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Enforcement for the Twenty-First Century**

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The Truth Is Out There:
Revamping Federal Antidiscrimination Enforcement for the Twenty-First Century[†]

by Marcia L. McCormick*

I. INTRODUCTION

Employment discrimination laws in the United States have not created full equality in the workplace. The *Wall Street Journal* recently reported that men of color and women of all colors have not only not caught up to white men, but have regressed recently in wages, representation in management, and representation in jobs in line for promotion to management.¹ Black women, for example, earn sixty-three percent of what white men earn, and Latina women earn only fifty-two percent of what white men earn.² These differences cannot be explained, or at least explained fully, by neutral factors like differences in education or time taken out of the work force.³

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¹Carol Hymowitz, *On Diversity, America Isn't Putting its Money where its Mouth Is*, WALL ST. J., Feb. 25, 2008, at B1.

²*Id.*

³*Id.* For more discussion of the shortfalls, see Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 21-22 (2006); Christine Littleton, *Reconstructing Sexual Identity*, 75 CAL. L. REV. 1279, 1325-26 (1987); Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Litigation and its Effects*, 81 TEX. L. REV. 1249 (2003).

Despite major change in public attitudes about race and gender, and despite progress for women and minorities in the workplace, . . . there remains considerable work to eliminate discrimination from the workplace completely. The Gallup Organization, *Employee Discrimination in the Workplace 12* (2005), available at

Additionally, the number of women of all colors in corporate officer posts and in the pipeline for those posts at Fortune 500 companies has fallen in the past two years.⁴ Women of color make up just two percent of those corporate officer posts.⁵

While these figures do represent some change from 1964, and employer practices have certainly changed since then, full equality requires greater accountability for those who make employment decisions.⁶ That accountability requires a strong enforcement system, which, in turn, requires greater federal involvement in enforcement and a mechanism to publicize the state of the nation's workplaces.⁷ This paper proposes taking private sector employment discrimination out of the hands of the Equal Employment Opportunity Commission (EEOC) and creating a new federal body to take a more direct role in enforcement and regulation. Roles this body could perform include investigating and issuing fact-finding about the state of individual workplaces, adjudicating discrimination claims, and promoting good practices and voluntary compliance by private employers.

Creating a federal agency to fill this role would remove two of the largest obstacles to eradicating employment discrimination—which I have labeled the enforcement gap⁸ and the secrecy effect⁹—and would foster greater workplace equality. This article is a first step in the recharacterization and reconstruction of anti-discrimination enforcement. It seeks to identify the problem with precision and to make a normative case for stronger federal enforcement.¹⁰

With these two foundational issues in mind, I propose removing private sector discrimination from the EEOC's enforcement authority and creating a new agency with a

http://media.gallup.com/government/PDF/Gallup_Discrimination_Report_Final.pdf.

⁴Hymowitz, *supra* note 1, at B1.

⁵*Id.*

⁶See Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589 (2006) (finding that affirmative action plans in combination with accountability structures for diversity provided the only consistent improvement in diversity in management).

⁷See Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405 (arguing that antidiscrimination law is a mechanism of distributive and not just corrective justice).

⁸See *infra* notes ___ - ___ and accompanying text.

⁹See *infra* notes ___ - ___ and accompanying text.

¹⁰The specifics of agency design will be addressed in future work.

significantly different model. There is a need to be filled that individuals cannot accomplish themselves¹¹ and which Congress probably cannot force the states to fill, unless it links the obligation with funding.¹² But the current model, with the EEOC writing compliance guidelines, encouraging mediation, and acting as prosecutor occasionally, is not working.

The new agency should move from a prosecutorial/compliance/recommendation-issuing model that currently exists to a model that provides best practices guidance with accountability standards and rewards for employers who meet those, and which also functions as a standing fact finding agency with independent power to investigate and publicize information about the state of the nation's workplaces.

A model that provides this investigation and publicity function might be found in the truth commission. The truth commission is a concept borrowed from international law, a tool of transitional justice.¹³ Transitional justice is a theory of how a repressive and illegitimate government can move to a legitimate one. A truth commission is a body established to help accomplish that transition by researching and reporting on human rights abuses over a certain period of time in a particular country or in relation to a particular conflict. Truth commissions in those countries have allowed individuals, relatives, and perpetrators to give evidence of human rights abuses, providing an official forum for their accounts. In most instances, truth commissions are also required by their mandate to provide recommendations on steps to prevent a recurrence of such abuses.

The federal government already uses a similar structure for legislative hearings and for blue-ribbon commissions, established to react to public crises. Those hearings serve information gathering, fact-finding, recommending, and publicizing functions. The 9-11 Commission even adjudicated claims and distributed compensation from a fund to victims of the September 11 terrorist attacks. Investigating and issuing reports is also the way that the United States Civil Rights Commission functions. I propose to take the concept of those existing structures one step further to focus on more disputes in a more narrow area.

Using that fact-finding, recommending, and publicizing structure as the model, the new agency could perform the information disseminating function necessary to enforcement, and could also participate in more effectively promoting best practices. While models exist for these

¹¹See *infra* notes ___ - ___ and accompanying text (discussing the enforcement gap).

¹²*E.g.* *Printz v. U.S.*, 521 U.S. 898 (1997) (holding that Tenth Amendment prohibited Congress from requiring that state and local law enforcement do background checks for gun purchases); *New York v. U.S.*, 505 U.S. 144 (1992) (providing that Congress cannot force states to accept ownership or regulate nuclear waste in a particular way).

¹³See PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS* 11 (2002).

functions, this agency would have broader responsibilities, which would warrant significant modification, and those modifications are things future papers will explore. To that end, Part II outlines the enforcement scheme of employment discrimination laws and elaborates on the gaps in that scheme. It also describes the EEOC, both as it has historically worked and its current strategy. Part III proposes a new role for a federal agency and outlines its potential functions.

II. ENFORCEMENT OF EMPLOYMENT DISCRIMINATION LAWS

The current legal landscape regulating the employment relationship is guided by principles in serious tension with one another. Courts, legislatures, many scholars, many employers, and at least some employees view the employment relationship primarily as an economic one and a private one, but courts and legislatures have also provided employees with certain rights, the most well-known of which are the antidiscrimination laws. They operate as external limitations on how that economic and private relationship can be structured. These laws also serve to provide the public goods of justice and greater equality. These external limitations, however, are always in some tension with the economic principle of laissez-faire and the privacy principle. And that tension grows the more a relationship is seen as essentially economic and private and the less consensus there is on the substance or legitimacy of the external limitation. Employment discrimination is an area in which both of these principles are true.

The employment relationship is viewed by the law first and foremost as an economic one, to be left to the self-regulation of the marketplace.¹⁴ Despite the language of “self-regulation,”

¹⁴Employment statutes and cases presume that employers retain the discretion to manage their businesses and at least part of their business is in deciding whom to hire, what to have employees do, how much to pay them, how to treat them, and how, when, and why to discharge them. See Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 953-58 (1984) (grounding the practical and theoretical principles underlying the at-will presumption in employment relationships in a combination of contract and property principles, both of which are most often economic subjects). This economic grounding is evident in the language of labor cases especially. For example,

[the employee] surrenders his labor as a whole, and in return receives a compensation package Looking at the economic realities, it seems clear that an employee is selling his labor primarily to obtain a livelihood, not making an investment.

Int'l Bhd. of Teamsters v. Daniel, 439 U.S. 551, 560 (1979) (considering whether a union trustee for a pension plan could be liable for securities fraud).

The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor or prescribe the conditions upon which he will accept such labor from the person offering to sell it.

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 102 (1937).

In employment discrimination cases, the economic justification is conveyed by the common exhortation that courts do not sit as super-personnel boards, second guessing the

leaving something to the marketplace in the United States does not leave the government neutral or absent from that relationship. Rather the power of the state is aligned with the holders of capital, protecting their right to control their property. This alignment is modified slightly by the labor laws, which align the power of the state with workers in some instances to allow those workers to leverage their bargaining power. But the core justifications of labor law remain economic. Thus, the labor laws create relatively less tension when they are enforced.

Conversely, the imposition of substantive rules, rules that frustrate the operation of the market or invade the autonomy of the parties, can create significant doctrinal and practical tension. In theory, if the employment relationship is simply an economic one, then the market should be able to regulate all aspects of employment by itself, and the efficient outcome will be the just outcome.¹⁵ Limitations are not only unnecessary, but are also unjust. Additionally, individuals should be allowed to structure the relationships that best work for themselves in order to maximize personal utility. Limitations on the operation of the market or autonomy of the parties run counter to core Western notions of liberty and autonomy.

Some of the substantive rules imposed on the employment relationship, like social security,¹⁶ workers' compensation, unemployment insurance, and occupational safety and health, have an explicit economic justification, and the tension is less. In other words, those substantive rules that are commonly seen to guard against failures in the market or to enhance the efficiency of the market all to protect the public interest will not create so much tension. Likewise, the more consensus about the need for those limitations, the less the inherent tension will manifest.

Anti-discrimination laws are not grounded in economics, however. They may have an economic justification, but that has not been the common understanding of their function.¹⁷ Anti-

employer's business decisions. See Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031, 1115-16 & n. 337 (2004) (documenting the hundreds of cases that recite this general principle).

¹⁵See GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* 44 (2d ed. 1971) (arguing that discrimination is economically inefficient).

¹⁶Some may disagree with this characterization of social security. Since at least the 1980s, calls for reform have urged privatization of these benefits on the grounds that the market can better provide them. Those calls have been adopted by President George W. Bush, who has advocated partial privatization. *E.g.*, Exec. Order 13210, 66 Fed. Reg. 22,895 (May 2, 2001) (appointing a sixteen-member Commission to Strengthen Social Security with the mandate that "modernization must include individually controlled, voluntary personal retirement accounts").

¹⁷See David L. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement*, 42 VAND. L. REV. 1121, 1130-31 (1989) (outlining

discrimination laws are instead rights based. And being rights based, rather than economically grounded, anti-discrimination laws create significant tension with the economic model.¹⁸ Additionally, to exacerbate this tension, insufficient consensus exists on the scope of the right to be free from discrimination.

Equality in its broadest terms is a core value to U.S. society, but the meaning of equality is not quite so settled. Most people agree that those who are the same should be treated the same and that those who are different should be treated differently. Most also agree that in many cases characteristics of race, color, religion, national origin, sex, age, and disability do not make a person different in a way that matters. Thus, a fairly strong consensus exists that employers should not be able to discriminate on these bases. However, as I and others have argued, people currently do not agree on what practices constitute discrimination or how widespread discrimination is, and therefore the scope and substance of the antidiscrimination right lacks an undergirding of social consensus.¹⁹

the economic arguments advanced in favor of Title VII but noting that those who advanced that argument concluded by saying that despite the economic justification, prohibiting discrimination in employment was “the right thing to do” and an inalienable right); *see also* Jacob Gersen, *Markets and Discrimination* 82 N.Y.U. L. REV. ____ (forthcoming 2007) (outlining the law and economics analyses of the extent of employment discrimination and the potential forces driving it).

¹⁸*See* Anthony S. Chen, *The Party of Lincoln and the Politics of State Fair Employment Practice Legislation in the North, 1945-64*, 112 AM. J. SOCIOLOGY 1713 (2007) (studying why some states adopted fair employment practices laws much more slowly than others and concluding the slowness was a result of key GOP office holders allied with organized business and motivated by free-market, anti-regulatory ideology).

¹⁹*E.g.*, Deborah A. Calloway, *St. Mary’s Honor Center v. Hicks: Questioning the Basic Assumption*, 26 CONN. L. REV. 997, 998 (1994); Marcia L. McCormick, *The Allure and Danger of Practicing Law as Taxonomy*, 58 ARK. L. REV. 159 (2005); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 284 (1997). Robert Belton has argued that at least before Title VII was enacted, employment discrimination was seen as a moral issue, not a legal one. Belton, *supra* note 5, at 913-14.

Without broad consensus on the scope or substance of the right, the tension between the rights model and the economic basis of the employment relationship is large. When it comes to enforcement, this tension creates serious practical difficulties and doctrinal incoherence. The sections that follow lay out the enforcement model in place and the gaps in enforcement that have resulted.

A. The Enforcement Model in Place

The main employment discrimination statutes include section 1981,²⁰ Title VII of the Civil Rights Act of 1964,²¹ the Equal Pay Act,²² the Age Discrimination in Employment Act,²³ Title I of the Americans with Disabilities Act,²⁴ sections 501 and 505 of the Rehabilitation Act of 1973,²⁵ and the Family Medical Leave Act.²⁶

Most of these follow the same model. They prohibit employers from taking action to harm an employee when those actions are motivated by the employee's status as a member of a protected group.²⁷ Most also prohibit actions taken for a neutral reason but that affect members of

²⁰42 U.S.C. § 1981 (2000) (prohibiting racial discrimination in contracts).

