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

Marcia L. McCormick†

Employment discrimination laws in the United States have not created full equality in the workplace. The federal legislative and executive branches need to take a more active role to vindicate the public interest and help promote equality in the private sector. This article details how the current system of enforcement falls short, makes the case for more non-judicial federal involvement in enforcing employment discrimination, and proposes a new agency model for private sector discrimination cases to accomplish that. The proposed model is inspired by the Truth Commission, a fact-finding body designed to promote transitional justice, an appropriate goal here where our employment discrimination laws are a piece of our transition from a society that used the law to enslave some segments of the population and even after slavery was abolished to keep some dependent on others for their support. Having a federal agency that engages in fact-finding, recommending action, and publicizing its decisions would help solidify the norm against discrimination, which, in turn, would help employers and employees both internalize that norm, prevent discrimination in the workplace, and minimize litigation in the long run.

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† Thanks to Paul Secunda for inviting me to participate in a panel on New Approaches to Employment Law at the Southeastern Association of Law Schools annual meeting in 2007, which made me begin to write on a topic I have been thinking about for around ten years. I appreciate all of the feedback I have received presenting this paper at that meeting, to the faculty of the University of Mississippi, to the faculty of the Cumberland Law School, to the faculty at the University of Akron College of Law, to the faculty at Stetson University College of Law, and at the 2007 Colloquium on Current Scholarship in Labor & Employment Law. Thanks also to John O'Connell, Michael Selmi, David Zaring, Serena Mayeri, Elizabeth Chamblee Burch, Nancy Levit, Wendy Greene, Brannon Denning, and the editors of the Berkeley Journal of Employment and Labor Law for their great advice and feedback on prior drafts. Lauren Sutton Phelps and Elizabeth McQuaid provided excellent research assistance. Any errors or omissions, technical or substantive, are mine alone.

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I.
INTRODUCTION

Employment discrimination laws in the United States have not created full equality in the workplace. The *Wall Street Journal* recently reported that people of color and white women 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 fully by neutral factors like differences in education or time taken out of the work force.[3] 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, achieving 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

1. Carol 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); *see also*, The Gallup Organization, Employee Discrimination in the Workplace 12 (2005), *available at* http://media.gallup.com/government/PDF/Gallup_Discrimination_Report_Final.pdf (stating that "[d]espite 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").

4. Hymowitz, *supra* note 1, at B1.

5. *Id.*

6. *See* 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).

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publicize the state of the nation's workplaces.[7] To date, the Equal Employment Opportunity Commission (EEOC), the agency created by Title VII to enforce its provisions, has been unable to achieve much accountability.[8] The EEOC has been widely viewed as ineffectual since its inception.[9] Accordingly, this paper proposes taking private sector employment discrimination out of the hands of the 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 new federal agency to fill these roles would remove two of the largest obstacles to eradicating employment discrimination–which I have labeled the enforcement gap[10] and the secrecy effect[11] and discuss in greater detail below–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 precisely and to make a normative case for stronger federal enforcement.[12]

For optimal enforcement, there is a need to be filled that individuals cannot accomplish themselves[13] and which Congress probably cannot force the states to fill, unless it links the obligation with funding.[14] But the current model, with the EEOC writing compliance guidelines, encouraging mediation and occasionally acting as prosecutor, is not working.

The new agency would move from the 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 them, 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.

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7. *See* 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).

8. *See infra* Part II.B.3.

9. *See id.* From its start, the EEOC has been 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 a month before it was to begin enforcement efforts. Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 Vand. L. Rev. 905, 920 (1978) (citing U.S. Comm'n on Civil Rights, The Federal Civil Rights Enforcement Effort: To Eliminate Employment Discrimination 87-88 (1971)).

10. *See infra* notes 86-101 and accompanying text.

11. *See infra* notes 102-06 and accompanying text.

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

13. *See infra* notes 107-26 and accompanying text (discussing the enforcement gap).

14. *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).

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The truth commission, a concept of transitional justice found in international law, is one model that provides these investigative and publicizing functions.[15] Transitional justice is a theory of how a repressive and illegitimate government can transition to a legitimate one.[16] 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.[17] Truth commissions allow individuals, relatives, and perpetrators to give evidence of human rights abuses and provide an official forum for their accounts.[18] In most instances, truth commissions are also required by their mandate to provide recommendations on steps to prevent a recurrence of such abuses.[19]

The federal government already uses a similar structure for legislative hearings and for blue-ribbon commissions, established to address public crises.[20] These legislative hearings serve information gathering, fact-finding, recommending, and publicizing functions.[21] The 9-11 Commission, one of these blue-ribbon commissions, did more than gather information; it adjudicated claims and distributed compensation from a fund to victims of the September 11 terrorist attacks.[22] Investigating and issuing reports is also the way that one federal agency, the United States Commission on Civil Rights, operates.[23] I propose to take the concept of those existing structures one step further to focus on more disputes in a more narrow area.

Using existing fact-finding, recommending, and publicizing structures as a model, the new agency would more effectively promote best practices

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

16. *Id.*; *see also* RUTI G. TEITEL, TRANSITIONAL JUSTICE 4-7 (2000).

17. HAYNER, *supra* note 15, at 3-5, 24.

18. *Id.* at 26, 28.

19. *See generally id.* at 32-49, 52, 57, 60, 61, 63, 67, 68.

20. Standing Rules of the Senate R. XXVI, cl. 1; *see* Rules of the House of Representatives, 111th Cong. R. X, cl. 2-3, R. XI, cl. 2-5.

21. *See generally* Standing Rules of the Senate R. XXVI, cl. 1; Rules of the House of Representatives, 111th Cong. R. X, cl. 2-3, R. XI, cl. 2-5; *see also* RICHARD C. SACHS, CONGRESSIONAL RESEARCH SERVICE, REPORT NO. 98-317 GOV, TYPES OF COMMITTEE HEARINGS (2004), *available at* http://www.thecapitol.net/Research/images/98-317.pdf; ANDREA SEVETSON, LEXISNEXIS, HEARINGS AND THE LEXISNEXIS® CONGRESSIONAL HEARINGS DIGITAL COLLECTION (2007) (describing legislative hearings in the context of the holdings of the LexisNexis database), http://academic.lexisnexis.com/pdf/HearingsWhitePaper.pdf.

22. The National Commission on Terrorist Attacks upon the United States was an independent commission created by Legislation. Pub. L. No. 107-306, 16 Stat. 2390 (2002), and extended by Pub. L. No. 108-271, 118 Stat. 814 (2004). The Commission's final report can be downloaded at http://govinfo.library.unt.edu/911/report/911Report.pdf.

23. Pub. L. No. 85-315, § 101(a), 71 Stat. at 634 (1957). Although the Commission was created as a temporary body, it was extended and its authority changed several times, and it was finally made permanent in 1983. Pub. L. No. 98-183, 97 Stat. 1301 (1983) (codified at 42 U.S.C. §§ 1975-1975f (2006)); *see* Jocelyn C. Frye, Robert S. Gerber, Robert H. Pees & Arthur W. Richardson, Comment, *The Rise and Fall of the United States Commission on Civil Rights*, 22 HARV. C.R.-C.L. L. REV. 449, 454-83 (1987).

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and perform the information disseminating function necessary to enforcement. However, this new agency would also have broader responsibilities, which would warrant significant modification of these existing models. The exact nature of such modifications is beyond the scope of this paper but is a topic I will explore in future papers.

Part II of this paper outlines the current 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, explaining how those functions would enhance the transparency and accountability essential for enforcement.

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 a private economic relationship. Yet, courts and legislatures have provided employees with certain rights, the most well-known of which are the anti-discrimination laws,[24] which operate as external limitations on how that economic and private relationship can be structured and serve to produce the public goods of justice and greater equality. Such external limitations, however, are always in some tension with the economic principle of laissez-faire and the privacy principle, and the 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. As I explain, 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.[25]

24. *See, e.g.*, 29 U.S.C. §§ 621-34 (2006); 42 U.S.C. §§ 2000e-2000e-17 (Supp. V 2000) (prohibiting discrimination by employers on the basis of race, color, national origin, religion, and sex and giving individuals a private cause of action to enforce their rights); 42 U.S.C. §§ 12111-17 (Supp. V 2000) (prohibiting discrimination on the basis of disability and creating a private cause of action for individual enforcement).

25. Employment statutes and cases presume that employers retain the discretion to manage their businesses, and at least part of this is 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). Further, "[t]he right of a person to

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Despite the language of "self-regulation," 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.[26] 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.[27] However, the core justifications of labor law remain economic.[28] 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 economic, then the market should be able to regulate all aspects of employment by itself, and the efficient outcome will be the just outcome.[29] 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. Limita-

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sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor [to] 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 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, 1116 n.337 (2004) (documenting the hundreds of cases that recite this general principle).

