

## Making Employment Civil Rights Real

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When Title VII of the Civil Rights Act of 1964<sup>1</sup> passed, it was heralded as a long-overdue measure to eradicate discrimination. The law has had a profound effect on the workplace, both by helping to establish a public ethic against discrimination and by providing a mechanism by which victims of discrimination can seek redress. Both of these means, however, have run into barriers limiting their effectiveness.

The public ethic against discrimination finds its barrier at the edge of consciousness. Almost everyone in the workplace understands that discrimination is prohibited,<sup>2</sup> and this understanding reduces acts of open hostility or conscious discrimination. Far fewer people in the workplace understand how underlying stereotypes can operate at an unconscious level to affect workplace decisions.<sup>3</sup> This form of discrimination, while less well understood, is also prohibited.<sup>4</sup> As a result, discrimination continues to occur, even in an environment where it is condemned and even by people who share in its condemnation.

The enforcement mechanism has found its barrier in a legal environment where typical dispute resolution options are unattainable for most victims of discrimination. For most workers, it is prohibitively burdensome to obtain legal assistance or to take effective action.

Although it is necessary to address both of these barriers — the complex nature of discrimination and problems with the enforcement mechanism — this article focuses on the latter, ending with a discussion of possible solutions.

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<sup>1</sup> Codified as amended at 42 U.S.C. §§ 2000e to e-17 (2006).

<sup>2</sup> Having counseled hundreds of clients over the course of sixteen years, I have seen that most lay people — workers and managers alike — have a flawed understanding of workplace rights, but they typically know that employers are not supposed to engage in blatant discrimination based on well-known, protected categories such as race, sex, age, and disability.

<sup>3</sup> A number of commentators have observed that the predominant form of discrimination now is not the type of overt and blatant discrimination prevalent in earlier decades. The new brand of discrimination is a more complex type of “stereotyping,” based on “a host of more subtle cognitive phenomena which can skew perceptions and judgments.” *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 61 (1st Cir. 1999) (citations omitted). The phenomena that result in more complex and subtle discrimination have been described extensively in legal scholarship. *See, e.g.*, Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1003–04 n.21 (2006).

<sup>4</sup> Under current law, an employee does not need to show that an employer harbored a conscious, overt discriminatory animus. The “ultimate question is whether the employee has been treated disparately ‘because of race’ . . . regardless of whether the employer consciously intended to base [its actions] on race, or simply did so because of unthinking stereotypes or bias.” *Thomas*, 183 F.3d at 58 (citing *Robinson v. Polaroid Corp.*, 732 F.2d 1010, 1015 (1st Cir. 1984) (citations omitted)). *See also* EEOC Compliance Manual § 15-V, at 15–10 (2006), available at <http://www.eeoc.gov/policy/docs/race-color.pdf> (“Racially biased decisionmaking and treatment . . . are not always conscious. The statute thus covers not only decisions driven by racial animosity, but also decisions infected by stereotyped thinking or other forms of less conscious bias.”) (footnotes omitted).

## Prevalence & Effects of Discrimination

It is difficult to fully appreciate the problem of ineffective enforcement without first recognizing that employment civil rights remain a significant problem for two principal reasons: the incidence of discrimination remains high and the consequences of discrimination are devastating.

Numerous studies have sought to quantify discrimination by measuring levels of *actual* discrimination or *perceived* discrimination. In terms of *actual* discrimination, a comprehensive study of employers in Boston, Atlanta, Los Angeles, and Detroit found that racial stereotypes routinely affect company assessment of employee skill-levels.<sup>5</sup> In a more recent study that sought to measure discrimination in hiring, two economists used fictitious resumes to demonstrate the effect of race in the labor markets of Boston and Chicago.<sup>6</sup> They found that resumes with white-sounding names led to 50% more callback interviews than otherwise indistinguishable resumes with African American-sounding names.<sup>7</sup> Another study used paired testers to demonstrate the effect of race in the low-wage labor market of New York City.<sup>8</sup> In applications to 171 employers, white applicants received a callback or job offer 31% of the time, compared to a 15.2% callback rate for similarly-qualified black applicants.<sup>9</sup> More generally, a large-scale study of implicit attitudes found strong empirical evidence of pervasive stereotypes, even among those who genuinely believe they are not biased.<sup>10</sup> All of these studies are limited by the difficulty of getting a pure measure of actual discrimination, but they all point to a similar conclusion: discrimination continues to play a significant role in the workplace.

Another category of studies seeks to measure the extent of *perceived* discrimination.<sup>11</sup> In a 2005 poll jointly sponsored by the U.S. Equal

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<sup>5</sup> PHILIP MOSS & CHRIS TILLY, *STORIES EMPLOYERS TELL: RACE, SKILL, AND HIRING IN AMERICA* 4, 77, 85–155 (2001).

<sup>6</sup> Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 *AM. ECON. REV.* 991 (2004).

<sup>7</sup> *Id.* at 998.

<sup>8</sup> Devah Pager et al., *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 *AM. SOC. REV.* 777 (2009).

<sup>9</sup> *Id.* at 784. Perhaps even more remarkably, white applicants with criminal records had better success than black applicants with no criminal records. *Id.* at 785-86.

<sup>10</sup> Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs From a Demonstration Web Site*, 6 *GROUP DYNAMICS: THEORY RES. & PRAC.* 101, 105–06 (2002).