²¹42 U.S.C. §§ 2000e-1 to 2000e-17 (2000) (enforcement authority codified at 42 U.S.C. §§ 2000e-4, e-5, e-12) (2000)).

²²29 U.S.C. §§ 206(d), 209, 211, 213, 215-19, 255-56, 259-60, 262 (2000).

²³29 U.S.C. §§ 621-34 (2000) (enforcement authority codified at 29 U.S.C. § 628 (2000)).

²⁴42 U.S.C. §§ 12111-17 (2000) (enforcement authority codified at 42 U.S.C. § 121116 (2000)).

²⁵29 U.S.C. §§ 791, 794, 794a (2000) (enforcement authority codified at 29 U.S.C. § 794(a)(1) (2000)).

²⁶29 U.S.C. §§ 2601-54 (2000).

²⁷29 U.S.C. § 206(d) (2000) (prohibiting different pay for the same work when that difference is because of sex under the Equal Pay Act); 29 U.S.C. 623 (2000) (barring decisions made on the basis of age as made about a person forty years old or older); 29 U.S.C. § 794(a) (2000) (prohibiting discrimination against qualified individuals with disabilities by anyone receiving federal funding); 42 U.S.C. § 2000e-2(a) (2000) (prohibiting discrimination on the basis of race, color, national origin, religion, and sex); 42 U.S.C § 12112 (2000) (prohibiting discrimination against qualified individuals with disabilities).

The FMLA is couched in anti-discrimination terms, in part. 29 U.S.C. § 2601 (2000); *see Nevada Dep't of Human Servs. v. Hibbs*, 538 U.S. 721, 728 & n.2 (2003). However, rather than simply outlaw discrimination against those who need to take family leave, the FMLA requires

a protected group disproportionately.²⁸ They further prohibit employers from retaliating against employees who seek the protection of the statutes or who help others seek that protection.²⁹ In addition to the similarity in protections, these statutes allow employees to sue the employer and to get damages, equitable relief, and attorneys fees for violations of the statutes.³⁰

Because the actions prohibited and the remedies provided are similar, these statutes also provide similar enforcement schemes. All but section 1981 are enforced in part by a federal administrative agency. For all of the remaining statutes except for the Family Medical Leave Act, that enforcement agency is the EEOC.

Originally, the EEOC was empowered only to provide technical assistance, to investigate, and to attempt conciliation; it could not prosecute charges of discrimination and could not adopt substantive interpretive regulations.³¹ In 1972, the EEOC was given the power to prosecute

that employers allow all employees, regardless of gender, up to twelve weeks of unpaid leave for their own serious health issue, or that of a close family member or for the birth or adoption of a child. 29 U.S.C. § 2612 (2000).

²⁸Smith v. City of Jackson, 544 U.S. 228 (2005) (recognizing disparate impact under the ADEA); Raytheon Co. v. Hernandez, 540 U.S. 44, 50 (2003) (holding that disparate impact claims were cognizable under the ADA); Alexander v. Choate, 469 U.S. 287, 296-300 (1985) (holding that some form of disparate impact claims were cognizable under Section 504 of the Rehabilitation Act); Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971) (recognizing disparate impact under Title VII). The structure of the FMLA, mandating that leave be provided, might be seen as a way to avoid the disparate impact on women that caretaking responsibilities often provide. *See Hibbs*, 538 U.S. at 728-30.

²⁹29 U.S.C. § 215(a)(3) (2000) (containing the anti-retaliation provision for the Equal Pay Act); 29 U.S.C. § 623(d) (2000) (containing the anti-retaliation provision for the ADEA); 42 U.S.C. § 2000e-3 (2000) (prohibiting retaliation under Title VII); 42 U.S.C. § 12203 (2000) (prohibiting retaliation and coercion under the ADA). Section 504 of the Rehabilitation Act has been interpreted to prohibit retaliation. *E.g.* Gribcheck v. Runyon, 245 F.3d 547, 550 (6th Cir. 2001); Sherman v. Runyon 235 F.3d 406 (8th Cir. 2000). The Supreme Court is currently considering whether a cause of action for retaliation exists under section 1981. *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 30 (2007) (granting certiorari).

³⁰29 U.S.C. § 216(b) (2000) (providing for damages, equitable relief, and attorneys' fees under the Equal Pay Act); 42 U.S.C. § 2000e-5(k) (2000) (providing for attorneys fees for violations of Title VII).

³¹Pub. L. No. 88-352, 78 Stat. 241 (1964); *see also* David L. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement*, 42 VAND. L. REV. 1121, 1134 (1989). In 1972, it was given the power to bring causes of action against

actions in federal court.³² For Title VII, it still lacks the power to issue regulations with the force of law.

The EEOC acts as something of a gatekeeper, but not a very strong one because nothing the EEOC does affects an employee's ability to pursue the charge in court; really it is simply a bureaucratic hurdle for most.³³ Nonetheless, an employee who has suffered a violation of one of the statutes must file a charge with the EEOC within 180 days of the event³⁴ or the employee will not be able to file an action in court later. If the charging party's state has an anti-discrimination law that covers the situation, the time for filing a charge with the EEOC is increased to 300 days.³⁵ After the charge is filed, the EEOC notifies the employer of the charge.³⁶ Charges that

employers. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. Additionally, it was empowered to promulgate substantive regulations under the Age Discrimination in Employment Act, Pub. L. No. 90-202, § 9, 81 Stat. 602 (1967), and the Americans with Disabilities Act, Pub. L. No. 101-336, § 106, 104 Stat. 327 (1990).

But Title VII does create an incentive for employers to comply with EEOC regulations by providing that “no person shall be subject to any liability or punishment for . . . an unlawful employment practice if [the person acted in] good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission.” 42 U.S.C. § 2000e-12(b) (2000).

³²Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. The EEOC also has the power to adjudicate federal claims, but not adjudicate private sector disputes. The adjudication of charges in the federal sector is beyond the scope of this paper.

³³As Michael Selmi has written, “although a plaintiff must file a claim with the agency, it is entirely possible that the EEOC will serve no function other than to issue a mandatory right-to-sue notice, which is akin to requiring a driver to apply for a bridge token in advance.” Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L. J. 1, 8 (1996).

³⁴29 U.S.C. § 626(d) (2000) (ADEA); 42 U.S.C. 2000e-5(e)(1) (2000) (Title VII). The Equal Pay Act does not require first filing a charge with the EEOC, see 29 U.S.C. § 216(b), but because there is significant overlap between the Equal Pay Act and Title VII, for situations that implicate both statutes, the EEOC recommends that parties file charges under both laws within the timeline, EEOC, *Filing a Charge of Employment Discrimination*, at http://eEOC.gov/charge/overview_charge_filing.html (last modified Aug. 13, 2003).

³⁵42 U.S.C. § 2000e-5(e)(1) (2000). A majority of states impose a shorter period for filing with their agencies, though, so the filing deadline is not always extended when a state has its own agency. Ariz. Rev. Stat. Ann. § 41-1481(A) (2007) (providing a 180-day period); Colo. Rev. Stat. § 24-34-306 (2006) (providing a six-month period); Conn. Gen. Stat. § 46a-82(e) (2007) (providing a 180-day period); Del. Cod Ann. Tit. 19 § 712(c)(1) (2007) (limiting filing period to 120 days); Ga. Code Ann. § 45-19-36 (2007) (providing 180-day period); Haw. Rev. Stat. Ann. §

strongly suggest that the employer has violated the law are marked for priority investigation.³⁷ If the parties are willing to mediate, investigation is suspended during the mediation process.³⁸ The charge can also be settled at any point in the investigation process, although settlement between an employee and employer would not alter the EEOC's ability to continue to investigate the employer unless the EEOC joins in the settlement.³⁹ If the investigation reveals that discrimination has occurred, the EEOC will attempt to conciliate the matter with the employer to develop a remedy for the discrimination.⁴⁰ If conciliation is successful, the parties will sign a settlement agreement, and not proceed to litigation.⁴¹ If conciliation is not successful, however,

368-11 (LexisNexis 2007) (same); 775 Ill. Comp. Stat. Ann. 5/7A-102 (LexisNexis 2007) (same); inc. Code Ann. § 22-9-1-3 (LexisNexis 2007) (same); Iowa Code § 216.15 (2006) (same); Kan. Stat. Ann. § 44-1005 (2006) (providing a filing period of six months); Ky. Rev. Stat. Ann. § 344.200 (LexisNexis 2006) (using 180-day filing period); La. Rev. Stat. Ann. § 51:2257 (2007) (same); Me. Rev. Stat. Ann. tit.5, § 4611 (2006) (requiring complaint to be filed within six months); Md. Ann. Code art. 49B, § 9A (2007) (same); Mo. Rev. Stat. § 213.075 (2007) (providing a 180-day filing period); Mont. Code Ann. § 49-2-501 (2005) (same); N.H. Rev. Stat. Ann. § 354-A:21 (2007) (same); N.J. Stat. Ann. § 10:5-18 (LexisNexis 2007); Ohio Rev. Code Ann. § 4112.05 (LexisNexis 2007) (giving a six month limitations period); Okla. Stat. tit. 25 § 1502 (2007) (using 180-day period); Pa. Stat. Ann. § 959 (LexisNexis 2006) (same); S.C. Code Ann. § 1-13-90 (2006) (same); S.D. Codified Laws § 20-13-31 (2007) (same); Tenn. Code Ann. § 4-21-302 (2007) (same); Tex. Lab. Code §§ 21.201-21.202 (2007) (same); Utah Code Ann. § 34A-5-107 (2007) (same); Wash. Rev. Code Ann. § 49.60.230 (LexisNexis 2007) (using a six-month period); Wyo. Stat. Ann. § 27-9-106 (2007) (same); 6 Alaska Admin. Code tit. 6, §30.230 (2008) (providing a 180-day period); Mich. Admin. Code R 37.4(6) (2007) (same); 22 Va. Admin. Code § 25-10-30 (2007) (same).

³⁶42 U.S.C. § 2000e-5(b) (2000).

³⁷NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: ORGANIZING FOR THE FUTURE 13-14 (2003) [hereinafter ORGANIZING EEOC]

³⁸*Id.* at 15

³⁹*See id.*; see also Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937 (2006).

⁴⁰42 U.S.C. § 2000e-5(b) (2000).

⁴¹*See* 42 U.S.C. § 2000e-5(f)(1) (2000) (providing that litigation commences only if “the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission”).

the EEOC may sue, and the employee may intervene.⁴²

Alternatively, the EEOC may close the case and issue a letter notifying the employee of the right to sue the employer in court.⁴³ If the EEOC finds the evidence insufficient to support the charge, it will dismiss the charge, but at the same time issue a notice to the employee that the employee retains the right to sue the employer in court.⁴⁴ If the investigation has not been resolved 180 days⁴⁵ after the charge was filed, the employee can request a right to sue letter, and the EEOC will issue the letter and stop the investigation.⁴⁶ Once an employee has received notice of the right to sue, the employee has ninety days to commence an action.⁴⁷

The EEOC has implemented a five-point plan toward enforcement:⁴⁸

1. proactive prevention, which focuses on education and outreach to both employees and employers;⁴⁹

⁴²42 U.S.C. §§ 2000e-5(f)(1), 2000e-6 (2000).

⁴³42 U.S.C. § 2000e-5(f)(1) (2000).

⁴⁴*Id.*

⁴⁵For the ADEA, the time period is any time after sixty days.

⁴⁶42 U.S.C. § 2000e-5(f)(1) (2000).

⁴⁷42 U.S.C. § 2000e-5(f)(1) (2000). That action may be brought in federal court. 42 U.S.C. § 2000e-5(f)(3) (2000). Because state courts usually also have jurisdiction over federal issues, an action may also be brought in state court if the state lacks its own employment discrimination statute, or if the state allows its employment discrimination cases to be heard in the state courts. *Howlett v. Rose*, 469 U.S. 356 (1990); *Testa v. Katt*, 330 U.S. 386 (1947). *But see Alden v. Maine*, 527 U.S. 706 (1999) (holding that the states cannot be forced to hear federal claims if they don't provide jurisdiction for parallel state claims)

The Equal Pay Act allows parties to go straight to state or federal court, and does not require an employee to go to the EEOC first. *See* 29 U.S.C. §216(b) (2000).

⁴⁸U.S. COMM'N ON CIVIL RIGHTS, TEN-YEAR CHECKUP: HAVE FEDERAL AGENCIES RESPONDED TO CIVIL RIGHTS RECOMMENDATIONS: VOL. IV: AN EVALUATION OF THE DEPARTMENTS OF EDUCATION, HEALTH AND HUMAN SERVICES, AND HOUSING AND URBAN DEVELOPMENT, AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 44 (2004) [hereinafter TEN-YEAR CHECK-UP], available at <http://www.usccr.gov/pubs/10yr04/10yr04.pdf>.

