arbitration Decisions*, 4 *EMP. RESP. & RTS. J.* 271, 271 (1991).

Towards the end of this first decade, the most comprehensive empirical study to date on whether mediation facilitates prejudice and bias was conducted. The MetroCourt study, conducted in New Mexico in the early 1990s by Michelle Hermann, Gary LaFree, Christine Rack, and their colleagues,³⁴ found gender, race, and ethnic differences in both outcomes of and party satisfaction with mediated versus adjudicative processes. This study had a unique “natural” control setting, with almost equal numbers of white, Hispanic, and African-American judicial officers and mediators, as well as a relatively equal division by gender. Based on bivariate analysis, the study found that minority women received less as claimants in mediation and paid more as respondents in adjudication; minority men received less as claimants in adjudication and mediation; and white women received less as claimants in adjudication.³⁵ However, much of the effect of race/ethnicity and gender on monetary outcomes disappeared when case-specific and repeat-player variables were added to the models. Of the two remaining ethnic/gender effects, only one supported the disparity hypotheses: minority male claimants received significantly less in mediation than in litigation.

Turning to perceptions, the MetroCourt study found that while some women fared “better” in mediation outcomes, they were more skeptical of that process and somewhat distrusting of its informal quality. Hispanics and some African-Americans preferred mediation, even when their outcomes were inferior to what they might have achieved in litigation, demonstrating some distrust of formal justice systems. Another interesting finding was that, in general, parties were more satisfied with processes in which the third-party neutral, whether a judge or a mediator, “matched” their own ethnicity.³⁶ The study thus found complex relationships in the mix of process used, demographics of litigants and third-party neutrals, and case types, and since it has not been fully replicated to date, the empirical uncertainty about the interpretation of these results persists.

B. 1995–2004

The second decade examined in our study saw a decrease in the volume of research. Ironically, as Eric Yamamoto noted in 1996, the continuing federal and state wave of ADR program adoption during this period was paralleled by a decline in the volume, depth, and prominence of legal scholarship critical of key aspects of ADR, including what he calls the “race and gender critique[].”³⁷ This trend seems to have extended to empirical research on ADR and inequality. However, several studies from

34. Hermann, *supra* note 19; LaFree & Rack, *supra* note 19, at 767.

35. Disparities were more consistent for claimants than for respondents and for minorities than for white women. Hermann, *supra* note 19; LaFree & Rack, *supra* note 19, at 767.

36. It is interesting to note Menkel-Meadow’s observation regarding the MetroCourt study, suggesting that it generally refuted Delgado et al.’s original argument. *See* Menkel-Meadow, *supra* note 20, at 618. It seems to us that the study did find some support to Delgado et al.’s concerns, albeit with nuances typical of rigorous empirical studies.

37. *See* Yamamoto, *supra* note 21, at 1062.

the second decade are noteworthy. First, in the context of parties' satisfaction with mediation proceedings, Arup Varma and Lamont Stallworth (2002) looked at the effects of both gender and race/ethnicity. The study examined the effects of attorney representation on the degree of satisfaction of Equal Employment Opportunity (EEO) mediation participants through a survey of participants, focusing on three variables: mediated outcomes, the mediation process, and mediator skills and abilities.³⁸ Women in the sample expressed higher satisfaction levels than men for all three variables, while white disputants were significantly more satisfied with all three measures than minority disputants.³⁹

Second, a study by Ayala Malach et al. (2002) explored gender differences—both in content and in style—in divorce mediation through a review of notes taken during thirty mediation sessions chosen randomly from approximately one hundred couples that came for divorce mediation between 1996 and 1998.⁴⁰ The study found gender differences in both content and style: men tend to use more legalistic arguments based on principles of law and customary practice while women tend to use more relational arguments based on interpersonal responsibility to a relationship. Furthermore, men's style tends to be unemotional and reserved, whereas women's style is emotional with more expression of insult and pain. The researchers concluded that since much of negotiation theory is built on rational analysis, which fits men's style and content of arguments, this creates an advantage for men in divorce mediation, which relies at its core on negotiation processes.⁴¹

A final example from the second decade is Lisa Bingham and Debra Mesch's work (2000) on decision making in employment and labor arbitration, which used an experimental research design to tease out whether and to what extent arbitration decisions differ based on the gender of the

38. Arup Varma & Lamont E. Stallworth, *Participants' Satisfaction with EEO Mediation and the Issue of Legal Representation: An Empirical Inquiry*, 6 EMP. RTS. & EMP. POL'Y J. 387, 395 (2002). It should be noted that the study had a low response rate—only seventeen percent (forty-seven completed the survey out of two-hundred and seventy-five who received it).