<sup>11</sup> See, e.g., Laura B. Nielsen & Robert L. Nelson, *Scaling the Pyramid: A Sociolegal Model of Employment Discrimination Litigation*, in *HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH* 3, 17–18 (Laura B. Nielsen & Robert L. Nelson eds., 2005); K.A. DIXON ET AL., *A WORKPLACE DIVIDED: HOW AMERICANS VIEW DISCRIMINATION AND RACE ON THE JOB* 7 (2002), [http://www.heldrich.rutgers.edu/uploadedFiles/Publications/Work\\_Trends\\_020107.pdf](http://www.heldrich.rutgers.edu/uploadedFiles/Publications/Work_Trends_020107.pdf); GALLUP ORG., *EMPLOYEE DISCRIMINATION IN THE WORKPLACE* 3 (2005), [http://media.gallup.com/government/PDF/Gallup\\_Discrimination\\_Report\\_Final.pdf](http://media.gallup.com/government/PDF/Gallup_Discrimination_Report_Final.pdf); JOSEPHINE LOUIE, *WE DON'T FEEL WELCOME HERE: AFRICAN AMERICANS AND HISPANICS IN METRO BOSTON* 19 (2005), <http://www.civilrightsproject.ucla.edu/research/metro/pollpaper.pdf>; Humphrey Taylor, *Workplace Discrimination Against, and Jokes About, African Americans, Gays, Jews, Muslims and*

Employment Opportunity Commission (“EEOC”) and other organizations, 26% of black employees reported that they had been discriminated against in their workplace in the prior twelve months.<sup>12</sup> Polls taken between 1997 and 2001 showed that even when the timeframe is shorter — “the last 30 days” — 18-21% of African Americans reported that they were discriminated against at their place of work.<sup>13</sup> Another study found that 28% of African American workers believe they were treated unfairly at work because of their race, while a larger number of African American workers — about half — believe that African Americans as a group are treated unfairly.<sup>14</sup> Similarly, a Harris Poll taken in 2002 found that 50% of African American workers believe that African Americans “often” experience employment discrimination.<sup>15</sup> To give scale to these figures, if 20% of all black workers in the U.S. believed they had experienced discrimination at work in the prior year, it would equate to about 2.9 million workers.<sup>16</sup> If all groups and bases of discrimination were included, the total number of workers experiencing discrimination would increase substantially.<sup>17</sup>

The relationship between actual and perceived discrimination is a thorny issue.<sup>18</sup> The reality, however, is that both actual and perceived discrimination create costs. By definition, actual discrimination imposes costs on its victims, because discrimination means that they are treated worse than they would have been but for a protected characteristic.<sup>19</sup> Discrimination in hiring often results in continued unemployment, leading to negative effects on the applicant’s emotional and financial well-being.<sup>20</sup> When discrimination affects an ongoing

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*Others*, HARRIS INTERACTIVE, Nov. 13, 2002,

[http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=340](http://www.harrisinteractive.com/harris_poll/index.asp?PID=340).

<sup>12</sup> GALLUP ORG., *supra* note 11, at 3. It is important to note, however, that this figure includes discrimination on any basis, including black workers who believe they were discriminated against based on non-race, but still protected, categories (such as gender) and non-race categories that are not protected (such as favoritism/nepotism). *Id.* at 4.

<sup>13</sup> Nielsen & Nelson, *supra* note 11, at 17.

<sup>14</sup> DIXON, *supra* note 11, at 11.

<sup>15</sup> Taylor, *supra* note 11, at Table 1.

<sup>16</sup> According to the 2000 Census, there were 14,453,460 black non-Hispanic workers in the civilian labor pool. U.S. CENSUS BUREAU, CENSUS 2000 EEO DATA TOOL (2000), <http://www.census.gov/eo2000/> (select and search “Employment by Census Occupation Codes,” select and search “U.S. Total,” and then select: “Sort by Codes” on the top left, “Total Civilian Labor Force” from dropdown menu in the center, and “Create Custom Race/Ethnic Groupings” in the middle of the page followed by clicking the “Black Alone non-Hispanic” box, then search) (last visited Oct. 8, 2009).

<sup>17</sup> For example, one study reported that 22% of women believed they had experienced discrimination at work. GALLUP ORG., *supra* note 11, at 22. According to the 2000 Census, there were 64,383,264 women in the civilian labor pool. U.S. CENSUS BUREAU, *supra* note 16. That means about 14 million women believe they experienced discrimination at work.

<sup>18</sup> Some argue that self-reported perceptions of discrimination are “meaningful measures of experience with discrimination.” Nielsen & Nelson, *supra* note 11, at 17.

<sup>19</sup> The costs of discrimination are not confined to its immediate victims. Other possible harms include the suffering felt by those who depend on financial or emotional support from the immediate victims.