26. The use of government power to defend property is intrinsic within the definition of property. Black's Law dictionary defines "property" as "[t]he right to possess, use, and enjoy a determinate thing," and it defines a "right" as "something that is due to a person by just claim, legal guarantee, or moral principle . . . a power, privilege or immunity secured to a person by law . . . , [or a] legally enforceable claim that another will do or will not do a given act . . . ." (8th ed. 2004). Thus, when the government recognizes private property, it also promises to protect that interest through law. *See* JEREMY BENTHAM, 1 BENTHAM'S THEORY OF LEGISLATION 145-46 (1914) ("there is no such thing as natural property; it is entirely the creature of law . . . . for I cannot reckon on the enjoyment of that which I regard as my own, save through the promise of the law that guarantees it to me."); JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT § 124 (1690) ("The great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property."); JAMES MADISON, PROPERTY, Papers 14:266-68 (29 Mar. 1792) ("Government is instituted to protect property of every sort . . . ."), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, ch. 16, doc. 23 (Philip B. Kurland & Ralph Lerner eds., 2000); PIERRE-JOSEPH PROUDHON, WHAT IS PROPERTY?: AN INQUIRY INTO THE PRINCIPLE OF RIGHT AND GOVERNMENT 75-80 (Benjamin R. Tucker trans., 1876) (refuting the natural rights theory of property). Property rights are protected from interference from legislative or executive branch actions by the Fifth and Fourteenth Amendments to the Constitution. U.S. CONST. amend. V, XIV. Property rights are also created by government and protected from private interference by the body of Property Law, Contracts, and Torts.

27. *See* 29 U.S.C. §§ 151, 158 (2006) (noting the unequal bargaining power between employers and employees, the history of labor strife, and protecting workers' rights to strike and bargain collectively in order to give employees greater bargaining power).

28. 29 U.S.C. § 151 (2006) (justifying the protection of the right to strike and bargain collectively as necessary to promote interstate commerce).

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

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tions on the operation of the market or autonomy of the parties run counter to core Western notions of liberty and autonomy.[30]

Some of the substantive rules imposed on the employment relationship, like Social Security,[31] workers' compensation, unemployment insurance, and occupational safety and health, have an explicit economic justification,[32] and thus, the tension is less. In other words, substantive rules that are commonly seen as guarding against failures in the market or enhancing the efficiency of the market to protect the public interest will not create as 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.[33] Anti-discrimination laws are instead rights based. And being rights based, rather than economically grounded, anti-discrimination laws create significant tension with the economic model.[34] 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

30. *See generally* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION (1995) (arguing that employment discrimination laws infringe on individual liberty, promote inefficiency, and cause more discrimination than they remedy); CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 157-58 (2001) (describing the market based argument against prohibiting discrimination by law).

31. Some 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 were adopted by former President George W. Bush, who advocated partial privatization. *See*, *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").

32. *See generally* 29 U.S.C. § 651(a) (2006) (finding that workplace injuries are a hindrance to interstate commerce through loss of production, wages, medical expenses, and disability payments); New York Cent. R.R. Co. v. White, 243 U.S. 188 (1917) (holding New York's workers' compensation law was motivated to keep people off of the public welfare roles); Statement on Signing the Social Security Act of 1935 (Aug. 14, 1935) (stating that the old age and unemployment insurance provisions of the law would "take care of human needs and at the same time provide the United States an economic structure of vastly greater soundness"); 1 LARSON'S WORKERS' COMPENSATION LAW § 1.02 (describing the workers' compensation system as designed provide support and prevent destitution).

33. *See* 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 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. 689, 696-702 (2007) (outlining the law and economics analyses of the extent of employment discrimination and the potential forces driving it).

34. *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. SOC. 1713 (2007) (studying why some states adopted fair employment practices laws much more slowly than others and concluding that the slowness was a result of key GOP office holders allied with organized business and motivated by free-market, anti-regulatory ideology).

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who are the same should be treated the same and that those who are different should be treated differently.[35] Many also agree now 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.[36] Thus, as the existence of the laws prohibiting discrimination in employment on these bases demonstrates, a fairly strong consensus exists that employers should not be able to discriminate on these bases. However, as I and others have argued, there is no current agreement as to which practices constitute discrimination or how widespread discrimination is; thus the scope and substance of the antidiscrimination right lacks an undergirding of social consensus.[37]

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 high. When it comes to enforcement, this tension creates serious practical difficulties and doctrinal incoherence.[38] The sections that follow lay out the enforcement model in place and the gaps in enforcement that have resulted.

35. SUNSTEIN, *supra* note 30, at 164-65 (describing much of the constitutional law of equality). This principle of equality was first developed by Aristotle, who argued that true equality required things or people that were the same to be treated alike and things or people that were different to be treated differently. ARISTOTLE, THE NICOMACHEAN ETHICS OF ARISTOTLE 145, 153, 256-67 (trans. F.H. Peters, 15th ed. 1904).

36. These are the classes protected by federal and sometimes state legislation from discrimination in employment (29 U.S.C. §§ 621-34 (2006) (prohibiting age discrimination); 42 U.S.C. §2000e-2000e-17 (Supp. V 2000) (covering sex, race, color, religion, and national origin); 42 U.S.C. §§ 12111-17 (Supp. V 2000) (governing disability)), housing (42 U.S.C. § 1982 (prohibiting discrimination in property transactions on the basis of race); 42 U.S.C. §§ 3601-31 (Supp. V 2000) (prohibiting discrimination on the basis of race, color, religion, sex, familial status, national origin, or handicap)), and for some of these classes, public accommodations (42 U.S.C. § 1981 (protecting freedom of contract on the basis of race); 42 U.S.C. §§ 2000a-2000a-6 (Supp. V 2000) (prohibiting discrimination in public accommodations on the basis of race, color, religion, and national origin)). These protections, gained through majoritarian processes, likely reflect the values of at least many if not most people and stand for the proposition that those classes are not relevant to decide who should be employed, have housing, or be served by public accommodations.

37. *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) (examining definitions of "discrimination"); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 284 (1997) (describing the Supreme Court's interpretation of unlawful discrimination); Belton, *supra* note 9, at 913-14 (arguing that, prior to the enactment of Title VII, employment discrimination was seen as a moral, rather than a legal issue); *see also* SUNSTEIN, *supra* note 30, at 49-66 (arguing that the real problem is not a lack of consensus on constitutional practices, but instead a lack of consensus on constitutional theory to give substance to the constitutional principles).

38. The best sign of this tension is the oft-repeated caveat that courts are not to sit as super-personnel boards, second guessing an employer's business decisions. *See* Sullivan, *supra* note 25, at 1115-16, 1116 n.337. *See generally* Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859 (2008) (thoroughly documenting how the system of private enforcement fails employees despite the language of the Act); Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489 (2006) (arguing that Title VII's causation standard had become doctrinally incoherent).

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A. *The Enforcement Model in Place*

The main employment discrimination federal statutes include section 1981,[39] Title VII of the Civil Rights Act of 1964,[40] the Equal Pay Act,[41] the Age Discrimination in Employment Act,[42] Title I of the Americans with Disabilities Act,[43] sections 501 and 505 of the Rehabilitation Act of 1973,[44] and the Family Medical Leave Act.[45]

Most of these statutes 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.[46] Most also prohibit actions taken for a neutral reason but that affect members of a protected group disproportionately.[47] They further prohibit employers from retaliating against employees who seek the protection of the statutes or who help others seek that protection.[48] In addition to the similarity in protec-

39. 42 U.S.C. § 1981 (Supp. V 2000) (providing that all persons within the jurisdiction of the United States have equal rights to make and enforce contracts as that enjoyed by white citizens).

40. 42 U.S.C. §§ 2000e- to 2000e-17 (Supp. V 2000) (enforcement authority codified at 42 U.S.C. §§ 2000e-4, e-5, e-12).

41. 29 U.S.C. §§ 206(d), 209, 211, 213, 215-19, 255-56, 259-60, 262 (2006).

42. 29 U.S.C. §§ 621-34 (2006) (enforcement authority codified at 29 U.S.C. § 628).

43. 42 U.S.C. §§ 12111-17 (Supp. V 2000) (enforcement authority codified at 42 U.S.C. § 12116).

44. 29 U.S.C. §§ 791, 794, 794a (2006) (enforcement authority codified at 29 U.S.C. § 794(a)(1)).

45. 29 U.S.C. §§ 2601-54 (2006).

46. 29 U.S.C. § 206(d) (2006) (prohibiting different pay for the same work when that difference is because of sex under the Equal Pay Act); 29 U.S.C. § 623 (2006) (barring decisions made on the basis of age as made about a person forty years old or older); 29 U.S.C. § 794(a) (2006) (prohibiting discrimination against qualified individuals with disabilities by anyone receiving federal funding); 42 U.S.C. § 2000e-2(a) (Supp. V 2000) (prohibiting discrimination on the basis of race, color, national origin, religion, and sex); 42 U.S.C § 12112 (Supp. V 2000) (prohibiting discrimination against qualified individuals with disabilities).

The FMLA is couched in anti-discrimination terms, in part. 29 U.S.C. § 2601 (2006); *see* Nev. Dep't of Human Servs. v. Hibbs, 538 U.S. 721, 729 n.2 (2003). However, rather than simply outlaw discrimination against those who need to take family leave, the FMLA requires 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 (2006).

