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THE MANY LANES OUT OF COURT: AGAINST PRIVATIZATION OF EMPLOYMENT DISCRIMINATION DISPUTES

THERESA M. BEINER*

I. INTRODUCTION

After Congress enacted the first laws prohibiting employment discrimination in 1964,¹ workplaces changed significantly. No longer could employers segregate workplaces based on race or sex.² In many workplaces, workers who had been separated now worked side by side. One only need board an airline flight to realize how law can transform jobs and workplaces. Instead of seeing only the pretty, slim, young, unmarried “stewardesses” of the 1960s, it is not uncommon to have an entirely male flight attendant crew that includes workers over age fifty.³ Indeed, both the pilot and co-pilot on a commercial flight might well be women. While this transformation in workplaces is one of Title VII’s key successes, in more recent years, scholars have lamented that employment discrimination laws have not proven effective in eliminating the many vestiges of discrimination in the workplace that still linger.⁴ Many scholars blame the

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1. See Civil Rights Act of 1954, Pub. L. No. 88-352, 28 Stat. 252 (codified at 42 U.S.C. §§ 2000e to 2000e-17 (2006)).

2. 42 U.S.C. § 2000e-2(a)(1) (2006) (discussing unlawful employment practices, generally).

3. Indeed, the three female flight attendants who helped the passengers off the US Airways flight 1549, which famously crashed into the Hudson River in 2009, were all in their fifties. Charlie Leocha, *Unsung Heroes on the Hudson—Flight Attendants on US Airways 1549*, CONSUMER TRAVELER, Jan. 20, 2009, <http://www.consumertraveler.com/today/unsung-heroes-on-the-hudson-flight-attendants-on-us-airways-1549/>.

4. See Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 764–72 (2011) (describing difficulties plaintiffs face in “[s]econd-[g]eneration” employment discrimination cases); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995) (arguing “the way in which Title VII jurisprudence constructs discrimination, while sufficient to address the deliberate discrimination prevalent in an earlier age, is inadequate to address the subtle, often unconscious forms of bias that Title VII was also intended to remedy”); Marcia L. McCormick, *The Truth Is Out There: Revamping Federal Antidiscrimination*

lackluster enforcement of employment discrimination laws on the federal courts' inability to understand or theorize about the lingering aspects of discrimination based on race and sex that still pervade the modern workplace.⁵ In addition, some scholars have opined that the federal courts are hostile to employment discrimination claims and do not wish to hear them.⁶ This may lead one to believe that out-of-court processes might better serve the aims of anti-discrimination laws.

This Article will argue the opposite: that there is a distinct need for employment discrimination cases to be tried in court before juries. This Article charts the many processes the federal courts have used over the last twenty years to withdraw themselves from the employment discrimination

Enforcement for the Twenty-First Century, 30 BERKELEY J. EMP. & LAB. L. 193, 194 (2009) (noting "[e]mployment discrimination laws in the United States have not created full equality in the workplace" and that "achieving full equality requires greater accountability for those who make employment decisions"); Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 667–69, 671–72 (2005) (outlining the current debates of whether there is too much, too little, or simply ineffective discrimination litigation); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460–61 (2001) (describing difficulties plaintiffs have in Title VII cases involving more ingrained forms—or "second generation" forms—of discrimination). Some debate exists about whether Title VII or economic factors resulted in gains made by women and members of minority groups. See ALFRED W. BLUMROSEN, MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY 306–10 (1993) (concluding that Title VII did actively produce positive effects on "female employment opportunities").

5. See Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 556–57 (2001) (suggesting that courts are influenced by certain pervasive biases and the general misconception that anti-employment discrimination cases are easy to win).

6. See generally Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 958 (2002) [hereinafter Clermont & Eisenberg, *Plaintiphobia*] (explaining that "[c]loser consideration of job discrimination cases strengthens an attitudinal explanation of the defendant/plaintiff differential"); see, e.g., Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 110 disp. 2, 111, 112 (2009) [hereinafter Clermont & Schwab, *From Bad to Worse*] (noting that the approximately forty-one percent to nine percent spread in reversal rates on appeal between defendants and plaintiffs in employment discrimination cases is more extreme than the difference between plaintiff and defendant reversal rates in non-job cases); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 442 (2004) [hereinafter Clermont & Schwab, *How Employment Plaintiffs Fare*] (citing statistics illustrating that "employment discrimination plaintiffs have won only 19.29 percent of judge trials but 37.77 percent of jury trials"). The difference in reversal rates on appeal is stark. Reversal rates for defendants from plaintiff pretrial wins is thirty percent compared to a nearly eleven percent reversal rate for plaintiffs who appeal defendant pretrial wins. The reversal rate from trial wins is forty-one percent for defendants when plaintiffs win at trial compared to nearly nine percent for plaintiffs when the defendant wins at trial. Clermont & Schwab, *From Bad to Worse*, *supra*, at 110 disp. 2.

business.⁷ In a series of cases, the Supreme Court of the United States has opened the door to alternative forms of dispute resolution in order to “get rid of” these cases.⁸ Whether it be through a robust pro-arbitration jurisprudence, an uncalled-for reliance on employer internal grievance mechanisms, or aggressive settlement conferences, courts are shunting employment discrimination cases out of the court system and into the sphere of private dispute resolution.⁹ Notably, the courts are not the only movers of this trend; even the federal agency tasked with enforcing these laws—the Equal Employment Opportunity Commission (“EEOC”)—is finding means other than court cases for addressing these claims.¹⁰ In addition, lower courts have used invigorated civil procedure rules, including summary judgment motions and motions to dismiss, as an effective tool to clear their dockets, leaving plaintiffs with no relief at all.¹¹

The resulting dearth of employment discrimination cases going to trial may not be cause for much concern. Indeed, it could be that the efforts of prior plaintiffs have resulted in the elimination of employment discrimination based on race, sex, and religion from the American workplace. Nevertheless, discrimination has become more subtle,¹² and evidence of continued employment discrimination based on sex and race abounds.¹³ It could also be, given arguments regarding judicial hostility to these cases, that these alternative practices are more effective in bringing relief to plaintiffs and in furthering the purposes of antidiscrimination laws.

7. See *infra* Part II.A–D (discussing the arbitration lane, internal employer grievance mechanism lane, procedure lane, and mediation and settlement lane).

8. See *infra* Part II.

9. See generally Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 24–27 (2006) (coining the concept of “[d]isplacement” for the phenomenon of legal claims that once were resolved in the legal system being resolved elsewhere); see *infra* Part II.A–D.

10. See *infra* Part II.D (discussing EEOC’s mediation success).

11. See Part II.C. But cf. Galanter, *supra* note 9, at 25 (proposing as a possibility what we are seeing is not a “diminishment of trials, but their relocation”).

12. See Krieger, *supra* note 4, at 1164 (recognizing that these “subtle, often unconscious forms” exist today); see also Anand Swaminathan, *The Rubric of Force: Employment Discrimination in the Context of Subtle Biases and Judicial Hostility*, 3 MOD. AM. 21, 23 (2007) (“[I]mplicit attitudes can be seen as closer to overt discrimination in that they reflect learned behavior or the suppression of previously held overt attitudes.”).

13. See Dino Falaschetti, *A Sex Difference in Risk Taking and Promotions in Hierarchies: Evidence from Females in Legislatures*, 55 J.L. & ECON. 477, 478–79 (2012) (noting the persistence of “substantial gender inequality”); Patrick L. Mason, *Persistent Racial Discrimination in the Labor Market*, in AFRICAN AMERICANS IN THE U.S. ECONOMY 141–45 (Cecilia A. Conrad et al. eds., 2005) (explaining that racial discrimination in the labor market explains at least half of black-white inequity in pay); McCormick, *supra* note 4, at 194 (describing evidence that discrimination still abounds, particularly with respect to “people of color and white women”). See generally Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CALIF. L. REV. 1119, 1121–23 (2006) (discussing how system justification theory explains how discrimination persists).

Unfortunately, there is no way to know how methods of alternative dispute resolution—such as arbitration, mediation, settlement, or internal employer grievance mechanisms—are actually working. Most of these alternative dispute resolution systems are not studied and scrutinized by professionals. They exist “in the shadow of the law,” as commentators suggest.¹⁴ There is no realistic way to know if these alternative dispute resolution mechanisms are bringing about just results. In addition, these mechanisms do not alert employers and employees to what is and is not acceptable workplace behavior.¹⁵

There is another problem with condemning these alternative schemes. When Congress enacted these laws, it provided for a conciliation process and clearly envisioned that litigants would resolve at least some of these cases outside the court system.¹⁶ Thus, one could argue that the system is working consistently with Title VII’s conciliation goals by encouraging non-court dispute resolution. This Article proposes that court-driven alternative dispute processes have gone well beyond what Congress envisioned in enacting Title VII of the Civil Rights Act of 1964,¹⁷ the Americans with Disabilities Act of 1990 (“ADA”),¹⁸ and the Age Discrimination in Employment Act of 1967 (“ADEA”),¹⁹ and does not, in the long run, further the many purposes of anti-discrimination laws.²⁰

Most importantly, however, these alternative schemes suffer from a significant problem aside from difficulties in assessing their efficacy. These schemes provide no support for the “norm-enforcing” scheme that is the American legal system. This Article, in the tradition of Professor Owen Fiss’s *Against Settlement*,²¹ addresses the potential effects of employment discrimination laws being enforced—if at all—through private dispute

14. See Marc Galanter, *Justice in Many Rooms*, 19 J. LEGAL PLURALISM 1, 2 (1981) (discussing bargaining and regulation “in the shadow of the law”); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979) (coining this phrase in the context of divorce negotiations).

15. See *infra* Part II.B.

16. See 42 U.S.C. § 2000e-5(b) (2006) (“If the [EEOC] determines after such investigation that there is reasonable cause to believe that the charge is true, the [EEOC] shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.”).

17. 42 U.S.C. § 2000e *et seq.* (2006).

18. 42 U.S.C. §§ 12111–12117 (2006).

19. 29 U.S.C. §§ 621–634 (2006).

20. See *infra* Part III.

21. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1073 (1984) [hereinafter Fiss, *Against Settlement*] (analyzing the alternative dispute resolution (“ADR”) movement which promised to reduce the amount of litigation initiated); see also Owen M. Fiss, *The History of an Idea*, 78 FORDHAM L. REV. 1273, 1278 (2009) [hereinafter Fiss, *History of an Idea*] (noting “the judgment of reasonableness is often made without the benefit of a truly adversarial process”).

resolution mechanisms.²² Anti-discrimination laws serve a vital public purpose—they set norms of behavior for workplaces and workers in the area of equal employment opportunity. Indeed, some areas of employment discrimination law involve assessing what the “reasonable person” would believe.²³ What other group is in a better position to make this assessment than a group of twelve jurors?²⁴ Picking up on Marc Galanter’s work regarding the vanishing American trial,²⁵ this Article argues that trials in this area provide an important public function in setting norms of appropriate workplace behavior and practices as well as setting monetary values for the harm employment discrimination causes its victims.²⁶ As this Article will explain, there is cause for concern when alternative dispute schemes supplant jury trials in this area of the law.

This Article begins by charting the many paths, including court developments and agency practices, that have led employment discrimination cases out of the court system and into alternative dispute resolution schemes.²⁷ This Article also considers application of civil procedure rules that have left plaintiffs out of the court system and without a remedy altogether.²⁸ It argues that some of the cases leading to these results are poorly decided, and indeed the courts frequently reach to remove these cases from the court system.²⁹ This Article ultimately argues, from a

22. See *infra* Parts II.A–D.

23. See, e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (sexual harassment is actionable if a “reasonable person” would find it “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment”).

24. See Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe Is Sexually Harassing*, 75 S. CAL. L. REV. 791, 809–19 (2002) [hereinafter Beiner, *Let the Jury Decide*] (presenting examples of numerous decisions reached outside of trial in which courts were hostile to plaintiffs’ claims, including instances where courts overturned jury decisions in the plaintiff’s favor); Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 75 (1999) [hereinafter Beiner, *The Misuse of Summary Judgment*] (acknowledging that, in the Title VII context, “[n]o longer are these cases being taken from judicial fact finding, but instead from a jury of the plaintiff’s peers”).

25. See Galanter, *supra* note 9, at 7 (discussing “an abundance of data that shows that trials, federal and state, civil and criminal, jury and bench, are declining precipitously”); see also Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 468 (2004) (acknowledging, however, that “[f]or 30 years, even as the portion of cases tried has fallen, *civil rights* has remained the type of case most likely to reach trial” (emphasis added)). Interestingly, while all civil trials are decreasing, employment discrimination trials are decreasing at a slower rate than other civil categories. Clermont & Schwab, *From Bad to Worse*, *supra* note 6, at 124 (noting the drop in trials in employment discrimination cases during the period they studied was “only thirty-three percent”).

26. See *infra* Part III.

27. See *infra* Parts II.A–D.

28. See *infra* Part II.C.

29. See *infra* Parts II.A–C.

policy perspective, that more trials are important in this area of the law. Eschewing problems plaintiffs encounter in this area of the law, this Article advocates that trials are an important means of vindicating the public purposes behind employment discrimination laws.³⁰

II. THE ROAD OUT OF COURT

The road that leads employment discrimination claims out of the federal court system is multi-laned. First, while the courts initially disfavored arbitration of employment discrimination claims, eventually the Supreme Court reinvigorated the Federal Arbitration Act (“FAA”),³¹ leading to widespread enforcement of employment arbitration agreements.³² Second, the Court created an affirmative defense in sexual harassment cases that created an incentive for employers to create internal grievance mechanisms to handle such complaints.³³ After the Court’s recent decision in *Staub v. Proctor Hospital*,³⁴ it appears that the Court is leaning toward deferring to employer grievance mechanisms for all employment discrimination cases.³⁵ Third, the EEOC itself has increased its efforts to mediate these cases.³⁶ While this action may come from the agency’s honest desire to achieve the best results for plaintiffs, it means that some meritorious cases of discrimination will never come to the public’s awareness, as they result in mediated settlements with confidentiality provisions.³⁷ Finally, many scholars have noted that courts and defendants have used rules of civil procedure to thwart the efforts of employment discrimination plaintiffs with meritorious claims.³⁸ Some of the observations of these scholars, as well as studies supporting their claims, will be canvassed in this Part.³⁹

30. See *infra* Parts III–IV.

31. 9 U.S.C. §§ 1–16 (2006).

32. See *infra* Part II.A.

33. See *infra* Part II.B.

34. 131 S. Ct. 1186 (2011).

35. See *infra* Part II.B.

36. See *infra* Part II.D.

37. See 29 C.F.R. § 1601.22 (2010) (providing that information contained in a charge under Title VII or the ADA shall be kept confidential, but can be made public if a proceeding is instituted under the ADA or Title VII involving that charge).

38. See *infra* Part II.C.

39. See *infra* Part II.C.

A. *The Arbitration Lane*

Initially, the federal courts were reluctant to enforce arbitration provisions in employment agreements that forbade employees from pursuing statutory employment discrimination claims in court.⁴⁰ The EEOC agreed with this position in its 1997 policy statement.⁴¹ The courts' position began to change in 1991, however, with the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corporation*.⁴²

In *Gilmer*, the Court held that a plaintiff in an ADEA case could be forced into compulsory arbitration by an arbitration agreement contained in a securities registration application.⁴³ In doing so, the Court concluded that arbitration of ADEA claims was not inconsistent with the statutory framework or purposes of the Act.⁴⁴ The Court, however, did note that not all statutory claims are appropriate for arbitration, and explained that if Congress itself intended to preclude parties from waiving court remedies for a particular statutory claim, arbitration would be inappropriate.⁴⁵ This interpretation ultimately left open the possibility that courts might read other anti-discrimination statutes differently.

There was another wrinkle in the Federal Arbitration Act that gave plaintiffs hope that employment discrimination claims would fall outside of the FAA's mandatory arbitration language—Section 1 of the FAA.⁴⁶ Section 1 of the FAA exempts from its mandate for arbitration “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”⁴⁷ In extending FAA coverage to the ADEA claim in *Gilmer*, the Court avoided the issue of whether the claim fell under Section 1's exemption by arguing that the arbitration provision was not in the employee's contract of employment but was

40. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59–60 (1974) (holding that an employee subject to a collective-bargaining agreement (“CBA”) could pursue a race discrimination claim under Title VII, despite prior arbitration pursuant to the CBA); *Utley v. Goldman Sachs & Co.*, 883 F.2d 184, 187 (1st Cir. 1989) (finding plaintiff in Title VII sex discrimination suit was not required to arbitrate a claim pursuant to an arbitration agreement).