<sup>20</sup> By definition, discrimination in hiring means that an applicant does not receive a job offer from the offending employer. In the case of an applicant fielding multiple job offers, the loss of a single offer may not result in any harm, depending on the relative value of the offers. Many workers do not have

work relationship — resulting, for example, in lower wages or a hostile work environment — there are similar adverse consequences.<sup>21</sup> When discrimination results in termination of employment, the costs to the employee are usually profound.<sup>22</sup> In terms of emotional health, losing a job as the result of a layoff — i.e., based on an employer’s need to make cuts due to financial difficulties — can inflict deep emotional harm.<sup>23</sup> If the job loss is compounded by accusations of incompetence, allegations of wrongdoing, or reasons that are simply manufactured — as is typical in cases of discrimination — the employee’s distress likely will be even greater. In terms of financial well-being, losing a job for benign reasons (i.e., for business decisions unrelated to the performance of the particular worker) has been found to lead to prolonged unemployment, a shift from full-time to part-time work, and lower wage rates.<sup>24</sup> These financial consequences are likely greater when the termination results from allegations of misconduct or incompetence.<sup>25</sup> Among other things, an employee terminated based on alleged performance problems can expect more difficulty finding another job.<sup>26</sup>

The effects of *perceived* discrimination are also substantial, regardless of the accuracy of the perception. The emotional toll on employees who believe they have been discriminated against does not turn on whether their belief is correct. A substantial body of literature supports a correlation, and likely a causal relationship, between perceived discrimination and adverse health consequences.<sup>27</sup> Because perceived discrimination appears to have an adverse

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the luxury of choosing among multiple offers, particularly in periods of high unemployment; instead, they are hoping for any offer. For a worker without any other offers, losing an offer because of discrimination will result in an extended period of unemployment, leading to an extended period of financial harm (due to a lack of wages) and the potential for continuing health problems. See Margaret W. Linn, et al., *Effects of Unemployment on Mental and Physical Health*, 75 AM. J. PUB. HEALTH 502, 504–506 (1985) (finding that data suggest causal relationship between unemployment and adverse psychological symptoms).

<sup>21</sup> When discrimination results in lower wages for an employee—because of lower pay relative to peers, a lost promotion, or otherwise—the adverse financial effect on the employee are obvious. Although the financial consequences of hostile treatment are less obvious, there is evidence that hostile treatment results in various types of harm. David C. Yamada, *The Phenomenon of “Workplace Bullying” and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L. J. 475, 483–84 (2000).

<sup>22</sup> The effects of losing a job have been extensively studied and are well established. See, e.g., LOUIS UCHITELLE, *THE DISPOSABLE AMERICAN: LAYOFFS AND THEIR CONSEQUENCES* 178–204 (2004) (discussing consequences on mental health); Henry S. Farber, *What Do We Know About Job Loss in the United States? Evidence from the Displaced Workers Survey, 1984–2004*, ECON. PERSP., 2Q/2005, at 13, 23 (discussing consequences of job loss on future employment and earnings); HART RESEARCH ASSOCIATES, *UNEMPLOYED IN AMERICA* 12 (2008), <http://www.unemployedworkers.org/page/-/UI/show8860.pdf> (discussing effects of unemployment on personal and family well-being) (last visited Oct. 8, 2009).

<sup>23</sup> UCHITELLE, *supra* note 22, 178–204.

<sup>24</sup> Farber, *supra* note 22.

<sup>25</sup> Seymour Moskowitz, *Employment-at-Will and Codes of Ethics: The Professional’s Dilemma*, 23 VAL. U. L. REV. 33, 55 (1988).

<sup>26</sup> *Id.* Indeed, common sense and everyday experience tells us that when an applicant reports to prospective employers that he was fired from his previous job, many employers will be less likely to view the applicant favorably.

<sup>27</sup> See, e.g., Yin Paradies, *A Systematic Review of Empirical Health Research on Self-Reported Racism and Health*, 35 INT’L J. EPIDEMIOLOGY 888 (2006) (reviewing 138 empirical studies of the

effect on mental health, and because mental health problems can reduce motivation and productivity,<sup>28</sup> perceived discrimination may lead to financial harm in the form of lost wages.

### **Lack of Widespread Enforcement**

The ongoing persistence and costliness of discrimination has not resulted in sufficiently widespread efforts to address it. There are at least two major factors in play. First, with relatively minor exceptions, victims of employment discrimination face significant barriers when seeking legal assistance. Second, the current options for resolving claims of discrimination are woefully inefficient. These factors exacerbate one another, which makes the search for possible solutions particularly challenging.

Most workers who believe they have suffered discriminatory treatment have nowhere to turn for effective assistance.<sup>29</sup> Private attorneys are out of reach, because hourly fees are high.<sup>30</sup> For workers who cannot afford such high fees — the overwhelming majority<sup>31</sup> — the possibility of a reduced-fee or contingency arrangement with a reputable attorney is equally unreachable. With relatively few exceptions, discrimination cases are considered too difficult to win and too expensive to litigate to justify the type of contingency fee

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relationship between health and self-reported experiences with racism); Amy J. Schulz et al., *Discrimination, Symptoms of Depression, and Self-Rated Health Among African-American Women in Detroit: Results from a Longitudinal Analysis*, 96 AM. J. PUB. HEALTH 1265, (2006). One study's findings were "consistent with a causal model positing that perceived discrimination contributes to poorer health outcomes over time." Schulz, *supra*, at 1267. Paradies' review found flaws and mixed results in many studies, but concluded, "there is an association between self-reported racism and ill health," and "evidence from longitudinal studies . . . suggests that self-reported racism precedes ill health rather than vice versa." Paradies, *supra*, at 895.