47. Smith v. City of Jackson, 544 U.S. 228, 238 (2005) (recognizing disparate impact under the ADEA); Raytheon Co. v. Hernandez, 540 U.S. 44, 51-52 (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.

48. 29 U.S.C. § 215(a)(3) (2006) (the anti-retaliation provision for the Equal Pay Act); 29 U.S.C. § 623(d) (2006) (the anti-retaliation provision for the ADEA); 42 U.S.C. § 2000e-3 (Supp. V 2000) (prohibiting retaliation under Title VII); 42 U.S.C. § 12203 (Supp. V 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, 409-10 (8th Cir. 2000). The Supreme Court held just last term that a cause of action for retaliation exists under section 1981. CBOCS West, Inc. v. Humphries, 553 U.S. ___, 128 S. Ct. 1951 (2008).

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tions, these statutes allow employees to sue the employer and to get damages, equitable relief, and attorneys' fees for violations of the statutes.[49]

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.[50] For all of the remaining statutes except for the Family Medical Leave Act,[51] 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.[52] In 1972, the EEOC was given the power to prosecute actions in federal court, in order to provide for more effective enforcement.[53] For Title VII, it still lacks the power to issue regulations with the force of law.

The EEOC acts as something of a gatekeeper to the courts, but not a very strong one because nothing it does affects an employee's ability to pursue the charge in court; instead it is simply a bureaucratic hurdle for most plaintiff employees.[54] Nonetheless, an employee who has suffered a violation of one of the statutes must file a charge with the EEOC within 180

49. 29 U.S.C. § 216(b) (2006) (providing for damages, equitable relief, and attorneys' fees under the Equal Pay Act); 29 U.S.C. § 626(b) (2006) (allowing courts to award legal and equitable relief for age discrimination); 29 U.S.C. § 794 (2006) (adopting the remedies provided by Title VI of the Civil Rights Act of 1964 for discrimination against the disabled by recipients of federal funds); 42 U.S.C. § 1981a (Supp. V 2000) (providing for damages and attorneys fees in civil rights cases including those brought under Title VII, the ADA, and the Rehabilitation Act); 42 U.S.C. § 2000e-5 (Supp. V 2000) (providing for a cause of action, equitable relief and attorneys' fees for violations of Title VII); 42 U.S.C. § 12117 (Supp. V 2000) (adopting the remedies available in Title VII for violations of the ADA).

50. Section 1981 is not enforced by any agency, but is instead enforced through private rights of action brought by individuals. *See* 42 U.S.C. § 1981 (Supp. V 2000); Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 459-60 (1975) (confirming that section 1981 created a private cause of action).

51. The FMLA is enforced by individuals, who may file private causes of action, and by the Department of Labor. 29 U.S.C. § 2617 (2006).

52. *See* Civil Rights Act of 1964, Pub L. No. 88-352, 78 Stat. 241 (1964); *see also* Rose, *supra* note 33, at 1134. In 1972, it was given the power to bring causes of action against employers. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972). 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).

53. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103; Statement about Signing the Equal Employment Opportunity Act of 1972 (Mar. 25, 1972) ("Everyone familiar with the operation of title VII over the past 7 years has realized that the promise of that historic legislation would remain unfulfilled until some additional, broad-based enforcement machinery was created. This bill provides that enforcement capability."). 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.

54. As 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).

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days of the event,[55] 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.[56] After the charge is filed, the EEOC notifies the employer of the charge.[57] Charges that strongly suggest that the employer has violated the law are marked for priority investigation.[58] If the parties are willing to mediate, investigation is suspended during the mediation process.[59] 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.[60] 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.[61] If conciliation is successful, the parties will sign a settlement agreement, and not proceed to litigation.[62] If

55. 29 U.S.C. § 626(d) (2006) (ADEA); 42 U.S.C. § 2000e-5(e)(1) (Supp. V 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, *available at* http://eeoc.gov/charge/overview_charge_filing.html (last modified Aug. 13, 2003).

56. 42 U.S.C. § 2000e-5(e)(1) (Supp. V 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) (LexisNexis 2009) (providing a 180-day period); COLO. REV. STAT. § 24-34-306 (2008) (providing a ninety-day period); CONN. GEN. STAT. § 46a-82(f) (2008) (providing a 180-day period); DEL. CODE ANN. tit. 19 § 712(c)(1) (2009) (limiting filing period to 120 days); GA. CODE ANN. § 45-19-36 (2008) (providing 180-day period); HAW. REV. STAT. ANN. § 368-11 (LexisNexis 2008) (same); 775 ILL. COMP. STAT. ANN. 5/7A-102 (LexisNexis 2008) (same); IND. CODE ANN. § 22-9-1-3 (LexisNexis 2009) (same); IOWA CODE § 216.15 (2008) (same); KAN. STAT. ANN. § 44-1005 (2008) (providing a filing period of six months); KY. REV. STAT. ANN. § 344.200 (LexisNexis 2009) (using 180-day filing period); LA. REV. STAT. ANN. § 51:2257 (2008) (same); ME. REV. STAT. ANN. tit. 5, § 4611 (2008) (requiring complaint to be filed within six months); MD. ANN. CODE art. 49B, § 9A (LexisNexis 2009) (same); MO. REV. STAT. § 213.075 (2009) (providing a 180-day filing period); MONT. CODE ANN. § 49-2-501 (2007) (same); N.H. REV. STAT. ANN. § 354-A:21 (LexisNexis 20079) (same); N.J. STAT. ANN. § 10:5-18 (2009) (same); OHIO REV. CODE ANN. § 4112.05 (LexisNexis 2009) (giving a six month limitations period); OKLA. STAT. tit. 25 § 1502 (2008) (using 180-day period); 43 PA. STAT. ANN. § 959 (2008) (same); S.C. CODE ANN. § 1-13-90 (2007) (same); S.D. CODIFIED LAWS § 20-13-31 (2008) (same); TENN. CODE ANN. § 4-21-302 (2009) (same); TEX. LAB. CODE §§ 21.201-21.202 (2008) (same); UTAH CODE ANN. § 34A-5-107 (2008) (same); WASH. REV. CODE ANN. § 49.60.230 (LexisNexis 2009) (using a six-month period); WYO. STAT. ANN. § 27-9-106 (2008) (same); 6 ALASKA ADMIN. CODE tit. 6, §30.230 (2009) (providing a 180-day period); MICH. ADMIN. CODE R. 37.4(6) (2009) (same); 22 VA. ADMIN. CODE § 25-10-30 (2008) (same).

57. 42 U.S.C. § 2000e-5(b).

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

59. *Id.* at 15.

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

61. 42 U.S.C. § 2000e-5(b).

62. *Id.* § 2000e-5(f)(1) (providing that litigation commences only if "the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission").

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conciliation is not successful, however, the EEOC may sue, and the employee may intervene.[63]

Alternatively, the EEOC may close the case and issue a letter notifying the employee of the right to sue the employer in court.[64] 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.[65] If the investigation has not been resolved 180 days[66] 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.[67] Once an employee has received notice of the right to sue, the employee has ninety days to commence an action.[68]

Although the EEOC has the power to investigate every charge of discrimination filed with it and even to engage in its own investigations and legal actions, to do so would require vast resources. In its current efforts to achieve maximum enforcement with its limited resources, the EEOC has implemented a five-point plan:[69]

1. Proactive prevention, which focuses on education and outreach to both employees and employers;[70]
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

63. 42 U.S.C. §§ 2000e-5(f)(1), 2000e-6 (Supp. V 2000).

64. *Id.* § 2000e-5(f)(1).

65. *Id.*

66. For the ADEA, the time period is any time after sixty days. 29 U.S.C. § 626(d)(1) (2006).

67. 42 U.S.C. § 2000e-5(f)(1).

68. *Id.* The action may be brought in federal court. 42 U.S.C. § 2000e-5(f)(3). 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) (2006).

69. U.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.

70. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2006 PERFORMANCE AND ACCOUNTABILITY REPORT 13-17, 33 (2006) [hereinafter EEOC FY-06] (detailing its strategic litigation agenda), *available at* http://www.eeoc.gov/abouteeoc/plan/par/2006/par2006.pdf 13-17, 33; ORGANIZING EEOC, *supra* note 58, 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. TEN-YEAR CHECKUP, *supra* note 69, at 46-47. The 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.