⁴⁹EEOC FY-06, *supra* note 10, at 13-17, 33; ORGANIZING EEOC, *supra* note 36, at 18-19. Part of this outreach effort includes the EEOC's compliance manual. From 1998 to 2004, the EEOC issued only two new sections to that manual, and the Civil Rights Commission has recommended that it complete and issue a full new manual. 10-yr. report, at 46-47. The

2. proficient resolution, which attempts to resolve charges fairly and efficiently;
3. promotion and expansion of its mediation program;
4. strategic enforcement and litigation, which seeks to focus on systemic cases; and
5. EEOC as a model workplace, which endeavors to have the agency operate under the goals it would set for the broader workforce.

Two of these points, mediation and strategic litigation, deserve a little more explanation. The EEOC's policy encourages parties to mediate their claims, and it is putting significant resources into its mediation program.⁵⁰ This push to mediate is a relatively recent development. In 1991, the EEOC first experimented with mediation in four field offices.⁵¹ The EEOC fully adopted the program, writing a policy statement in 1994 that set forth core principles for alternative dispute resolution (ADR) in antidiscrimination cases. The EEOC continued to expand its use of mediation, and now about half of all EEOC charges are mediated.⁵² Most of those are charges that appear to have merit but require more information before a decision can be made on those merits.⁵³

The strategic litigation strategy focuses on systemic cases, which it defines as "pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location."⁵⁴ In 2006, the EEOC filed suit in 370 cases, and more than forty percent of the EEOC's case load involved multiple employees or challenged policies that affected a number of employees.⁵⁵ The EEOC obtains some relief in over ninety percent of its cases.⁵⁶

Although the EEOC plays a role in enforcement through its conciliation, mediation, and

Commission has also criticized the EEOC's use of informal guidance and its failure to include guidance on some key types of discrimination. *Id.* at 48.

⁵⁰EEOC FY-06, *supra* note 10, at 7.

⁵¹ORGANIZING EEOC, *supra* note 36, at 15.

⁵²*Id.* at 13-14.

⁵³ORGANIZING EEOC, *supra* note 36, at 13, 15. Those cases which the EEOC determines are priority charges to which it devotes principle investigative and settlement efforts are not referred for mediation. *See id.*

⁵⁴EEOC FY-06, *supra* note 10, at 9; *see also* EEOC SYSTEMIC REPORT, *supra* note 10.

⁵⁵EEOC FY-06, *supra* note 10, at 9.

⁵⁶*Id.* at 9-10.

litigation efforts,⁵⁷ it relies primarily on private parties coming to it to file charges, and then the bulk of actions brought in court to enforce the antidiscrimination laws are brought by private parties. In 2006, over 14,000 suits were brought in federal court, and while that number is lower than the number of suits brought in prior years,⁵⁸ that number is still forty times the number of suits brought by the EEOC.⁵⁹ That number does not capture the number of cases settled before a charge was filed or a suit was brought.

The second largest amount of enforcement comes from state and local fair employment practices agencies (FEPAs), over ninety of them, which handle over 50,000 charges annually.⁶⁰ Even though the state agencies together handle fewer charges than the EEOC, the workload is significantly greater for many of the states. Several states have agencies that investigate and attempt to conciliate charges, much like the EEOC does, and several also adjudicate charges either as the sole remedy or as an alternative to litigation in court.⁶¹ Without a single source that

⁵⁷The EEOC reports that it resolved almost 16,500 cases in favor of employees in 2006 through mediation, settlement, or consideration for litigation. EEOC FY-06, *supra* note 10, at 6 (reporting 22.2% of 74,308 resolutions were merit factor resolutions).

⁵⁸ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 2006 JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR tbl. C-2A (2007).

⁵⁹The EEOC brings about 350 actions against employers per year. *See* EEOC FY-06, *supra* note 10, at 6.

⁶⁰ExpectMore.gov, Detailed Information on the Equal Employment Opportunity Assessment, Questions/Answers (Detailed Assessment) 2.5 (2006), *at* <http://www.whitehouse.gov/omb/expectmore/detail/10003914.2006.html>.

⁶¹Mich. Const. art. V, § 29 (creating agency to investigate and adjudicate discrimination claims); Alaska Stat. §§ 18.80.110-130 (2006) (providing that agency may function as investigator, prosecutor, and adjudicator); Ariz. Rev. Stat. Ann. § 41-1481 (2001) (creating role for agency as investigator and prosecutor); Cal. Gov't Code §§ 12930(f), (h), 12935, 12963, 12965 (Deering 2007) (providing that agency can be investigator, prosecutor, and adjudicator); Colo. Rev. Stat. § 24-34-305 (2006) (same); Conn. Gen. Stat. §§ 46a-54, 56, 82, 84 (2007) (same); Del. Code Ann. tit. 19, § 712(a)(3), (c) (2007) (creating roles as investigator and prosecutor); D.C. Code Ann. § 2-1403.04, 1404.02, 1411.03 (LexisNexis 2007) (creating one agency to investigate and prosecute claims and another to adjudicate); Fla. Stat. § 760.11 (2007) (providing that agency is investigator and allowing employees to opt for agency adjudication instead of going to court); Ga. Code Ann. § 45-19-36, 37 (2007) (limiting agency role to investigator, but providing for cases with reasonable cause to be referred to special masters for hearings); Haw. Rev. Stat. Ann. §§ 368-3, 13, 14 (empowering agency to serve as investigator, prosecutor, and adjudicator); Idaho Code Ann. §§ 67-5906 through 5908 (2007) (creating role as investigator and prosecutor); 775 Ill. Comp. Stat. Ann. §§ 5/7A-102, 8A-102 (LexisNexis 2007)

collects information on FEPAs and their activities and with uneven reporting of caseload statistics, it is difficult to assess how much enforcement state activity is responsible for. This enforcement model, combining the efforts of state and local FEPAs with the efforts of a federal agency has left several gaps in enforcement.

B. Gaps in Our Enforcement Model

The system of enforcement of employment discrimination laws has a gap, as is demonstrated by the lack of workplace equality that still exists. Title VII has not created as much

(creating one agency to serve as investigator and prosecutor and a second agency to serve as adjudicator); Inc. Code Ann. § 22-9-1-6 (LexisNexis 2007) (providing a role for the agency as investigator and adjudicator); Iowa Code §§ 216.5, .15 (2006) (empowering agency to serve as investigator, prosecutor, and adjudicator); Kan. Stat. Ann. § 44-1005 (2006); (creating role for agency as prosecutor and adjudicator); Ky. Rev. Stat. Ann. §§ 344.180, 200, 210 (empowering agency to serve as investigator and adjudicator); La. Rev. Stat. Ann. §§ 51:2235, 2237 (2007) (providing that agency can be investigator, prosecutor, and adjudicator); Me. Rev. Stat. Ann. tit. 5 §§ 4566, 4612, 4613 (2006) (creating role as investigator and prosecutor); Md. Ann. Code art. 49B, §§ 9A, 10, 11 (empowering agency to serve as investigator, prosecutor and adjudicator); Mass. Ann. Laws ch. 151B, §§ 3, 5 (LexisNexis 2007) (same); Mich. Comp. Laws Serv. § 37.2602 (same); Minn. Stat. § 363A.28, 29, 33 (2006) (same); Mo. Rev. Stat. § 213.075 (2007) (same); Mont. Code Ann. §§ 49-2-504, 505 (2005) (creating one agency to investigate and attempt to conciliate and another to adjudicate); Neb. Rev. Stat. Ann. § 48-1117 (LexisNexis 2007) (creating roles for agency as investigator and adjudicator); Nev. Rev. Stat. Ann. §§ 233.150, 170 (LexisNexis 2007) (same); N.H. Rev. Stat. Ann. §§ 354-A:5, 21 (same); N.J. Stat. Ann. §§ 10:5-8, 14, 16 (same); N.M. Stat. Ann. §§ 28-1-4, 10, 11 (empowering agency to investigate, prosecute, and adjudicate); N.Y. Exec. §§ 295, 297 (Consol. 2007) (same); N.D. Cent. Code §§ 14-02.4-22, 4-23 (2007) (same); Ohio Rev. Code Ann. §§ 4112.04, 05 (LexisNexis 2007) (providing that agency can investigate and adjudicate); Okla. Stat. tit. 25, § 1501-02 (2007) (empowering agency to investigate, prosecute, and adjudicate); Or. Rev. Stat. § 659A.825, 835, 845, 850 (2005) (same); Pa. Stat. Ann. §§ 957, 959 (LexisNexis 2006) (same); R.I. Gen. Laws § 28-5-13, 5.1-6 (2007) (same); S.C. Code Ann. § 1-13-70 (2006) (same); S.D. Codified Laws §§ 20-13-7, 29, 32, 35 (2007) (creating one agency to investigate and another to prosecute and adjudicate claims); Tenn. Code Ann. § 4-21-202 (2007) (empowering agency to investigate, prosecute, and adjudicate claims); Tex. Lab. Code §§ 21.003, 124, 251 (2007) (allowing agency to investigate and prosecute claims); Utah Code Ann. § 34A-5-107 (2007) (creating an agency to investigate and issue relief upon sufficient evidence of discrimination and a second agency to hold a further hearing on those findings); Va. Code Ann. § 2.2-2634 (2007) (empowering agency to investigate and adjudicate claims); Wash. Rev. Code Ann. § 49.60.120 (LexisNexis 2007) (same); W. Va. Code Ann. §§ 5-11-8, 10 (LexisNexis 2007) (empowering agency to investigate, prosecute, and adjudicate); Wis. Stat. Ann. § 111.39 (LexisNexis 2006) (creating one agency to investigate and another to adjudicate); Wyo. Stat. Ann. §§ 27-9-104, 106 (2007) (empowering agency to investigate and adjudicate).

social change as supporters had originally hoped.⁶² Although the language of Title VII is potentially sweeping, the enforcement scheme has never contained the elements supporters believed necessary for real change.⁶³ Title VII was modeled on fair employment practice laws that had been adopted by states, and which had had little effect.⁶⁴ In those states, the laws were enforced either by private suits or the state attorney general, which left too much control up to the political will of the state attorney general and the interpretation of the courts.⁶⁵ Now, the system continues to rely primarily on states⁶⁶ and on litigation brought by private parties⁶⁷ to enforce the law. Not surprising to some, the resulting enforcement is rather weak. First, not all states enforce the law or the norms underlying it.⁶⁸ Second, even for those states that do have laws prohibiting discrimination in the private sector, many of the state systems are considered ineffective, relying too heavily on either private parties alone or on the state attorney general alone to bring an

⁶²ALFRED W. BLUMROSEN, *MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY* 4 (1993) (arguing that “the effort to ameliorate long standing patterns of race and sex subordination [through Title VII] is perhaps *the most ambitious social reform effort ever undertaken in America*” (emphasis in original)); *see also supra* note 1.

⁶³Rose, *supra* note 9, at 1134.

⁶⁴*Id.* Some of these agencies even had full cease and desist power. Belton, *supra* note 5, at 913 (stating that even with this power, states did not use it effectively).

⁶⁵*Id.*

⁶⁶Joseph P. Witherspoon, *Civil Rights Policy in the Federal System: Proposals for a Better Use of Administrative Process*, 74 *YALE L.J.* 1171, 1172 (1964) (stating that Congress and the public expected civil rights to be enforced primarily at the state and local level and expected Title VII to operate primarily in the Southern states which had not challenged the violation of civil rights, citing as support for this proposition S. Rep. No. 872, 88th Cong., 2d Sess., 2 U.S.C.C.A.N. 2368 (1964)).

⁶⁷Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 *VAND. L. REV.* 905 (1978); *see also* EEOC v. Assoc. Dry Goods Corp., 449 U.S. 590, 603 n.21 (1981); Nantiya Ruan, *Bringing Sense to Incentives: An Examination of Incentive Payments to Named Plaintiffs in Employment Discrimination Class Actions*, 10 *EMP. RTS. & EMP. POL’Y J.* 395, 400-01 (2006).

⁶⁸For example, Alabama, Georgia, and Mississippi do not prohibit discrimination by private employers, except that Mississippi prohibits discrimination on the basis of military status and in all three at least some public sector employees are protected; in Alabama, only employees of the legislature are protected. ALA. CODE §§ 25-1-21 through 29-4-3 (2007); GA. CODE ANN. §§ 45-19-29, 45-19-22, 45-19-28, 34-1-2, 34-5-3 (2007); MISS. CODE ANN. §§ 25-9-149, 33-1-15 (2007).

action.⁶⁹

Private enforcement through litigation is also not as effective as we might hope, for a number of reasons.⁷⁰ The danger of retaliation or being blacklisted within an industry places practical limitations on workers' ability to challenge the actions of current or even past employers.⁷¹ As a practical matter, "[o]nly in our dreams are we free. The rest of the time we need wages."⁷² Additionally, many employees do not know their rights, lack resources to vindicate them or to attract representation to help vindicate them, or are subject to agreements to submit any disputes to ADR.⁷³ The system of enforcement does not compensate for this lack of power in employees.