<sup>28</sup> See, e.g., AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 349 (4th ed. 2000) ("Loss of interest or pleasure is nearly always present, at least to some degree" in a major depressive episode); David A. Adler et al., *Job Performance Deficits Due to Depression*, 163 AM. J. PSYCHIATRY 1569, 1569 (2006) (concluding that "[m]ultiple dimensions of job performance are impaired by depression"); Walter F. Stewart et al., *Cost of Lost Productive Work Time Among U.S. Workers with Depression*, 289 J. AM. MED. ASS'N 3135 (2003) (examining effect of depression on work productivity).

<sup>29</sup> I experience this difficulty on a near-daily basis through my work at the Employment Civil Rights Clinic at Harvard Law School ("ECRC") and with the Fair Employment Project, Inc. ("FEP"). ECRC represents workers experiencing civil rights violations. We can accept only a small percentage of workers seeking assistance. FEP provides information to workers with potential employment civil rights claims and, where possible, seeks legal counsel for them. Because no public interest attorneys in Massachusetts, other than ECRC, prioritize individual cases of employment discrimination, the only other option is the private bar. In our experience, finding private attorneys is very difficult, particularly for lower-wage workers who lack sizable damages for lost wages or who do not speak English. The situation is not much better for middle-income workers who are unable, or unwilling, to pay thousands of dollars for expected fees or expenses.

<sup>30</sup> If paying hourly rates in an employment discrimination case, a worker can expect to spend tens of thousands of dollars.

<sup>31</sup> In 2008, the median wage in the U.S. was \$15.57 per hour, or \$32,390 per year. U.S. DEP'T OF LABOR, OCCUPATIONAL EMPLOYMENT AND WAGES 2008, 1 (2009), <http://www.bls.gov/news.release/pdf/ocwage.pdf>. This level of income does not leave much room for attorney's fees, particularly for a worker who has just lost the job that provided the income.

arrangement that is common in other areas, such as personal injury or medical malpractice.<sup>32</sup> This is true even though most civil rights statutes provide for an award of attorneys' fees.<sup>33</sup>

Among public interest attorneys working in the area of employment civil rights, there is a widely-held view that scarce resources should be directed toward so-called "impact litigation"<sup>34</sup> rather than toward more widespread enforcement of individual cases. For example, there are a number of advocacy organizations that handle employment civil rights issues, including the Lawyers' Committee for Civil Rights Under Law,<sup>35</sup> the National Association for the Advancement of Colored People Legal Defense & Educational Fund,<sup>36</sup> and the Mexican American Legal Defense & Education Fund.<sup>37</sup> All of these organizations prioritize small numbers of impact cases; none provide representation in a significant number of individual cases.<sup>38</sup>

With some notable exceptions, legal services offices, which more often represent large numbers of individual clients, do not provide representation in individual cases involving employment civil rights claims.<sup>39</sup> The reluctance to do so appears to stem from the belief that employment civil rights cases are unusually resource-intensive,<sup>40</sup> particularly when compared to other cases, such as housing, family, and benefits matters. These legal services offices also think that representing small numbers of workers (the necessary result of complex cases) would not have a sufficient impact to justify a commitment of scarce resources.<sup>41</sup>

The second major factor preventing more widespread enforcement is the inefficiency of commonly-available dispute resolution mechanisms. There are three options open to most employees. They can (and generally must as a first step) file a charge of discrimination with the EEOC or a state fair employment

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<sup>32</sup> Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563 (2001).

<sup>33</sup> See, e.g., 42 U.S.C. § 2000e-5(k) (2006) (giving courts discretion to award a "reasonable attorney's fee" to the prevailing party).

<sup>34</sup> "Impact litigation" has no accepted definition, but it is most commonly understood to mean litigation that is expected to have far-reaching results. See, e.g., Lambda Legal:Key Words, <http://www.lambdalegal.org/help/keywords/> (last visited Oct. 8, 2009) (Impact litigation is "[p]recedent-setting cases designed to affect large numbers of people and bring about meaningful social change.").

<sup>35</sup> Lawyers' Committee for Civil Rights Under Law, About the Employment Discrimination Project, [http://www.lawyerscommittee.org/projects/employment\\_discrimination/about?id=0001](http://www.lawyerscommittee.org/projects/employment_discrimination/about?id=0001) (last visited Oct. 8, 2009).

<sup>36</sup> NAACP, Legal Department History, <http://www.naacp.org/legal/history/index.htm> (last visited Oct. 8, 2009).

<sup>37</sup> Mexican American Legal Defense and Education Fund, Promoting Fair Employment Practices, <http://maldef.org/employment/litigation/> (last visited Oct. 8, 2009).

<sup>38</sup> Lawyer's Committee for Civil Rights Under Law, *supra* note 35; NAACP LDF, *supra* note 36; Mexican American Legal Defense and Education Fund, *supra* note 37.

<sup>39</sup> Christine Jolls, *The Role and Functioning of Public-Interest Legal Organizations in the Enforcement of the Employment Laws*, in EMERGING LABOR MARKET INSTITUTIONS FOR THE 21ST CENTURY 141, 150–52 (Richard Freeman et al. eds., 2004); Sharon M. Dietrich & Noah Zatz, *A Practical Legal Services Approach to Addressing Racial Discrimination in Employment*, 36 CLEARINGHOUSE REV. 39, 40 (2002).

<sup>40</sup> Dietrich & Zatz, *supra* note 39, at 40–41.