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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 investing significant resources into its mediation program.[71] This push to mediate is a relatively recent development. In 1991 the EEOC first experimented with mediation in four field offices.[72] The EEOC fully adopted the program, writing a policy statement that set forth core principles for alternative dispute resolution (ADR) in antidiscrimination cases.[73] The EEOC continued to expand its use of mediation, and now about half of all EEOC charges are mediated.[74] Most of those are charges that appear to have merit but require more information before a decision can be made.[75]

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."[76] In 2008, the EEOC filed suit in 290 cases, and more than forty percent of the EEOC's case load involved multiple employees or challenged policies that affected a number of employees.[77] The EEOC obtains some relief in over ninety percent of its cases.[78]

Although the EEOC plays a role in enforcement through its conciliation, mediation, and litigation efforts,[79] it relies primarily on private parties coming to it to file charges.[80] Indeed, the bulk of actions brought in court to enforce the antidiscrimination laws are brought by private parties. In 2008, over 14,000 suits were brought in federal court, and while that num-

71. EEOC FY-06, *supra* note 70, at 7.

72. Organizing EEOC, *supra* note 58, at 15.

73. EEOC 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.

74. Organizing EEOC, *supra* note 58, at 13-14.

75. *Id.* 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.*

76. EEOC FY-06, *supra* note 70, at 9; *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], http://eeoc.gov/abouteeoc/task_reports/systemic.pdf.

77. U.S. Equal Employment Opportunity Commission, FY 2008 Performance and Accountability Report 8-9 (2006) [hereinafter EEOC FY-08], *available at* http://eeoc.gov/abouteeoc/plan/par/2008/par2008.pdf.

78. *Id.* at 23.

79. The EEOC reports that it resolved over 17,000 charges in favor of employees in 2008 through mediation, settlement, or consideration for litigation. EEOC FY-08, *supra* note 77, at 6 (reporting 21.4% of 81,081 resolutions were merit factor resolutions).

80. *See* EEOC FY-08, *supra* note 77, at 6, 9 (private parties filed over 95,000 charges with the EEOC in 2008, compared to thirty-eight Commissioners' charges under investigation).

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ber is lower than the number of suits brought in prior years[81] it is still forty times the number of suits brought by the EEOC.[82] Further, 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 more than ninety state and local fair employment practices agencies (FEPAs), which handle over 50,000 charges annually.[83] The EEOC uses "work sharing agreements," to balance the workload: "if a charge is filed with a FEPA and is also covered by federal law, the FEPA 'dual files' the charge with EEOC to protect federal rights and the charge usually is retained by the FEPA for handling"; "if a charge is filed with EEOC and also is covered by state or local law, EEOC 'dual files' the charge with the state or local FEPA, but ordinarily retains the charge for handling."[84] Even though the state agencies together handle fewer charges than the EEOC, the workload is significantly greater for many of the states because of what they do to handle those charges. 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.[85] Without a single source that collects information on FEPAs and

81. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 2008 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS, tbl. C-2A (2009).

82. The EEOC has historically brought about 350 actions against employers per year, see EEOC FY-06, *supra* note 70, at 6, and that number is shrinking, as you can see in the current report, EEOC FY-08, *supra* note 77, at 8-9.

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

84. EEOC, Filing a Charge of Discrimination, http://www.eeoc.gov/charge/overview_charge_filing.html.

85. MICH. CONST. art. V, § 29 (creating agency to investigate and adjudicate discrimination claims); ALASKA STAT. §§ 18.80.110-130 (2009) (providing that agency may function as investigator, prosecutor, and adjudicator); ARIZ. REV. STAT. ANN. § 41-1481 (LexisNexis 2009) (creating role for agency as investigator and prosecutor); CAL. GOV'T CODE §§ 12930(f), (h), 12935, 12963, 12965 (Deering 2008) (providing that agency can be investigator, prosecutor, and adjudicator); COLO. REV. STAT. § 24-34-305 (2008) (same); CONN. GEN. STAT. §§ 46a-54, 56, 82, 84 (2008) (same); DEL. CODE ANN. tit. 19, §§ 712(a)(3), (c) (2009) (creating roles as investigator and prosecutor); D.C. CODE ANN. §§ 2-1403.04, 1404.02, 1411.03 (LexisNexis 2009) (creating one agency to investigate and prosecute claims and another to adjudicate); FLA. STAT. ANN. § 760.11 (LexisNexis 2008) (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 (2008) (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 (LexisNexis 2008) (empowering agency to serve as investigator, prosecutor, and adjudicator); IDAHO CODE ANN. §§ 67-5906, 5907, 5908 (2008) (creating role as investigator and prosecutor); 775 ILL. COMP. STAT. ANN. §§ 5/7A-102, 8A-102 (LexisNexis 2008) (creating one agency to serve as investigator and prosecutor and a second agency to serve as adjudicator); IND. CODE ANN. § 22-9-1-6 (LexisNexis 2009) (providing a role for the agency as investigator and adjudicator); IOWA CODE §§ 216.5, 216.15 (2008) (empowering agency to serve as investigator, prosecutor, and adjudicator); KAN. STAT. ANN. § 44-1005 (2008) (creating role for agency as prosecutor and adjudicator); KY. REV. STAT. ANN. §§ 344.180, 200, 210 (LexisNexis 2009) (empowering agency to serve as investigator and adjudicator); LA. REV. STAT. ANN. §§ 51:2235, 2237 (2008) (providing that agency can be investigator, prosecutor,

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their activities and with uneven reporting of caseload statistics, it is difficult to assess how much enforcement state activity provides. 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 enforcement system for employment discrimination laws has a gap, demonstrated by the lack of workplace equality that still exists. Title VII has not created the social change supporters had envisioned.[86] Although the language of Title VII is broad, the enforcement scheme failed to include elements supporters believed necessary for real change.[87] Title VII was modeled on largely ineffective state fair employment practice laws.[88] These state laws were enforced either by private suits or by the state attorney general, which left enforcement too dependent on the political will of the state attorney general and the interpretation of the courts.[89] Now, the

and adjudicator); ME. REV. STAT. ANN. tit. 5 §§ 4566, 4612, 4613 (2008) (creating role as investigator and prosecutor); MD. ANN. CODE art. 49B, §§ 9A, 10, 11 (LexisNexis 2009) (empowering agency to serve as investigator, prosecutor and adjudicator); MASS. ANN. LAWS ch. 151B, §§ 3, 5 (LexisNexis 2009) (same); MICH. COMP. LAWS SERV. § 37.2602 (LexisNexis 2009) (same); MINN. STAT. § 363A.28, 29, 33 (2008) (same); MO. REV. STAT. § 213.075 (2009) (same); MONT. CODE ANN. §§ 49-2-504, 505 (LexisNexis 2007) (creating one agency to investigate and attempt to conciliate and another to adjudicate); NEB. REV. STAT. ANN. § 48-1117 (LexisNexis 2009) (creating roles for agency as investigator and adjudicator); NEV. REV. STAT. ANN. §§ 233.150, 170 (LexisNexis 2009) (same); N.H. REV. STAT. ANN. §§ 354-A:5, 21 (LexisNexis 2009) (same); N.J. STAT. ANN. §§ 10:5-8, 14, 16 (2009) (same); N.M. STAT. ANN. §§ 28-1-4, 10, 11 (LexisNexis 2008) (empowering agency to investigate, prosecute, and adjudicate); N.Y. EXEC. LAW §§ 295, 297 (Consol. 2007) (same); N.D. CENT. CODE §§ 14-02.4-22, 4-23 (2009) (same); OHIO REV. CODE ANN. §§ 4112.04, 05 (LexisNexis 2009) (providing that agency can investigate and adjudicate); OKLA. STAT. tit. 25, §§ 1501-02 (2008) (empowering agency to investigate, prosecute, and adjudicate); OR. REV. STAT. §§ 659A.825, 835, 845, 850 (LexisNexis 2007) (same); 43 PA. STAT. ANN. §§ 957, 959 (2008) (same); R.I. GEN. LAWS §§ 28-5-13, 5.1-6 (2009) (same); S.C. CODE ANN. § 1-13-70 (2007) (same); S.D. CODIFIED LAWS §§ 20-13-7, 29, 32, 35 (2008) (creating one agency to investigate and another to prosecute and adjudicate claims); TENN. CODE ANN. § 4-21-202 (2009) (empowering agency to investigate, prosecute, and adjudicate claims); TEX. LAB. CODE §§ 21.003, 251 (2008) (allowing agency to investigate and prosecute claims); UTAH CODE ANN. § 34A-5-107 (2008) (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 (2008) (empowering agency to investigate and adjudicate claims); WASH. REV. CODE ANN. § 49.60.120 (LexisNexis 2009) (same); W. VA. CODE ANN. §§ 5-11-8, 10 (LexisNexis 2008) (empowering agency to investigate, prosecute, and adjudicate); WIS. STAT. ANN. § 111.39 (2008) (creating one agency to investigate and adjudicate); WYO. STAT. ANN. §§ 27-9-104, 106 (2008) (empowering agency to investigate and adjudicate).

86. ALFRED W. BLUMROSEN, MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY 4 (1993) (arguing that "[t]he 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 added)); *see also supra* note 1.

87. Rose, *supra* note 33, at 1134.

88. *Id.*; *see also* Belton, *supra* note 9, at 913 (noting that states did not make effective use of their enforcement powers, which ranged from conciliation to full cease and desist power).