39. Since the racial mix in the sample was skewed (thirty-seven whites, three blacks, three Hispanics/Latinos, and three Native Americans), the researchers combined the responses of the three minority groups. *Id.* at 406.

40. Ayala Malach Pines, Hamutal Gat & Yael Tal, *Gender Differences in Content and Style of Argument Between Couples During Divorce Mediation*, 20 CONFLICT RESOL. Q. 23, 29 (2002).

41. In a similar vein, Tamara Relis (2009) found through one hundred and thirty-one interviews, questionnaires, and observations of plaintiffs, defendants, lawyers, and mediators involved in sixty-four fatality and medical injury cases, that women as litigant-parties in mediation processes were more concerned with emotional, not just compensatory, aspects of their mediated cases; were more likely to want alleged harm doers to attend mediation sessions; and hoped for direct communication with other parties, not just about legal issues, but about "extra-legal" aspects of their disputes. Furthermore, women plaintiffs were less comfortable talking and advocating strongly in mediation settings, and female lawyers were more likely to engage in problem solving and collaborative behavior in mediation settings than their male counterparts. See TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS, AND GENDERED PARTIES (2009).

grievant.⁴² The results were consistent with previous studies on gender effects in arbitration: while the study found that women are awarded back pay more often than men, no gender effect was found for grievant reinstatement.

C. 2005–2015

The third and final decade of research we reviewed saw both an increase in the volume of research in general and, in particular, an increase in research pertaining to arbitration and to other personal identity characteristics besides gender. Though the numbers are too small to assert any real trends, it is possible that this increase reflects a revival in researchers' interest in the relationship between ADR and inequality, which may generate more robust findings in the future. With regard to arbitration, recent studies used rigorous research designs to identify any effects on disadvantaged parties. While these studies found some evidence of potential adverse effects based on gender and class in arbitration proceedings, they did not give any attention to racial or ethnic characteristics. David Lipsky et al. (2013) examined how women fare compared to men in employment disputes resolved by arbitration in the securities industry.⁴³ The authors analyzed the awards and case characteristics in a sample of nearly three thousand and two hundred employment arbitration cases, finding that the gender of the complainant and the complainant's attorney (but not the gender of the respondent's attorney or the arbitrator) had significant effects on the size of the awards. Female complainants did worse than male complainants in these cases, and male attorneys obtained larger awards than female attorneys.⁴⁴ Alexander Colvin (2014) looked at the extent to which the operation of mandatory arbitration as an employment dispute system increases or decreases equality of access to justice in employment relations.⁴⁵ He did so by analyzing previously-collected survey data and found that mandatory arbitration disrupts existing mechanisms for enforcement of individual employment rights. His evidence suggests that mandatory arbitration leads to both wide variation in how employment rights are protected among companies and significant barriers to the effective bringing of claims against employers. The result is that, rather than enhancing equality, mandatory arbitration exacerbates inequality in access to justice in the workplace.

42. Lisa B. Bingham & Debra J. Mesch, *Decision Making in Employment and Labor Arbitration*, 39 *INDUS. REL.* 671, 671 (2000).

43. David B. Lipsky, J. Ryan Lamare & Abhishek Gupta, *The Effect of Gender on Awards in Employment Arbitration Cases: The Experience in the Securities Industry*, 52 *INDUS. REL.* 314, 314 (2013).

44. It should be noted, though, that the authors attribute these differences to employment conditions in the securities industry rather than biases in the arbitration process. *Id.*

45. Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 *BERKELEY J. EMP. & LAB. L.* 71, 73 (2015).