<sup>41</sup> *Id.* at 43 ("the garden variety disparate treatment case probably should be avoided").

practices agency,<sup>42</sup> they can (and sometimes must) resolve their claim through arbitration,<sup>43</sup> or they can go to court.<sup>44</sup> Each option has severe limitations.

The EEOC takes and investigates complaints, issues preliminary determinations, facilitates settlement discussions, and brings enforcement actions in court.<sup>45</sup> Unless it files suit against an employer, however, the EEOC has no power to award remedies<sup>46</sup> — a reality that is not lost on employers and that renders the agency less effective as an enforcement agent. Given its limited resources, and for other potential political reasons,<sup>47</sup> the EEOC files relatively few cases in court.<sup>48</sup> Taken as a whole, the agency plays an arguably modest role in filling the enforcement gap. Although some state agencies wield greater power,<sup>49</sup> the use of that power is inconsistent.<sup>50</sup>

Arbitration is an alternative dispute resolution mechanism that offers the potential for resolutions that are faster and less expensive than going to court.<sup>51</sup> But in practice this potential is largely unrealized.<sup>52</sup> It is not clear that

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<sup>42</sup> 42 U.S.C. § 2000e-5(a) to -5(c) (2006).

<sup>43</sup> See 14 Penn Plaza L.L.C. v. Pyett, 129 S.Ct. 1456, 1474 (2009) (holding that an employee may be required to arbitrate statutory discrimination claims under a private or collectively bargained agreement).

<sup>44</sup> 42 U.S.C. § 2000e-5(f) (2006).

<sup>45</sup> 42 U.S.C. § 2000e-4 (2006).

<sup>46</sup> 42 U.S.C. § 2000e-5 (2006).

<sup>47</sup> The low number of filings is in part a result of the EEOC's conservative standard of proof in such cases, bureaucratic and legal constraints on investigators, and investigator's reliance on conservative informal performance rules. Lenahan O'Connell, *Investigators at Work: How Bureaucratic and Legal Constraints Influence the Enforcement of Discrimination Law*, 51 PUB. ADMIN. REV. 2, 123-130 (1991).

<sup>48</sup> From fiscal years 1997 through 2008, the Commission filed an average of 397 lawsuits each year. EEOC, *Litigation Statistics FY 1997-FY 2008*, <http://www.eeoc.gov/stats/litigation.html> (last visited Oct. 8, 2009). For context, the number of administrative charges filed at the EEOC during this period ranged from a low of 75,428 in fiscal year 2005 to a high of 95,402 in fiscal year 2008. EEOC, *Charge Statistics FY 1997-FY 2008*, <http://www.eeoc.gov/stats/charges.html> (last visited Oct. 8, 2009).

<sup>49</sup> For example, the Massachusetts Commission Against Discrimination has the power not only to investigate alleged discrimination, but to hold hearings and award remedies. MASS. GEN. LAWS ch. 151B, § 3 (2008).

<sup>50</sup> Factors that lead to different uses of power among state agencies include budget limitations, party identification of the governor or legislature, EEOC enforcement in the state, and variations among state agency staff. Lola R. Dodge, *Intergovernmental Relations and the Administrative Enforcement of Equal Employment Opportunity Laws*, 57 PUB. ADMIN. REV. 5, 440 (1997).

<sup>51</sup> David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 BERKELEY J. EMP. & LAB. L. 1, 7 (2003).

<sup>52</sup> It is unclear whether arbitration has to any significant degree replaced the use of lawsuits in employment civil rights cases. Some evidence indicates that an increasing number of employers are adopting arbitration procedures. Alexander J.S. Colvin, *Empirical Research of Employment Arbitration: Clarity Amidst the Sound and Fury*, 11 EMPLOYEE RTS. & EMP. POL'Y J. 405, 408-11 (2007). There has also been a decrease in the number of employment cases filed in federal court. Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court, From Bad to Worse*, 2 HARV. L. & POLICY REV. 1, 14-17 (2008). Although some theories have been advanced, the reason for this decrease has not been identified. *Id.* at 17-20. To the author's knowledge, no studies have examined whether the decrease is related to an increased reliance on arbitration, but such a relationship is possible and worth examining. In any event, even if a larger

arbitration is fast enough<sup>53</sup> or inexpensive enough<sup>54</sup> to make a difference for workers who cannot obtain legal assistance. Moreover, arbitration is not available to many employees because their employers did not agree to arbitration before or after the dispute.<sup>55</sup>

Other than the EEOC, a state fair employment practices agency, or arbitration mechanism (if available), the only other option available to workers is a civil action in state or federal court. Civil actions are slow, expensive, and complicated (particularly for a *pro se* plaintiff), so going to court is rarely a viable option for workers.<sup>56</sup>

Given the lack of meaningful options, it is not surprising that most workers who believe they have been subjected to discrimination do not do anything about it. When the level of perceived discrimination is compared to the number of claims brought, it is evident that only a small percentage of affected workers take any formal action, such as filing a charge of discrimination.<sup>57</sup> One study found that about one third of all workers who believed they were treated unfairly based on their race or ethnicity did nothing, about 19% filed a complaint according to company procedure, and only about 3% filed suit.<sup>58</sup> These numbers should not be read to suggest that employers are effectively handling issues and thereby eliminating the need for further action. When asked whether the employer took any action to respond to an allegedly unfair incident, 63% reported that the employer ignored the issue.<sup>59</sup>

The result of these current realities is that most workers have nowhere to turn if they believe they have been victims of employment civil rights violations. This is unjust. The enforcement of legal rights should be an option for all, not an option available only to the most well-off. But there is another problem. If the majority of workers who have been victims of unlawful discrimination, harassment, or retaliation cannot effectively exercise their rights, those rights become illusory.