89. Rose, *supra* note 33, at 1134.

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enforcement system as a whole continues to rely primarily on states[90] and on litigation brought by private parties.[91] The resulting enforcement is rather weak. First, not all states enforce the law or the norms underlying it.[92] Second, in those states that do have laws prohibiting discrimination in the private sector, the enforcement systems are structurally ineffective, relying too heavily on either private parties alone or on the state attorney general alone to bring an action.[93]

Private enforcement through litigation is not effective for a number of reasons.[94] The danger of retaliation or being blacklisted within an industry severely limits workers' ability to challenge the actions of current or even past employers.[95] As a practical matter, "[o]nly in our dreams are we free.

90. Joseph P. Witherspoon, *Civil Rights Policy in the Federal System: Proposals for a Better Use of Administrative Process*, 74 YALE L.J. 1171, 1172 (1965) (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. 88-872 (1964)).

91. Belton, *supra* note 9; *see also* EEOC v. Assoc. Dry Goods Corp., 449 U.S. 590, 603 n.21 (1981) (citing the legislative history behind the 1972 amendments to Title VII to affirm the importance of a private right of action); 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) (discussing the importance of employment discrimination class actions as a tool for social change).

92. For 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. *Compare* ALA. CODE tit. 25 (2007) (industrial relations and labor chapter not providing for an enforcement mechanism for private discrimination), *with* ALA. CODE § 29-4-3 (prohibiting discrimination in hiring employees of the legislature). *See generally* GA. CODE ANN. §§ 34-1-2, 34-5-3, 45-19-22, 45-19-28, 45-19-29 (2007) (various laws banning different types of discrimination but not providing for an enforcement mechanism); MISS. CODE ANN. §§ 25-9-149, 33-1-15 (2007) (providing an antidiscrimination policy for state employees and penalties for discrimination on the basis of current or former membership in the armed forces, respectively).

93. Belton, *supra* note 9, at 918-19.

94. *See generally* Brake & Grossman, *supra* note 38 (thoroughly documenting how the system of private enforcement fails employees).

95. *Id.* at 902-05 (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) ("[M]any 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 PSYCHOLOGY 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 PSYCHOLOGY 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)).

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The rest of the time we need wages."[96] 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.[97] The system of enforcement does not compensate for this imbalance of power between employees and employers.

The EEOC was one mechanism created to supplement the enforcement of states and individuals,[98] and its most powerful weapon is litigation. As one EEOC veteran remarked:

> [T]he most dramatic shift [in the power of the EEOC] was in 1972 when we got the litigation authority. . . . Investigation-conciliation remained, but you had an enormous club that you could walk into federal district court with [that] didn't have to rely on the private bar. . . . It was the force of the United States of America . . . .[99]

Similarly, another veteran added that the power to litigate "gave this agency substantially more teeth. In the first place, just the growl itself was effective from time to time . . . ."[100] Even though it has this power, however, the agency lacks the resources to bring suits in every meritorious case and therefore chooses to get involved only in some cases involving more than one employee or which could lead to a change in policies for a number of employees.[101] More and different types of federal involvement are necessary for effective enforcement and accountability.

A second 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,[102] growing numbers of employers have required as a condition of employment that employees sign pre-dispute arbitration agreements, agreeing to submit all disputes to arbitration and waiving the right to go to court.[103] Aside

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

97. *See* Brake & Grossman, *supra* note 38, at 902-05; Ruan, *supra* note 91, at 397, 410-11; *see also infra* notes 127-30, detailing the extent of workplaces that use pre-dispute arbitration or other forms of ADR.

98. Belton, *supra* note 9, at 912-18 (reviewing contemporaneous events, legislative history, and statements by President Kennedy).

99. EEOC, MAKING A RIGHT A REALITY: AN ORAL HISTORY OF THE EARLY YEARS OF THE EEOC, 1965-72 (1998), *available at* http://www.eeoc.gov/abouteeoc/35th/voices/making.html (containing excerpted quotes from 20-year veterans of the EEOC, including comments by Ronnie Blumenthal).

100. *Id.* (citing comments by Donald Hollowell).

101. EEOC FY-06, *supra* note 70, at 9; *see also* EEOC SYSTEMIC REPORT, *supra* note 76.

102. Gilmer v. Interstate Johnson/Lane Corp., 500 U.S. 20, 23 (1991). The Court recently confirmed that individual employees not only could be required to arbitrate their statutory disputes as a condition of employment, but also that a union could waive individual employees' rights to bring a statutory claim in court and agree to arbitration instead. 14 Penn. Plaza, LLC v. Pyett, 556 U.S. ___, 129 S. Ct. 1456 (2009).

103. EEOC NOTICE NO. 915.002, *supra* note 73. Several studies have been conducted to try to gauge how many businesses have adopted mandatory arbitration. Those surveys reflected that by the

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from arbitration, other forms of ADR such as mediation and internal dispute resolution have grown in popularity. All of these forms of ADR operate in a private system, hidden from the public.

A private system of dispute resolution may not be 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, and also in a distributive sense by limiting access to social goods.[104] Thus discrimination affects the public in a way that solely 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 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.[105] If information about discrimination can be hidden from the public, the system cannot serve this norm expressing function.[106]

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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) [hereinafter Colvin, *Mandatory Arbitration*]; *see also* KATHERINE V. W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 189 (2004) (noting that as of 2004, the number of employees covered by mandatory arbitration agreements equaled the number covered by collective bargaining agreements). A mid-1990s United States General Accounting Office survey 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 7 (1995), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=gao&docid=F:he95150.pdf (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 Employment 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*].

104. Suk, *supra* note 7, at 414-15.

105. *See* Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1, 3.

106. *But see id.* (finding that "ADR can play a significant role in developing legitimate and effective solutions to common problems and, in the process, produce generalizable norms").

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In sum, 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 employers have over employees. Second, private dispute resolution cannot vindicate public harms. Third, the EEOC itself is ineffective and in fact contributes to the secrecy problem.

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

Although it was not always the case, working for wages is the primary way that most of us now support ourselves.[107] 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. However, the vast majority of Americans are now dependent on wages and the employers providing those wages.[108]

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.[109] At the same time, only thirty-seven percent of consumers save or invest money for the future.[110] 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 wage without another job 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 by filing a charge of discrimination or even complaining within the company of discriminatory treatment.

Title VII and the other employment discrimination laws prohibit retaliation against those who file charges with the EEOC or who complain internally about discrimination. However, despite these protections, some risk remains, as is demonstrated by the rise in charges of retaliation filed with the EEOC to record levels.[111] First, it can be difficult to prove that the

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

108. *See* ERIC 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 and the shift post-World War II to wage dependence); Karst, *supra* note 107, at 532.

109. NIELSEN, CONSUMER CONFIDENCE, CONCERNS & SPENDING INTENTIONS: A GLOBAL NIELSEN CONSUMER REPORT 5 (July 2007), *available at* http://asiapacific.acnielsen.com/site/documents/GlobalConsumerConfidenceJuly07.pdf.

110. *Id.* at 5 (reporting this figure for the U.S. and Canada together).

111. The EEOC's website indicates that in fiscal year 2007, 26,663 retaliation charges were filed, up eighteen percent from the prior year, which is twice the rate at which charges generally rose. Press

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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, not all retaliation is prohibited; the retaliatory conduct must be severe enough that it would deter a reasonable employee from objecting to the discrimination or filing a charge.[112] This may be difficult for a person in the middle of a dispute to evaluate accurately. 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 claim in order to state a retaliation claim. There is a split in the circuits about whether the facts giving rise to the underlying discrimination must be sufficient to survive a motion to dismiss, or whether simply a good faith belief that the conduct violated the law is enough.[113] 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 other kinds of activities will be protected from retaliation.[114]

Even where the risk of retaliation is small, that risk may deter employees from pursuing valid claims.[115] If the employee cannot afford loss of employment, the employee is not likely to risk actions that may lead to retaliation. The employee's fear of retaliation is rational. Social science research demonstrates that complaining of discrimination backfires on those who complain.[116] People who complain that they have been discriminated against are perceived negatively by others even when the perceiver knows that the complaint is true.[117] Thus, making a claim of discrimination is an inherently risky act, and that fact will reasonably deter employees from making meritorious claims. Further, many employees may not know their rights or may not know or want to admit that they have been discriminated against.[118] Finally, discrimination is difficult to detect from an individual incident. It can be subtle or heavily coded, and it will be particularly hard

Release, EEOC, Job Bias Charges Rise 9% in 2007, EEOC Reports (Mar. 5, 2008), http://eeoc.gov/press/3-5-08.html.

112. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 77 (2006).

113. *See* 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).

114. *See* Crawford v. Metropolitan Gov't of Nashville, 555 U.S. ___, 129 S. Ct. 846 (2009) (holding that statements made in internal sexual harassment investigation objecting to harassment were protected from retaliation under Title VII's opposition clause).

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

116. *Id.* at 818-19.

117. *Id.*

118. As social psychologists have demonstrated, many people do not accurately perceive when they have been discriminated against. *Id.* at 804-06. Some people also interpret ambiguous events as discriminatory, but such interpretation is not as common as people often think. *Id.* at 803-04, 824-25.