⁶⁹Belton, *supra* note 5, at 918-19.

⁷⁰*See generally* Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. Rev. ____ (forthcoming 2008) (thoroughly documenting the way that the system of private enforcement fails employees), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1010181#PaperDownload.

⁷¹*Id.* at ____ [unpublished version at 34-36] (citing Jane Adams-Roy & Julian Barling, *Predicting the Decision to Confront or Report Sexual Harassment*, 19 J. ORG. BEHAV. 329, 334 (1998) (finding that women who reported sexual harassment internally through formal channels suffered more negative outcomes than did those who did nothing); Theresa M. Beiner, *Using Evidence of Women's Stories in Sexual Harassment Cases*, 24 U. ARK. LITTLE ROCK L. REV. 117, 124-25 (2001) ("Many plaintiffs' lawyers would tell you that once an employee complains about discrimination on the job, he or she can usually consider that employment relationship over."); Mindy E. Bergman et al., *The (Un)reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment*, 87 J. APPLIED PSYCHOL. 230 (2002) (describing a study which found that despite women's subjective views that reporting harassment improved their situation, empirical outcomes demonstrated that the women suffered adverse consequences); Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 1, 32-42 (2005) (describing studies of retaliation); Matthew S. Hesson-McInnis & Louise F. Fitzgerald, *Sexual Harassment: A Preliminary Test of an Integrative Model*, 27 J. APPLIED PSYCHOL. 877, 896 (1997) ("[A]ssertive and formal responses were actually associated with more negative outcomes of every sort."); Shereen G. Bingham & Lisa L. Scherer, *Factors Associated with Responses to Sexual Harassment and Satisfaction with Outcome*, 29 SEX ROLES 239, 247-48 (1993) (same)).

⁷²TERRY PRATCHETT, WYRD SISTERS 235 (1988) (1st ROC prtg. 1990).

⁷³Brake & Grossman, *supra* note 70, at ____ [unpublished version at 34-36]; Ruan, *supra* note 5, at 397, 410-11 (detailing risks like retaliation, ostracization, and blacklisting within an industry); *see also infra* notes ____, detailing the extent of workplaces that use pre-dispute arbitration or other forms of ADR.

As mentioned above, the EEOC was one mechanism created to supplement the enforcement of states and individuals, and its most powerful weapon is litigation: [T]he most dramatic shift [in the power of the EEOC] was in 1972 when we got the litigation authority. You changed the whole orientation mission of the agency which was up until then the investigation and conciliation of charges of employment discrimination. Investigation- conciliation remained, but you had an enormous club that you could walk into federal district court with. And we could do it ourselves and didn't have to rely on the private bar...It was the force of the United States of America, and I think what made us more conscious of it was the caliber of people recruited crackerjack trial lawyers and crackerjack appellate lawyers with many years of experience.⁷⁴

...

Oh, no question about it [The power to litigate] gave this agency substantially more teeth. In the first place, just the growl itself was effective from time to time, just the fact that you were able to go to court got some positive effects.⁷⁵

However, the agency lacks the resources to bring suits in every meritorious case and therefore chooses to get involved only in cases involving more than one employee or which could lead to a change in policies for a number of employees.⁷⁶ More and a different type of federal involvement is needed for effective enforcement and accountability.

Another obstacle to ending discrimination, related to the enforcement gap is the secrecy effect. The secrecy effect is caused by the ability of litigants to hide information about claims of discrimination through alternative forms of dispute resolution. Since the Supreme Court held that employers could require employees to arbitrate their statutory rights,⁷⁷ growing numbers of employers have required as a condition of employment that employees sign pre-dispute

⁷⁴Comments of Ronnie Blumenthal, *in* EEOC, Making Right a Reality, <http://www.eeoc.gov/abouteeoc/35th/voices/making.html> (containing excerpted quotes from 20-year veterans of the EEOC from EEOC, MAKING A RIGHT A REALITY: AN ORAL HISTORY OF THE EARLY YEARS OF THE EEOC, 1965 - 72 (1998)).

⁷⁵Comments of Donald Hollowell, *in* EEOC, *supra* note 74.

⁷⁶U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2006 PERFORMANCE AND ACCOUNTABILITY REPORT 9 (2006) [hereinafter EEOC FY-06] (detailing its strategic litigation agenda), *available at* <http://www.eeoc.gov/abouteeoc/plan/par/2006/par2006.pdf>; *see also* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION SYSTEMIC TASK FORCE, SYSTEMIC TASK FORCE REPORT TO THE CHAIR OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (2006) [hereinafter EEOC SYSTEMIC REPORT], *available at* http://eeoc.gov/abouteeoc/task_reports/systemic.pdf.

⁷⁷*Gilmer v. Interstate Johnson/Lane Corp.*, 500 U.S. 20 (1991).

arbitration agreements, agreeing to submit all disputes to arbitration and waiving the right to go to court.⁷⁸ Aside from arbitration, other forms of ADR, such as mediation and internal dispute resolution, grow in popularity. All of these forms of ADR operate in a private system, hidden from the public.

A private system of dispute resolution would not be so problematic if the only interests at stake were the interests of employer and employee. This is simply not the case. Discrimination is a private harm, in that the individual subject to discrimination is injured, but it is also a public harm. An action taken because of a person's group status affects everyone in that group both in a corrective sense of injury and stigma, but also in a distributive sense by limiting access to social goods.⁷⁹ Thus, discrimination affects the public in a way that truly individual disputes do not.

Because of the public harm caused by discrimination, the public has an interest in knowing the extent of allegations of discrimination, knowing the information that a trial makes

⁷⁸EEOC NOTICE NO. 915.002: POLICY STATEMENT ON MANDATORY BINDING ARBITRATION OF EMPLOYMENT DISCRIMINATION DISPUTES AS A CONDITION OF EMPLOYMENT (1997), available at <http://www.eeoc.gov/policy/docs/mandarb.html>. Several studies have been conducted to try to gauge how many businesses have adopted mandatory arbitration. Those surveys reflected that by the late 1990s and early 2000s, approximately fifteen percent of companies had adopted mandatory arbitration. Alexander J.S. Colvin, *From Supreme Court to Shopfloor: Mandatory Arbitration and the Reconfiguration of Workplace Dispute Resolution*, 13 CORNELL J. L. & PUB. POL'Y 581, 586-88 (2004) (reporting on several surveys); see also KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS 189 (2004) (noting that as of 2004, the number of employees covered by mandatory arbitration agreements equalled the number covered by collective bargaining agreements). The United States General Accounting Office did a survey in the mid 1990s that suggested almost all firms with 100 or more employees used some method of ADR. U.S. GAO, GAO/HEHS 95-150, EMPLOYMENT DISCRIMINATION: MOST PRIVATE SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION 6 (1995) (reporting that while only about ten percent of these employers used arbitration, almost ninety percent used some form of ADR). And the larger the company, the more likely it is to have used arbitration. Michael H. LeRoy, *Getting Nothing for Something: When Women Prevail in Employment Arbitration Awards*, 16 STAN. L. & POL'Y REV. 573, 578 n.22 (2005) (citing *Alternative Dispute Resolution: Most Large Employers Prefer ADR as Alternative to Litigation, Survey Says*, DAILY LAB. REP. (BNA) No. 93, at A4 (May 14, 1997)). The use of arbitration has increased since the late 1990s. See Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Claims: An Empirical Comparison*, 58 DISPUTE RES. J. 44 (Jan. 2004). In his most recent article, Alexander Colvin suggests that nearly one quarter of the workforce is covered by pre-dispute arbitration agreements. Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 411 (2007) [hereinafter Colvin, *Empirical Research*].

⁷⁹Suk, *supra* note 3, at 414-15.

public, and knowing how the law is being interpreted. This knowledge is necessary to determine whether the distribution of employment opportunity is truly a just distribution. Moreover, although one function of adjudication is to settle disputes, another function of adjudication is to develop and publicize norms to help people conform their conduct to those norms.⁸⁰ If information about discrimination can be hidden from the public, the system cannot serve this norm expressing function.⁸¹

Thus, the current model of enforcement has an enforcement gap and a secrecy gap caused by three main factors. First, private suits cannot effectively and fully enforce Title VII because of the dependence of individuals on employment to live and the resulting power that gives employers. Second, private dispute resolution cannot vindicate public harms. And third, the EEOC itself is ineffective and in fact contributes to the problem of secrecy.

1. Limitations on the Ability of Private Parties to Fully Enforce Employment Discrimination Laws

Although this was not always the case, working for wages is the primary way that most of us support ourselves.⁸² In other words, while at the founding of this country, most people were self-sufficient, growing much of their own food, making many of their own goods, and trading for the rest rather than working for someone else for wages, at least since World War II, almost no one continues to be self-sufficient, and the vast majority of people work for someone else.⁸³ Thus, the vast majority of Americans depend on wages and employers to live.

In addition to this baseline level of dependence, according to survey data, twenty to forty percent of workers say that they live paycheck to paycheck.⁸⁴ At the same time, only thirty-seven

⁸⁰See Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. DISPUTE RESOLUTION 1, 3.

⁸¹*But see generally id.*

⁸²Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 532 (1997).

⁸³ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR*, at xiv-xvii (1995) (documenting the market revolution); Karst, *supra* note 64, at 532.

⁸⁴NIelsen, *CONSUMER CONFIDENCE, CONCERNS & SPENDING INTENTIONS: A GLOBAL NIelsen CONSUMER REPORT 5* (July 2007), available at <http://us.nielsen.com/news/20050613.shtml> (reporting that 23% of U.S. consumers say they have no money left once they have covered their essential living expenses); CareerBuilder.com, *Four-in-Ten Workers Live Paycheck to Paycheck*,

percent of consumers save or invest money for the future.⁸⁵ If that means that sixty-three percent of consumers have little or no savings, then it is fair to assume that the majority of American workers can ill afford to go without a paycheck for very long even if those workers are not quite living paycheck to paycheck. Only a minority of Americans is able to risk losing a job without another one to go to. A large number of people, then, are wholly dependent on the goodwill (or lack of ill will) of employers. This dependence means that not many employees are able as a practical matter to risk the displeasure of their employers, and filing a charge of discrimination or even complaining within the company of discriminatory treatment is likely to displease an employer.

Some might argue that because Title VII and the other employment discrimination laws prohibit retaliation against those who file charges with the EEOC or who complain internally about discrimination, there is no risk to the employee of losing a job (if the employee has not been terminated) or of being blacklisted by other employers (if the employee has been terminated or has quit and is seeking other work). However, despite these protections, some risk remains, as is demonstrated by the rise in charges of retaliation filed with the EEOC to record levels.⁸⁶ First, it can be difficult to prove that the employer's motive was retaliation, since proving a person's state of mind is often difficult. The state of mind is not itself observable but can only be inferred from the statements and actions of the actor, which are often capable of more than one interpretation. Second, the form that retaliation can take must be enough that it would deter a reasonable employee from objecting to the discrimination or filing a charge.⁸⁷ Evaluating whether one is acting like a reasonable employee can be challenging when one is in the middle of a dispute. Third, even if an employee can prove motive and can prove that the employer's action would deter a reasonable employee, it is not clear what the employee has to prove about the underlying discrimination in order to state a retaliation claim. In other words, there is a split in the circuits about whether in order to state a valid claim of retaliation, the facts giving rise to the underlying discrimination must be sufficient to survive a motion to dismiss, or whether simply a

According to CareerBuilder.com Survey (Mar. 12, 2007), <http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?id=pr357&sd=3/12/2007&ed=12/31/2007> (reporting that 40% say they live paycheck to paycheck and 20% of those who make \$100,000 or more say so).

⁸⁵NIELSEN, *supra* note 66, at 5 (reporting this figure for the U.S. and Canada together).

⁸⁶The EEOC's website indicates that in fiscal year 2007, 26,663 retaliation charges were filed, up 18 percent from the prior year, which is twice the rate at which charges generally rose. EEOC, Job Bias Charges Rise 9% in 2007, EEOC Reports (Mar. 5, 2008), <http://eoc.gov/press/3-5-08.html>.