Turning to mediation research, Lorig Charkoudian and Ellen Kabcenell Wayne (2010) focused on various factors affecting parties' satisfaction with mediation proceedings (rather than outcomes), examining both gender and race/ethnicity.⁴⁶ The goal of this research was to examine the effects of matching mediators and mediation participants by gender and by racial or ethnic identity in a community mediation program. They surveyed participants and observed mediation sessions. The researchers found that failing to match disputants and mediators by gender had negative effects on mediation satisfaction measures. Those effects increased when the mediator's gender also matched that of the other participant.⁴⁷ By contrast, failure to match by racial or ethnic group had little effect, but when an unmatched participant faced both an opposing participant and a mediator who shared a racial or ethnic identification, mediation satisfaction decreased.⁴⁸

While the latter findings do not specifically confirm or refute Delgado et al.'s predictions, they may shed some light on the role of third party neutrals in parties' evaluation of legal proceedings. This claim was put forward to explain the importance of disputants' perceptions of process fairness in determining satisfaction with dispute resolution procedures generally. As E. Allan Lind explains, since people typically cannot predict what would be considered a fair outcome in their case, they use a "fairness heuristic" and "form their original justice judgment on the basis of procedures and social process and then later incorporate outcome information into their overall impressions of the fairness or unfairness of the encounter."⁴⁹ Individuals are thus especially attuned to the procedure's neutrality, the trustworthiness of the third party, and signals that convey social standing, such as having a voice in the process.⁵⁰ They pay special attention to procedural elements that may indicate favoritism towards one party, such as the time allocated for each party to speak.⁵¹ In this sense, it is not surprising to find that when people are faced with both

46. Lorig Charkoudian & Ellen Kabcenell Wayne, *Fairness, Understanding, and Satisfaction: Impact of Mediator and Participant Race and Gender on Participants' Perception of Mediation*, 28 CONFLICT RESOL. Q. 23, 23 (2010).

47. However, while the "other gender match only" condition was not significantly related to participants' satisfaction with the mediation process, it was significantly related to participants' lower satisfaction in the "no gender match" condition. These inconsistent results might be influenced by the small sample size. *Id.* at 44.

48. Apart from the small sample size, the study also suffers from another limitation—the possibility that the observations are not independent of one another, since responses from participants in the same mediation session might be reactions to an experience with the same mediator. *Id.* at 45.

49. E. Allan Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, in EVERYDAY PRACTICES AND TROUBLE CASES 177, 185 (Austin Sarat ed., 1998).

50. E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 230 (1988); Tom R. Tyler & E. Allan Lind, *Procedural Justice*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 65 (Joseph Sanders & V. Lee Hamilton eds., 2000).

51. See Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 690 n.226 (2002) (observing that those litigants who reported speaking more during mediation felt that they had more input in determining the outcome than did litigants who spoke less).

an opposing participant and a mediator who share a gender or a racial or ethnic identity that do not match their own, they perceive the proceeding as less fair.

V. IMPLICATIONS

More than three decades after Delgado et al.'s warning about the potential prejudicial consequences of relying on informal dispute resolution, we have insufficient evidence to conclude whether ADR favors or disfavors women (or men) or minority (or majority) disputants or is unaffected by disputants' identity characteristics. Despite some notable efforts to investigate the concerns raised by Delgado et al., the evidence is too contradictory and methodologically fragile to reject those concerns. Nor does it offer a basis for identifying contexts in which explicit or implicit bias might be more or less significant. Contemporary politics give no reason to believe that the level of bias within the general (or elite) population has diminished and, therefore, no reason to believe that the potential for bias to affect dispute resolution processes and outcomes has waned. Indeed, recent social psychological research on implicit bias should heighten, rather than diminish, the concerns Delgado et al. raised so long ago.

In the decades since *Fairness and Formality* was published the civil dispute resolution process in the United States has changed dramatically. Formal trials rarely occur. Consumer credit claims brought by institutional plaintiffs against unrepresented individual defendants end in default judgments without the latter ever appearing in court. More substantial civil damage lawsuits are disposed of summarily or settled, often without any significant participation by parties. Mandatory pre-dispute arbitration agreements bar the courthouse to consumers and employees. In a world in which formal public dispute resolution is out of reach to so many, informal dispute resolution may offer the only path to procedural fairness for a large majority of the population. Today, more than ever, we need to know more about how to minimize the risk of prejudice in ADR.