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to detect by people who believe strongly that society is on the whole fair and legitimate.[119]

Outside of the limitations on individuals themselves, employees face significant external hurdles in litigation. In fact, scholars have documented how few cases are brought,[120] how few cases go to trial,[121] how few cases are resolved in favor of employees,[122] and how little private class actions seem to affect company practices.[123] Part of the reason for this is the implicit biases of the decision makers.[124] 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 act accordingly. Still they hold others to the higher standard they predicted for themselves and are suspicious when only one employee complains.[125]

For all of these reasons, relying primarily on lawsuits brought by individuals is a poor way to enforce the laws prohibiting employment discrimination.[126] 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

119. *Id.* at 824.

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

121. *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).

122. Kevin 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 37, 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 ninety eight percent of federal court employment discrimination cases resolved at the pretrial stage).

123. Selmi, *supra* note 3, at 1249 (documenting how class actions fail to affect shareholder price or real management change in most cases).

124. *See* Kaiser & Major, *supra* note 115, at 824; *see also* Selmi, *supra* note 122, at 556-57, 561-71.

125. Kaiser & Major, *supra* note 115, at 824; *see also* Selmi, *supra* note 122, at 556-57, 561-71.

126. This critique is supported by a recent study by Laura Beth Nielsen, Robert L. Nelson, and Ryon Lancaster for the American Bar Foundation. Laura Beth Nielsen, Robert L. Nelson, & Ryon Lancaster, *Uncertain Justice: Litigating Claims of Employment Discrimination in the Contemporary United States*, RESEARCHING LAW (American Bar Foundation, Chicago, Ill.), Spring 2008, *available at* http://www.americanbarfoundation.org/uploads/cms/documents/rlspring08.pdf. Using a large random sampling of 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. *Id.* at 1, 9-11, 13-18. The authors concluded that litigation seldom provided a mechanism for systemic reform or provided a meaningful remedy for individuals. *Id.* at 31.

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discrimination and the complex nature of the employee's perception of the conduct in the first place.

2. *The Problem of ADR*

Not only is relying on individuals to enforce the law problematic, but so is using litigation as the primary enforcement vehicle because of the use of ADR. Methods of alternative dispute resolution were developed as alternatives to litigation and became a popular choice for litigants with fairly broad use by the mid-1980s.[127] 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,[128] and a large number are covered by some kind of internal or external mediation.[129] Even more workers are covered by internal dispute resolution programs.[130]

ADR in the employment discrimination context is not like ADR between parties at arm's 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 are very rarely 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.[131] Mandatory arbitration–which employees are required as a condition of employment to agree to before any dispute has arisen–has been

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

128. Colvin, *Empirical Research*, *supra* note 103, at 411 (extrapolating from studies a figure of between fifteen and twenty-five percent). The unionization rate in 2006 was only twelve per cent, and so more employees are covered by these agreements than collective bargaining arbitration systems. *Id.* (citing U.S. DEP'T OF LAB., BUREAU OF LAB. STATISTICS, MLR: THE EDITOR'S DESK: UNION MEMBERSHIP IN 2006 (2007), *available at* http://www.bls.gov/opub/ted/2007/jan/wk4/art05.htm).

129. U.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 per cent 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, COMPANY STATISTICS: PROFILING U.S. BUSINESSES, TABULATIONS BY ENTERPRISE SIZE (2005), *available 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).

130. U.S. GEN. ACCOUNTABILITY OFFICE, *supra* note 129, 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, 80.6% of these employees used either a neutral party within or outside the company to investigate complaints and develop findings that may provide a basis for resolution, and 19.9% used peer review committees of employees or an employee/management mix to resolve complaints).

131. Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1393; Richard Delgado, *ADR and the Dispossessed: Recent Books about the Deformalization Movement*, 13 LAW & SOC. INQUIRY 145 (1988).

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widely critiqued as a method of resolving statutory claims.[132] 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.[133]

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.[134] Additionally, arbitrators need not decide the dispute based on substantive law.[135] Furthermore, full discovery is rarely 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,[136] their absence in arbitration can help to solidify that power imbalance.

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 is extremely deferential.[137] Review is also impracticable. Arbitration proceedings produce no record unless the parties provide for it

132. These critiques do not apply with equal force in the context of collective bargaining over wages, hours, and other terms and conditions of work, where the workers organized have significantly more power in relation to the employer than individual employees do.

133. Alfred 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).

134. Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. & EMP. L.J. 381, 403, 426 (1996); Julius G. Getman, *Labor 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 133, at 685-86.

135. *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).

136. The 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 decision-maker within those rules.

137. *E.g.,* 9 U.S.C. § 10(a) (2006) (vacating the award 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."). Courts have sometimes refused to enforce arbitration agreements that fail to meet minimum due process protections. However, the Supreme Court in *Gilmer v. Interstate Johnson/Lane Corp.*, 500 U.S. 20, 28 (1991) found that due process protections were present in the agreement at issue and upheld arbitration of statutory employment discrimination claims. 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).

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in their arbitration agreement.[138] Moreover, arbitration often produces no written decision with an explanation of the arbitrator's reasoning. 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.[139] For all of these reasons, many commentators worry that these agreements allow employers to escape liability for discrimination.[140]

Recently, employers have begun to move away from arbitration and focus more heavily on mediation. Mediation is not binding, nor is it as formal or alienating as adjudication. Thus, employee advocates see this transition as a positive development.[141] Mediation may facilitate reconciliation, a positive result for a purely private dispute.[142] However, mediation is essentially a process of bargaining. 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

138. The National Association of Securities Dealers, the group at issue in the *Gilmer* decision, required a 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/en/display/display_main.html?rbid=2403&element_id=4086. The 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/en/display/display.html?rbid=2403&element_id=4273.

139. Edward 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).

140. *See* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631, 1632-34 (2005) (describing both the level of criticism of mandatory arbitration agreements and their expansive use). Some empirical research supports that assertion, Colvin, *Empirical Research*, *supra* note 103, at 414-19, 423-24, while other empirical research suggests that employees win slightly more often in arbitration than they do in litigation, but are awarded less in damages, Lisa 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, 2003; Cornell Law School Working Paper, 2003), *available at* http://ssrn.com/abstract=389780 *or* DOI: 10.2139/ssrn.389780; Michael H. LeRoy, *supra* note 103, at 576-77, 589 (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).

141. *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 study that demonstrates high employee satisfaction with mediation); E. PATRICK MCDERMOTT ET AL., ORDER NO. 9/0900/7632/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).

142. Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1260 (1994); Harry Mika, *The Practice and Prospect of Victim-Offender Programs*, 46 S.M.U. L. REV. 2191, 2195 (1993).

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between employer and employee.[143] This power imbalance lends itself to the employer exploiting the situation and the employee behaving submissively.[144] For example, employees are almost never represented by counsel in mediation. Moreover, in mediation, where there is no compelled discovery, an employer can maintain a monopoly on the information about the dispute. Employers may run mediation-style dispute resolution mechanisms in a way that subverts employees' claims, reinterpreting them as personality conflicts and management issues in a way that convinces employees that they have no right at stake.[145] 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.[146]

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 over directly.[147]

In fact, regardless of what kind of ADR the parties use, the public is disserved. Dispute resolution is not the only goal of litigation.[148] Public rulemaking to give form to legislation is an important function that only courts or agencies with power to do so can provide.[149] 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.[150] 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.[151] Without an understanding of what conduct will lead to liability, employers

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

144. *Id.* at 199, 213-33.

145. Lauren 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).

146. RUBIN & BROWN, *supra* note 143, at 251-55.

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

148. Brunet, *supra* note 139, at 17.

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

150. As 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).

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

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cannot police themselves to avoid engaging in the conduct; it is their ability to detect risks, and the presence of a regulatory body able to point out those risks, that leads to changes in corporate behavior.[152]

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.[153] Without transparency, the public cannot see how norms are being developed in this area, and the norms themselves will stagnate.[154] Additionally, without transparency, we cannot know whether the distributive goals of the antidiscrimination law are being met.

Congress recognized the centrality of this value by enacting the Civil Rights Act of 1964 and other antidiscrimination provisions.[155] Moreover, where Congress has created an administrative agency to oversee enforcement, it has essentially mandated that this law be considered 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.[156] It is not surprising then that the EEOC opposes arbitration, although it promotes its mediation program.[157]

3. *The Ineffectiveness of the EEOC*

Compounding the difficulties posed by relying on private litigation, the EEOC is itself ineffective. The EEOC lacks the resources to fulfill its mission and, even if it were fully funded, EEOC processes would not fully transform the workplace. Although the EEOC can issue technical guidance,

152. *See* Stephen Calkins, *Corporate Compliance and the Antitrust Agencies' Bi-Modal Penalties*, 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.

153. *E.g.*, U.S. CONST. amend. XIV (No State shall . . . deny to any person within its jurisdiction the equal protection of the laws); 42 U.S.C. § 1981 (concerning equal rights to contract); CAL. GOV'T CODE § 12920 (2008); ILL. CONST. art. I, § 2. There are far too many such statutes and state constitutional provisions to provide a full list.