⁸⁷*Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006).

good faith belief that the conduct violated the law is enough.⁸⁸ And fourth, while it is clear that activities like filing a charge or complying with an investigation by the EEOC will be protected, it is less clear what kinds of activities not in connection with a charge filed with the EEOC will be protected from retaliation.⁸⁹

Furthermore, even if the risk of retaliation were small, that risk will suffice to deter some employees from pursuing valid claims.⁹⁰ Even if the employee could win a claim of retaliation, if the employee can't risk being out of work, the employee won't take the risk of doing anything that could potentially lead to retaliation. Additionally, the employee's fear of retaliation is rational. Social science research demonstrates that complaining of discrimination backfires on those who complain. Those who complain that they have been discriminated against are perceived by others negatively even when the perceiver knows that the complaint is true, that is even when the person who hears the complaint of discrimination knows that the person actually was discriminated against.⁹¹ And so making a claim of discrimination is an inherently risky act, and that fact will reasonably deter employees from making meritorious claims. To compound that, many employees may not know their rights or may not know or want to admit that they have been discriminated against; as social psychologists have demonstrated, many people do not accurately perceive when they have been discriminated against.⁹² Finally, discrimination is difficult to detect from an individual incident. It can be subtle or heavily coded, and it will be particularly hard to detect by people who believe strongly that society is on the whole fair and legitimate.⁹³

Outside of the limitations on individuals themselves, employees face significant external hurdles in litigation. In fact, scholars have documented how few cases are brought,⁹⁴ how few

⁸⁸See *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001) (assuming without holding that plaintiff would have to show both a good faith belief that conduct amounted to unlawful discrimination and that the belief was objectively reasonable).

⁸⁹See *Crawford v. Metropolitan Gov't of Nashville*, 99 Fair Empl. Prac. Cas. (BNA) 438 (6th Cir. 2006), *cert. granted*, 76 U.S.L.W. 3391 (2008).

⁹⁰Cheryl R. Kaiser & Brenda Major, *A Social Psychological Perspective on Perceiving and Reporting Discrimination*, 31 LAW & SOC. INQUIRY 801, 818 (2006).

⁹¹*Id.* at 818-19.

⁹²*Id.* at 804-06. Some people also interpret ambiguous events as discriminatory, but that is not as common as people often think. *Id.* at 803-04, 824-25.

⁹³*Id.* at 824.

⁹⁴KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* 26-30 (1992) (reporting on a 1980 study by the Civil Litigation Research Project).

cases go to trial,⁹⁵ how few cases are resolved in favor of employees,⁹⁶ and how little private class actions seem to affect company practices.⁹⁷ Part of the reason for this is the implicit biases of the decision makers. For example, individuals predict that if *they* were to experience discrimination, they would confront the discriminator or report the matter to a supervisor, but when those same people are actually faced with discrimination, most do not do those things; still those people hold others to that higher standard, not realizing that even they cannot live up to it, and are suspicious when only one employee complains.⁹⁸

For all of these reasons, relying primarily on lawsuits brought by individuals is a poor way to enforce the laws prohibiting employment discrimination. It requires that individuals recognize that they have been discriminated against, that all who have been discriminated against speak out by bringing formal legal proceedings, and that investigators, judges, and jurors understand their own implicit biases against those who complain of discrimination and the complex nature of the employee's perception of the conduct in the first place.

This critique is supported by a recent study by Laura Beth Nielsen, Robert L. Nelson, and Ryon Lancaster for the American Bar Foundation.⁹⁹ Using a large random sampling of

⁹⁵ E.g. Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 Wake Forest L. Rev. 71, 120 n.330 (1999) (suggesting that only ten percent of employment discrimination cases go to trial); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. Empirical Legal Stud. 429, 440-41, 444 (2004) (suggesting that seventy percent of employment discrimination cases settle and plaintiffs win only just over four percent of pretrial adjudications).

⁹⁶Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP RTS. & EMP. POL'Y J. 547, 556-58, 566 (2003) (finding that cases decided in favor of plaintiffs are four times more likely to be reversed than those found in favor of defendants); Selmi, *supra* note 36, at 283-84, 309 (arguing that meritorious cases are lost or reversed on appeal); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 558, 560-61 (2001) (asserting that employers prevail in 98 percent of federal court employment discrimination cases resolved at the pretrial stage).

⁹⁷Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Litigation and its Effects*, 81 TEX. L. REV. 1249 (2003) (documenting how class actions fail to affect shareholder price or real management change in most cases).

⁹⁸Kaiser & Major, *supra* note 71, at 824; *see also* Selmi, *supra* note 76, at 556-57, 561-71.

⁹⁹Laura Beth Nielsen, Robert L. Nelson, & Ryon Lancaster, *Uncertain Justice: Litigating Claims of Employment Discrimination in the Contemporary United States* (2008), *available at*

employment discrimination cases filed between 1988 and 2003, the authors studied the resolution of those cases, accounting for the stage of litigation at which they were resolved in addition to the substantive outcome.¹⁰⁰ The authors concluded that litigation seldom provided a mechanism for systemic reform or provided a meaningful remedy for individuals.¹⁰¹

2. The Problem of ADR

Relying on litigation as the primary means to enforce the law is also problematic. Litigation brings with it methods of ADR. Methods of alternative dispute resolution were developed as alternatives to litigation and had become a popular choice for litigants with fairly wide use by the mid-1980s.¹⁰² They are attractive to courts and litigants because they resolve disputes quickly, informally, and less expensively. The main forms of ADR used in the employment discrimination context are mandatory binding arbitration and mediation. Now, nearly one quarter of the workforce is covered by pre-dispute arbitration agreements,¹⁰³ and a large number are covered by some kind of internal or external mediation.¹⁰⁴ Even more workers

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1093313.

¹⁰⁰*Id.* at 1, 9-11, 13-18.

¹⁰¹*Id.* at 31.

¹⁰²Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 668 (1986).

¹⁰³Colvin, *Empirical Research*, *supra* note 11, at 411 (extrapolating from studies a figure of between fifteen and twenty-five percent). The unionization rate in 2006 was only twelve percent, and so more employees are covered by these agreements than collective bargaining arbitration systems. *Id.* (citing U.S. Dep't of Lab., Bureau of Labor Statistics, *MLR: The Editor's Desk: Union Membership in 2006* (2007), available at <<http://www.bls.gov/opub/ted/2007/jan/wk4/art05.htm>>).

¹⁰⁴U.S. GEN. ACCOUNTABILITY OFFICE, GAO/HEHS-95-150, EMPLOYMENT DISCRIMINATION: MOST PRIVATE SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTIONS 7 (1995) (reporting that about forty-five percent of employers that had more than 100 employees used internal or external mediation). About sixty-four percent of the workforce is employed by employers this size or larger. *See* U.S. Census Bureau, Number of Firms, Number of Establishments, Employment, and Annual Payroll by Employment Size of the Enterprise for the United States and States, Totals (2005) (Company Statistics: Profiling U.S. Businesses, Tabulations by Enterprise Size, at <http://www.census.gov/csd/susb/susb05.htm>, select U.S. and all states totals link to download the figures from which this number is calculated).

are covered by internal dispute resolution programs.¹⁰⁵

ADR in the employment discrimination context is not like ADR between parties at arms length and represented by counsel. First, employers usually have unilateral power to require employees to agree to ADR methods and unilateral power to craft the agreements. Employees very rarely are represented by counsel either at the point of entering the agreement or during the dispute resolution processes.

ADR may not serve the disempowered well for a number of reasons, all of which are related to the power of employers and dependence of employees.¹⁰⁶ Mandatory arbitration—which employees are required as a condition of employment to agree to before any dispute has arisen—has been widely critiqued as a method of resolving statutory claims.¹⁰⁷ Employees have no real power to bargain over the terms of the agreement, and may not realize what they are giving up by agreeing. Employers thus have more power to draft agreements in ways that systematically disempower employees.¹⁰⁸

Employers may be favored by the processes of arbitration as well. Employers are repeat players in arbitration, which may either make arbitrators less neutral or may make it difficult for employees to accurately assess neutrality.¹⁰⁹ Additionally, arbitrators need not decide the dispute

¹⁰⁵U.S. GEN. ACCOUNTABILITY OFFICE, *supra* note 81, at 2, 7 (reporting that 74.2% of employers that had more than 100 employees used a process that allowed the employee to discuss a complaint with a senior manager without fear of reprisal, that 80.6% of these employees used either a neutral party within or external to the company to investigate complaints and develop findings that may provide a basis for resolution, and that 19.9% used peer review committees of employees or an employee/management mix to resolve complaints).

¹⁰⁶Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; Richard Delgado, *ADR and the Dispossessed: Recent Books about the Deformalization Movement*, 13 LAW & SOC. INQUIRY 145 (1988).

¹⁰⁷These critiques do not apply with equal force in the context of collective bargaining, where the workers organized have significantly more power in relation to the employer than individual employees do.

¹⁰⁸Alfred W. Blumrosen, *Exploring Voluntary Arbitration of Individual Employment Disputes*, 16 U. MICH. J.L. REFORM 249, 254-55 (1983); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 682-83 (1996).

¹⁰⁹Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381, 403, 426 (1996); Julius G. Getman, *Labor*

based on substantive law.¹¹⁰ Furthermore, rarely is full discovery available, and the rules of evidence do not apply during the proceedings. To the extent that these procedural devices help to correct power imbalances between parties in court,¹¹¹ their absence in arbitration can help to solidify that power imbalance.

And there is very little a court can do to correct problems with an arbitration's processes after the fact because the standard for setting aside an arbitral award are extremely deferential.¹¹² Review is also impracticable. Arbitration proceedings produce no record unless the parties provide for it in their arbitration agreement.¹¹³ Moreover, arbitration often produces no written

Arbitration and Dispute Resolution, 88 YALE L.J. 916, 936 (1979); Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. ILL. L. REV. 635, 656; Lewis Maltby, *Paradise Lost—How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.L. SCH. J. HUM. RTS. 1, 4-5 (1994); Sternlight, *supra* note 85, at 685-86.

¹¹⁰*Cf.* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 789-93 (1984) (arguing that this frees the parties to reach more creative solutions).

¹¹¹The informality of the rules of evidence may also benefit employees, though. Employees without any legal background are much less likely than attorneys for employers or even non-attorney employer representatives to understand how to present material to the decisionmaker within those rules.

¹¹²*E.g.* 9 U.S.C. § 10(a) (2000) (providing for vacatur where (1) “the award was procured by corruption, fraud or undue means;” (2) where “there was evident partiality or corruption in the arbitrators;” (3) where “the arbitrators were guilty of misconduct,” *e.g.*, by refusing to postpone the hearing for good cause shown or by refusing to consider material and pertinent evidence; and (4) where “the arbitrators exceeded their powers, or so imperfectly executed them that a . . . final, and definite award upon the subject matter submitted was not made.”). At the same time, the Supreme Court in *Gilmer v. Interstate Johnson/Lane Corp.*, 500 U.S. 20, 28 (1991), relied on the due process protections present in the agreement at issue in that case in upholding arbitration of statutory employment discrimination claims. And courts have refused to enforce arbitration agreements that fail to meet minimum due process protections. For a good summary of applicable case law and industry self-regulation, see Martin H. Malin, *Due Process in Employment Arbitration: The State of the Law and the Need for Self-Regulation*, 11 EMP. L. & EMP. POL’Y J. 363 (2007).

¹¹³The National Association of Securities Dealers, the group at issue in the *Gilmer* decision does keep record. Nat’l Ass’n of Sec. Dealers, Uniform Code of Arbitration Procedure § 10326(a) (governing cases filed before April 2007), *available at* http://finra.complinet.com/finra/display/display.html?rbid=1189&element_id=1159000927. The

decision with the reasoning of the arbitrator explained. Arbitrators are usually not required to issue findings of fact or conclusions of law, and employees may even be required to keep the results confidential.¹¹⁴

For all of these reasons, many commentators worry that these agreements allow employers to escape liability for discrimination.¹¹⁵ Some empirical research supports that assertion,¹¹⁶ while other empirical research suggests that employees win slightly more often in arbitration than they do in litigation, but are awarded less in damages.¹¹⁷

Recently, employers have begun to move away from arbitration and focus more heavily on mediation, and because mediation is not binding, nor is it formal or as alienating as adjudication is, employee advocates see this as a positive development.¹¹⁸ Mediation is

current provisions also provide for a record to be kept. Nat'l Ass'n of Sec. Dealers, NASD Code of Arbitration Procedure for Customer Disputes § 13606, *available at* http://finra.complinet.com/finra/display/display.html?rbid=1189&element_id=1159000927.

¹¹⁴Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 17 (1987); Laura Macklin, *Promoting Settlement, Foregoing the Facts*, 14 N.Y.U. REV. L. & SOC. CHANGE 575 (1986).

¹¹⁵See Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631, 1632-34 (2005) (describing the level of criticism of mandatory arbitration agreements and their expansive use).

¹¹⁶Colvin, *Empirical Research*, *supra* note 11, at 414-19, 423-24.