41. EQUAL EMP. OPP. COMM’N, 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>.

42. 500 U.S. 20, 35 (1991) (concluding that plaintiff did not meet his burden to show that Congress intended to exclude arbitration of claims under the ADEA).

43. *Id.*

44. *Id.* at 26–30.

45. *Id.* at 26. Indeed, the plaintiff in *Gilmer* conceded that there was no legislative history or statutory text to support this for the ADEA. *Id.* at 26–27.

46. See 9 U.S.C. § 1 (2006) (exempting workers in foreign and interstate commerce from FAA).

47. *Id.*

instead in his registration application.⁴⁸ Thus, the Court “le[ft] for another day the issue” of whether Section 1 exempted all employment agreements.⁴⁹ The possibility remained that when faced with an actual agreement between employer and employee, the Court might hold that the FAA’s Section 1 exemption applied.

The Court finally decided this issue in 2001 in *Circuit City Stores, Inc. v. Adams*.⁵⁰ In this case, the Court held that only employment contracts involving employees who worked directly in commerce, like the seamen and railroad employees listed in Section 1, fit within the exemption from arbitration.⁵¹ A majority of the Court rejected a variety of arguments raised by the plaintiff, Adams, who did not raise his claims under federal antidiscrimination laws but instead raised them under California’s Fair Employment and Housing Act.⁵² Adams argued that the Court should interpret the exemption phrase “any other class of workers engaged in foreign or interstate commerce” in Section 1 broadly to encompass the limits of Congress’s contemporary Commerce Clause authority.⁵³ Because the Court had earlier adopted an expansive reading of the phrase “transaction involving commerce” in Section 2 of the FAA,⁵⁴ Adams argued that the Court should likewise read the language of Section 1 expansively.⁵⁵ The Court rejected this argument on numerous grounds, including reasoning that the principle of *ejusdem generis* suggested that the specific words used in the phrase—“seaman” and “railroad workers”—implied that the residual term was meant to encompass similar workers.⁵⁶ The Court also explained that the distinctions between the phrases “involving commerce” (used in Section 2) and “in . . . interstate commerce” (used in Section 1) suggested that the latter phrase was narrower.⁵⁷

The Court also rejected the argument that Congress limited its language in the Section 1 exemption because a series of Supreme Court decisions in the early twentieth century limited Congress’s authority over

48. *Gilmer*, 500 U.S. at 25 n.2.

49. *Id.* The parties in *Gilmer* also did not raise the issue, but instead amicus curiae raised it. *Id.*

50. 532 U.S. 105, 112–13 (2001) (explaining that, while the Court in *Gilmer* did not deem it necessary to reach the meaning of Section 1, “the issue reserved in *Gilmer* is presented here”).

51. *Id.* at 115, 119.

52. *Id.* at 110.

53. 9 U.S.C. § 1 (2006); *Circuit City*, 532 U.S. at 114.

54. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277, 279–80 (1995) (reading “involving commerce” in Section 2 of the FAA to reach the full extent of Congress’s current commerce clause authority).

55. *Circuit City*, 532 U.S. at 114.

56. *Id.* at 114–15.

57. *Id.* at 115–17.

employment-related commerce.⁵⁸ Adams argued that this decision evinced Congress's intent to legislate to the limits of its authority at the time in enacting Section 1, and thus, like the modern interpretation of Section 2, this boundary now included workers like himself.⁵⁹ The Court, however, was not swayed by these arguments and extended the FAA to Adams's state law employment discrimination claims.⁶⁰

The Court's holding still left an opening for plaintiffs to litigate specific federal anti-discrimination claims if Congress expressed an intention not to send the particular type of claim to arbitration. With the

58. Justice Souter described the state of the law in 1925, when the FAA was passed, well in his dissent:

When the Act was passed (and the commerce power was closely confined) our case law indicated that the only employment relationships subject to the commerce power were those in which workers were actually engaged in interstate commerce. Thus, by using "engaged in" for the exclusion, Congress showed an intent to exclude to the limit of its power to cover employment contracts in the first place, and it did so just as clearly as its use of "involving commerce" showed its intent to legislate to the hilt over commercial contracts at a more general level.

Id. at 136 (Souter, J., dissenting).

59. The Court was still in the heyday of the *Lochner* era in 1925 when the FAA was enacted. During this period, it struck many state and federal laws regulating the conditions of work. *See, e.g.,* *Carter v. Carter Coal Co.*, 298 U.S. 238, 285, 302 (1936) (holding the Bituminous Coal Conservation Act unconstitutional on commerce clause grounds, reasoning that "[m]ining is not interstate commerce, but like manufacturing, is a local business, subject to local regulation and taxation"); *Adkins v. Children's Hosp. of D.C.*, 261 U.S. 525, 562 (1923) (holding a minimum wage law for women unconstitutional). For more on *Lochner*, see PAUL KENS, *LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL 2* (1998) (proposing to discuss *Lochner*, which for "eighty years [] has served legal scholars as a poignant example of judicial activism"); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lessons of Lochner*, 76 N.Y.U. L. REV. 1383, 1447–55 (2001) (discussing the lessons from *Lochner* and suggesting that "even if there was a jurisprudential basis for *Lochner*-era decisions, the critique of constitutional judging as inconsistent with democracy still found full voice"); Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 4 (1991) (describing *Lochner* as a "transitional era" during which "tenets of early and modern American constitutionalism" blended together); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 875 (1987) (understanding *Lochner* from a different perspective—that is, "to symbolize not merely an aggressive judicial role, but an approach that imposes a constitutional requirement of neutrality, and understands the term to refer to preservation of the existing distribution of wealth and entitlements under the baseline of the common law"). There are a plethora of other articles on *Lochner*. As Cass Sunstein noted in *Lochner's Legacy*, criticism of the *Lochner* era as representing overreaching by the Court into areas that belonged to the political branches has "spawned an enormous literature." Sunstein, *supra*, at 874. Recently, however, this view has been challenged. *See* DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 3* (2011) (offering "the first comprehensive modern analysis of *Lochner* and its progeny, free from the baggage of the tendentious accounts of Progressives, New Dealers, and their successors on the left and, surprisingly, the right.").

60. *Circuit City*, 532 U.S. at 119 ("In sum, the text of the FAA forecloses the construction of § 1 followed by the Court of Appeals in the case under review, a construction which would exclude all employment contracts from the FAA." (emphasis added)).

exception of a brief period of time in the Ninth Circuit,⁶¹ however, each court that addressed this issue held that the FAA covered Title VII, ADA, and ADEA claims.⁶² Indeed, without ever considering the legislative history of the antidiscrimination statutes involved in the case, the Court in *EEOC v. Waffle House, Inc.*⁶³ broadly endorsed arbitration to resolve employment-related disputes.⁶⁴ In that case, the Court stated that “[e]mployment contracts . . . are covered by the FAA.”⁶⁵ It also explained that federal statutory claims can be resolved pursuant to arbitration agreements because such agreements do not amount to a waiver of a statutory claim, but rather simply select the forum in which the claimant will pursue the claim.⁶⁶ The Court specifically avoided looking at the purposes behind the FAA and the ADA, instead reasoning that the statutory text provided a clear answer to the specific question involved—whether the EEOC could pursue a claim on an employee’s behalf in spite of his arbitration agreement with the employer.⁶⁷ In concluding that the EEOC did have such authority, the Court had no need to address the policies underlying the ADA and what those policies might indicate about the arbitrability of claims by individuals.

Interestingly, there is considerable support in both the legislative history of the ADA and the amendments to Title VII through the Civil

61. See *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1202–03 (9th Cir. 1998) (stating “Duffield ha[d] met her burden of showing that Congress intended in enacting the Civil Rights Act of 1991 to preclude the compulsory arbitration of Title VII disputes”), *overruled by* *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 744–45 (9th Cir. 2003) (en banc).

62. See *Luce*, 345 F.3d at 748–49 (canvassing circuit courts and stating that “[a]ll of the other circuits have concluded that Title VII does not bar compulsory arbitration agreements”); see also *14 Penn Plaza, LLC v. Pyett*, 556 U.S. 247, 274 (2009) (holding CBAs “clearly and unmistakably require[] union members to arbitrate ADEA claims”); *Awuah v. Coverall North America, Inc.*, 703 F.3d 36, 45–46 (1st Cir. 2012) (holding that the FAA preempts the ADA claim brought by plaintiffs).

63. 534 U.S. 279 (2002). The Court in this case addressed whether the EEOC could bring a lawsuit under the ADA on behalf of a wronged employee in spite of the employee’s prior consent to an arbitration agreement that covered the claim. *Id.* at 282. In ruling that the EEOC had an independent right to pursue the action, the Court made clear in its opinion that its analysis applied to Title VII as well. *Id.* at 287, 295–96.

64. *Id.* at 289, 295 n.10, 296. Courts have relied on language from this case in enforcing arbitration agreements. See, e.g., *Collie v. Wehr Dissolution Corp.*, 345 F. Supp. 2d 555, 560 (M.D. N.C. 2004) (noting that despite the FAA’s limiting language, “the FAA applies to most employment contracts, including at-will employment contracts”); *Gillispie v. Vill. of Franklin Park*, 405 F. Supp. 2d 904, 908 (N.D. Ill. 2005) (same).

65. *Waffle House, Inc.*, 534 U.S. at 289.

66. *Id.* at 295 n.10 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 472 U.S. 614, 628 (1985); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)). Neither of the cases cited examined whether Congress intended for such statutory claims to be pressed into mandatory arbitration by pre-dispute arbitration agreements.

67. *Id.* at 285–87.

Rights Act of 1991 that Congress did not intend to force employees to arbitrate these claims.⁶⁸ The impetus to send Title VII claims to arbitration comes through Section 118 of the Civil Rights Act of 1991.⁶⁹ In Section 118, Congress stated: “Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is *encouraged* to resolve disputes arising under the Acts or provisions of Federal law amended by this title.”⁷⁰

The ADA has similar language.⁷¹ The Older Worker Benefits Protection Act (“OWBPA”),⁷² an amendment to the ADEA, likewise

68. See, e.g., H.R. REP. NO. 102-40(I), at 97 (1991) (“The Committee emphasizes, however, that the use of alternative dispute resolution mechanisms is intended to supplement, *not supplant*, the remedies provided by Title VII. Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration . . . does not preclude the affected person from seeking relief under the enforcement provisions of Title VII.” (emphasis added)).

69. Pub. L. No. 102-166 § 118, 105 Stat. 1081 (1991).

70. *Id.* (emphasis added). Section 118, however, does not appear as a section within Title 42, Chapter 21, Subchapter VI of the U.S. Code. Instead, Congress placed it in the notes following Section 1981. 42 U.S.C. § 1981 note (2006). This does not, however, undermine its force as law. After laws are passed by Congress and signed by the President, they are published in chronological order in the Statutes at Large, which serves as “‘legal evidence’” of the law. *Gonzalez v. Vill. of W. Milwaukee*, 671 F.3d 649, 661 n.6 (7th Cir. 2012) (citing 1 U.S.C. § 112; Mary Whisner, *The United States Code, Prima Facie Evidence, and Positive Law*, 101 LAW LIBR. J. 545, 546 (2009)). That chronological arrangement, however, is not efficient for researchers, and therefore, the statutes are arranged by subject matter for publication in the U.S. Code. *Gonzalez*, 671 F.3d at 661 n.6 (citing 2 U.S.C. § 285b; Whisner, *supra*, at 546). Title 1 of U.S.C. § 204(a) declares that the U.S. Code establishes “‘prima facie the laws of the United States, general and permanent in their nature . . . Provided, however, [t]hat whenever titles of such Code shall have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained, in all the courts[.]’” *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964). The Supreme Court has said that “‘the very meaning of “prima facie” is that the Code cannot prevail over the Statutes at Large when the two are inconsistent.’” *Id.* (quoting *Stephan v. United States*, 319 U.S. 423, 426 (1943)). Even where Congress has enacted a codification into positive law, the “‘change of arrangement . . . cannot be regarded as altering the scope and purpose of the enactment. For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed.’” *Id.* (quoting *Fourco Glass Co. v. Transmirra Corp.*, 353 U.S. 222, 227 (1957)). If construction of a section of the U.S. Code that has not been enacted into positive law is necessary, “‘recourse must be had to the original statutes themselves.’” *Id.* (quoting *Murrell v. W. Union Tel. Co.*, 160 F.2d 787, 788 (5th Cir. 1947)). The Office of Law Revision Counsel prepared and continues to prepare titles of the United States Code for reenactment as positive law by Congress in order to “‘remove ambiguities, contradictions, and other imperfections both of substance and of form,’ while ‘conform[ing] to the understood policy, intent, and purpose of the Congress in the original enactments.’” *Gonzalez*, 671 F.3d at 661 n.6 (citing 2 U.S.C. § 285b(1) (2006); Whisner, *supra*, at 553–56). For those titles that Congress has enacted into positive law, the Code constitutes “‘legal evidence’” of the law. *Id.* (citing 1 U.S.C. § 204(a) (2006)). Thus, while the placement of Section 118 as a note in the U.S. Code is unusual, it is contained in the Statutes at Large as well. Pub. L. No. 102-166 § 118, 105 Stat. 1081 (1991).

71. See 42 U.S.C. § 1981a(a)(2) (applying Section 1981a to the ADA); see also text accompanying note 70.

protects older workers in signing arbitration agreements.⁷³ Section 118 of the Civil Rights Act of 1991 “encourage[s]” parties in Title VII cases to use alternative dispute resolution but does not mandate it.⁷⁴ Instead the section suggests its use “[w]here appropriate and to the extent authorized by law.”⁷⁵ What does it mean to “encourage” alternative dispute resolution? Most lower courts that have considered the issue have concluded that this language is not ambiguous but rather expresses Congress’s clear preference for alternative dispute resolution.⁷⁶ As a result, few courts have investigated the legislative history of this section carefully, asserting instead that the clarity of the language did not necessitate it.⁷⁷

Upon scrutiny of the legislative history of Section 118, one understands that it was convenient for the lower courts to assess its language as unambiguous. The section of the House Report addressing the alternative dispute resolution provision makes clear that Congress did not intend for courts to enforce, under the Civil Rights Act of 1991, pre-dispute arbitration agreements absent both parties’ consent:

Section 216 encourages the use of alternative means of dispute resolution to resolve disputes arising under Title VII of the Civil Rights Act of 1964 . . . or the Age Discrimination in Employment Act . . . where appropriate and to the extent authorized by law. . . . This section is intended to encourage alternative means of dispute resolution that are already authorized by law.⁷⁸

72. Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified as amended in scattered sections of 29 U.S.C.).

73. See 29 U.S.C. § 626(f)(1)(C) (2006) (“An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum . . . (C) the individual does not waive rights or claims that may arise after the date the waiver is executed.”).

74. Pub. L. No. 102-166 § 118, 105 Stat. 1081 (1991).

75. *Id.*

76. See, e.g., *Desiderio v. Nat’l Ass’n of Securities Dealers, Inc.*, 191 F.3d 198, 205 (2d Cir. 1999) (“[W]e assume, as does the Supreme Court, that the drafters of Title VII and the amendments introduced in the Act were well aware of what language was required for Congress to evince an intent to preclude a waiver of judicial remedies.”); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 170 F.3d 1, 10–11 (1st Cir. 1999) (noting that “Congress has repeatedly rejected legislation that would explicitly bar mandatory agreements to arbitrate employment discrimination claims” and holding “neither the language of the statute nor the legislative history” illustrates this preclusive intent); *Seus v. John Nuveen & Co, Inc.*, 146 F.3d 175, 183 (3d Cir. 1998) (same).

77. See, e.g., *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 752–53 (9th Cir. 2003) (“We conclude . . . that this history should not be relied on to establish that Congress intended to preclude waiver of a judicial forum in derogation of a clear and unambiguous statute.”).