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proportion of cases were going to arbitration, there is no evidence that more workers have therefore achieved easier access to the legal system.

<sup>53</sup> Estreicher, *supra* note 32, at 564 (comparing disposition times of cases pending in court and arbitration). Although arbitration may result in faster average times, *id.*, the differences may not be significant enough to make a difference. A finding that arbitrations had a median disposition time of 16 months, *id.*, will not provide much comfort to a worker who has just been terminated or to an attorney wondering about how expensive it will be to get a case resolved.

<sup>54</sup> One study found that employers reported significantly lower costs for arbitration (\$20,000) than for litigation (\$96,000), and it has been suggested that employees would enjoy a similar cost savings. Estreicher, *supra* note 32, at 570 n.14. That may be true, and it suggests the possibility for significant cost savings, but the current rules for arbitrating employment discrimination cases still can result in significant expenses. See AM. ARB. ASS'N, NATIONAL RULES FOR RESOLUTION OF EMPLOYMENT DISPUTES (2009), <http://www.adr.org/sp.asp?id=32904>.

<sup>55</sup> Sherwyn, *supra* note 51, at 31–69.

<sup>56</sup> And the outlook, at least for cases pending in federal court, can be grim. See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 429 (2004). Between 1988 to 2000, an average of 15,149 “jobs” suits were filed each year in federal district courts. *Id.* at 455. During that same period, an average of 268 plaintiffs won at trial each year. *Id.*

<sup>57</sup> Nielsen & Nelson, *supra* note 11, at 30.

<sup>58</sup> DIXON, *supra* note 11, at 35.

<sup>59</sup> *Id.*



## Possible Solutions

Because the current situation is characterized by limited access to legal expertise and a lack of efficient dispute resolution mechanisms, the options for making progress are clear: (1) improve access to legal assistance, (2) develop a more efficient dispute resolution mechanism, or (3) do both. In the long run, the only realistic option is the third one. It is only through a sustained effort to get effective assistance to workers while also developing more efficient resolution mechanisms that the problem will be addressed in a broad and meaningful way.

There is a strong moral argument for providing more legal assistance, even without directly addressing the procedural infirmities. If American society is going to recognize the dignity of the civil rights it has created, it should ensure that anyone whose rights are violated has some meaningful recourse. On a more practical level, providing more legal assistance without attending to the procedural dysfunctions may be counterproductive, because throwing more cases at an ineffective system will likely make the system even worse.<sup>60</sup> Making the system worse may create a stronger force for change — more people will be affected and they will be affected more profoundly — but the system should seek change directly rather than create chaos in the hope of effecting change.

Similarly, developing a better procedural option without working to expand access to legal expertise will maintain a state of asymmetric knowledge and power. In most cases, and certainly in the case of lower-wage workers, employers have greater resources for navigating the legal system. Making that system easier to navigate may reduce this inequity to some extent, but it will not make the inequity disappear.<sup>61</sup>

In terms of possible solutions to these two challenges, there have been only limited efforts to expand access to legal expertise, and there does not appear to be anything approaching a nationwide movement.<sup>62</sup> Part of the problem, of

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<sup>60</sup> Although predictions about newly-opened floodgates of litigation are often overblown, one cannot simply ignore the potential problems presented by a significant increase in the number of formal claims in an already over-taxed system. See Toby J. Stern, *Federal Judges and Fearing the "Floodgates of Litigation,"* 6 U. PA. J. CONST. L. 377, 402–04 (2003) (discussing accuracy of predictions about “floodgates” opening and effects of increase in federal court caseload over past 40 years).

<sup>61</sup> In another area characterized by large numbers of cases, an expedited system for resolving disputes, and asymmetric power — housing cases — there is evidence that access to legal expertise leads to better outcomes for the less-powerful group (i.e., tenants). Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 429–32 (2001). Although formal studies have not yet been conducted in other areas (such as disputed claims for unemployment benefits), there is certainly a widely-held view that access to legal expertise leads to better outcomes on average.

<sup>62</sup> There are a growing number of websites offering general legal information to workers. See, e.g., Can My Boss Do That?, <http://www.CanMyBossDoThat.com> (last visited Oct. 9, 2009); Workplace Fairness, <http://www.workplacefairness.org> (last visited Oct. 9, 2009). It is more difficult to find organizations that seek to work directly with employees facing civil rights claims. Two examples are Boston-based Fair Employment Project, Inc. and The Legal Aid Society Employment Law Center in