¹¹⁷Lisa B. Bingham, *Employment Dispute Resolution: The Case for Mediation*, 22 CONFLICT RESOL. Q. 145 (2004); Lisa B. Bingham, *Is There a Bias in Arbitration of Nonunion Employment Disputes? An Analysis of Actual Cases and Outcomes*, 6 INT'L J. CONFLICT MGMT. 369 (1995); Theodore Eisenberg & Elizabeth T. Hill, *Employment Arbitration and Litigation: An Empirical Comparison* (NYU Law School, Public Law Research Paper No. 65, Cornell Law School Working Paper Mar. 5, 2003), *available at* <http://ssrn.com/abstract=389780> or DOI: 10.2139/ssrn.389780; Michael H. LeRoy, *Getting Nothing for Something: When Women Prevail in Employment Arbitration Awards*, 16 STAN. L. & POL'Y REV. 573, 576-77, 589 (2005) (asserting that employees tend to win in arbitration but the value of the award is much less than what the courts offer); Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. REV. 105 (2003); Lewis L. Maltby, *The Myth of Second-Class Justice: Resolving Employment Disputes in Arbitration*, in *HOW ADR WORKS* 915, 921 (Norman Brand ed., 2002).

¹¹⁸*E.g.*, E. PATRICK McDERMOTT ET AL., EEOC ORDER No. 9/0900/7632/2, AN EVALUATION OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION MEDIATION PROGRAM (2000), *available at* <http://www.eeoc.gov/mediate/report/index.html> (reporting results of a

sometimes seen as a process of reconciliation, which sounds like a good result for a purely private dispute.¹¹⁹ Mediation is problematic, though still, because settlements can be reached that, while they serve the minimum desires of individual employees,¹²⁰ do not vindicate legal rights or work structural change. In addition, mediation processes may tend to disempower employees by not compensating for their relative lack of power. Employees are almost never represented by counsel in mediation. Moreover, in mediation, where there is no compelled discovery, as opposed to arbitration where there may be some limited discovery, an employer can maintain a monopoly on the information about the dispute. Employees are likely not to have counsel, as well. In addition, studies have demonstrated the way that employer run mediation-style dispute resolution mechanisms can subvert employees' claims, reinterpreting them as personality conflicts and management issues in a way that convinces employees that they have no right at stake.¹²¹ Thus, mediation can simply magnify the power differential that already exists in the employer/employee relationship.

Mediation is essentially a process of bargaining. However, the patterns of interdependence in bargaining suggest that bargaining over issues of employment discrimination is not likely to produce just results because of the disparity of power between employer and employee.¹²² This power imbalance lends itself to the employer exploiting the situation and the

study that demonstrates high employee satisfaction with mediation); E. PATRICK McDERMOTT ET AL., ORDER NO. 9/0900/7623/G, THE EEOC MEDIATION PROGRAM: MEDIATORS' PERSPECTIVE ON THE PARTIES, PROCESSES, AND OUTCOMES (2001), *available at* <<http://www.eeoc.gov/mediate/mcdfinal.html>> (same); D. Hardison Wood & David Mark Leon, *Measuring Value in Mediation: A Case Study of Workplace Mediation in City Government*, 21 OHIO J. DISPUTE RESOL. 383 (2006) (reporting high employee satisfaction and better working conditions as a result of mediation)

¹¹⁹Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 126_ (1994); Harry Mika, *The Practice and Prospect of Victim-Offender Programs*, 46 S.M.U. L. REV. 2191, 2195 (1993).

¹²⁰See McDERMOTT ET AL., EEOC ORDER NO. 9/0900/7632/2, *supra* note 116; McDERMOTT ET AL., ORDER NO. 9/0900/7623/G, *supra* note 116; Brent T. White, *Say You're Sorry: Court Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261 (2006) (discussing the importance litigants place on an apology aside from or instead of more traditional relief).

¹²¹Lauren B. Edelman, Howard S. Erlanger, & John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497 (1993).

¹²²JEFFREY Z. RUBIN & BERT R. BROWN, THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION 198-99, 201-13 (1975).

employee behaving submissively.¹²³ The more that the parties see each other as competitors or enemies, the more likely their motivational orientation will move farther into competition, frustrating the bargaining process.¹²⁴

Finally, even if these difficulties did not exist in a particular dispute, the problem with ADR for statutory antidiscrimination issues is that there is always a third party—the public—which has an interest in the matter but which is not present in the negotiation. Moreover, even if the public could be represented in a negotiation, the interests of the public tend to be very intangible, and thus difficult to bargain directly over.¹²⁵

In fact, regardless of what kind of ADR the parties use, the public is disserved. Dispute resolution is not the only goal of litigation.¹²⁶ Public rulemaking to give form to legislation is an important function that only courts or agencies with power to do so can provide.¹²⁷ Rules can only be made through decisions that will bind more than the immediate parties to the dispute. ADR does not make rules and in fact hides allegations of wrongdoing from the public eye.¹²⁸ Employees cannot tell whether they have been discriminated against without a record of cases developing rules in the area, and employers cannot determine how to avoid liability.¹²⁹ Without an understanding of what conduct will lead to liability, employers cannot police themselves to avoid engaging in the conduct; the ability to detect risks or having a regulatory body able to point

¹²³*Id.* at 199, 213-33.

¹²⁴*Id.* at 251-55.

¹²⁵*See id.* at 130-36, 155 (arguing that intangible issues should be translated into concrete dimensions, broken into tangible components, and those components should be negotiated over).

¹²⁶Brunet, *supra* note 90, at 17.

¹²⁷Anne S. Kim, *Rent-a-Judges and the Cost of Selling Justice*, 44 DUKE L.J. 166 (1994).

¹²⁸As the Supreme Court has stated, The disclosure through litigation of incidents or practices which violate national policies respecting nondiscrimination in the work force is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from a misappreciation of [Title VII's] operation or entrenched resistance to its commands, either of which can be of industry-wide significance. *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358-59 (1995).

¹²⁹Melissa Hart, *The Possibility of Avoiding Discrimination: Considering Compliance and Liability*, 39 CONN. L. REV. 1623 (2007).

those out changes corporate behavior.¹³⁰

Even more than this lack of rulemaking, though, there is a special public interest at stake in employment discrimination cases. The equality norm is a core value of our society. It is the subject of constitutional provisions and numerous federal and state statutes. Without transparency, the public cannot see how norms are being developed in this area, and the norms themselves will stagnate. Additionally, without transparency, the distributive goals of the antidiscrimination law cannot be met.

Congress recognized the centrality of this value by enacting the Civil Rights Act of 1964 and other antidiscrimination provisions. Moreover, where Congress has created an administrative agency to oversee enforcement, it has expressed a preference that this law is central to the public interest and that the federal government should engage in that enforcement. Taking these kinds of cases out of the hands of that agency through ADR promotes private rather than public interests.¹³¹ It is not surprising then that the EEOC opposes arbitration, although it promotes its mediation program.¹³²

3. The Ineffectiveness of the EEOC

Compounding the difficulties posed by relying on private litigation, the EEOC is itself ineffective both because it lacks the resources to fulfill its mission, and also because even if it were fully funded, the processes used by the EEOC would not fully transform the workplace. Although the EEOC can issue technical guidance, which gives employers an affirmative defense if followed,¹³³ its lack of power under Title VII and the Equal Pay Act to issue regulations with

¹³⁰See Stephen Calkins, *Corporate Compliance and the Antitrust Agencies' Bi-Modal Penalites*, LAW & CONTEMP. PROBS., Summer 1997, at 127; John T. Scholz, *Enforcement Policy and Corporate Misconduct: The Changing Perspective of Deterrence Theory*, LAW & CONTEMP. PROBS., Summer 1997, at 253.

¹³¹William Funk, *Bargaining Toward the New Millenium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351 (1997); William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA's Woodstove Standards*, 18 ENVTL. L. 55 (1987).

¹³²Compare EEOC FY-06, *sura* note 9, at 7-9 with EEOC NOTICE NO. 915.002: POLICY STATEMENT ON MANDATORY BINDING ARBITRATION OF EMPLOYMENT DISCRIMINATION DISPUTES AS A CONDITION OF EMPLOYMENT (July 10, 1997), *available at* <<http://www.eeoc.gov/policy/docs/mandarb.html> (setting a policy opposing arbitration for statutory discrimination claims).

¹³³*Id.* Title VII provides that “no person shall be subject to any liability or punishment for . . . an unlawful employment practice if [the person acted in] good faith, in conformity with, and

the force of law has meant that the courts frequently refuse to defer to its interpretations of the laws it enforces, making the EEOC particularly toothless.¹³⁴

Scholars and antidiscrimination activists were concerned that the EEOC would be ineffective when it was created because the state systems that the EEOC was modeled on had not been effective. These concerns have been borne out. From the start, the EEOC was behind. Given a year from the date that Title VII was passed to gather personnel and establish procedures, the EEOC was not able to begin to prepare until one month before it was to begin enforcement efforts.¹³⁵ And it seems the EEOC has never recovered from that slow start.

The EEOC has been limited by the lack of staff, funding, and political support to accomplish the mission it was charged with.¹³⁶ Most recently, the Commission operated without

in reliance on any written interpretation or opinion of the Commission.” 42 U.S.C. § 2000e-12(b) (2000).

¹³⁴*E.g.* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976) (“Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations,” and thus the deference courts should give “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control”); *see also* Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 *FORDHAM L. REV.* 1937 (2006) (arguing that the Supreme Court almost never defers to the EEOC even under statutes the EEOC possesses rulemaking power to enforce). *But see* Federal Express Corp. v. Holowecki, No. 06-1322 (Feb. 27, 2008) (deferring to the EEOC’s interpretation of what a charge is).

¹³⁵Belton, *supra* note 5, at 920 (citing U.S. COMM’N ON CIVIL RIGHTS, *THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT: TO ELIMINATE EMPLOYMENT DISCRIMINATION* 87-88 (1971)).

¹³⁶TEN-YEAR CHECK-UP, *supra* note 47, at 40. (reporting as well that the EEOC has not received between ten and twenty million dollars of the annual funding it has requested, although its funding went from \$242 million in 1998 to \$310 million in 2002, and increase of almost \$70 million dollars in four years); *id.* at 42 (reporting that the EEOC did not receive the staffing it requested); *see also* Belton, *supra* note 5, at 920 (citing U.S. COMM’N ON CIVIL RIGHTS, *supra* note 113, at 88, which documents the staffing deficiencies from the start of the EEOC’s existence). The current Chair of the EEOC, Naomi Churchill Earp remarked at the 2008 State of the Black Union conference the chronic lack of funding and also noted that no Chair since Eleanor Holmes Norton has had the ear of the President. Naomi Churchill Earp, Chair, EEOC, Remarks at the State of the Black Union (Feb. 23, 2008) (C-Span television broadcast), *available at* http://www.c-spanarchives.org/library/index.php?main_page=product_video_info&products_id=204090-1 (at 1:08:52 to 1:15:08).

all five commissioners from 1997 to 2004, and without a general counsel from 2000 to 2003.¹³⁷ And as mentioned above, out of about 76,000 private sector charges, the EEOC can file suit in only about 370 cases.¹³⁸

Although the EEOC has worked in the past few years to modify its processes and maximize its efforts, it has not reached its goal. In 2003, a panel of the National Academy of Public Administration (NAPA panel) issued a report, prepared at the request of the EEOC, giving recommendations on how best to structure the EEOC and use its human capital.¹³⁹ The NAPA panel recommended changes in organizational structure, budget alignment, use of technology, management of human capital, and management of performance.¹⁴⁰ The changes urged most strenuously by the NAPA panel were a national call center and a system for filing charges electronically.¹⁴¹ The EEOC has created its “National Contact Center,” but was criticized by the Government Accountability Office for not adequately considering all of the NAPA panel’s recommendations.¹⁴² The National Contact Center was created as a pilot project in 2005, and the Office of the Inspector General reported a year later that while there had been advancements, the National Contact Center was ineffective and would remain so without significant changes.¹⁴³

¹³⁷TEN-YEAR CHECK-UP, *supra* note 47, at 42.

¹³⁸EEOC FY-06, *supra* note 10, at 6; *see also* ORGANIZING EEOC, *supra* note 36, at 14 (setting charge numbers in prior years closer to 80,000).

¹³⁹ORGANIZING EEOC, *supra* note 36, at xi. The report was part of the EEOC’s restructuring plan and strategic human capital plan required by the President’s Management Agenda and directives issued by the Office of Personnel Management and Office of Management and Budget. *Id.* The President maintains report cards of federal agencies at <http://www.whitehouse.gov/omb/expectmore/index.html>, and you can view the EEOC’s most recent report card summary at <http://www.whitehouse.gov/omb/expectmore/summary/10003914.2006.html> with details at <http://www.whitehouse.gov/omb/expectmore/detail/10003914.2006.html>.

¹⁴⁰ORGANIZING EEOC, *supra* note 36, at xi, xii.