78. H.R. REP. NO. 102-40(I), at 97 (1991).

The Committee emphasizes, however, that the use of alternative dispute resolution mechanisms “is intended to supplement, not supplant, the remedies provided by Title VII.”⁷⁹ Thus, for example, “the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII.”⁸⁰ As the Committee further mentions, “[t]his view is consistent with the Supreme Court’s interpretation of Title VII in *Alexander v. Gardner-Denver Co.*”⁸¹ Finally, the House Report adds that “[t]he Committee does not intend this section to be used to preclude rights and remedies that would otherwise be available.”⁸²

While the language of Section 118 is ambiguous, this legislative history is not. Indeed, this House Report reveals that Congress meant for victims of employment discrimination, at least for purposes of Title VII and the ADA,⁸³ to have all available methods of enforcing their statutory rights at their disposal.⁸⁴ The Committee’s reference to *Gardner-Denver* solidifies this position. In 1974’s *Gardner-Denver*, the Court held that an employee who arbitrated his age claim pursuant to a collective bargaining agreement’s arbitration provision could not be precluded from pursuing his case in court.⁸⁵ Thus, the House Report’s reference to *Gardner-Denver* further supports that Congress intended for plaintiffs to have court actions as an option—rather than be limited by pre-dispute arbitration agreements. This position makes sense, given that the 1991 Act expanded remedies for victims of discrimination, including permitting jury trials⁸⁶ as well as awards of compensatory and punitive damages.⁸⁷ Limiting plaintiffs to

79. *Id.*

80. *Id.*

81. *Id.*; 415 U.S. 36, 48–49 (1974).

82. H.R. REP. NO. 102-40(I), at 97.

83. The Act also covered cases brought under Section 1981, which covers race discrimination. *Id.*

84. Indeed, early commentators looking at the language opined that the history might well cause problems for enforceability of mandatory arbitration agreements. See, e.g., Thomas J. Piskorski & David B. Ross, *Private Arbitration as the Exclusive Means of Resolving Employment-Related Disputes*, 19 EMP. RELATIONS L.J. 205, 208–09 (1993) (“This legislative history could limit the support Section 118 otherwise would provide to the proponents of the enforceability of private arbitration agreements with respect to statutory claims”).

85. 415 U.S. at 59–60.

86. 42 U.S.C. § 1981a(c) (2006) (“If a complaining party seeks compensatory or punitive damages under this section—(1) any party may demand a trial by jury.”).

87. *Id.* § 1981a(b).

arbitration under certain circumstances is inconsistent with the general purpose of the 1991 Act, which expanded court remedies.

Yet, the only circuit court to hold that the Civil Rights Act of 1991 intended to preserve court remedies in the face of pre-dispute arbitration agreements was the Ninth Circuit,⁸⁸ and that position was short-lived thanks to the momentum of other circuits holding otherwise.⁸⁹ Few of the courts of appeals that addressed the issue have explicitly engaged the language in the House Report described above. The Supreme Court alluded to it in a footnote in the 2009 case *14 Penn Plaza LLC v. Pyett*,⁹⁰ but conveniently avoided engaging in much analysis of the House Report, instead opining rather summarily:

But the legislative history mischaracterizes the holding of *Gardner-Denver*, which does not prohibit collective bargaining for arbitration of ADEA claims. Moreover, reading the legislative history in the manner suggested by respondents would create a direct conflict with the statutory text, which encourages the use of arbitration for dispute resolution without imposing any constraints on collective bargaining. In such a contest, the text must prevail.⁹¹

The Court's cursory analysis did not do the competing argument justice, as it could have read this legislative history consistently with the statutory text. The Court could have read the statute as "encourage[ing]" parties to engage in alternative dispute resolution when they agreed to do so post-dispute. Indeed, this interpretation seems the most reasonable reading when one considers the House Report, statutory text, and the Civil Rights Act's purpose to expand court remedies for discrimination.⁹²

The few courts of appeals that have considered the language, including the First Circuit and ultimately the Ninth Circuit, have concluded that it did not evince congressional intent to provide a choice for plaintiffs who entered into pre-dispute arbitration agreements. The First Circuit in *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*⁹³ reasoned that the

88. See *Duffield v. Robertson Stephens & Col.*, 144 F.3d 1182, 1196 (9th Cir. 1998), *overruled by* *EEOC v. Luce*, Forward, Hamilton & Scripps, 345 F.3d 742, 748–49 (9th Cir. 2003).

89. See *EEOC v. Luce*, Forward, Hamilton & Scripps, 345 F.3d 742, 748–49 (9th Cir. 2003) (explaining that "[i]n the post-*Gilmer* world, our decision in *Duffield* stands alone"); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 21 (1st Cir. 1999) (holding "there was no congressional intent to preclude pre-dispute arbitration agreements manifested in the 1991 CRA or the OWBPA[,] despite concluding that the agreement in the case was not enforceable").

90. 556 U.S. 247, 259 n.6 (2009) (noting that "Section 118 expresses Congress's support for alternative dispute resolution").

91. *Id.*

92. See *supra* text accompanying notes 78–87.

93. 170 F.3d 1 (1st Cir. 1999).

Court's decision in *Gilmer*, coming some six months before the enactment of the Civil Rights Act of 1991, was evidence of Congress's acquiescence in the enforcement of pre-dispute arbitration agreements.⁹⁴ In addition, it relied on an earlier case it decided involving the ADA, which included similar language in its legislative history.⁹⁵ The *Rosenberg* court also reasoned that language in the OWBPA stating an older worker could not "waive rights or claims that may arise after the date the waiver is executed" was meant to apply only to the underlying statutory rights and not the right to jury trial.⁹⁶ The Ninth Circuit, after initially holding that statutory discrimination claims were not subject to pre-dispute arbitration agreements, changed its position.⁹⁷

While there may be some question as to what evidence from floor debates shows regarding the interpretation of Section 118,⁹⁸ the House Report is the most authoritative interpretation of what Congress meant by the provision. The Supreme Court has stated "that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'"⁹⁹ Reliance on the comments of a single member or statements from floor debates is discouraged.¹⁰⁰ Thus, committee reports, such as the House

94. *Id.* at 8.

95. *See id.* at 9 (noting that the ADA's language can only reasonably be interpreted as favoring arbitration (citing *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 150 (1st Cir. 1998))).

96. *Id.* at 12 (citing 29 U.S.C. § 626(f)(1) (2006)). There is dicta in *Gilmer* that supports this position. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991) ("Congress . . . did not explicitly preclude arbitration or other nonjudicial resolution of claims, even in its recent amendments to the ADEA.").

97. *See EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 749 (9th Cir. 2003) (holding that its holding in *Duffield* was "in error[,]") concluding that it incorrectly interpreted the 1991 Act's text, legislative history, and general purpose).

98. *See Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1196 (9th Cir. 1998) (stating that "Congress in fact *specifically rejected* a proposal that would have allowed employers to enforce 'compulsory arbitration' agreements"), *overruled by Luce*, 345 F.3d at 760 (suggesting the same).

99. *Garcia v. United States*, 469 U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)).

100. *Id.* (citing *Weinberger v. Rossi*, 456 U.S. 25, 35 (1982) ("We have eschewed reliance on the passing comments of one Member and casual statements from the floor debates."); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (finding despite support for petitioners' argument "in a Conference Report four years after the enactment of [the relevant provision of the Freedom of Information Act ("FOIA") at issue] . . . 'legislative history' of this sort cannot be viewed as controlling"); *United States v. O'Brien*, 391 U.S. 367, 385 (1968) (suggesting that "the more authoritative reports of the Senate and Armed Services Committees" are particularly helpful resources in deciphering legislative purpose).

Report concerning Section 118, are more authoritative than statements or comments made on the House or Senate floor.¹⁰¹

One need not conclude that the courts are necessarily wrong about enforcing arbitration clauses in this context to make the larger point that these cases are finding a way out of the court system. The purpose of recounting some of the history here is not to assess whether the U.S. Supreme Court or the lower federal courts made the correct assessment on this particular issue.¹⁰² The point here is that there is a reasonable reading of the statute and its legislative history that would have precluded an employer from forcing an employee into arbitration against his or her will on the basis of a pre-dispute arbitration agreement. The courts, however, chose to go in the opposite direction, making these contracts enforceable.¹⁰³ Similarly, one could read the OWBPA's preclusion of enforcement of employment agreements that include provisions that "waive rights or claims that may arise after the date the waiver is executed" to encompass the right to jury trial.¹⁰⁴ Yet, most courts that have considered it have refused to read the statutory text in this manner.¹⁰⁵ These decisions in and of themselves provide evidence that courts are sending these cases out of court and to arbitration when there are compelling arguments that Congress intended otherwise. Thus, in situations in which the courts have leeway in interpreting employment discrimination law in a manner that tends to lead

101. See *supra* note 100; see also *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395–96 (1951) (Jackson, J., concurring) ("Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared. . . . [T]o select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions.").

102. See *Duffield*, 144 F.3d at 1196–97 (suggesting in the debates that the Civil Rights Act of 1991 was not intended to preclude enforcement of mandatory arbitration agreements; however, the House Report, which provides a more authoritative interpretation of the statute than statements by law makers from the floor, is more reasonably read to preclude enforcement of these agreements).

103. See *supra* text accompanying notes 4546–67, 93–97.

104. See *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*, 170 F.3d 1, 12 (1st Cir. 1999) (quoting 2 U.S.C. § 626(f)(1)) ("Amici point to legislative history that suggests that Congress was particularly concerned about older workers losing the right to a jury trial for ADEA claims.").

105. *Id.* at 13 ("A party who agrees to arbitrate 'does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'"); see also *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 181 (3d Cir. 1998), *cert. denied*, 525 U.S. 1139 (1999) (noting that that OWBPA's legislative history "provide[s] persuasive evidence that the protection it affords is limited to the waiver of substantive rights under the ADEA"); *Williams v. Cigna Fin. Advisors, Inc.*, 56 F.3d 656, 660 (5th Cir. 1995) ("[T]he OWBPA protects against the waiver of a right or claim, not against the waiver of a judicial forum."). But see *Hammaker v. Brown & Brown, Inc.*, 214 F. Supp. 2d 575, 580–81 (E.D. Va. 2002) (distinguishing *Seus*, *Rosenberg*, and *Williams* and holding that the right to jury trial was one of the rights not subject to waiver under Section (C) of the OWBPA).

such cases out of court, the courts are not bashful in exercising their interpretative powers to make it so.¹⁰⁶

B. The Internal Employer Grievance Mechanism Lane

Another means courts are using to take employment discrimination claims out of court is supporting the use of employer grievance mechanisms as a defense in such cases.¹⁰⁷ The Court appears to be in the process of extending a defense that arose in the context of sexual harassment cases¹⁰⁸ to all forms of employment discrimination claims. In the seemingly pro-plaintiff 2011 Supreme Court case *Staub v. Proctor Hospital*,¹⁰⁹ the Court suggested in the context of a discrimination claim under the Uniformed Services Employment and Reemployment Rights Act (“USERRA”) that employees who fail to take advantage of internal employer grievance mechanisms might be precluded from proceeding in court.¹¹⁰ Similar to arbitration case law, this line of cases could lead many employment discrimination cases out of court.

106. There is a significant body of work criticizing the use of arbitration in the context of employment agreements. See, e.g., Craig Smith & Eric V. Moyé, *Outsourcing American Civil Justice: Mandatory Arbitration Clauses in Consumer and Employment Contracts*, 44 TEX. TECH L. REV. 281, 292 (2012) (disagreeing with enforcement of employment arbitration agreements on numerous grounds, including that they are not the result of arms-length bargaining and quoting with approval the Court’s position in *Gilmer* that “because arbitrators generally do not issue opinions, mandatory arbitration would result ‘in a lack of public knowledge of employers’ discriminatory policies, an inability to obtain effective appellate review, and a stifling of the development of the law’”); see also *infra* notes 338–346 and accompanying text.

107. See, e.g., Lauren B. Edelman, Christopher Uggen & Howard S. Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 407–08 (1999) (describing how employer created grievance mechanisms were incorporated into legal standards by the courts). See generally Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. SOC. 1401, 1422–35 (1990) (providing empirical evidence illustrating that “[t]he civil rights movement and mandates of the 1960s altered organizations’ legal environments by heightening societal attention to issues of fair governance”).

108. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08 (1998) (stating that, while an employer is “subject to vicarious liability . . . for an actionable hostile environment[.]” the employer may raise an affirmative defense comprising of two elements: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise”); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764–65 (1998) (same).

109. 131 S. Ct. 1186 (2011).

110. See *id.* at 1194 n.4 (expressing no direct opinion on whether or not the defendant would have been able to use an affirmative defense if the plaintiff did not take advantage of the employer’s grievance mechanism despite recognizing that the plaintiff took advantage of the employer’s grievance process).

Internal employee grievance mechanisms have traditionally played a role in sexual harassment cases.¹¹¹ In the first case in which the U.S. Supreme Court recognized a claim for sexual harassment—*Meritor Savings Bank v. Vinson*¹¹²—the Court considered what effect an employer complaint process might have on an employer’s liability for such discrimination.¹¹³ The defendant in *Meritor* argued that it had an internal complaint process that the plaintiff should have used but did not.¹¹⁴ The employer argued that failure to use the provided grievance process provided a defense to liability.¹¹⁵ Avoiding a definitive rule on the issue, the Court held that the grievance process set up by the employer in that case was insufficient on a number of grounds.¹¹⁶ In particular, it required the employee, Ms. Vinson, to report the sexual harassment to her harasser, who was also her supervisor.¹¹⁷ After the Court’s determination in *Meritor*, the courts of appeals adopted a variety of approaches to the issue.¹¹⁸ Eventually the jurisprudence became sufficiently confused on the issue of liability for supervisor harassment that the Court granted certiorari on the issue in *Burlington Industries, Inc., v. Ellerth* and *Faragher v. City of Boca Raton*.¹¹⁹

The Court in these two cases determined that an employer is vicariously liable for supervisor hostile environment harassment, subject to an affirmative defense to “liability or damages.”¹²⁰ The defense is

111. See Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 198 (2004) (explaining how the courts have created incentives for employers to use these mechanisms).

112. 477 U.S. 57 (1986).

113. *Id.* at 72–73 (“reject[ing] petitioner’s view that the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent’s failure to invoke that procedure, must insulate petitioner from liability”).

114. *Id.* at 72.

115. *Id.*

116. *Id.* at 72–73 (suggesting that petitioner could bolster its contention that its nondiscrimination policy and internal grievance procedure should “insulate” it from liability “if its procedures were better calculated to encourage victims of harassment to come forward”).

117. *Id.* at 73.

118. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 785–86 (1998) (acknowledging confusion in lower courts).

119. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751 (1998) (“We granted certiorari to assist in defining the relevant standards of employer liability.”); *Faragher*, 524 U.S. at 785–86 (same).

120. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. No court has ever used the defense to limit damages, although the *Faragher* and *Ellerth* Courts clearly contemplated it. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. Quid pro quo cases, in which a supervisor takes a tangible employment action against a plaintiff, are not subject to the defense. The employer is vicariously liable in such a case. See *Ellerth*, 524 U.S. at 765 (stating “[n]o affirmative defense is

comprised of two parts. First, the employer must show that it took reasonable steps to prevent and correct harassment.¹²¹ Second, the employer must show that the employee failed to take advantage of any corrective opportunities provided by the employer or to avoid harm otherwise.¹²² An internal grievance mechanism could help an employer satisfy both prongs of the affirmative defense. The existence of an anti-discrimination policy and grievance mechanism might help the employer show that it took reasonable steps to prevent and correct any sexual harassment of which it became aware.¹²³ The employer could also use its anti-discrimination policy and grievance mechanism to satisfy the second prong, by showing that the employee failed to take advantage of such a program.¹²⁴ Thus, the Court essentially promoted the use of such grievance mechanisms as an antidote to liability for sexual harassment.¹²⁵ Many employers picked up on this position and created such policies to “bullet proof[]” themselves from potential liability for supervisor harassment.¹²⁶

The Court in *Ellerth* and *Faragher* was clear in articulating why it set up such a standard for harassment claims. First, it explained that such a defense would not be available if the supervisor took some action against the harassed employee because he or she refused to agree to the sexually explicit demands of his or her supervisor.¹²⁷ Generally referred to as quid pro quo claims, it was clear to the Court “that if an employer demanded sexual favors from an employee in return for a job benefit, discrimination with respect to terms or conditions of employment was explicit.”¹²⁸ Hostile environment sexual harassment, however, was different.¹²⁹ In this context, the employer, in theory, obtained no benefit from this behavior and often had policies that prohibited employees from committing such acts of

available, however, when the supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment”).

121. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

122. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

123. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

124. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

125. *Ellerth*, 524 U.S. at 765 (explaining that an anti-harassment policy with complaint process would help employers prove the affirmative defense); *Faragher*, 524 U.S. at 807–08 (same).

126. Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 976 (1999).

127. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807–08 (both noting the defense is only available if no tangible employment action is taken against harassed employee).

128. *Ellerth*, 524 U.S. at 752.