course, is the lack of effective mechanisms for resolving disputes, which poses a significant barrier for those who might otherwise be interested in working in this area. Another part of the problem is a set of common misconceptions about the nature of discrimination disputes. Anecdotally, there is a tendency among advocates to see these cases as being more homogeneous than they really are — that is, as cases necessarily requiring a substantial commitment of time and resources. In fact, discrimination cases fall along a broad spectrum, where some disputes may be quickly and easily resolved and others require extensive discovery and formal adjudication.<sup>63</sup> Most cases fall somewhere in between, meaning that it may be feasible to take on significant numbers of individual cases without a huge commitment of resources. Another misconception is that it is always better to focus on impact litigation than on individual cases, which are often referred to dismissively as “garden-variety” cases. There is a strong case to be made for shifting some resources away from impact litigation toward greater levels of individual representation.<sup>64</sup> Given these misconceptions, a critical re-examination of prevailing views may lead to a stronger commitment to broader, more individualized enforcement efforts. Because there are inherent difficulties with pursuing such efforts on a national scale,<sup>65</sup> one effective approach may be to encourage and support diverse pilot projects and to evaluate, in a systematic way, what works and why. Two obvious candidates for undertaking these projects are existing legal services offices (which have high levels of contact with relevant populations) and social entrepreneurs<sup>66</sup> (who can attract funding and devote their full attention to the issue).

The second challenge — developing a more effective mechanism for resolving disputes — appears daunting given the entrenched nature of existing procedures, but there is cause for optimism. For one thing, employers should have a strong interest in supporting reforms that make the system more efficient. A large survey of employers found that labor and employment litigation is their

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San Francisco. Fair Employment Project, <http://fairemploymentproject.org> (last visited Oct. 9, 2009); Legal Aid Society Employment Law Center, <http://www.las-elc.org/index.html> (last visited Oct. 9, 2009).

<sup>63</sup> I have handled cases at all points along this continuum. As an example of a quick case, we were consulted by a low-wage employee who was fired based on religious reasons that prohibited him from working on Saturdays. We wrote a brief demand letter to the employer and the employee was reinstated. In the absence of a service offering legal expertise to low-wage workers, the employee likely would have obtained no remedy.

<sup>64</sup> Developing this position in a meaningful way is beyond the scope of this paper. In short, however, there are at least three arguments. First, if the ultimate goal of preventing discrimination requires employers to perceive discrimination as costly, a greater commitment to individual representation may do more to create that perception than is accomplished by focusing on so-called impact litigation. Second, if impact litigation results in favorable changes in the legal landscape but there is no market for individual cases, those favorable changes may be of questionable value. Third, a commitment to individual representation is necessary to identify the need for, and the best candidates for, impact litigation. The bottom line is that a greater focus on individual representation may have a greater impact on the workplace than impact litigation.

<sup>65</sup> Those problems include, for example, the large number of employees who might seek assistance and the unique aspects of each state’s employment law.

<sup>66</sup> By “social entrepreneurs” I do not mean those seeking to develop a for-profit business that advances more socially-responsible goals; I use the term more generally to mean those seeking to develop new approaches to entrenched problems.

greatest litigation concern.<sup>67</sup> Another survey suggested that employers have an arguably irrational fear of facing a discrimination claim.<sup>68</sup> Given that the average defense costs of an employment dispute is in the tens of thousands of dollars — not to mention the indirect costs on morale, reputation, or lost productivity — it is not surprising that employers express concern about facing discrimination claims. Employers, like employees, should therefore have an appetite for change.<sup>69</sup>

Another reason for optimism is the existence of more effective dispute resolution mechanisms that could be adapted to the employment discrimination context. One obvious model is the unemployment benefits system. Having handled a large number of disputed claims for unemployment benefits, I have been impressed by how much more effective that mechanism is than the mechanism for resolving discrimination claims.<sup>70</sup> There are, to be sure, significant differences between the two types of claims, with discrimination claims typically being more complex, so I am not recommending that unemployment agencies simply add discrimination claims to their docket. But the differences between the claims are not nearly as great as the differences between the current mechanisms for resolving them. One process typically takes a matter of weeks to get a hearing<sup>71</sup>; the other typically takes a matter of years, assuming the worker ever gets to a hearing. One explanation for the efficiencies of the unemployment benefit system is accountability: each state's performance is closely measured using uniform reporting statistics.<sup>72</sup> It is unclear, however, what modifications would be necessary to the current system for resolving unemployment benefits claims to make it suitable for discrimination claims, or conversely, what could be done to the current system for resolving employment discrimination claims to make it similarly efficient.

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<sup>67</sup> FULBRIGHT & JAWORSKI L.L.P., THIRD ANNUAL LITIGATION TRENDS SURVEY FINDINGS 10 (2006), <http://www.fulbright.com/mediaroom/files/2006/FulbrightsThirdAnnualLitigationTrendsSurveyFindings.pdf>.

<sup>68</sup> CHUBB GROUP OF INSURANCE COMPANIES, THE CHUBB 2004 PRIVATE COMPANY RISK SURVEY 3 (2004), <http://www.chubb.com/news/EPLExecutiveSummary2004.pdf>. According to this survey, 22% of responding companies reported that an employee had filed a charge of discrimination during the “past few years.” *Id.* at 3. Notwithstanding that historical benchmark, 50% of respondents expected that their company would face a charge of discrimination in the next year. *Id.*

<sup>69</sup> It is fair to ask why employers have not pursued change if they have an appetite for it. My experience (representing both employers and employees) suggests that employers do not necessarily appreciate the possible alternatives to currently-prevailing practices.