¹⁴¹*Id.* at xi. The NAPA panel also recommended mobile units and dispersed staff to spread services more broadly. *Id.* at xii, xiii-xvi.

¹⁴²U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-10, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: ACTIONS TAKEN, BUT AGENCY RESTRUCTURING EFFORTS COULD BENEFIT FROM A MORE SYSTEMATIC CONSIDERATION OF ADVISORY PANEL’S RECOMMENDATIONS (2005), *available at* <http://www.gao.gov/new.items/d0610.pdf>.

¹⁴³JOB PERFORMANCE SYSTEMS, OFFICE OF INSPECTOR GENERAL, THE NATIONAL CONTACT CENTER: AN EVALUATION OF ITS IMPACTS (2006).

Another weakness with the EEOC has been its “focus on process and not mission-oriented factors to measure progress.”¹⁴⁴ As the United States Civil Rights Commission reported to Congress, “[f]ederal civil rights enforcement, to evaluate effectiveness, must also formally assess agency progress toward discrimination reduction, the government’s overarching goal.”¹⁴⁵ Simply counting the number of charges resolved and measuring the speed of that resolution does not assess progress towards that qualitative goal. Related to that criticism, the EEOC does not evaluate the performance of state Fair Employment Practices Agencies at all, only collecting information on the number of charges handled by those agencies.¹⁴⁶

Perhaps even more disconcerting, the EEOC does not seem to have more expertise than courts or the litigants themselves to evaluate claims of discrimination or predict the likely outcomes. The study by Nielsen, Nelson, and Lancaster, found that the EEOC’s priority codes, the system created to manage the charges it received so that the charges most likely to result in a finding that there was cause to believe discrimination had occurred, did not predict case outcomes in federal court.¹⁴⁷

The news concerning the EEOC is not all negative. Participants in its mediation programs have been very satisfied with those programs.¹⁴⁸ Employers, though, have been less willing to use

¹⁴⁴TEN-YEAR CHECKUP, *supra* note 47, at iii (directing this critique at all of the agencies). Some of the impetus for the EEOC’s current assessments may be the Presidential Management Agenda discussed *supra* note 117. That report card measures efficiencies and cost effectiveness by the duration of proceedings and the use of interpretive regulations as a substitute for individual contact, in part. *See* EXPECTMORE.GOV, DETAILED INFORMATION ON THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ASSESSMENT, at questions/answers 3.RG4 and 4.3 (2006), at <http://www.whitehouse.gov/omb/expectmore/detail/10003914.2006.html>.

¹⁴⁵*Id.*

¹⁴⁶ExpectMore.gov, Detailed Information on the Equal Employment Opportunity Commission Assessment, at Question/Answer 2.5, at <http://www.whitehouse.gov/omb/expectmore/detail/10003914.2006.html> (last visited Feb. 28, 2008).

¹⁴⁷Nielsen, Nelson, & Lancaster, *supra* note 99, at 19-20, 28-30, 33; *see also* Michelle A. Travis, Susan Bisom-Rapp, E. Patrick McDermott, Michael Z. Green, & Jean R. Sternlight, *Dispute Resolution in Action: Examining the Reality of Employment Discrimination Cases: Proceedings of the 2007 Annual Meeting, Association of American Law Schools, Sections on Employment Discrimination and Alternative Dispute Resolution*, 11 EMP. RTS. & EMP. POL’Y J. 139, 147-48 (2007) (describing the EEOC’s priority system).

¹⁴⁸E. PATRICK McDERMOTT ET AL., EEOC ORDER NO. 9/0900/7632/2, AN EVALUATION OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION MEDIATION PROGRAM (2000),

the EEOC's mediation processes because they see nothing to be gained; they view the charges as meritless and fear nothing from the EEOC investigation.¹⁴⁹ Additionally, where the EEOC does institute litigation, that litigation is likely to result in a win or a successful settlement.¹⁵⁰

Despite the satisfaction of the participants in the EEOC's mediation program, this program and the rest of the EEOC's processes contribute to the secrecy effect. Rather than enhancing transparency or making public the state of the American workplace, the EEOC's processes are kept confidential by law unless and until the EEOC brings an enforcement action.

Nothing said or done during and as a part of [conciliation] may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than \$1,000 or imprisoned for not more than one year, or both.¹⁵¹

...

It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information.¹⁵²

These confidentiality proceedings make some sense during an investigatory phase and are in accord with the principles governing mediation generally. Federal Rule of Evidence 408 makes information about or gained through settlement negotiations or mediation inadmissible.¹⁵³ And parties routinely sign agreements to keep the information revealed through the course of the

available at <<http://www.eeoc.gov/mediate/report/index.html>>; E. PATRICK McDERMOTT ET AL., ORDER NO. 9/0900/7623/G, THE EEOC MEDIATION PROGRAM: MEDIATORS' PERSPECTIVE ON THE PARTIES, PROCESSES, AND OUTCOMES (2001), *available at* <<http://www.eeoc.gov/mediate/mcdfinal.html>>.

¹⁴⁹E. PATRICK McDERMOTT ET AL., AN INVESTIGATION OF THE REASONS FOR THE LACK OF EMPLOYER PARTICIPATION IN THE EEOC MEDIATION PROGRAM, *available at* <http://www.eeoc.gov/mediate/study3/index.html>.

¹⁵⁰Nielsen, Nelson, & Lancaster, *supra* note 99, at 22, tbl. 1.

¹⁵¹42 U.S.C. 2000e-5(b) (2000).

¹⁵²42 U.S.C. 2000e-8(e) (2000).

¹⁵³FED. R. EVID. 408.

mediation confidential.¹⁵⁴

This lack of transparency in EEOC proceedings has roots in philosophies governing state fair employment practices commissions established prior to Title VII.¹⁵⁵ Many were “committed to human relations rather than civil rights” and as a result, “believed in education, dialogue, reconciliation and conciliation as the methods for resolving the basic problem of employment bias’ . . . conducted in private, without the threat of sanctions and without objective standards for compliance.”¹⁵⁶ This emphasis on human relations and secrecy prevailed in the original powers of the EEOC to conciliate complaints and it remains in the EEOC’s current emphasis on conciliation and mediation.

Finally, even though the EEOC’s regulations mandate that employers of 100 or more employees file yearly statistical reports, information from them, along with information about the EEOC’s processes, is available only through Freedom of Information Act Requests.¹⁵⁷ Thus, rather than create transparency and accountability, the EEOC’s processes contribute to the secrecy about the state of our workplaces and whether we are reaching our goal of equality.

IV. INITIAL PROPOSAL

The lack of transparency and the lack of accountability caused by the EEOC’s limitations and the difficulties with relying on private parties as primary enforcers are substantial obstacles to achieving workplace equality. The responsibility for enforcing Title VII at least in the private sector should be taken away from the EEOC and vested in a new agency with a substantially different model, one that better uses the tools of transitional justice.

Although the issue has not been cast in these terms, Title VII, and the use of litigation to enforce it, is an attempt at transitional justice. In this country we used the law and the power of the state to enslave people based on race, and to restrict the political, civil, and economic rights of people based on race, sex, religion, and national origin. Reconstruction began the

¹⁵⁴EDWARD BRUNET ET AL., *ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE’S PERSPECTIVE CASES AND MATERIALS* 276 (3d ed. 2006).

¹⁵⁵Belton, *supra* note 5, at 913-14.

¹⁵⁶*Id.* at 914 (quoting Timothy Lionel Jenkins, *A Study of Federal Effort to End Job Bias: A History, a Status Report, and a Prognosis*, 14 HOW. L.J. 259, 279 (1968) and citing Hearings on S. 773, S. 2210, and S. 1937 Before the Subcomm. on Employment and Manpower of the Senate Comm. on Labor and Public Welfare, 88th Cong., 1st Sess. 228-29, 240 (1963) and Herbert Hill, *Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis with Recommendations*, 14 BUFFALO L. REV. 22, 38 (1964)).

¹⁵⁷29 C.F.R. Parts 1602, 1610, 1627, and 1630 (2007).

transformation from that system to one more legitimate: the country first abolished slavery and then much more slowly removed the laws that limited rights. The third step, which really did not begin in earnest until the middle of the twentieth century, involved prohibiting private actors from depriving others of access to benefits like jobs, housing, goods, and services. Title VII was part of this third step.¹⁵⁸

¹⁵⁸BLUMROSEN, *supra* note 60, at 4 (arguing that “the effort to ameliorate long standing patterns of race and sex subordination [through Title VII] is perhaps *the most ambitious social reform effort ever undertaken in America*” (emphasis in original)); David L. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Enforcement*, 42 VAND. L. REV. 1121, 1129 (1989) (citing H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, at 16 (1964)). The House Report that Rose cited noted specifically that “[t]oday, more than 100 years after their formal emancipation, Negroes . . . are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are . . . the birthright of all citizens.” H.R. Rep. No. 914, at 18; *see generally* OWEN FISS, *THE LAW AS IT COULD BE* (2003) (arguing that the courts are the only entities able to counteract the power of corporations and also of bureaucracy in other government institutions and that judges both can and must give content to the equality norm).

For a discussion of this evolution in the context of race, *see* MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 426, 432, 435-36, 441 (2004) (arguing that the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965 were a reaction by the public to end the violent oppression of Blacks); Robert D. Loevy, *Chapter I: Introduction the Background and Setting of the Civil Rights Act of 1964*, in *THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION* 1, 1-42 (Robert D. Loevy ed., 1997) (describing the evolution of U.S. policy from slavery to the Civil Rights Act of 1964).

The intent of Congress to transform the way that women were treated is not quite as clear. Title VII was originally drafted to prohibit discrimination on the bases of race, color, national origin, and religion, and as a last-minute amendment by a Southern Democrat, proposed, some say, as a means to defeat the bill, sex was added to the list of prohibited classifications. 110 Cong. Rec. 2577-84 (1964), *reprinted in* 1 LEGISLATIVE HISTORY OF TITLES VII & IX OF THE CIVIL RIGHTS ACT OF 1964, at 3213-28 (undated); *see also* RAYMOND F. GREGORY, *WOMEN AND WORKPLACE DISCRIMINATION: OVERCOMING BARRIERS TO GENDER EQUALITY* 23-27 (2003) (describing the overt discrimination of women in employment and the evolution to Title VII, but implying that banning discrimination on the basis of sex was not really the goal of the statute). Even though the proponent thought that the inclusion of sex would defeat the bill, Representative Martha Griffiths (D. Mich.) urged liberal groups to support the amendment, reasoning that some conservatives would vote for it because of its proponent, and she could persuade other members of Congress to join in; thus Title VII may indeed have been intended to transform how society treated women. MARY FRANCES BERRY, *WHY ERA FAILED: POLITICS, WOMEN’S RIGHTS, AND THE AMENDING PROCESS OF THE CONSTITUTION* 61 (1988); *see also* Jo Freeman, *How “Sex” Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQUALITY 163 (1991).

The goal of employment discrimination laws in the U.S. has been social change, imposing a new norm that existed but was not universal.¹⁵⁹ The establishment of this norm was a large step taken to fundamentally transform society, part of the move from a repressive regime, one that actively subordinated some groups, to a new society with greater legitimacy. That transition is not yet complete. Despite the fact that the country has been in the process of transition for years, neither lawmakers nor scholars have approached the problem of employment discrimination as a problem of transitional justice.

Transitional justice is a way to move from a repressive political system (or war) to a more democratic and legitimate system (or peace),¹⁶⁰ and one of its tools is adjudication, an adversarial process with two parties with a stake in the outcome presenting a case to a neutral decisionmaker for a binding determination. When, during the former regime, actors violated laws in place at the time they acted, adjudication can be a useful means to justice, if it vindicates the victims and appropriately punishes the actors. Trials also signal that the government is working to reform the system, adding to the condemnation of the bad acts of the prior regime and legitimizing the new government. Sometimes, however, adjudication is not feasible. For example, the judicial infrastructure may be too broken, or sanctions may not be possible. And in those instances, a different tool of transitional justice may be useful: the truth commission.¹⁶¹

A truth commission is an official body set up usually by a government or international organization to investigate and report on a pattern of past human rights abuses.¹⁶² Truth commissions have been used in many countries, with some positive and some negative results.¹⁶³ There is no single model for a truth commission, and in fact part of its strength is that a truth commission is designed with the particular needs of the culture in mind. But truth commissions have shared some similarities. A truth commission takes evidence, and makes a public record of people's stories, issuing a report. It does not impose sanctions itself, but it often makes recommendations for reform. Sometimes the process includes an amnesty for the perpetrators of abuse in return for their testimony.

¹⁵⁹Witherspoon, *supra* note 4, at 1171.

¹⁶⁰*See* PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS 11 (2002).