129. See *id.* (distinguishing between quid pro quo claims and hostile environment claims and suggesting that “[l]ess obvious was whether an employer’s sexually demeaning behavior altered terms or conditions of employment in violation of Title VII”).

harassment.¹³⁰ Thus, plaintiffs had difficulty arguing that such behavior was within the course and scope of the supervisor's employment. From the Court's perspective, this behavior might occur even when the employer explicitly forbade it in its workplace.¹³¹ As a result, for an employer who had made attempts to eliminate harassment and provide relief internally for victims of harassment, the Court set up this affirmative defense.

Commentators have criticized this defense because it requires an employer simply to put some sort of training program and grievance mechanism in place without determining what sorts of programs might actually work to address and eliminate harassment.¹³² It became very easy for employers who did so to escape liability for even egregious forms of sexual harassment.¹³³ In addition, employers were not liable for co-worker harassment unless they "knew or should have known of the harassment" and failed to take reasonable corrective action.¹³⁴ Under this standard, an employee who does not complain through an internal grievance process fails to give notice to the employer; thus, the employer generally would have no reason to know of the harassment and would escape liability for co-worker harassment as well.¹³⁵ Indeed, the courts tend to look at these cases as resulting from the acts of "one bad apple"—that is, one bad employee—instead of being the result of a more systemic problem at the place of

130. *Id.* at 757.

131. *See id.* at 756 (explaining that it is not clear how hostile environment harassment benefits the employer).

132. *See infra* text accompanying notes 312–318.

133. *See infra* text accompanying notes 312–318.

134. *See, e.g.*, 29 C.F.R. § 1604.11(d)–(e) (2013) ("With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."); *see also Faragher*, 524 U.S. at 799 (noting that circuits had "uniformly" judged co-worker harassment under a negligence standard); *EEOC v. Xerxes Corp.*, 639 F.3d 658, 675 (4th Cir. 2011) ("So long as the employer's response to each known incident of coworker harassment is reasonably prompt, and the employer takes remedial measures that are reasonably calculated to end the harassment, liability may not be imputed to the employer as a matter of law."); *Duch v. Jakubek*, 588 F.3d 757, 762 (2d Cir. 2009) (explaining plaintiff "must demonstrate that her employer 'failed to provide a reasonable avenue for complaint' or that 'it knew, or in the exercise of reasonable care should have known, about the harassment yet failed to take appropriate remedial action'" (quoting *Howley v. Town of Stratford*, 217 F.3d 141, 154 (2d Cir. 2000))); *Courtney v. Landair Transp., Inc.*, 227 F.3d 559, 565 (6th Cir. 2000) ("[I]n coworker cases the standard is based on a 'reasonableness' standard: 'when an employer responds to charges of coworker sexual harassment, the employer can be liable only if its response manifests indifference or unreasonableness in light of the facts the employer knew or should have known.'" (quoting *Blankenship v. Parke Care Ctrs., Inc.*, 123 F.3d 868, 872–73 (6th Cir. 1997))).

135. *See Bisom-Rapp, supra* note 126, at 975 (stating an employee who does not use his employer's grievance process is without redress).

employment.¹³⁶ Hence, courts are reluctant to hold employers liable for such employee misconduct.¹³⁷

The courts have been less reluctant to hold employers liable for more traditional forms of discrimination—namely, discriminatory failure to hire, firing, pay discrimination, etc.¹³⁸ A defense based on an employer grievance process was not thought to extend to these types of employer actions.¹³⁹ There are suggestions in *Staub*, however, that the Court is considering extending the rationale of the *Ellerth/Faragher* line of cases to the average employment discrimination claim, at least under certain circumstances.¹⁴⁰ In *Staub*, the Supreme Court, in an opinion written by Justice Scalia, purported to resolve the split over application of subordinate bias liability in employment discrimination suits.¹⁴¹ The issue arose in an unusual discrimination setting—discrimination based on the plaintiff’s membership in the United States Army Reserve.¹⁴² Staub argued that two supervisors harbored resentment toward him because of his military service and were determined to see him fired.¹⁴³ Eventually, these supervisors wrote Staub up for workplace infractions that Staub disputed, and an employee in the human resources department, Buck, made the decision to fire him.¹⁴⁴ There was no evidence that Buck acted based on her own discriminatory animus.¹⁴⁵ At the time of his termination, Staub complained to Buck that the two other supervisors wanted him fired because of his military service.¹⁴⁶ Buck reviewed Staub’s entire employment file and

136. See Anne Lawton, *The Bad Apple Theory in Sexual Harassment Law*, 13 GEO. MASON L. REV. 817, 818–26 (2005) (arguing that courts tend to see discriminatory harassment as the act of “one bad apple,” and thus an individual problem, instead of a workplace-wide problem).

137. See *id.* at 835 (explaining the Court’s word choice indicates an individual rather than organizational focus, thus showcasing its reluctance to hold an employer liable).

138. Indeed, Title VII explicitly applies to these forms of discrimination. The statute states, among other things, that it is an unlawful employment practice “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e–2(a)(1) (2006).

139. The Court’s refusal to extend the defense to tangible employment actions in *Ellerth* and *Faragher* supports this interpretation. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998).

140. See *supra* text accompanying note 110, *infra* text accompanying notes 159–164.

141. *Staub v. Proctor Hospital*, 131 S. Ct. 1186, 1189, 1191 (2011).

142. *Id.* at 1189.

143. *Id.* at 1190.

144. *Id.* at 1189–90.

145. *Id.* at 1190.

146. *Id.* at 1189–90.

decided to fire him anyway.¹⁴⁷ She never investigated Staub's contentions.¹⁴⁸

The employer hospital argued that the independent investigation of the alleged discriminatory animus by Buck (and her rejection of the allegations) should negate any prior discrimination.¹⁴⁹ The Court rejected this contention in part, explaining that if the decisionmaker's actions were not based on the original biased actions, an employer would not be liable under USERRA; however, if the decisionmaker takes the biased information or report into consideration in the decisionmaking process, bias can remain a causal factor in the decision.¹⁵⁰ As Justice Scalia explained, "[w]e are aware of no principle in tort or agency law under which an employer's mere conduct of an independent investigation has a claim-preclusive effect."¹⁵¹ Thus, the Court seemed skeptical of the use of internal investigations as a mechanism by which employers can break the chain of causation, although it did contemplate that an employer may have legitimate reasons for an adverse employment action that, while not encompassing discriminatory animus, will relieve it of liability.¹⁵²

While the Court explained this in the body of its decision, in a footnote later in the case, the Court appears to suggest that internal employee grievance mechanisms might provide a defense to employer liability if an employee, unlike Staub, did not complain through such a process.¹⁵³ In footnote four the majority opened up potential caveats.¹⁵⁴ First, the Court explained, rather cryptically, that "the employer would be liable only when the supervisor acts within the scope of his employment, or when the supervisor acts outside the scope of his employment and liability would be imputed to the employer under traditional agency principles."¹⁵⁵ Given the language of USERRA, which covers hiring, rehiring, retention, promotion, and benefits of employment, one is hard pressed to think of a situation in which a decisionmaker would be acting outside the scope of his or her employment and engage in an action that is covered by USERRA.¹⁵⁶ The Court then cited *Ellerth*.¹⁵⁷ It is not clear what the Court meant by citing

147. *Id.* at 1189.

148. *Id.* at 1189–90.

149. *Id.* at 1193.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 1194 n.4.

154. *Id.*

155. *Id.*

156. 38 U.S.C. § 4311(a) (2006).

157. *Staub*, 131 S. Ct. at 1194 n.4.

Ellerth, although perhaps a reference to employer grievance mechanisms later in the footnote provides some insight.¹⁵⁸

The Court later noted that Staub used the employer's internal grievance mechanism, and, citing *Pennsylvania State Police v. Suders*,¹⁵⁹ once again "express[ed] no view as to whether Proctor [the hospital] would have an affirmative defense if he [Staub] did not."¹⁶⁰ The issue in *Suders* was whether constructive discharge constituted a tangible employment action for which an employer would not be able to use the *Ellerth/Faragher* affirmative defense in a sexual harassment case.¹⁶¹ The portion of the *Suders* case Justice Scalia cites in *Staub* is the discussion of the circumstances under which an employer will or will not have such a defense in a purported constructive discharge scenario.¹⁶² It is unclear, however, what Justice Scalia meant in the context of *Staub*. Was he alluding to harassment based on military status? If Justice Scalia meant to suggest an *Ellerth/Faragher* type defense is available when the employee is discharged, as was the case for Staub, it would appear to presage an extension of the defense to non-harassment employment discrimination claims or at least claims that involve the animus of non-decisionmaking employees.¹⁶³ The *Ellerth/Faragher* defense already has proven to be an effective tool for granting summary judgment for employers.¹⁶⁴ In my opinion, extending an employer grievance mechanism defense to more discrimination claims will allow courts to throw more employment discrimination claims out of court before the fact finder can scrutinize the discriminatory behavior. Unlike sexual harassment, a supervisor's decision

158. *Id.*

159. 542 U.S. 129 (2004).

160. *Staub*, 131 S. Ct. at 1194 n.4.

161. *Suders*, 542 U.S. at 143.

162. *Staub*, 131 S. Ct. at 1194 n.4 (citing *Suders*, 542 U.S. at 148–50).

163. See *Suders*, 542 U.S. at 150 ("The [First and Seventh Circuits] in *Reed* and *Robinson*[, respectively,] properly recognized that *Ellerth* and *Faragher*, which divided the universe of supervisor-harassment claims according to the presence or absence of an official act, mark the path constructive discharge claims based on harassing conduct must follow.").

164. Theresa M. Beiner, *Using Evidence of Women's Stories in Sexual Harassment Cases*, 24 U. ARK. LITTLE ROCK L. REV. 117, 120 (2001) [hereinafter Beiner, *Using Evidence*]; see also Theresa M. Beiner, *Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 WM. & MARY J. WOMEN & L. 273, 331 (2001) [hereinafter Beiner, *Sex, Science and Social Knowledge*] (explaining how, with respect to the second prong of the *Ellerth/Faragher* defense, "Courts simply have not proven to be in the best position to understand the victim's perspective, especially at the summary judgment stage, where many of these cases are decided"); M. Isabel Medina, *A Matter of Fact: Hostile Environments and Summary Judgments*, 8 S. CAL. REV. L. & WOMEN'S STUD. 311, 345 (1999) (explaining that "on numerous occasions, the defendant employer's ability to demonstrate any sort of remedial action has been treated by district courts as a basis for dismissing the plaintiff's case").

to terminate an employee, even if the discriminatory animus comes from non-decisionmaking supervisors, does not have weak links to actions that implicate employer behavior. Indeed, if a decisionmaker is motivated to fire a reservist because of biased information from the reservist's direct supervisor or co-worker, what difference does it make whether a grievance mechanism is in place? The employer still has fired the employee because of his reservist status.

The Supreme Court has not yet declared that the *Ellerth/Faragher* defense applies to all employment discrimination claims, but it looks like that might be coming.¹⁶⁵ I believe if the Court does so, this decision will make it even more difficult for plaintiffs to get to trial in these cases. It is already difficult to know what is and is not sufficiently harassing to be actionable.¹⁶⁶ In part, this confusion is due to the courts' reliance on employer internal grievance mechanisms, which keep juries away from the merits of these cases.¹⁶⁷ This reliance is particularly problematic in harassment cases, because the standard requires that a "reasonable person" would find the behavior sufficiently severe or pervasive to alter the terms, conditions, or privileges of employment.¹⁶⁸ While employers complain that they do not know what constitutes harassment,¹⁶⁹ the courts continue to refuse to let juries decide cases so that a community standard can evolve.¹⁷⁰ As explained later in this Article, this instance is just one in which a grievance mechanism outside of the court system leaves society flummoxed when it comes to identifying a standard.

It is also another avenue for privatization, although unlike arbitrations, which involve at least purportedly neutral decisionmakers,¹⁷¹ this time the fox is watching the hen house.¹⁷² The courts would be giving the process over to the employer, not only leaving the process in private hands that are unaccountable to the public, but also placing that process in the hands of the defendant employer.¹⁷³ As one plaintiff in an employment discrimination

165. See *supra* text accompanying notes 153–164; see also *Vance v. Ball St. Univ.*, 133 S. Ct. 2434, 2439, 2444 (2013) (narrowing the term "supervisor" in the *Ellerth/Faragher* affirmative defense, thereby requiring defendants to meet the lesser co-worker standard in more cases).

166. Beiner, *Let the Jury Decide*, *supra* note 24, at 820.

167. *Id.*

168. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

169. See Beiner, *Let the Jury Decide*, *supra* note 24, at 791–92 (noting that human resources professionals complain that there is no clear definition of what constitutes sexual harassment).

170. *Id.* at 820.

171. See *infra* text accompanying notes 338–340 (describing problems with repeat players).

172. See Lawton, *supra* note 136, at 838 (stating that employers hold the power to control their liability by using internal grievance mechanisms).

173. See *id.* (describing how employers have shaped workplace sexual harassment procedures).

suit put it: “I went [to the company’s internal EEO office], and of course they said they were going to investigate, but how do you investigate yourself? . . . There’s not an outside [agency] doing it. [The employer is] doing it.”¹⁷⁴ As Nielsen and Nelson sum up, “even those employees who take formal actions inside their company are likely to confront a corporate culture with a vested interest in transforming their claim from discrimination to something else.”¹⁷⁵

C. The Procedure Lane

The previous section alluded to the use of the procedural device of summary judgment to dispose of employment discrimination claims. Commentators have described this phenomenon in the context of sexual harassment cases and other sex discrimination cases.¹⁷⁶ Recently, Professor Elizabeth Schneider has accounted for the various ways courts use pretrial procedure to send employment discrimination plaintiffs out of court.¹⁷⁷ Professor Schneider looks specifically at pleading requirements, summary judgment, and the evidentiary burden established for scientific evidence by the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁷⁸ line of cases.¹⁷⁹

174. Ellen Berrey, Steve G. Hoffman & Laura Beth Nielsen, *Situated Justice: A Contextual Analysis of Fairness and Inequality in Employment Discrimination Litigation*, 46 L. & SOC’Y REV. 1, 16 (2012).

175. Nielsen & Nelson, *supra* note 4, at 686.

176. See, e.g., John H. Marks, *Smoke, Mirrors and the Disappearance of “Vicarious” Liability: The Emergence of a Dubious Summary-Judgment Safe Harbor for Employers Whose Supervisory Personnel Commit Hostile Environment Workplace Harassment*, 38 HOUS. L. REV. 1401, 1404 (2002) (arguing that many lower courts have “emasculated” the *Ellerth/Faragher* rule in order to dismiss harassment cases by granting summary judgment); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 705–06 (2007) (exploring the relationship between grants of summary judgment and sex discrimination cases); Beiner, *The Misuse of Summary Judgment*, *supra* note 24, at 72 (stating that it is becoming more common to grant summary judgment in claims of harassment brought under Title VII of the Civil Rights Act of 1964); Medina, *supra* note 164, at 315 (stating that in situations constituting a hostile environment, courts often grant summary judgment due to their “discomfort with the perceived lack of an injury to the victim”); Nielsen & Nelson, *supra* note 4, at 675–80 (describing how case law generally makes it more difficult for employment discrimination plaintiffs).

177. See Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PENN. L. REV. 517, 518–19 (2010) (noting that “[j]udicial gatekeeping is happening at an earlier stage than ever before” and “the greatest impact of this change . . . is the dismissal of civil rights and employment discrimination cases from federal courts in disproportionate numbers”).

178. 509 U.S. 579 (1993).

179. Schneider, *supra* note 177, at 551–55 (discussing *Daubert* motions); see also Erica Beecher-Monas, *The Heuristics of Intellectual Due Process: A Primer for Triers of Science*, 75 N.Y.U. L. REV. 1563, 1656 (2000) (stating that the “Supreme Court’s evidentiary trilogy”—*Daubert*, *Gen. Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*,

Schneider suggests that the cumulative effect of shifts in these areas results in increased settlements and fewer trials in these cases.¹⁸⁰

In the pretrial context, the most recent cases that have undermined the ability of a plaintiff to remain in court are 2007's *Bell Atlantic Corp. v. Twombly*¹⁸¹ and 2009's *Ashcroft v. Iqbal*.¹⁸² These cases effectively changed the pleading standard set out in Federal Rule of Civil Procedure 8(a) from the minimal notice pleading standard¹⁸³ to requiring a plaintiff to plead "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"¹⁸⁴ For over fifty years, the reigning interpretation of Federal Rule of Civil Procedure 8 was set out in the Court's 1957 decision in *Conley v. Gibson*.¹⁸⁵ In that case, the Court explained that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."¹⁸⁶ After *Twombly* and *Iqbal*, a plaintiff's complaint must contain facts that provide a plausible basis for relief.¹⁸⁷ Courts must disregard legal conclusions if not supported by factual allegations.¹⁸⁸ The "possibility" of the defendant's wrongdoing is insufficient to withstand this new pleading standard.¹⁸⁹ The

526 U.S. 137 (1999)—has made an "important contribution toward rationalizing the jurisprudence of scientific evidence").

180. Schneider, *supra* note 177, at 523. Clermont and Schwab's data show that there are actually more trials and likely fewer settlements in employment discrimination cases than other federal civil cases. See Clermont & Schwab, *From Bad to Worse*, *supra* note 6, at 122, 123 disp. 9. The percentage of employment discrimination cases that are resolved by trial has fallen from 18.2% in 1979 to 2.8% in 2006. There are, however, more trials in employment discrimination cases than other areas of federal civil practice, where the trial rates have fallen from 6.2% in 1979 to 1% in 2006. See *id.* at 123 disp. 9.