154. *See generally* KARL MANNHEIM, SYSTEMATIC SOCIOLOGY: AN INTRODUCTION TO THE STUDY OF SOCIETY 128-46 (J.S. Erös & W.A.C. Steward eds., 1957) (describing the role of individual interaction in enforcing social stability and in social change).

155. *E.g.*, H.R. REP. NO. 914, 88th Cong., 1st Sess. (1964), *reprinted in* 1 EEOC, LEGISLATIVE HISTORY OF TITLES VII AND IX OF THE CIVIL RIGHTS ACT OF 1964, at 2018 (1968) (reporting that most people now believe that discrimination conflicts with the fundamental values of the country); H.R. REP. NO. 1370, 87th Cong., 2d Sess. (1962), *reprinted in* 1 EEOC, *supra,* at 2155-57 (explaining that continued discrimination was at odds with the values on which the country was founded).

156. William Funk, *Bargaining Toward the New Millennium: 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).

157. *Compare* EEOC FY-06, *supra* note 70, at 7-9 *with* EEOC NOTICE NO. 915.002, *supra* note 73 (setting a policy opposing arbitration for statutory discrimination claims).

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which gives employers an affirmative defense if followed,[158] its lack of power under Title VII and the Equal Pay Act to issue regulations with the force of law has meant that the courts frequently refuse to defer to its interpretations of the laws it enforces, relying instead on the judges own beliefs about what discrimination is and what the national policy should be, making the EEOC particularly toothless.[159]

The EEOC has been limited by the lack of staff, funding, and political support to accomplish the mission it was charged with.[160] Most recently, the Commission operated without all five commissioners from 1997 to 2004, and without a general counsel from 2000 to 2003.[161] Out of about 76,000 private sector charges, the EEOC has the resources to file suit in only about 300 cases.[162]

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.[163] The

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

159. *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* Hart, *supra* note 60 (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, 128 S. Ct. 1147 (2008) (deferring to the EEOC's interpretation of what a charge is).

160. TEN-YEAR CHECK-UP, *supra* note 69, 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, an 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 9, at 920 (citing U.S. COMM'N ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT: TO ELIMINATE EMPLOYMENT DISCRIMINATION 88 (1971) (documenting staffing deficiencies from the start of the EEOC's existence)). Then-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).

161. TEN-YEAR CHECK-UP, *supra* note 69, at 42.

162. EEOC FY-08, *supra* note 77, at 8-9; EEOC FY-06, *supra* note 70, at 6; *see also* ORGANIZING EEOC, *supra* note 58, at 14 (setting charge numbers in prior years closer to 80,000).

163. ORGANIZING EEOC, *supra* note 58, 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 the EEOC's most recent report card summary can be viewed at http://www.whitehouse.gov/omb/expectmore/summary/10003914.2006.html, with details at http://www.whitehouse.gov/omb/expectmore/detail/10003914.2006.html.

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NAPA panel recommended changes in organizational structure, budget alignment, use of technology, management of human capital, and management of performance.[164] The changes urged most strenuously by the NAPA panel were a national call center and a system for filing charges electronically.[165] 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.[166] 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.[167]

Another weakness with the EEOC has been its "focus on process and not mission-oriented factors to measure progress."[168] 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."[169] 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 FEPAs at all, only collecting information on the number of charges handled by those agencies.[170]

Perhaps even more disconcerting, the EEOC does not seem to have more expertise than courts or the litigants themselves to evaluate claims of

164. ORGANIZING EEOC, *supra* note 58, at xi, xii.

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

166. U.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.

167. JOB PERFORMANCE SYSTEMS, OFFICE OF INSPECTOR GENERAL, THE NATIONAL CONTACT CENTER: AN EVALUATION OF ITS IMPACTS (2006). The NCC was not receiving the call volume that was expected, in part because people called the regional offices, and the EEOC did not route those through the call center first. Some offices reported that time was saved by routing routine calls through the call centers, but others found that the NCC created more work because its staff did not correctly or fully fill out necessary forms. The employees of the NCC did not fully understand their role or the work of the EEOC, and the NCC itself was not well integrated. All of this meant that the NCC resulted in duplication of work rather than savings of work. *Id.* at i-v.

168. TEN-YEAR CHECKUP, *supra* note 69, 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 163. 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), http://www.whitehouse.gov/omb/expectmore/detail/10003914.2006.html.

169. *Id.*

170. ExpectMore.gov, Detailed Information on the Equal Employment Opportunity Commission Assessment, at Question/Answer 2.5, http://www.whitehouse.gov/omb/expectmore/detail/10003914.2006.html.

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discrimination or predict the likely outcomes.[171] Nielsen, Nelson, and Lancaster's study found that the EEOC's priority codes, an internal system created to rank complaints according to the likelihood of a finding that there was cause to believe discrimination had occurred, did not predict case outcomes in federal court.[172]

The news concerning the EEOC is not all negative. Participants in its mediation programs have been very satisfied with them.[173] Additionally, where the EEOC does institute litigation, that litigation is likely to result in a win or a successful settlement.[174]

Despite the satisfaction of the participants in the EEOC's mediation program, both it and the rest of the EEOC's processes contribute to the secrecy effect. Rather than enhancing transparency or publicizing the state of the American workplace, the EEOC's processes are kept confidential by law unless and until the EEOC brings an enforcement action.[175]

Confidential proceedings make some sense during an investigatory phase and are in accord with the principles governing mediation generally. The Federal Rules of Evidence make information about or gained through settlement negotiations or mediation inadmissible.[176] And parties routinely sign agreements to keep the information revealed through the course of the mediation confidential.[177]

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171. Nielsen, Nelson, & Lancaster, *supra* note 126, at 19-20, 28-30, 33.

172. *Id.*; *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).

173. MCDERMOTT ET AL., EEOC ORDER NO. 9/0900/7632/2, *supra* note 141; MCDERMOTT ET AL., ORDER NO. 9/0900/7632/G, *supra* note 141. Employers, though, have been less willing to use 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. E. 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.

174. Nielsen, Nelson, & Lancaster, *supra* note 126, at 22, tbl. 1.

175. Title VII provides

> 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.

42 U.S.C. § 2000e-5(b) (Supp. V 2000), and

> 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.

42 U.S.C. § 2000e-8(e) (Supp. V 2000).

176. FED. R. EVID. 408.

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

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This lack of transparency in EEOC proceedings has roots in philosophies governing state fair employment practices commissions established prior to Title VII.[178] Many were "'committed to human relations rather than civil rights [and] . . . 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."[179] 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. Yet this emphasis frustrates efforts to remedy the public harm caused by discrimination.

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.[180] 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.

III.
Initial Proposal

The lack of transparency and 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. Moreover, the EEOC's historical lack of funding, support, and power have rendered it an especially ineffective engine for enforcement. The responsibility for enforcing Title VII and the other employment discrimination laws[181] 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

178. *See* Belton, *supra* note 9, at 913-14.

179. *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, 270 (1968) and citing *Hearings on S. 773, S. 2210, and S. 1937 before the Subcomm. on Employment and Manpower of the S. 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 Buff. L. Rev. 22, 38 (1964)).

180. 29 C.F.R. Parts 1602, 1610, 1627, and 1630 (2007).

181. The EEOC currently has significantly greater power in the federal sector; it can adjudicate claims against the federal government and issue binding orders. 42 U.S.C. § 2000e-16 (Supp. V 2000). Because the EEOC has already established a system to do this and has developed expertise in this area, it may be more useful to keep the agency for handling federal sector antidiscrimination claims.

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on race, and to restrict the political, civil, and economic rights of people based on race, sex, religion, and national origin. Reconstruction began the 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 because of their membership in particular groups. Title VII was part of this third step.[182]

The goal of employment discrimination laws in the U.S. has been social change, imposing a new norm that existed but was not universal.[183] The establishment of this norm was a large step taken to fundamentally transform society from a repressive regime that actively subordinated members of some groups to a new society with greater legitimacy.[184] Despite

182. BLUMROSEN, *supra* note 86, 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)); Rose, *supra* note 33, at 1129 (citing H.R. Rep. No. 914, *supra* note 155, at 16). 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, *supra* note 155, 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. A last-minute amendment by a Southern Democrat, proposed, some say, as a means to defeat the bill, added sex to the list of 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).

183. *See* Witherspoon, *supra* note 91, at 1171.

184. *See* H.R. REP. NO. 1370, *supra* note 155 at 2155-57 (tracing the history of government efforts towards protecting civil rights since the abolition of slavery, portraying it as a continuous process culminating in what would become Title VII and praising that development as required by the principles this country was founded upon).

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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).[185] Adjudication, an adversarial process involving two parties with a stake in the outcome presenting a case to a neutral decision maker for a binding determination, is one tool of transitional justice. When, in the prior system, 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 system 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. In those instances, a different tool of transitional justice may be useful: the truth commission.[186]

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.[187] Truth commissions have been used in many countries, with some positive and some negative results.[188] There is no single model for a truth commission, and in fact part of their strength is that truth commissions are designed to fit the particular needs of the culture.[189] But truth commissions have shared some basic similarities. They take evidence, make a public record of people's stories, and issue a report.[190] They do not impose sanctions, but often make recommendations for reform.[191] Some-

185. *See* HAYNER, *supra* note 15, at 11.