¹⁶¹*See id.* at 12-13 (describing how frequently those losing power negotiate amnesty for their past acts, the lack of judicial infrastructure in countries undergoing such a transition, and the large numbers of accused perpetrators which even an established judicial system would have trouble handling).

¹⁶²*Id.* at 5.

¹⁶³*Id.* at 7-8 (documenting both the broad disappointment many experience and the surprising reforms and restitution that has resulted after some)

A modified version of this approach to enforce our employment discrimination laws is warranted for several reasons. Our current system is solely adversarial and relies primarily on private enforcement as described above. But adjudication alone has not created the change intended by the law. An agency to promote public values could complement the system of adjudication and come closer to accomplishing the transition than our current system alone.

A strong federal role in enforcement is necessary to produce real change. Although some social science research suggests that federal civil rights legislation does not enhance workplace equality,¹⁶⁴ the majority of the research suggests that workplace equality is politically mediated, that is that political institutions are largely responsible for changes in workplace inequality.¹⁶⁵ Enactment of civil rights laws shapes the way that employers manage their regulatory environment, and the management of this environment is accomplished through interaction with federal regulatory bodies and through the courts.¹⁶⁶ Kevin Stainback, Corre Robinson, and Donald Tomaskovic-Devey demonstrated in a recent study a strong positive correlation between resources devoted to the enforcement of the antidiscrimination laws and workplace integration.¹⁶⁷ One of the most important findings of that study was that the law did not produce change in employer behavior unless it was accompanied by significant enforcement, which included both findings that the law had been broken and some sanction imposed; declines in enforcement meant a stalling of improvements in integration.¹⁶⁸ Recent literature on new governance further supports these findings. New governance promotes harnessing institutional culture to promote real change, but that governance must occur in the shadow of the law to make change.¹⁶⁹

¹⁶⁴James P. Smith & Finis Welch, *Affirmative Action and Labor Markets*, 2 J. LAB. ECON. 269 (1984); James P. Smith & Finis R. Welch, *Black Economic Progress after Myrdal*, 27 J. ECON. LIT. 519 (1989).

¹⁶⁵See Kevin Stainback, Corre L. Robinson, & Donald Tomaskovic-Devey, *Race and Workplace Integration: A Politically Mediated Process?*, 48 AM. BEHAV. SCI. 1200, 1204 (2005) (concluding this and citing a number of other studies supporting the politically mediated hypothesis).

¹⁶⁶*Id.* at 1207-08.

¹⁶⁷*Id.* at 1217-23.

¹⁶⁸*Id.* at 1222.

¹⁶⁹Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071 (2005). *But see* Kalev et al., *supra* note 6 (finding that employer actions in the absence of strict accountability standards were ineffective at creating or maintaining diversity); Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L.J. 1206 (1994) (arguing that traditional incentives created by powerful outsiders, Congress and the administrative agency are preferable to regulations

Second, although this is not a feature of truth commissions, an agency can be developed to harness expertise in the field. In addition to the usual cadre of lawyers, the agency might be staffed with social science experts like cognitive psychologists, sociologists specializing in organizational behavior, and economists. One of the principal critiques of our current employment discrimination jurisprudence is that discrimination is difficult to detect and that expert testimony is needed to decode behaviors.¹⁷⁰ These experts would help untangle what are very complicated issues, but also would help direct public policy that was grounded in solid research.

Third, the public is served not only by increased equality that enforcement will bring, but also by the norm developing function of a public presence in identifying violations of norms and condemning those violations. Having the state serve this role is necessary for justice—it is the only way to involve the public and ensure that the values embodied in authoritative texts (statutes and Constitution) are given force (reality made to conform with them).¹⁷¹ Moreover, having an authoritative voice give greater content to the meaning of discrimination and how it is accomplished will help employers avoid liability and will harness their ability to promote substantive equality.

Fourth, private enforcement alone, as demonstrated above, cannot provide enough enforcement to create equality.¹⁷² And related to that, a fact-finding body that publicizes its processes will enhance transparency, which is a necessary precondition to accountability, but which is also a good in its own right. Transparency will enhance the ability of the market to assist

negotiated).

¹⁷⁰E.g. Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R-C.L. L. REV. 91 (2003); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Ann C. McGinley, *¡Viva la Évolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 418, 426-27 (2000); Marc Poirier, *Is Cognitive Bias at Work a Dangerous Condition on Land?*, 7 EMPLOYEE RTS. & EMP. POL'Y J. 459 (analogizing liability for discrimination caused by cognitive bias to the law related to dangerous conditions on land); Michael Selmi, *Discrimination as Accident: Old Whine, New Bottle*, 74 IND. L.J. 1233 (1999); Susan Sturm, *Second Generation Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 467-68 (2001); Joan Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the "Cluelessness" Defense*, 7 EMPLOYEE RTS. & EMP. POL'Y J. 401 (2003).

¹⁷¹Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

¹⁷²*Supra* notes 76-77 and accompanying text.

in preventing discrimination. We treat the employment relationship as a contractual one and treat both parties to the contract, employer and employee, as equals. But there are very serious information asymmetries when it comes to information about discrimination. Employers have a monopoly on information about allegations of discrimination and about the wages and terms and conditions of work employees in the aggregate. Having a public record of past behavior will empower employees to make better decisions about what cultures they are willing to work in and what wages they are willing to accept.

Finally, a federal agency that performs some sort of adjudication can provide greater access to justice for employees and small employers and stronger enforcement than relying on the court system or ADR alone. Rank and file employees lack access to the courts because they cannot find attorneys to take their cases, in part because the cases are so difficult to win.¹⁷³ Federal agencies are usually created to harness the skills of those with special expertise in an area and to provide for cost-effective enforcement. Both of those things would benefit those regulated and also the court system. And employment discrimination law is a specialized area, requiring understanding of human behavior and of economic policies. Just moving these cases from the court system to a federal agency would benefit litigants and the public. Recent research suggests that one of the reasons that so many hurdles for employment discrimination plaintiffs have been raised is that courts perceive themselves to be overworked in these cases.¹⁷⁴ And an agency that publicizes its proceedings will not cause the secrecy problems that ADR methods do.

The details of possible agency functions, like whether the agency has exclusive initial jurisdiction over all employment claims, how class claims might be handled, exactly what processes should be included, and what sanctions the agency could implement, are a topic for future articles.

These questions are particularly challenging. On the one hand, if employees have a choice about whether to go to the agency at all, the agency is not likely to have any effect. Employers could require employees to waive their rights to go to the agency as a condition of employment or could require that in exchange for severance at termination. Employers would have greater incentive to settle potential claims earlier, and employees would have an incentive to accept the settlements rather than risk no recovery. That would not be a bad outcome for the individual employees, but the public interest would not necessarily be served if employer behavior was not

¹⁷³E.g. Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUMAN RTS. L. REV. 29, 59-60 (1998) (comparing claims brought by managers to those sought by rank and file employees, noting that only 10% of those who get a right to sue letter succeed in filing a civil complaint and only 7.5% of those who get a right to sue letter are successful in retaining an attorney).

¹⁷⁴Lee Reeves, *Pragmatism over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence* (2007) (unpublished manuscript on file with author), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1024632.

otherwise changed. On the other hand, if employees are forced to use the agency's processes only, their rights may be frustrated by bureaucratic incompetence, delay, or agency capture. The public interest, too, may be subverted by these things or even by simple lack of funding, like that which plagues the EEOC currently or even worse, like that which plagues the Occupational Safety and Health Administration.

In terms of the agency's processes or sanctions, several important considerations will have to be explored. It might be desirable for the agency to adjudicate claims of discrimination. The expertise and relative inexpense of agency proceedings would mean that claims would have better outcomes and that more people would have access to a neutral forum to make a claim. At the same time, it is not clear that a federal agency can adjudicate claims between two private parties at least without their consent.¹⁷⁵ In light of this and other concerns, it might instead be better for the agency to find facts and issue an order that is not self enforcing but which can be enforced in federal court if the employer does not comply, like for the National Labor Relations Board. A system of graduated penalties might be instituted if the employer did not comply without resort to court enforcement. Sanctions short of self-enforcing orders, however, may not create enough accountability to create real change.

These difficult questions aside for now, I will outline just briefly the components the agency *must* have.

First, the agency's processes and findings must be public.¹⁷⁶ There are good reasons that investigations need to be confidential at times, mostly to prevent the subject of the investigation from being able to hide wrongdoing more effectively armed with knowledge of the process and findings of an investigation. However, some pieces of information, like the fact that a charge has been filed against a particular employer, should immediately become public information, absent a strong reason for confidentiality.

Second, the reporting requirements of the current system should remain, but should be extended to smaller employers. Additionally, the agency should have to make that information public at the very least in the aggregate, and preferably with all details intact. In other words, the public should have access to the diversity demographics of the country's larger employers. Transparency for this information will allow private parties to better assess the employer's culture and will also provide another form of accountability for the federal agency. If the agency

¹⁷⁵See *CFTC v. Schor*, 478 U.S. 833 (1986) (allowing a common law counterclaim to be brought in an adjudication by a federal agency where the parties waived the right to an article III court and power did not encroach too seriously on the work of article III courts).

¹⁷⁶See Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 *LAW & CONTEMP. PROBS.* 1, 15 (2005) (describing the importance of transparency for optimal administrative agencies); Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 *LAW & CONTEMP. PROBS.* 63 (2005).

fails to investigate persistent suspicious employment practices, members of the public can discover that failure and pressure the agency to investigate.

Third, the agency must possess independent investigatory and “prosecutorial” powers, just as the EEOC does now, but broader. For all of the reasons that it is risky for employees to come forward with information about potential discrimination, some practices simply cannot be challenged easily by private parties. And the agency investigation and publicizing power should be employer-wide, not simply limited to the allegations that an individual employee may have brought to the agency. In other words, a charge of discrimination simply sets in motion an investigation of the employer’s practices towards all of its employees. But an investigation should not require a charge at all to investigate an employer or industry. Reporting requirements, like those currently required but reaching to smaller employers, could provide the data that would raise a suspicion of discrimination.

Fourth, the agency must have the power to issue interpretive regulations, binding on employers and employees. “Discrimination” is illegal, but what practices constitute discrimination are the subject of serious debate. Regulations developed by experts will help give content to this norm. Fifth, the agency must have create some additional incentive to comply with what it identifies as best practices. Some kind of branding or approval rating, like that suggested by Ian Ayres and Jennifer Gerarda Brown¹⁷⁷ would help remedy the information asymmetries in the labor market.

Fifth, the agency must engage in outreach to both employers and employees to inform people of their rights and obligations. Some of that outreach will be accomplished simply by more information being made public.

Sixth, the personnel of the agency must be balanced by political party, like many agencies, but also by background. An agency dominated either by management or by those with a labor-side background will be unable to avoid agency capture. Moreover, the best way to ensure that the agency serves the needs of the people whose rights it works to protect is to include those people in the planning of the agency design.

Finally, whatever form the agency takes, it cannot supplant the current system entirely. Litigation by private parties, though inadequate, is still an important avenue for relief, an important outlet for employee voice, and an important check on government inaction and employer power.

To be sure, creating a new agency and giving it these functions faces substantial obstacles. If the EEOC has never been fully funded, there is nothing to suggest that an agency

¹⁷⁷Ian Ayres & Jennifer Gerarda Brown, *Mark(et)ing Nondiscrimination: Privatizing ENDA with a Certification Mark*, 104 MICH. L. REV. 1639 (2006); Ian Ayres & Jennifer Gerarda Brown, *Privatizing Employment Protections*, 49 ARIZ. L. REV. 587 (2007).

with broader powers would be either. And if employers believe that they benefit from the current system by not being penalized for discrimination, they will lobby against any change. It will take significant political will to overcome this lobbying, and the continuing lack of consensus on the antidiscrimination norm suggests that enough political will would be difficult to marshal. These obstacles are not insurmountable, however, and this paper and those that will follow are efforts toward that goal.

V. CONCLUSION

Our system of enforcement of employment discrimination laws is broken, and more or different positive law will change this reality little. That positive law has to be interpreted by courts to have effect, and courts all too often interpret the law to keep employment discrimination cases out of court. Whether that is caused by the judges' implicit biases, distaste for the subject matter, or sense of being overworked, the end result is the same. Progress on workplace equality has stalled, and our focus on litigation is not likely to resolve that. The EEOC as it currently functions is also unable to resolve our lack of progress. The structure of the agency, its functions, and its lack of funding all serve to make the agency ineffective at creating systemwide change.

It has been more than two generations since Title VII was first enacted. Although progress towards equality was made, that progress stalled in the mid 1980s, and there are even reports that we are starting to move backwards.¹⁷⁸ A generation without progress ought to be enough to warrant a new approach.

¹⁷⁸Stainback, Robinson & Tomaskovic-Devey, *supra* note 141 (reporting that progress has stalled); Hymowitz, *supra* note 1 (reporting losses).