181. 550 U.S. 544 (2007).

182. 556 U.S. 662 (2009).

183. Federal Rule of Civil Procedure 8(a) states that "[a] pleading that states a claim for relief must contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief[.]" FED. R. CIV. P. 8(a)(2); see also Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 3–5 (2010) (examining the history of the Federal Rules of Civil Procedure); Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 535 (2001) ("The 1938 Rules liberalized the rules of pleading and joinder . . . making it easier for litigants, even those of modest means and limited expertise, to have their day in court.").

184. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

185. 355 U.S. 41 (1957).

186. *Id.* at 45–46.

187. See *supra* text accompanying note 184.

188. *Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

189. *Id.* at 679 ("[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—that the pleader is entitled to relief.") (quoting FED. R. CIV. P. 8(a)(2)).

Court in both cases looked for other explanations for the defendant's behavior in determining whether the plaintiff's allegations stated a "plausible" claim for relief.¹⁹⁰ The Court adopted this fact-based requirement in spite of the Court's purpose in adopting notice pleading in modern Federal Rule of Civil Procedure 8 being to avoid the problems associated with fact pleading.¹⁹¹

Commentators already have begun to examine the implications of the *Twombly* and *Iqbal* decisions on employment discrimination claims.¹⁹² While early studies showed a "modest" increase in the granting of motions to dismiss post-*Twombly*,¹⁹³ a more recent study conducted by Professor Raymond Brescia suggests that once the Court decided *Iqbal*, there was a distinct change in motion to dismiss practice in employment discrimination cases.¹⁹⁴ Professor Brescia's study examined the effects of *Twombly* and *Iqbal* on dismissals in civil rights/employment cases as well as fair housing cases in which a defendant argued that there was a problem with the specificity of the facts alleged in the complaint.¹⁹⁵ Brescia's study found that *Iqbal* had a significant effect on dismissal rates. In the 41-month period prior to *Twombly*, sixty-one percent of motions to dismiss were

190. See *id.* at 682 (arguing that non-invidious theories for the defendants' actions were that they wished to detain illegal aliens and find those involved in the 9/11 attacks); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (equally plausible explanation for defendants' actions in antitrust case was that they were engaging in parallel conduct to compete with each other).

191. See *Conley*, 355 U.S. at 47–48 (explaining that "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits"); see also *Twombly*, 550 U.S. at 573–76 (Stevens, J., dissenting) (explaining the history of Rule 8(a)); J. Scott Pritchard, *The Hidden Costs of Pleading Plausibility: Examining the Impact of Twombly and Iqbal on Employment Discrimination Complaints and the EEOC's Litigation and Mediation Efforts*, 83 TEMP. L. REV. 757, 759–60 (2011) (describing the history of federal pleading standards).

192. See, e.g., Michael O'Neil, Note, *Twombly and Iqbal: Effects on Hostile Work Environment Claims*, 32 B.C. J. L. & SOC. JUST. 151, 154, 175–76 (2012) (expressing concern that recent judicial interpretations of *Twombly* and *Iqbal* could lead to more dismissals of hostile environment sexual harassment cases).

193. See Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1030 tbl.A (2009). This study of Title VII, ADA and ADEA claims that showed pre-*Twombly*, 54.5% of motions to dismiss were granted and 20.9% were granted in part, for a total of 75.4%. *Id.* Post-*Twombly*, 57.1% were granted, and 20.5% were granted in part, for a total of 77.6%. *Id.*

194. See Raymond H. Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235, 239 (2012) (noting "that the number of dismissals on the grounds that the pleadings were not sufficiently specific has risen dramatically after [*Iqbal*], a fact that is missed by looking solely at dismissal rates, and not the volume of dismissals").

195. See *id.* at 262 (discussing the methodology of dismissal rates study).

granted.¹⁹⁶ In the 24-month period between *Twombly* and *Iqbal*, courts' granting of motions to dismiss actually decreased: only fifty-seven percent of motions to dismiss were granted.¹⁹⁷ Post-*Iqbal*, however, dismissal rates changed markedly. In the 19-month period following *Iqbal*, courts granted motions to dismiss in seventy-two percent of the cases studied.¹⁹⁸ While the study only considered electronically reported trial court cases,¹⁹⁹ the study's focus on decisions in which these specific cases appear to be having an impact makes it more helpful than those studies that look at motions to dismiss more generally.²⁰⁰ Other studies have shown a similar increase in dismissal rates post-*Iqbal*.²⁰¹

What is perhaps more disturbing is that the number of cases in which defendants have made these motions has accelerated considerably after *Iqbal*. Brescia plots this information by quarter, beginning with 2004 and ending with the third quarter of 2010.²⁰² The number of decisions in the first quarter of 2004 that addressed a motion to dismiss based on the specificity of the pleadings was twelve.²⁰³ By the third quarter of 2010, courts issued sixty-one decisions.²⁰⁴ As Brescia points out, this is a greater than five hundred percent increase.²⁰⁵ This dramatic rise occurred in spite of no marked increase in federal case filings involving these causes of action.²⁰⁶ This increase logically means that plaintiffs now are fighting

196. *Id.* at 262, 269 tbl.1.

197. *Id.*

198. *Id.* Brescia also tracked dismissals with prejudice, which showed a similar pattern, but the results were not statistically significant. *Id.* at 270 tbl.2, 291 app. C. Likewise, dismissal rates were particularly high for pro se plaintiffs, with courts granting seventy-four percent of motions and granting fifty-nine percent at least in part with prejudice in the 41-month period post-*Iqbal*. *Id.* at 272 tbl.4. Once again, these findings were not statistically significant. *Id.* at 291 app. C.

199. *Id.* at 241.

200. *Id.* at 239. Motions to dismiss can be based on matters extraneous to the *Twombly/Iqbal* standard, such as failure to exhaust administrative remedies or statutes of limitations. *Id.* *Twombly* and *Iqbal* would not have an effect on motions based on these and similar grounds. *Id.*

201. See, e.g., Scott Dodson, *A New Look: Dismissal Rates of Federal Civil Claims*, 96 JUDICATURE 127, 127–29, 132 (2012) (discussing a study of federal district court opinions on Westlaw that revealed a statistically significant increase in dismissal rates and more sizable increase in dismissal rates based on factual insufficiency).

202. Brescia, *supra* note 194, at 281, 282 tbl.9.

203. *Id.*

204. *Id.* at 282 tbl.9.

205. *Id.* at 281.

206. *Id.* at 283, 289–90 app. B. While employment discrimination filings went up slightly during the study period, housing discrimination claims fell slightly. *Id.* In addition, employment discrimination case terminations are generally down. See Clermont & Schwab, *From Bad to Worse*, *supra* note 6, at 116 disp. 5, 117 (showing a drop in terminations from a high of 23,722 in 1998 to 15,007 in 2007). In terms of the federal civil docket load, employment discrimination cases went from nearly ten percent of case terminations in 2001 to fewer than six percent by 2006.

more motions to dismiss, further increasing the costs of this litigation for the party least likely to possess sufficient wealth to handle additional costs. The higher costs of litigation in turn increases costs for lawyers, who often take employment discrimination cases in reliance on the fee-generating nature of these claims, making it more costly to litigate these cases.²⁰⁷ Likewise, the total number of cases dismissed and dismissed with prejudice (as opposed to the percentages) increased “exponentially” after *Iqbal*.²⁰⁸ It is little wonder that Professor Suja Thomas has referred to the motion to dismiss as the “new summary judgment motion.”²⁰⁹

In addition to the motion to dismiss, there is another significant motion that commonly leaves plaintiffs on the courthouse steps: the summary judgment motion. Many commentators have expressed concern that courts are too eager to grant summary judgment in employment discrimination cases.²¹⁰ Recently, studies have begun to show the significance of this

See *id.* at 117. In terms of case filings, Nielsen et al. report that the number of employment discrimination filings peaked in 1997 at 23,796 and have been declining ever since, with the filing rate declining to 14,353 in 2006. LAURA BETH NIELSEN ET AL., AM. BAR FOUND., *CONTESTING WORKPLACE DISCRIMINATION IN COURT: CHARACTERISTICS AND OUTCOMES OF FEDERAL EMPLOYMENT DISCRIMINATION LITIGATION 1987–2003* (2008), http://www.americanbarfoundation.org/uploads/cms/documents/nielsen_abf_edl_report_08_final.pdf.

207. Nancy L. Lane, *After Price Waterhouse and the Civil Rights Act of 1991: Providing Attorney’s Fees to Plaintiffs in Mixed Motive Age Discrimination Cases*, 3 ELDER L.J. 341, 349–350 (1995) (“[B]ecause civil rights plaintiffs often are not in a financial position to pursue an employment discrimination suit, including attorney’s fees in the recovery gives attorneys an incentive to represent these plaintiffs.”).

208. Brescia, *supra* note 194, at 282, 283 tbl.10.

209. Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 17–18 (2010). At least some in the Senate have suggested that the old notice pleading rule be restored. See Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. §2 (2009) (putting forth that “[f]ederal courts shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957)”; Pritchard, *supra* note 191, at 757–58 (describing legislative efforts, including the Notice Pleading Restoration Act of 2009, to move away from the *Twombly* and *Iqbal* pleading standard reforms).

210. See, e.g., Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 206 (1993) (examining the “gradual and continuing erosion of the factfinder’s role in federal employment discrimination cases and its replacement by an increasing use of summary judgment through which courts make pretrial determinations”); Beiner, *Let the Jury Decide*, *supra* note 24, at 805–09 (discussing articles finding that courts favor granting pretrial motion practice in employment discrimination cases, particularly in the instances of sexual harassment claims); Medina, *supra* note 164, at 313–14 (arguing that federal courts are increasingly turning to “granting summary judgment to employers accused of employment discrimination on the basis of sex”); Schneider, *supra* note 177, at 537–40 (discussing the increasingly higher rates of summary judgment in the employment discrimination context, contrasted with the historical disfavoring of summary judgment).

problem. Professor Joseph Seiner conducted a study of summary judgment motions in all employment discrimination cases terminated in fiscal year 2006 in which a defendant made a motion for summary judgment.²¹¹ Seiner derived his study's data from the Federal Judicial Center, and as such, it is not simply limited to those cases that were reported either officially or electronically.²¹² Of the 3,983 summary judgment orders issued in these cases, courts granted 62.6% of the motions, granted 18.2% in part, and denied only 19.2%.²¹³ Thus, in over eighty percent of the cases in which a defendant made such a motion, it was granted in whole or in part.²¹⁴

While Seiner's study does not provide information about how many defendants in employment discrimination cases make summary judgment motions, anecdotal as well as other evidence suggests they are frequent.²¹⁵ Professor Vivian Berger, a certified mediator, has noted that most employer's counsels state that they will file a summary judgment motion if

211. Seiner, *supra* note 193, at 1033.

212. *Id.*

213. *Id.* at 1033 tbl.C.

214. *Id.* Neilsen et al. found in a study of 1788 cases filed from 1987 to 2003 an average of eighteen percent of cases were lost on a motion to dismiss and sixteen percent on a motion for summary judgment. See NIELSEN ET AL., *supra* note 206, at 2, 29. Clermont and Schwab found that pretrial dispositions, which include motions, were at about twenty percent in 2006—not much different than the pretrial disposition rates for other federal civil cases. See Clermont & Schwab, *From Bad to Worse*, *supra* note 6, at 122–23 disp. 9. An earlier study by Theodore Eisenberg and Charlotte Lanvers attempted to assess the effect of the game-changing 1986 summary judgment trilogy—*Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574 (1986)—on summary judgment rates. See Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts* (Cornell Law School, Research Paper No. 08-022, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1138373. Studying three federal district courts—the Eastern District of Pennsylvania, the Northern District of Georgia, and the Central District of Florida—they found a marked increase (nearly doubling) in summary judgment rates in employment discrimination cases in the Northern District of Georgia. *Id.* at 16. The summary judgment rates in employment discrimination cases in the Northern District of Georgia reached almost twenty-five percent for cases terminated in 2001–02. *Id.* While there was not a similar increase for other categories or other districts, the rate increased in other civil rights cases in the Northern District of Georgia. *Id.* This increase, however, was not statistically significant. *Id.*

215. See, e.g., Vivian Berger, Michael O. Finkelstein & Kenneth Cheung, *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45, 48 (2005) (noting that “most employers’ counsel say during mediation that they intend to file a ‘Rule 56’ motion if the case does not settle; and at least in the Southern and Eastern Districts of New York, a large number of employers do so” (internal citation omitted)); Lawrence D. Rosenthal, *Motions for Summary Judgment When Employers Offer Multiple Justifications for Adverse Employment Actions: Why the Exceptions Should Swallow the Rule*, 2002 UTAH L. REV. 335, 336 (2002) (explaining that “[a]fter the conclusion of discovery in most employment discrimination lawsuits, employers file motions for summary judgment to dispose of the litigation prior to trial”). But see *supra* note 214 (describing studies that suggest summary judgment rates, overall, are not much higher in employment discrimination cases than other civil cases).

their case does not settle.²¹⁶ Likewise, using data from fiscal year 2006, the Federal Judicial Center took a random sample of 1500 cases from most of the United States district courts.²¹⁷ The Center designed the study to determine the impact on summary judgment practice in federal courts based on the structure of summary judgment motions, if any, set out in local rules.²¹⁸ The study found that in thirty-five percent and thirty-seven percent of employment discrimination cases studied (depending on summary judgment motion structure), defendants filed *at least one* summary judgment motion.²¹⁹ This number is quite a higher percentage of motions in employment discrimination than other types of cases. For example, defendants moved for summary judgment in ten percent and fourteen percent (depending on structure) of contracts cases and nine percent and eleven percent (depending on structure) of torts cases.²²⁰ Indeed, of the categories of cases studied (contracts, torts, employment discrimination, other civil rights, and other), employment discrimination cases had the highest percentage of defendant's filing at least one summary judgment motion.²²¹ Not surprisingly, employment discrimination cases also had the highest percentage of courts granting such motions in whole or in part.²²² Thus, the anecdotal evidence is borne out by this study. Defendants appear to make motions for summary judgment more often in employment discrimination cases when compared to other types of civil filings, and courts are granting them.

Of course, this leads to the question of whether lawyers who handle employment discrimination cases simply are bringing weaker cases than lawyers who handle other areas of the law. Intuitively, it does not seem

216. Berger, Finkelstein & Cheung, *supra* note 215, at 48.

217. See generally Joe Cecil & George Cort, *Report on Summary Judgment Practice Across Districts with Variations in Local Rules*, FED. JUDICIAL CTR., Aug. 13, 2008, <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/sujulrs2.pdf> (discussing a study designed to determine if the manner in which movant and non-movant proceed with motions for summary judgment, based on local rules, appeared to impact outcomes of summary judgment motions). The study did not include certain types of cases, such as class actions, or cases from three district courts from which it could not obtain usable data (Western District of Wisconsin, District of the Northern Marianas Islands, and the District of the Virgin Islands). *Id.* at 4.

218. *Id.* at 1.

219. *Id.* at 12 tbl.7. The percentage of employment discrimination plaintiffs filing summary judgment motions was decidedly low—three percent of employment discrimination cases. *Id.* at 13 tbl.8.

220. *Id.* at 12 tbl.7.