186. *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).

187. *Id.* at 5.

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

189. *See id.* at 15-16, 213-33 (describing the flexibility of truth commission design and the importance of culture in choosing attributes).

> There are many factors and a range of participants that help shape each country's transitional possibilities and constraints, and thus its posttransition reality. These include the strength of those groups or individuals who were responsible for the abuses and their ability to control transition policy choices; how vocal and organized is a country's civil society, including victims and rights groups; and the interest, role, and involvement of the international community. In addition, the transitional choices will be affected by the type and intensity of the past violence or repression and the political nature of the transition. And finally, there are often aspects of political and social culture–an undefinable set of preferences, inclinations, beliefs, and expectations–that help to shape the parameters of whether and in what manner the past is confronted.

Id. at 22.

190. *Id.* at 5, 14, 16.

191. *See id.* at 32-49, 52, 57, 60, 61, 63, 67, 68, 167, 306-13 (listing the commission mandates and the reforms recommended).

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times the process includes an amnesty for the perpetrators of abuse in return for their testimony.[192]

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. Yet 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,[193] the majority of the research suggests that workplace equality is politically mediated; political institutions are largely responsible for changes in workplace inequality.[194] 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.[195] For example, Kevin Stainback, Corre Robinson, and Donald Tomaskovic-Devey demonstrated a strong positive correlation between resources devoted to the enforcement of antidiscrimination laws and workplace integration.[196] According to the study, the law did not produce change in employer behavior unless it was accompanied by significant enforcement, which included findings that the law had been broken and the imposition of some sanction.[197] The study also correlated declines in enforcement with stalled improvements in integration.[198]

Recent literature on new governance further supports these findings that voluntary adoption of regulatory norms must occur in the shadow of

> Commission reports have recommended reforms in the judiciary, armed forces, and political sector; the prosecution of perpetrators or their removal from active military or police duty; reparations for victims; further investigation into matters not fully covered by the current commission; measures to instill a human rights culture in society, including through human rights education; and a national commitment to standards of international human rights norms through ratifying international rights treaties.

Id. at 167. There has been no thorough review of how many of these reforms have been successfully instituted. *Id.* at 168. In El Salvador, many of the recommendations have been instituted, while in other countries, the recommendations are still being considered. *Id.* at 168-69.

192. *Id.* at 12-13, 16.

193. James 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).

194. *See* 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).

195. *Id.* at 1207-08.

196. *Id.* at 1217-23.

197. *Id.* at 1201, 1217, 1222-23.

198. *Id.* at 1222.

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the law to make change.[199] New governance promotes the harnessing of institutional culture to promote real change.[200] Whereas traditional regulatory theory envisioned a top-down view of regulation, government imposing mandatory rules on private actors, new governance envisions a collaborative model, with stakeholders and government collaborating on rules and how they should be enforced.[201] Hallmarks of new governance include things like public/private partnerships, negotiated rulemaking, audited self-regulation, performance-based rules, decentralized problem solving, disclosure requirements, and coordinated information collection.[202]

Second, although this is not a feature of truth commissions, an agency can be developed to harness expertise in the fields of economics, sociology, organizational psychology, and other areas relevant to employment discrimination. 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.[203] 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 the increased equality that enforcement will bring, but also by the norm legitimizing function of a public presence in identifying violations of norms and condemning those viola-

199. Orly 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 negotiated).

200. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 344-45 (2004).

201. *Id.*

202. *Id.* at 345.

203. *E.g.*, William T. Bielby & Pamela Coukos, *"Statistical Dueling" with Unconventional Weapons: What Courts Should Know about Experts in Employment Discrimination Class Actions*, 56 EMORY L. J. 1563 (2007); 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 Evolución!: 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 (2003) (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).

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tions. 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, such as the Constitution and statutes, are given force (and reality made to conform with them).[204] 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.[205] Part of the reason for that is the way that private enforcement lacks transparency. A fact-finding body that publicizes its processes will enhance transparency, a necessary precondition to accountability and a good in its own right. Transparency will enhance the ability of the market to assist in preventing discrimination by revealing discrimination to market participants (employees or consumers) who can then act in accordance with preferences not to discriminate or be discriminated against. 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 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 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 adjudication can provide greater access to justice for employees and small employers, and stronger enforcement than reliance 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.[206] Federal agencies are usually created to harness the skills of those with special expertise in an area and to provide for cost-effective enforcement.[207] Employment discrimination law is a specialized area, requiring understanding of human behavior and of economic policies. Moreover, 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

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

205. Notes 122-23 and accompanying text.

206. *E.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).

207. *See* ROGER E. MEINERS, AL H. RINGLEB & FRANCES L. EDWARDS, THE LEGAL ENVIRONMENT OF BUSINESS 119-20 (9th ed. 2005); DAVID H. ROSENBLOOM & ROSEMARY O'LEARY, PUBLIC ADMINISTRATION AND LAW 3-9, 73 (2d ed. 1997).

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overworked in these cases.[208] Moving these cases from the court system to a federal agency would benefit litigants and the public by providing expert, cost-effective enforcement. The processes can be less formal, and thus less expensive, than court proceedings, and the expertise of the agency's staff would mean less need for litigants to present experts. Additionally, administrative law judges or commissioners would not as likely be beholden to any of the litigants for continued employment, enhancing their neutrality. Further, an agency that publicizes its proceedings will not cause the secrecy problems that are inherent in the ADR model.

The details of possible agency functions, such as 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 topics 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 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. While this may not be a bad outcome for the individual employees, the public interest may not be served if employer behavior was not 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 may be similarly subverted by these pitfalls or even by simple lack of funding, like that which plagues the EEOC.

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. Agency expertise and the relative low expense 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.[209] 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, similar to federal enforcement of the National Labor Relations Board orders. A system of graduated penalties might be instituted if the employer did not com-

208. Lee 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.

209. *See* Commodity Futures Trading Comm'n 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).

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ply 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.[210] There are good reasons for investigations being confidential at times, most important of which is to prevent the subject of the investigation from being able to hide wrongdoing through the acquisition of knowledge of the process and findings of an investigation. Similarly, claims of harassment, particularly harassment that involves sexual conduct, frequently involve highly personal and humiliating details. And because one of the things that must be proven in such a case is that the sexual conduct was unwelcome, the actions, dress, and sexual history of the charging party are often a target of the defense strategy.[211] There are good reasons to provide for confidentiality to protect the individual's interests in privacy in those cases. However, some information, like the fact that a charge has been filed against a particular employer, will immediately become public information, absent a strong reason for confidentiality, such as is likely to be present in at least some sexual harassment cases.

Second, the reporting requirements of the current system will remain, but will also be extended to smaller employers. Additionally, the agency will have to make that information public at the very least in the aggregate, and preferably with all details intact. In other words, the public will 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 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 broader independent investigatory and "prosecutorial" powers than the EEOC. For the myriad reasons previously discussed, it is simply too risky for employees to challenge some discriminatory practices as private parties. The agency investigation and publicizing power will 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 will simply set in motion an investigation of the employer's practices towards all of its employees. In fact, an investigation

210. *See* Benedict Kingsbury, Nico Krisch, Richard B. Stewart & Jonathan B. Wiener, *Global Governance as Administration – National and Transnational Approaches to Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 1, 4-5 (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).

211. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 68-70 (1986).

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will not require a charge at all to investigate an employer or industry. Reporting requirements, like those currently required but reaching to smaller employers, will provide the data that raises a suspicion of discrimination and sets in motion an agency investigation.

Fourth, the agency must have the power to issue interpretive regulations, binding on employers and employees, and thus entitled to strong deference by the courts. "Discrimination" is illegal, but what practices constitute discrimination are the subject of serious debate.[212] Regulations developed by experts will help give content to this norm.

Fifth, the agency must 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 Brown,[213] will help remedy the information asymmetries in the labor market and will also be a powerful marketing tool for the company's products and services, much like the government's Energy Star rating is currently.[214]

Sixth, 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.

Seventh, 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 likely 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. The proper balance to be struck to allow this safety valve but to avoid neutralizing the agency's effectiveness is a complicated question that deserves its own lengthy treatment in a future article.

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 with broader powers would be sufficiently funded. 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

212. *See, e.g.*, Miranda Oshige McGowan, *Against Interpretation*, 42 San Diego L. Rev. 711, 718-20 (2005).

213. Ian 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).

214. *See generally* http://www.energystar.gov/index.cfm?c=home.index.

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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.

IV.
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.[215] 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 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 systemic 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.[216] A generation without progress ought to be enough to warrant a new approach.

215. *See supra* notes 120-22 and accompanying text.

216. Stainback, Robinson & Tomaskovic-Devey, *supra* note 194 (reporting that progress has stalled); Hymowitz, *supra* note 1 (reporting losses).

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