<sup>70</sup> To give some sense of how efficient the unemployment benefit process must be, during July 2009, the nationwide number of new claims for unemployment benefits was over 500,000 per week. U.S. Dep't of Labor, Unemployment Insurance Weekly Claims Data, <http://www.ows.doleta.gov/unemploy/claims.asp> (select “national” and click “search”) (last visited Oct. 9, 2009).

<sup>71</sup> See U.S. Dep't of Labor, Unemployment Insurance Performance Management, <http://www.workforcesecurity.doleta.gov/unemploy/performance.asp> (last visited Oct. 9, 2009) [hereinafter Performance Management] (reporting statistics regarding duration of appeals). To give an example from one state (Massachusetts), during 2008 there were over 1,000 hearings requested each month. U.S. Dep't of Labor, Benefits: Timeliness and Quality Reports, <http://www.workforcesecurity.doleta.gov/unemploy/btq.asp> (Oct. 9, 2009). In over 99% of all cases, decisions were issued within 180 days of the hearing request. *Id.*

<sup>72</sup> Performance Management, *supra* note 71.

Another model is the United Kingdom's Tribunals Service.<sup>73</sup> As part of this agency, the Employment Tribunals Service ("ETS") hears claims about unfair dismissal, discrimination, and other issues.<sup>74</sup> During their 2007–2008 reporting period, the ETS accepted about 189,000 claims, with over one third of all causes of action involving discrimination or equal pay.<sup>75</sup> During the same period, the ETS resolved about 82,000 claims, either through voluntary withdrawals, settlements, dismissals, or adjudications.<sup>76</sup> Although there are no publicly-available statistics about the average duration of each case, the ETS closely tracks the amount of time it takes before a first hearing, and in the employment area 74% of "single application" cases (the most common type)<sup>77</sup> went to a hearing within twenty-six weeks of receipt of the claim.<sup>78</sup> The ETS also measures customer satisfaction.<sup>79</sup> In the last year for which data were separately available for the ETS, 96% of users were satisfied with the ETS's service.<sup>80</sup> This is a remarkably high level of satisfaction, and it is difficult to imagine workers or employers in the U.S. reporting similarly high levels of satisfaction with the EEOC, state fair employment practice agencies, or courts. Indeed, there is surely a connection between the close monitoring of ETS's performance and its high level of user satisfaction.

The alternative to reforming government-managed dispute mechanisms is to develop a new, privately-managed one. Although arbitration is an option available to willing parties, it has met with limited success likely due to a lack of support from advocates and inadequate efficiency advantages as compared to litigation.<sup>81</sup> It is an open question whether a more streamlined approach would enjoy greater success, but it is a question worth pursuing further. A one-day investigation by a well-trained and adequately-empowered neutral could expedite what could otherwise be months, if not years, of contentious discovery.

In light of the frustration commonly expressed by workers, it is clear that many employees value getting their day in court, and getting it promptly, over reaching the right result every single time. Similarly, employers likely would be willing to sacrifice some accuracy for a faster and less costly process. Placing too much emphasis on the inevitable inaccuracies of a system that moves more quickly and efficiently may give too little weight to the parties' own preferences.

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<sup>73</sup> EMPLOYMENT TRIBUNALS SERVICE, ANNUAL REPORT & ACCOUNTS 2008-09, at 4-10 (2009), [http://www.tribunals.gov.uk/Tribunals/Documents/Publications/239\\_016\\_TS\\_AR\\_2009\\_Web\\_Version.pdf](http://www.tribunals.gov.uk/Tribunals/Documents/Publications/239_016_TS_AR_2009_Web_Version.pdf) [hereinafter ANNUAL REPORT & ACCOUNTS 2008-09].

<sup>74</sup> *Id.* at 115.

<sup>75</sup> EMPLOYMENT TRIBUNALS SERVICE, EMPLOYMENT TRIBUNAL AND EAT STATISTICS (GB), ANNUAL STATISTICS 2007/08, at 2 (2008), [http://www.employmenttribunals.gov.uk/Documents/Publications/EmploymentTribunal\\_and\\_EAT\\_Statistics\\_v9.pdf](http://www.employmenttribunals.gov.uk/Documents/Publications/EmploymentTribunal_and_EAT_Statistics_v9.pdf).

<sup>76</sup> *Id.* at 3.

<sup>77</sup> ANNUAL REPORT & ACCOUNTS 2008-09, *supra* note 73, at 13 n.1.

<sup>78</sup> *Id.* at 118.

<sup>79</sup> *Id.* at 23.

<sup>80</sup> EMPLOYMENT TRIBUNALS SERVICE, ANNUAL REPORT & ACCOUNTS 2005-06, at 12 (2006), <http://www.employmenttribunals.gov.uk/Documents/Publications/ARA0506.pdf>.

<sup>81</sup> *See* Sherwyn, *supra* note 51, at 22-30 (discussion of the traditional arguments against arbitration offered by advocates).

These possible answers might have problems, and there certainly are no fast or easy solutions, but it is difficult to imagine a situation that is much worse than the current one. On a near-daily basis I have to tell workers that there are no lawyers to help them unless they are prepared to spend thousands or tens of thousands of dollars. I have to tell them that even if they do bring a claim, they will not get a hearing for years, if ever. Although some workers persevere and set out to enforce their rights, many seem resigned to the reality that they have hard-won protections that amount to nothing. This reality falls far short of Title VII's promise of equal opportunity.