221. *Id.*

222. *Id.* at 16 tbl.11. Depending on the structure of the summary judgment motion, the courts granted such motions either twenty percent of the time or sixteen percent of the time in the cases studied. *Id.* Taking contracts cases again as point of comparison, such motions were granted in whole or in part in only six percent or seven percent of contracts cases studied. *Id.*

obvious why plaintiff's lawyers in this area would do so.²²³ Employment discrimination plaintiffs are not known as particularly wealthy clientele.²²⁴ As noted earlier, plaintiff's lawyers bring these cases with the hope of an award of attorney's fees to a prevailing party, as provided by statute.²²⁵ Thus, lawyers have a significant financial incentive to take cases that they have a realistic possibility of winning.²²⁶ While it is possible that lawyers bring weaker cases in hope of a quick settlement, there does not seem to be a logical reason why lawyers would bring weaker cases in this area than they would in another area that involves frequently similar risky compensation—contingent fees generated in tort cases. Yet the study above shows far fewer motions for summary judgment in torts cases.²²⁷ This disparity suggests that there is significant disagreement in employment discrimination cases between the plaintiff's bar and defense bar regarding what is a worthwhile case. At this point, the federal judiciary is siding more with the defense bar in employment discrimination than it is in other areas of the law.²²⁸

Plaintiffs fare no better in the federal appellate courts, where the courts are far more likely to reverse plaintiffs' victories on appeal than defendants' victories. In their study of employment discrimination cases in the federal courts, Clermont and Schwab found that the reversal rate for defendants who appeal a plaintiff victory in the trial court is 41.10%, whereas the plaintiffs' reversal rate when they appeal a defendant's trial court victory is 8.72%.²²⁹ As they note, plaintiffs' chances of retaining a victory on appeal "cannot meaningfully be distinguished from a coin flip[.]" whereas

223. Clermont & Schwab play devil's advocate and argue that it is possible that plaintiffs bring weaker cases in the employment discrimination context as a potential explanation for the poor plaintiff win rates in these types of cases on appeal in federal court. Clermont & Schwab, *From Bad to Worse*, *supra* note 6, at 114 n.34. They subsequently reject this counterargument. *See id.* ("It merits stressing that we have never claimed that our attitudinal explanation of the anti-plaintiff effect is irrefutable. . . . [A]lthough we concede that this counterargument is coherent, we maintain that it is unconvincing in [the employment discrimination] setting for a number of reasons."); *see also* Nielsen & Nelson, *supra* note 4, at 670 (recounting a case in which the judge was skeptical of classwide discrimination). *But see* Lee Reeves, *Pragmatism over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence*, 73 MO. L. REV. 481, 482–83 (2008) (arguing that judicial aversion to these claims is a result of caseload, not ideology).

224. *See* Lane, *supra* note 207.

225. 42 U.S.C. § 2000e-5(g)(2)(B)(i), 2000e-5(k) (2006).

226. *See* Bisom-Rapp, *supra* note 126, at 1027 (survey of employment lawyers showing that they are reluctant to take cases that do not have strong evidence of discrimination because of defendants' advantages in these cases).

227. Cecil & Cort, *supra* note 217, at 16 tbl.11.

228. *See generally* Clermont & Schwab, *From Bad to Worse*, *supra* note 6, at 104 (reporting at the outset its "concluding view that results in the federal courts disfavor employment discrimination plaintiffs, who are now forswearing use of those courts").

229. Clermont & Schwab, *From Bad to Worse*, *supra* note 6, at 110 disp. 2.

defendants who prevail at trial “can be assured of retaining that victory after appeal.”²³⁰ Clermont and Schwab explain that this discrepancy in reversals after trial on the merits is particularly disturbing because the issues of intent relevant in these cases usually entail judgments about witness credibility—something appellate courts should not be second-guessing on appeal.²³¹

Some commentators have suggested that the disparate rates of reversal for plaintiffs’ and defendants’ respective appeals in employment discrimination cases are the result of judicial hostility to civil rights cases.²³² Indeed, former federal district court judge Nancy Gertner described her experience:

Federal courts, I believe, were hostile to discrimination cases. Although the judges may have thought they were entirely unbiased, the outcomes of those cases told a different story. The law judges felt “compelled” to apply had become increasingly problematic. Changes in substantive discrimination law since the passage of the Civil Rights Act of 1964 were tantamount to a virtual repeal. This was so not because of Congress; it was because of judges.²³³

Gertner posits that judges’ approaches to employment discrimination cases are skewed by the cases that they see, that is, the cases that do not settle. Because judges feel that the best cases settle, they come to believe that all employment discrimination cases are weak and that there is no significant need for anti-discrimination law.²³⁴ This attitude, combined with asymmetric decisionmaking, whereby judges write detailed decisions when they grant summary judgment but do not write opinions when they deny the motions, results in judges adopting what Gertner characterizes as “[l]osers’ [r]ules”—manipulations of the legal rules to get rid of these cases by granting motions to dismiss or motions for summary judgment.²³⁵ Indeed, Gertner relates that in the beginning of her judicial career, “the trainer

230. *Id.* at 112; see also Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 107 tbl.I, 108 (1999) (reporting similar findings in a study of ADA cases in several federal circuits).

231. Clermont & Schwab, *From Bad to Worse*, *supra* note 6, at 112.

232. See, e.g., *id.* at 112 (identifying an “anti-plaintiff affect” in the federal appellate courts). Further, plaintiffs in these cases have one of the worst win rates of all civil cases. *Id.* at 113. Clermont and Schwab attribute this in part to “attitudinal explanation[s].” *Id.* at 112. But see Reeves, *supra* note 223, at 482–83 (arguing that low plaintiff win rates in employment discrimination cases should not be attributed to judicial attitudes and general ideology toward these types of cases, instead advocating for an approach that considers judges’ workloads as part of an apparent anti-plaintiff bias).

233. Nancy Gertner, *Losers’ Rules*, 122 YALE L.J. ONLINE 109, 109 (2012) (emphasis in original) (citation omitted).

234. *Id.* at 111–12, 114–15.

235. *Id.* at 110.

teaching discrimination law to new judges announced, ‘Here’s how to get rid of civil rights cases’²³⁶

I would take Gertner’s argument one step further. While good cases used to settle, emboldened by success in motion practice, defense lawyers have stopped trying to settle cases that formerly would reach early settlement. In fact, given the prevalence of defendants’ success using motions, defense counsel would be foolish not to attempt motions to dismiss and/or summary judgment.²³⁷ Whatever the reason, procedural devices such as motions to dismiss and summary judgment are fruitful avenues for defendants to use to take these cases out of the court system.

D. The Mediation and Settlement Lanes

The EEOC increasingly has encouraged mediation, which, if successful, results in a settlement much like a lawyer-negotiated settlement prior to trial, as a means of resolving employment discrimination suits. It is estimated that fifty percent of employment discrimination suits settle.²³⁸ Clermont and Schwab’s study demonstrates that while fewer employment discrimination cases settle early in the litigation compared to other cases, the majority of these cases ultimately settle.²³⁹ Scholars have identified many arguments in favor of mediation and settlement as viable means of resolving these disputes, especially if the employee wishes to continue to work for the same employer.²⁴⁰ Indeed, a study of the EEOC’s mediation

236. *Id.* at 117.

237. Clermont & Schwab, *From Bad to Worse*, *supra* note 6, at 121. Specifically, Clermont and Schwab’s research reflects that “employment discrimination plaintiffs manage fewer resolutions early in litigation compared to other plaintiffs, and so they have to proceed toward trial more often. Defendants’ resistance reflects awareness of their good chances in court.” *Id.*

238. See Berrey, Hoffman & Nielsen, *supra* note 174, at 24. The authors also report that most of the remaining cases are decided on procedural grounds. *Id.*; see also Nielsen & Nelson, *supra* note 4, at 695–96 figs.3 & 4 (illustrating that forty-three percent of employment discrimination cases settled in 2001).

239. Clermont & Schwab, *From Bad to Worse*, *supra* note 6, at 122–23 n.57 (finding that 36.66% of jobs cases settle early in the litigation, whereas 58.57% of nonjobs cases settle early, thus illustrating that “far fewer employment discrimination cases end early in the litigation process”).

240. See, e.g., Richard Delgado, *Alternative Dispute Resolution Conflict as Pathology: An Essay for Trina Grillo*, 81 MINN. L. REV. 1391, 1395 (1997) [hereinafter Delgado, *Conflict as Pathology*] (noting that mediation can be faster, less expensive, and more cooperative, despite ultimately pointing out problems with alternative dispute resolution mechanisms); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1366 (1985) [hereinafter Delgado et al., *Fairness and Formality*] (noting the informality of the ADR process and therefore its accessibility); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1548–50 (1991) (identifying arguments in favor of mediation).

program showed high participant satisfaction with the program.²⁴¹ It is not the purpose of this Article to debate the pros and cons of mediation in this context, as scholars have done in many articles.²⁴² Instead, once again, this section will point out that mediation and its concomitant settlement are on the rise, leaving fewer cases for courts to resolve.

The EEOC's mediation program provides an example. EEOC statistics show that the EEOC has been conducting more and more mediations and resolving more and more cases using mediation since 1999.²⁴³ In 1999, the EEOC conducted 7,397 mediations and resolved 4,833 cases.²⁴⁴ By fiscal year 2010, that number had risen to 12,755 mediations, with mediations resolving 9,362 cases.²⁴⁵ The rate of resolution using mediation has risen as well, beginning with a 65.3% resolution rate in 1999 to an all-time high resolution rate of 73.4% of cases in fiscal year 2010.²⁴⁶ This rate is a much larger number than the number of cases the EEOC files in court. To illustrate, in fiscal year 2011, the EEOC filed only 300 suits and 261 on the merits.²⁴⁷ This disparity occurred at a time when

241. E. PATRICK McDERMOTT ET AL., EQUAL EMP. OPP. COMM'N, AN EVALUATION OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION MEDIATION PROGRAM 1, 4-5 (2000), available at <http://www.eeoc.gov/eeoc/mediation/report/index.html>.

242. See, e.g., Grillo, *supra* note 240, at 1548-49 (advocating that mediation "rejects an objectivist approach to conflict resolution," the process is "cooperative and voluntary, not coercive[,]"; "decisions supposedly may be informed by context rather than by abstract principle[,]"; and that "emotions are recognized and incorporated" into the [] process"); see also Jonathan R. Harkavy, *Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes*, 34 WAKE FOREST L. REV. 135, 150-56 (1999) (promoting mediation in the context of workplace sexual harassment claims); Susan K. Hippensteele, *Mediation Ideology: Navigating Space from Myth to Reality in Sexual Harassment Dispute Resolution*, 15 AM. U. J. GENDER SOC. POL'Y & L. 43, 46 (2006) (suggesting that "the sudden and dramatic shift in public awareness and attitudes toward sexual harassment and the sharp increase in sexual harassment complaint reporting following the Thomas hearings" adequately explains the rise in ADR as a mechanism for "re-privatizing sexual harassment"); Mori Irvine, *Mediation: Is It Appropriate for Sexual Harassment Grievances?*, 9 OHIO ST. J. ON DISP. RESOL. 27, 27 (1993) (explaining that mediation has been "successful in providing a forum for cases that do not warrant the time and expense of an arbitration hearing"); Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U. ILL. L. REV. 583, 597-608 (1999) (outlining reasons why mediation might improve Title VII enforcement). Mediation appears to be especially controversial in the sexual harassment context, e.g., Hippensteele, *supra*, as well as for members of traditionally disempowered groups, such as women. See Grillo, *supra* note 240, at 1549-50 (arguing that compulsory mediation can be destructive to many women).

243. The precise number of mediations conducted from 1999 to 2012 is 159,760. EQUAL EMP. OPP. COMM'N, EEOC MEDIATION STATISTICS FY 1999 THROUGH FY 2012, http://www.eeoc.gov/eeoc/mediation/mediation_stats.cfm [hereinafter EEOC MEDIATION STATISTICS] (last visited Mar. 8, 2014).

244. *Id.*

245. *Id.*

246. *Id.*

247. EQUAL EMP. OPP. COMM'N, EEOC LITIGATION STATISTICS, FY 1997 THROUGH FY 2013, <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm> (last visited Mar. 8, 2014).

charge filing was at an all-time high; in fiscal year 2011, complainants filed nearly 100,000 charges with the EEOC.²⁴⁸ One might assume that the increase in mediations is a result of the increase in charge filings. Statistics show, however, that the EEOC mediated 10% of charges in 1999, whereas 13% of charges were mediated in 2010.²⁴⁹ The number of charges resolved through mediation likewise rose by 3%—from 6% of charges in 1999 and 9% of charges in 2010.²⁵⁰ The EEOC has entered into some 200 agreements with large employers that create standing agreements that the particular employer will use the EEOC's mediation program to resolve charges.²⁵¹ In addition, local EEOC district offices have entered into more than 1,500 such mediation agreements.²⁵²

The EEOC's success in resolving charges has increased over the years, with some intermittent variations. Overall, by comparing 1997 to 2011 statistics, it appears that the EEOC is resolving more charges through settlement, resulting in the withdrawal of charges with benefits to the charging party. For example, in 1997, 3.8% of the resolutions occurred by settlement, whereas 9.1% of charges were resolved by settlement in fiscal year 2011.²⁵³ In some of the years between, settlement rates rose as high as

According to the EEOC's website, "[m]erits suits include direct suits and interventions alleging violations of the substantive provisions of the statutes enforced by the Commission and suits to enforce administrative settlements." *Id.*

248. EQUAL EMP. OPP. COMM'N, EEOC CHARGES STATISTICS FY 1997 THROUGH FY 2013, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> [hereinafter EEOC CHARGES STATISTICS] (last visited Mar. 8, 2014).

249. This statistic was calculated by dividing the number of mediations in 1999 (7397) by the number of charges filed in 1999 (77,444). Similarly, for 2010, the number of mediations for that year (12,755) was divided by the number of charges filed for 2010 (99,922). EEOC MEDIATION STATISTICS, *supra* note 243; EEOC CHARGES STATISTICS, *supra* note 248.

250. This statistic was calculated by dividing the number of charges resolved by mediation in 1999 (4,833) by the number of charges filed in 1999 (77,444). Similarly, for 2010, the number of charges resolved by mediation for that year (9,362) was divided by the number of charges filed for 2010 (99,922). EEOC MEDIATION STATISTICS, *supra* note 243; EEOC CHARGES STATISTICS, *supra* note 248.

251. Press Release, Equal Emp. Opp. Comm'n, EEOC and CVS Caremark Sign National Mediation Agreement (June 29, 2010), *available at* <http://www.eeoc.gov/eeoc/newsroom/release/6-29-10b.cfm>.

252. *See id.* (noting that the EEOC has created a universal agreement to mediate to facilitate employers' entering into mediation agreements); *see also* EQUAL EMP. OPP. COMM'N, UNIVERSAL AGREEMENT TO MEDIATE, http://www.eeoc.gov/eeoc/mediation/universal_agreement.cfm (last visited Mar. 8, 2014) (showing same).

253. EQUAL EMP. OPP. COMM'N, ALL STATUTES FY 1997–FY 2012, <http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm> (last visited Mar. 8, 2014).

12.2%.²⁵⁴ Similarly, 3.4% of charges were withdrawn with benefits to the charging party in 1997, whereas 5.1% were withdrawn in 2011.²⁵⁵

The above data shows that employment discrimination charges commonly end by resolution through settlement or mediated settlement and that the EEOC's emphasis on mediations has increased recently. Like other avenues examined,²⁵⁶ this practice results in cases being taken out of the public view that is the court system.

III. SOME PROBLEMS WITH PRIVATIZATION AND THE VANISHING TRIAL

From the foregoing discussion, it is evident employment discrimination plaintiffs are having a tough time getting their suits into court and remaining there.²⁵⁷ Although this position is not without controversy,²⁵⁸ Professor Marc Galanter has documented the overall phenomenon of the "vanishing trial" and has argued that this trend is problematic for a number of reasons.²⁵⁹ In a similar vein, in his groundbreaking 1984 article, *Against Settlement*, Professor Owen Fiss suggested that the then-burgeoning alternative dispute resolution system, where many employment discrimination claims are now resolved, is also problematic due to issues surrounding settlement.²⁶⁰ The positions of these scholars, however, are not without their detractors, including those who have noted that trials were never all that prevalent.²⁶¹

254. *Id.* This rate was for fiscal year 2007. The rate was actually down slightly from prior years in 2011.

255. *Id.*

256. *See supra* Part II.B.

257. *See* Clermont & Eisenberg, *Plaintiphobia*, *supra* note 6, at 958 (remarking that "prisoners have less difficulty maintaining their trial victories than do nonprisoner civil rights plaintiffs").

258. For example, Gillian Hadfield disagrees with some of the data on vanishing trials relied upon by Professor Galanter; in particular, Hadfield argues that there are problems with the data in this area because the courts count cases as "terminated" that might not be concluded. Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEG. STUD. 705, 709 (2004). Hadfield also believes there are problems with coding cases. *Id.* at 711–12, 713 tbl.1.

259. Galanter, *supra* note 9, at 29–33.

260. Fiss, *Against Settlement*, *supra* note 21, at 1073–75 (arguing that, as a general premise, settlement should be treated as a "highly problematic technique for streamlining dockets").

261. *See, e.g.*, Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. EMPIRICAL LEG. STUD. 689, 689, 691 (2000) (arguing that trials have never been the "norm" and that "[c]ivil trials do not make much of a mark on popular culture"); Hadfield, *supra* note 258, at 714–15 (arguing that the number of cases terminated by jury trial since 1979 has been "relatively stable"). For purposes of employment discrimination suits, jury trials did not become available until the enactment of the Civil Rights Act of 1991. 42 U.S.C. § 1981a(c) (2006). Thus, earlier data regarding jury trials is inapplicable to the cases discussed here because jury trials simply were not available to plaintiffs in those cases.

In employment discrimination cases specifically, commentators have expressed concern that plaintiffs experience double harm as they are harmed at the hands of their employers and by the legal system's treatment of their cases.²⁶² Given the prevalent judicial hostility in this context, these plaintiffs may fare better before juries, by settling a case before filing suit, or at least settling before motion practice begins.²⁶³ One could then reasonably argue that it may not be such a bad thing that employment discrimination cases are being resolved in other arenas besides the legal system.²⁶⁴ While this argument certainly would favor plaintiffs settling these cases, it does not address the experiences of plaintiffs who brought cases to court and watched as their claims were thrown out on motions to dismiss or motions for summary judgment. These plaintiffs receive nothing.²⁶⁵

This Part examines the problems with the many paths that lead plaintiffs out of the courts by examining settlements, arbitration, and internal employer grievance mechanisms.²⁶⁶ It then suggests that trials have

262. See, e.g., Berrey, Hoffman & Nielsen, *supra* note 174, at 15 (study of employment discrimination plaintiffs, lawyers, and employer representatives in which researchers noted “[p]laintiffs frequently narrate their experiences of the law as financially devastating, emotionally wrenching, and personally damaging”). Former federal district court judge Nancy Gertner and Melissa Hart refer to the two stories discrimination lawsuits tell—one about discrimination by the employer and the other about potential discrimination by the judge. Nancy Gertner & Melissa Hart, *Employment Law: Implicit Bias in Employment Litigation*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 80, 87 (Justin D. Levinson & Robert J. Smith eds., 2012). This second story involves not only the bias of the judge in viewing the facts but also the development of legal doctrine that is biased against plaintiffs. See *id.* at 87.

263. See Berrey, Hoffman & Nielsen, *supra* note 174, at 7 (finding most individuals are dissatisfied when their disputes are “transformed by lawyers” and the court system); see also Clermont & Schwab, *From Bad to Worse*, *supra* note 6, at 130 (in a study of federal employment discrimination cases from 1979 to 2006, plaintiffs won in trials before juries 37.63% of the time, whereas they won in bench trials 19.62% of the time).

264. See Berrey, Hoffman & Nielsen, *supra* note 174, at 5 (noting that absent fair process, confidence is lost “in the ability of legal institutions to resolve future grievances,” creating legitimacy issues and undermining future legal behavior).

265. Indeed, even plaintiffs who settle using the EEOC conciliation or mediation program often receive nothing. EEOC MEDIATION STATISTICS, *supra* note 243 (showing that between 1999 and 2012, anywhere from 912 to 1285 mediations resulted in no monetary benefits to the complainant).

266. There is a large body of literature canvassing the debate about the vanishing trial, including whether it is actually vanishing and whether or not this is a good thing. See *supra* notes 258, 261; see also Hadfield, *supra* note 258, at 709 (illustrating how changes in statistical reporting and court management practices could account for this phenomenon). In addition, there are many legal scholars who have addressed problems related to arbitration and mediation of employment disputes. See, e.g., Michael Z. Green, *Measures to Encourage and Reward Post-Dispute Agreements to Arbitrate Employment Discrimination Claims*, 8 NEV. L.J. 58, 67–68 (2007) [hereinafter Green, *Measures to Encourage*] (describing the various disadvantages facing both employers and employees in arbitration); Michael Z. Green, *Tackling Employment Discrimination with ADR: Does Mediation Offer a Shield for the Haves or Real Opportunity for*

benefits, both private and public, that litigants should consider before abandoning them completely.²⁶⁷ It ends with a bit of a reality check. Right now, plaintiffs are not faring well in the legal system.²⁶⁸ But is the real solution to take cases out of the adjudicatory system or rather to suggest corrections that might make the system more just?

There is an obvious reason why plaintiffs avoid the legal system.²⁶⁹ Empirical studies have shown employment discrimination plaintiffs do not fare well in court.²⁷⁰ In addition to losing their claim, they also experience incredible personal upheaval and disappointment when their cases do not turn out as they had hoped.²⁷¹ Indeed, Clermont and Schwab's study of federal court employment discrimination cases saw a distinct drop in the number of terminations between 2001 and 2006—from ten percent of terminations in 2001 to six percent in 2006.²⁷² Clermont and Schwab suggest that the decline results from plaintiffs and their lawyers filing fewer cases due to their dim prospects for success in federal court.²⁷³

In their study of participants in employment discrimination cases, Berrey, Hoffman and Nielsen detail the difficulties facing plaintiffs in the

the Have-Nots, 26 BERKELEY J. EMP. & LAB. L. 321, 347–53 (2005) [hereinafter Green, *Tackling Employment Discrimination*] (commenting on the inherent power imbalances in arbitration); Matt A. Mayer, *The Use of Mediation in Employment Discrimination Cases*, 1999 J. DISP. RESOL. 153, 164–66 (1999) (discussing the potential disadvantages for mediating employment discrimination claims); Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 457 (1999) (explaining that “[a]rbitration fails the public because it does not further the basic objective of the statute” while litigation fails because it is an expensive and lengthy process); Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401, 1482–89 (2004) (stating that three factors—the societal interests in eliminating discrimination, tension between public and private goals, and the impact of societal/individual tension—make employment discrimination suits particularly difficult to resolve). It is not my intent to address all the arguments surrounding each of these areas of debate. Instead, I will suggest why the many lanes that lead employment discrimination claims out of court are a cause for concern.

267. See generally David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2623 (1995) (noting that developing the advocacy skills of litigants serves both private and public goods); Fiss, *Against Settlement*, *supra* note 21, at 1085 (describing some benefits of public adjudication, including the growth of court interpretations of legal doctrine).

268. See Clermont & Eisenberg, *Plaintiphobia*, *supra* note 6, at 957–58 (emphasizing the starkly different success rates of defendants and plaintiffs in civil rights disputes).

269. See, e.g., Clermont & Schwab, *From Bad to Worse*, *supra* note 6, at 108–15 (discussing the “anti-plaintiff effect” in the appellate process of employment discrimination cases).

270. Clermont & Eisenberg, *Plaintiphobia*, *supra* note 6, at 957–58.

271. See Berrey, Hoffman & Nielsen, *supra* note 174, at 16–17 (describing the overwhelming feeling of disappointment amongst plaintiffs who thought that either the whole legal system or specific aspects of the trial were biased against them).

272. Clermont & Schwab, *From Bad to Worse*, *supra* note 6, at 117; see also NIELSEN ET AL., *supra* note 206 (noting that employment discrimination case filing peaked at 23,971 in 1997, declining to 14,353 in 2006).

273. Clermont & Schwab, *From Bad to Worse*, *supra* note 6, at 118.

litigation process.²⁷⁴ Berrey and her colleagues interviewed a variety of parties involved in employment discrimination suits,²⁷⁵ including plaintiffs, defendants and employers. While the law appears neutral, and indeed employment discrimination plaintiffs believe they are playing on an even playing field,²⁷⁶ the legal system actually favors those in power—meaning those with more resources and experience.²⁷⁷ As Berrey and her colleagues explain, “[p]laintiffs frequently narrate their experiences of the law as financially devastating, emotionally wrenching, and personally damaging.”²⁷⁸ Berrey and her colleagues also describe how both parties in an employment discrimination suit operate under the fiction that they are somehow on equal footing in a system in which the fact finder will decide the case on the merits.²⁷⁹ Instead, they found that reliance on this myth of fairness “can cloak the many ways in which employers actually shape the terms and outcomes of disputes.”²⁸⁰ Only three of the forty-one plaintiffs that these researchers interviewed were very satisfied with the outcome of their cases.²⁸¹

With experiences like those described above, it is little wonder that individuals who believe they are wronged by employment discrimination seek out alternative forms of dispute resolution, such as mediation or settlement.²⁸² Mediation offers advantages in terms of party control, preserving relationships, and the possibility of creating win-win solutions, among other things.²⁸³ Arbitration is arguably quicker and less costly.²⁸⁴

274. See Berrey, Hoffman & Nielsen, *supra* note 174, at 15–18 (discussing plaintiffs’ “[d]ashed [h]opes for [f]airness” in the employment discrimination litigation context).

275. *Id.* at 9–11 (describing the methods of the qualitative study).

276. *Id.* at 18 (noting that most plaintiffs are optimistic “that the law could be a fair arbiter of their workplace disputes”).

277. See *id.* at 8 (citing empirical research to illustrate that certain “structural features” of the American legal system “produce tangible material advantages for affluent defendants and corporate litigants”).

278. *Id.* at 15.

279. *Id.* at 12.

280. *Id.* One advantage employers have in these disputes is that the defendant has an easier time defending a claim than the plaintiff does pursuing a claim because defendants can rely on organizational supports and past experience to minimize the burdens of litigation. *Id.* at 19. In addition, the defendants’ representatives are not named in the lawsuit, thereby avoiding the personal hardships the plaintiff endures during the course of litigation. *Id.* at 20.

281. *Id.* at 26 (twenty-three were not at all satisfied and fifteen were ambivalent).

282. See Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34 (1982) (describing the many advantages of mediation over the adversarial system, namely that it is cheaper, faster, and more collaborative).

283. See Harkavy, *supra* note 242, at 156–61 (detailing the advantages of mediation in the sexual harassment context).

284. Moohr, *supra* note 266, at 403.

So, why do I insist on arguing in favor of trials in the face of these contrary realities?

There are many arguments for why trials, and specifically jury trials, are good in this area of the law.²⁸⁵ Distinct problems emerge and are associated with each alternative dispute resolution mechanism, whether it be by settlement, arbitration, or an internal employer grievance mechanism.²⁸⁶ I will examine each of these approaches briefly, in the context of common arguments against different forms of alternative dispute resolution.

One of the consistent criticisms of settlement derives from its confidential nature.²⁸⁷ Because most settlements require confidential terms and conditions, there is no way for the larger society to examine or judge whether the settlement is fair.²⁸⁸ Such settlements also provide no norm for future decisions, whether it be by judicial resolution or private settlements, about what is an appropriate amount of compensation for the injuries the defendant caused and the plaintiff incurred.²⁸⁹ Eventually, lawyers will not even know how to assess what is a fair settlement or how to value a case, because so few cases get to trial.²⁹⁰ This prevents a benchmark from which lawyers can bargain from evolving.²⁹¹

Instead of emphasizing what is fair compensation or a just resolution for plaintiffs, settlement involves a variety of extra-legal concerns.²⁹² Marc Galanter emphasized how settlement occurs in the “shadow of the law,”²⁹³ meaning that, while settlements are inevitably influenced by legal

285. See Fiss, *Against Settlement*, *supra* note 21, at 1075 (comparing settlement to “the civil analogue of plea bargaining”—consent is often coerced, the bargain may be drafted by someone without the proper authority, and justice may not generally be served by the process).

286. *Id.* at 1076–85 (detailing how power imbalances, the absence of authoritative consent, and a lack of foundation for continuing judicial involvement plague the alternative dispute resolution realm).

287. *Id.* at 1085 (noting that courts are “reactive institutions,” and thus the confidential nature of settlements do not properly allow courts to proceed with the development of the law).

288. See Nielsen & Nelson, *supra* note 4, at 693 (noting “[b]ecause we have virtually no information on how favorable settlements are for plaintiffs, this represents an enormous gap in our knowledge about discrimination litigation”).

289. Luban, *supra* note 267, at 2653 (noting that discovery information can be of great public importance to litigators and the public good alike).

290. See *id.* at 2651–58 (discussing the value of “sunshine laws” and their ability to create transparency in the judicial process).

291. *Id.* at 2622 (describing how “court system[s] not only resolve disputes,” but they also create “rules and precedent”; private judges in contrast are “terribly inefficient producers of rules”).

292. See generally *id.* at 2621–26 (comparing the public value of public adjudication with the public disservice of private dispute resolution).

293. Galanter borrowed this phrase from Robert Mnookin and Lewis Kornhauser. See Galanter, *supra* note 25, at 525 (citing Mnookin & Kornhauser, *supra* note 14, at 950).

standards, they also take into account “considerations of expense, delay, publicity and confidentiality, the state of the evidence, the availability and attractiveness of witnesses, and a host of other contingencies that lie beyond the substantive rules of law.”²⁹⁴ Owen Fiss specifically linked the considerations that go into settlement with the ideals of justice:

The bargaining that normally takes place between litigants—characterized . . . by the pursuit of self-interest, imbalances of material resources, inequalities of information, and strategic behavior—has no connection to justice whatsoever. It is obviously not constitutive of justice, nor is it much of an instrument for achieving justice. On occasion, bargaining might produce a just outcome, just as the judicial process might sometimes fail and produce an unjust outcome. But there is no reason to presume that the outcome of the bargaining process—a settlement—is just. All we can presume of a settlement is that it produces peace—often a very fragile and temporary peace—and although peace might be a precondition for the achievement of justice, it is not justice itself.²⁹⁵

Clearly settlements do not necessarily lead to justice, which is a “public good.”²⁹⁶ Thus, when parties settle, “society gets less than what appears,” and justice may well not be done.²⁹⁷

Richard Delgado takes this argument one step farther by positing that avoiding conflict in favor of cooperation, which is touted as one of the advantages specifically of mediation, is actually problematic:

In a society like ours, conflict is normal, the ordinary state of affairs. Our society is made up of competing classes in endless struggle: consumers and manufacturers; whites and the descendants of former slaves; workers and factory owners. This conflict is normal, maybe even healthy. Smoothing it over ignores something important. And structuring a dispute resolution system so as to treat its every manifestation as a sign of unhealth is a very big mistake.²⁹⁸

294. *Id.* at 525–26.

295. Fiss, *History of an Idea*, *supra* note 21, at 1277.

296. *Id.*

297. Fiss, *Against Settlement*, *supra* note 21, at 1085. In his early work on the subject, Fiss was particularly concerned about the nature of consent in settled cases and the impact that a lack of resources might have on particular parties. *Id.* at 1075–76. Fiss concedes that resource imbalance can also influence outcomes in court but argues that the “guiding presence of the judge” may serve to “lessen the impact of distributional inequalities.” *Id.* at 1077–78.

298. Delgado, *Conflict as Pathology*, *supra* note 240, at 1401 (internal quotation marks and citation omitted).

Delgado's article also notes that anger and indignation, clear characteristics of conflict, can fuel reform.²⁹⁹

Commentators have likewise criticized settlements that involve courts, such as consent decrees or settlements of class actions.³⁰⁰ Fiss criticizes consent decrees because the judge never has the opportunity to hear the full story, unlike a trial.³⁰¹ Thus, such decrees may not reflect the real factual background of the case or provide relief that reflects the actual harm.³⁰² Marc Galanter argues more generally that decisions become more detached from facts, or at least facts as brought out in the unique setting of a trial.³⁰³ Galanter blames part of the rise of settlements on the expansion of managerial judging, whereby judges possess broad discretion to clear their dockets using whatever means at their disposal—including settlements.³⁰⁴

In the 1970s and 1980s, judges added case management and mediation duties to their roles as adjudicators.³⁰⁵ Galanter sees this increase of responsibility as a reflection of a wider shift in legal culture, that is, “part of a much broader turn from law, a turn away from the definitive establishment of public accountability in adjudication.”³⁰⁶ Indeed, he argues that the aversion to litigation also encompasses an “aversion to the determination of corporate accountability in public forums.”³⁰⁷ I find merit with this observation. For example, in the context of employment discrimination, it is particularly objectionable for an employer to be called racist or sexist; having these cases decided outside the public sphere works to the advantage of employers in many ways.³⁰⁸ Owen Fiss also lauds the public dimension of adjudication, stating:

Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in

299. See *id.* (noting that conflict is the normal state of affairs in our society).

300. Galanter, *supra* note 9, at 28.

301. Fiss, *Against Settlement*, *supra* note 21, at 1083.

302. See Galanter, *supra* note 9, at 28 (describing adjudication as a “spiral of attribution in which supposedly autonomous decision-makers take cues from other actors who purport to be mirroring the decisions of the former”).

303. Galanter, *supra* note 25, at 530.

304. *Id.* at 519–20.

305. *Id.* at 520. Galanter explains that “judicial ideology” is one factor influencing the long-term decline of the trial: “The primary role of courts, in this emerging view, is less enunciating and enforcing public norms and more facilitating the resolution of disputes.” Galanter, *supra* note 9, at 16.

306. Galanter, *supra* note 9, at 22.

307. *Id.*

308. THERESA M. BEINER, *GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW* 197–200 (2005) (discussing reform efforts for sexual harassment law to reflect proper punishment and induce deterrence).

which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.³⁰⁹

Even researchers who lament the treatment of employment discrimination claimants underscore that “settlements essentially buy employers out of trouble.”³¹⁰ In the context of employment discrimination cases, this purchase relieves employers of an obligation or incentive to examine their workplaces and consider that there may be organizational structural components that permit discrimination to flourish.³¹¹

The corporate desire to have cases heard outside of the legal system and to maintain employer control over the process is exhibited most vividly in the rise of employer grievance mechanisms for discrimination claims and the courts’ adoption of these mechanisms into the law itself.³¹² Lauren Edelman and her colleagues have accounted for the phenomenon of these employer implemented solutions to individual discrimination claims from a sociological perspective.³¹³ Edelman and her colleagues applied the idea of legal endogeneity in this context, which posits that “the content and meaning of law is determined within the social field that it is designed to regulate.”³¹⁴ In this specific context, the researchers trace the ascendancy of internal grievance mechanisms from a supposition (largely unfounded at the time it was suggested) in the professional personnel literature that such grievance mechanisms would limit the liability of companies for employment discrimination to the adoption of such mechanisms as a defense to supervisor hostile environment claims.³¹⁵ Note that there is no substantive link to eliminating discrimination; instead, employers

309. Fiss, *Against Settlement*, *supra* note 21, at 1085.

310. Berrey, Hoffman & Nielsen, *supra* note 174, at 26.

311. *See id.* (stating that “[e]mployers’ assertions of unfair settlements maintain the myth that discrimination lawsuits are typically meritless”).

312. Edelman, Uggen & Erlanger, *supra* note 107, at 412–14 (discussing the significant benefits, such as cost savings, available to organizations that institute internal grievance procedures).

313. *Id.* at 408 (noting that their argument has typically been construed as institutionalist, however, they intend to prove that the “organizational ideologies of rationality induce the judiciary to incorporate grievance procedures into legal constructions of compliance with EEO law” (emphasis in original)).

314. *Id.* at 407.

315. *Id.* at 409.

developed these mechanisms largely to avoid liability.³¹⁶ The interesting thing about these grievance mechanisms is that the courts accepted them as a solution to sexual harassment cases with little evidence regarding what, if any, type of system would remedy such discrimination.³¹⁷ Criticism of the court's reliance on internal grievance mechanisms has focused on both their efficacy as well as the social fact that most targets of sexual harassment do not complain using these systems.³¹⁸

Another advantage of trials is that they are public, which permits observation of and the ability to comment on the proceedings.³¹⁹ With regard to the trend toward sending cases to arbitration, Texas state court judges Craig Smith and Eric Moyé lament the loss of the public nature of trials, arguing:

Our civil justice system is an open court system, where public and private disputes are resolved in transparent proceedings. This system "ensures that the people . . . benefit from a full public airing of the issues, and it allows innovations and solutions learned from today's cases to help resolve tomorrow's disputes."³²⁰

Delgado also argues that adjudication allows society to confront new issues directly, rather than having to resolve them in "[i]nvisible, back-

316. See Susan Bisom-Rapp, *An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 13–25 (2001) (discussing how anti-discrimination training programs were designed to help avoid or reduce employer liability); Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 17–21 (2003) (explaining how the human resources community quickly embraced both the *Faragher* and *Ellerth* decisions in crafting "recipe[s] for legal compliance," which employers consequently incorporated into their workplace structures); Bisom-Rapp, *supra* note 126, at 980–1010 (discussing the prevalence of litigation prevention advice and legal compliance strategies).

317. See Martha S. West, *The Federal Courts' Wake-Up Call For Women*, 68 BROOK. L. REV. 457, 461–62, 467–68 (2002) (discussing how women are reluctant to report harassment); BEINER, *supra* note 308, at 158–61 (discussing that victims of harassment rarely report it as required by *Ellerth/Faragher* standard for imputing liability to employers for supervisors of sexual harassment); Bisom-Rapp, *supra* note 316, at 29–44 (addressing the pitfalls of anti-discrimination training); Grossman, *supra* note 316, at 41–49 (discussing the efficacy of employer prevention and training efforts).

318. BEINER, *supra* note 308, at 159–66 (describing studies suggesting victims rarely report sexual harassment).

319. See Paul Butler, *The Case for Trials: Considering the Intangibles*, 1 J. EMPIRICAL LEG. STUD. 627, 629–30 (2004) (explaining how the O.J. Simpson trial increased public consciousness by "illuminat[ing]" the "vast gulf between African Americans and whites about the fairness of" the criminal justice system).

320. Smith & Moyé, *supra* note 106, at 297 (quoting Wallace B. Jefferson, *The State of the Judiciary in Texas*, 70 TEX. B.J. 314, 314 (2007)).

room negotiation.”³²¹ Others link this public aspect of trials to storytelling. Describing trials as “one of the few official forums for story telling[.]” Paul Butler asserts that “[w]ith fewer trials, we lose some public stories, and their official morals (i.e., verdicts).”³²² This phenomenon can thus lead to public uncertainty about the law as well as societal mores.³²³

This loss of certainty in the law is particularly profound in employment discrimination cases, an area of law in which the public, through its legislators, has pronounced its support for equality of treatment at work.³²⁴ As employment discrimination is less overt in modern times, it becomes difficult for the public to know when it actually occurs.³²⁵ This difficulty is especially problematic in harassment cases, in which the fact finder uses a “reasonable person” standard to determine whether the harassment is sufficiently severe or pervasive to be actionable.³²⁶ How is an employer or employee supposed to know what reasonable people believe if so few cases are decided by juries? It is little surprise that one of the common complaints with respect to sexual harassment law is that employers and employees alike do not know what it is.³²⁷ Public trials could both inform the public while helping end such troubling and yet persistent workplace behavior.³²⁸

Paul Butler argues that jury trials also have value as a reflection of democracy because jurors reflect the diversity of American citizens.³²⁹ He posits, however, that just as juries have become increasingly more diversified, trials have simultaneously begun to vanish; he argues this could be viewed as a form of white flight from the legal system similar to that

321. Delgado, *Conflict as Pathology*, *supra* note 240, at 1405.

322. Butler, *supra* note 319, at 634.

323. *See id.* (noting that when the public does not have access to facts and must collect these facts from several venues—as opposed to one—it creates confusion and uncertainty).

324. *See* Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 95 (2003) (explaining that legislators enacted Title VII of the Civil Rights Act of 1964 “as part of a social movement against discrimination in all aspects of life,” including equal treatment in employment).

325. *See id.* at 99–108 (discussing the structural and organizational changes in the workplace that have impacted the way in which discrimination operates in this context in the wake of Title VII’s passage).

326. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

327. BEINER, *supra* note 308, at 15; Grossman, *supra* note 316, at 40.

328. BEINER, *supra* note 308, at 15–16 (discussing how few sexual harassment cases are decided by jury verdicts, leaving employers and the public guessing as to what constitutes actionable sexual harassment).

329. Butler, *supra* note 319, at 632–34 (arguing that diversity of jurors is one of many intangible benefits of trials).

which occurred after school desegregation.³³⁰ Another benefit to trials is that litigants in employment discrimination cases see going to trial as a statement of principle.³³¹

Fiss sees trials as embodying public principles that go beyond the particular dispute between the parties. In his later work on his concerns regarding fewer trials, Fiss argued that adjudication is meant to produce just outcomes, and society loses this when parties decide to settle.³³² As he sees it, “[j]ustice is a public good, objectively conceived, and is not reducible to the maximization of the satisfaction of the preferences of the contestants, which, in any event, are a function of the deplorable character of the options available to them.”³³³

Studies suggest that employment discrimination plaintiffs have more success before juries than judges; as Clermont and Schwab note, employment discrimination plaintiffs win at trial less than other plaintiffs overall.³³⁴ Win rate differentials lessen considerably, however, for jury trials.³³⁵ The comparison between employment discrimination plaintiff wins before juries and wins before judges is telling. In their study of trials between 1979 and 2006, they found that plaintiffs win 19.62% of bench trials compared with 37.63% of jury trials.³³⁶ As Clermont and Schwab opine, “it may be that trial judges are more demanding of plaintiffs than

330. *Id.* at 632; see also Delgado, *Conflict as Pathology*, *supra* note 240, at 1406 (arguing that ADR is favored by Republican business leaders because it sidetracks disputes by those who should be fighting, including civil rights claimants); Galanter, *supra* note 9, at 20–21 (explaining that “large sections of business, political and legal elites embraced a set of beliefs and prescriptions about the legal system that, for want of a name, I have called the ‘jaundiced view’”—in this view, “trials are not only expensive, but are [also] risky because juries are arbitrary, sentimental, and ‘out of control’”).

331. Butler, *supra* note 319, at 634. In their interviews with employment discrimination plaintiffs, Berrey and her colleagues noted that almost half “stress[ed] that, even if they lost their cases, they are glad they pursued the case” and spoke of “‘fighting’ for justice.” Berrey, Hoffman & Nielsen, *supra* note 174, at 17.

332. Fiss, *History of an Idea*, *supra* note 21, at 1277 (“All we can presume of a settlement is that it produces peace—often a very fragile and temporary peace—and although peace might be a precondition for the achievement of justice, it is not justice itself.”).

333. *Id.*

334. Clermont & Schwab, *From Bad to Worse*, *supra* note 6, at 129 (ranging from 28.47% for employment discrimination plaintiffs as compared with 44.94% for other plaintiffs).

335. *Id.* at 130 (noting that employment discrimination plaintiffs win jury trials 37.63% of the time as compared with 44.41% for other plaintiffs).

336. *Id.* (reviewing data from 1979 to 2006). The gap between win rates closed some at the end of the study period, but a disparity remains. See *id.* Nielsen and Nelson also note similar findings for data from 1990 to 2001, with plaintiff success rates during this period ranging from 36% to 44% before juries and from 14% to 33% before judges. Nielsen & Nelson, *supra* note 4, at 698.

juries are, or at least are exhibiting a well-founded fear that appellate judges are more likely to reverse judgments for plaintiffs.”³³⁷

Arbitration of employment discrimination claims has its own set of problems, including the often-cited “structural advantage” employers have as “repeat players.”³³⁸ Employers are advantaged in a system they use often, while employees, who are often only one-time players, are at a severe disadvantage in terms of experience.³³⁹ In addition, because arbitrators often see the same employers, they have a financial incentive to rule in the employers’ favor so that those employers will continue to choose them to arbitrate their next case.³⁴⁰ There is also a lack of fairness with regard to employment arbitration clauses, which are generally presented to employees as “take it or leave it” provisions³⁴¹ that they must accept if they want the job or, in some cases, to continue in their jobs. Smith and Moyé argue that this façade of cooperation is not the type of arm’s length bargaining that those who drafted the FAA envisioned for enforceable arbitration clauses.³⁴² Smith and Moyé note that the Supreme Court’s decision in *Rent-A-Center, West, Inc. v Jackson*,³⁴³ permitting arbitrators to determine even the issue of the unconscionability of the employment contract,³⁴⁴ only makes the apparent conflict for arbitrators worse in these cases.³⁴⁵ As they further explain, “[t]his effectively gives the arbitrator the discretion to decide whether or not he or she has authority to perform a task that he or she will receive income for completing, thus creating an inherent

337. Clermont & Schwab, *From Bad to Worse*, *supra* note 6, at 131. They also note that in certain types of cases lawyers rely on misperceptions about the sympathies of judges versus juries. *Id.* at 130–31.

338. Green, *Measures to Encourage*, *supra* note 266, at 65 n.31 (citation omitted); *see also id.* at 67–69 (discussing the various disadvantages both employers and employees must confront in the arbitration context).

339. *See* Smith & Moyé, *supra* note 106, at 298 (“Because [larger corporate parties] arbitrate repeatedly, they benefit from increased familiarity with the arbitrators as well as the arbitration process. This pattern also creates a potential for arbitrators to act in a manner inconsistent with the neutrality that is critical to the fairness and effectiveness of the arbitration process.” (internal citation omitted)).

340. *See id.* (identifying that this phenomenon is known as “repeat player bias”).

341. *See* Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 U. ILL. L. REV. 695, 705–20 (2001) (internal quotation marks omitted) (describing in detail the many criticisms of the unfair nature of arbitration clauses).

342. *See* Smith & Moyé, *supra* note 106, at 287 (noting that Congress intended the FAA to apply to contracts between parties at arm’s-length and *not* to parties with unequal bargaining power). Another effect of enforceable arbitration clauses is that a person must “yield his or her very access to the courts in order to meaningfully participate in our modern society.” *Id.* at 282.

343. 130 S. Ct. 2772 (2010).

344. *Id.* at 2779–81.

345. Smith & Moyé, *supra* note 106, at 293–94 (stating that this decision may also result in an increase in the number of gateway issues, like unconscionability, going to arbitrators).

and untenable conflict of interest.”³⁴⁶ The result, from these two judges’ perspective, is another example of the Seventh Amendment right to jury trial being eroded.³⁴⁷

IV. CONCLUSION

The courts appear eager to find other arenas where employment discrimination plaintiffs can resolve their claims. In light of this trend, employment discrimination plaintiffs would be rational to pursue other remedies outside the legal system, and, indeed, the latest data suggest they are beginning to abandon the federal adjudicatory system. Alternative dispute resolution mechanisms, however, may not offer the panacea employment discrimination plaintiffs seek, given that there is no way of knowing whether settlements, resulting from mediation or otherwise, are indeed just. Much of my analysis regarding problems in the court system would not be possible if the courts did not issue written decisions that are subject to public scrutiny. I would not be able to argue, for example, that the Court’s interpretation of the history of the Civil Rights Act of 1991 with respect to arbitration is wrongheaded without those public decisions to reference. With many employment discrimination cases settling, there is simply no way to determine if justice is truly being done. While settlement may provide plaintiffs with more control over the outcome, there is no way to criticize the current system unless some brave plaintiffs bring their cases to court.

The impact of resolving these cases “in the shadow of the law” goes beyond simply whether a given settlement or arbitration result is just. Society loses the opportunity to condemn employer practices that it considers discriminatory as well as to participate in the public debate that occurs in court cases about what is appropriate behavior in the workplace. In the context of harassment cases, in which the standard is based on the “reasonable person,” jury input on what the average person would find harassing would help develop not only appropriate standards for court determinations, but also appropriate standards for workplace conduct that employers might implement. Society loses something in both the

346. *Id.*

347. See *id.* at 295 (stating that the judicial interpretation of the FAA, creating in effect a “classwide” arbitration scheme, is responsible for this erosion of the right to a jury trial (internal quotation marks omitted)); *id.* at 301 (classifying blanket enforcement of arbitration agreements as effectively “assault[ing]” the Seventh Amendment’s right to a jury trial); see also Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OH. ST. J. DISP. RESOL. 669, 674–75 (2001) (explaining “[m]ost courts have not directly confronted the tension between the cases governing jury trial waivers and those governing arbitration clauses” because courts have not been presented with these particular issues).

development phase as well as the outcome phase when these decisions are not public. Perhaps most importantly, we, the public, lose the opportunity to see just what is going on in modern workplaces and therefore cannot evaluate and condemn the widespread discriminatory practices that remain.

So, in the end, I find myself arguing in favor of employment discrimination plaintiffs bringing their cases in the federal court system.³⁴⁸ While the system is currently not operating in an ideal manner, this circumstance is cause to suggest reform—not abandonment.

348. I also believe that some state court systems are more hospitable to claimants. While my emphasis here has been on the federal court system, in part because there is more data on the cases litigated in this forum, the state court systems offer the same public benefits that the federal court system provides.