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In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis

Jean R. Sternlight*

As our world effectively shrinks, many countries are beginning to reach a striking substantive consensus regarding the prohibition of employment discrimination. Yet, and in sharp contrast, nothing approaching consensus has yet emerged regarding the best procedural method with which to resolve individual claims of employment discrimination. Instead, while countries have struggled, individually, to devise processes that meet a variety of needs, none seems to be satisfied with its efforts. Litigation is slow, costly, and impersonal. Informal processes such as conciliation, mediation, arbitration, or administrative processes aim to be faster and cheaper, but may not result in adequate enforcement of discrimination laws. This Article suggests that by comparing the procedural approaches taken by three countries we can learn a great deal about why it has been so difficult to devise a good procedure for resolving employment discrimination disputes and also gain some significant insights regarding how to better handle such disputes in the future. Specifically, it provides an in-depth examination of how the United States, Britain, and Australia have attempted to handle employment discrimination disputes. This original comparative research reveals that policy makers in each country have typically focused only or primarily on what has and has not worked in their own jurisdiction, and have often devised systems that oscillate, somewhat predictably, between formal systems such as litigation and informal systems such as conciliation. Through examining ten aspects of employment discrimination claims that are common to all three

* Saltman Professor of Law, University of Nevada Las Vegas, and Director of the Saltman Center for Conflict Resolution. My research on this Article was funded in part by a grant from the College and University Affiliation Program of Educational and Cultural Affairs Bureau (formerly USIA) of the U.S. Department of State. This grant allowed me to travel to the Republic of Ireland and Northern Ireland to conduct a series of interviews. I also appreciatively acknowledge the financial support provided by the summer research grant from my prior institution, the University of Missouri-Columbia School of Law. Last but certainly not least I thank my research assistants Alyson Carrel, Jennifer Chierek, Natalya Johnson, and Mark Lyons, and also Missouri School of Law librarians Steve Lambson and Diane Collins. Without their help I could not have accomplished this comparative research.

jurisdictions, the Article then offers several key prescriptive insights. First, because it is highly unlikely that any single dispute resolution process will be able to serve all of our public and private interests in resolving employment discrimination claims, it is instead desirable that a jurisdiction offer multiple processes. Second, in designing each of these processes policy makers should focus explicitly on the public and private interests that have been identified, and try to design each process to serve certain of the interests. Whereas public interests are often best served by litigation, private interests are instead often best served by mediation or conciliation. Third, policy makers need to focus on how the selection is made among processes, and by whom, to protect as many of the identified interests as is possible. Finally, this Article contends that while these insights have been drawn from the context of employment discrimination, they will also have applicability to disputes arising in other substantive contexts.

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I. INTRODUCTION

As our world effectively shrinks, many countries are beginning to reach a striking consensus regarding the prohibition of employment discrimination. Numerous English-speaking and European countries have adopted legislation prohibiting employment discrimination on the grounds of race, ethnicity, gender, age, sexual orientation, disability, and religion or belief.¹ Most of these grounds are forbidden in the United States as well.² As these countries and others attempt to differentiate between illegal discrimination and legitimate employer

1. See CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15(1), *available at* <http://lois.justice.gc.ca/en/const/index.html> (last visited Feb. 4, 2004); S. AFR. CONST. ch. II, § 9(3), *available at* <http://www.polity.org.za/html/govdocs/constitution/saconst.html?rebookmark=1> (last visited Feb. 2, 2004); Workplace Relations Act, 1996, § 170CK (Austl.), *available at* http://www.austlii.edu.au/au/legis/cth/consol_act (last updated Jan. 28, 2004); Human Rights Act, 1993, § 21 (N.Z.), *available at* <http://www.legislation.govt.nz> (last visited Feb. 2, 2004); Council Directive 2000/78/EC, art. 1, 2000 O.J. (L 303) 16, 16, *available at* http://europa.eu.int/comm/employment_social/fundamental_rights/index_en.htm (last updated Feb. 14, 2003) (establishing the general framework for equal treatment in employment and occupation with regard to religion, belief, disability, age, or sexual orientation, and noting the prior existence of policies prohibiting employment discrimination as to gender, race or ethnicity); Council Directive 2000/43/EC, art. 1, 2000 O.J. (L 180) 22, 22, *available at* http://europa.eu.int/comm/employment_social/fundamental_rights/index.htm (last updated Apr. 11, 2002) (implementing the principle of equal treatment between persons irrespective of racial or ethnic origin).

2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2000) (prohibiting discrimination on the basis of race, color, religion, gender, or national origin); Americans with Disabilities Act, *id.* §§ 12101-12213 (prohibiting discrimination on the basis of disability); Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2000) (prohibiting discrimination on the basis of age against persons age forty or older). U.S. federal law does not prohibit discrimination in employment on the basis of sexual orientation. However, some state and local jurisdictions do prohibit such discrimination. For a summary of such laws, see Lambda Legal, *Summary of States Which Prohibit Discrimination Based on Sexual Orientation*, *at* <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=185> (last visited Feb. 2, 2004).

discretion, they are also dealing with many of the same substantive issues, and often coming up with similar solutions.³

Yet, and in sharp contrast, nothing approaching consensus has yet emerged regarding the best *procedural* method with which to resolve individual claims of employment discrimination.⁴ Instead, each country is still struggling, independently, to find the best or perhaps merely an adequate mechanism for determining such claims. Jurisdictions are using a range of procedural devices including litigation in the ordinary courts, formal adversarial processes in specialized tribunals or before governmentally appointed arbitrators,⁵ privately imposed binding arbitration,⁶ nonbinding administrative or

3. For example, one issue many countries have confronted is how to handle acts which have a detrimental impact on a protected group, but may not have been taken with a motive of harming a member of that group. In the United States, this concept is handled by doctrines of disparate impact and unconscious discrimination. See ALFRED W. BLUMROSEN, *MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY* 73-74 (1993). For the statutory definition of "disparate impact" in the United States, see 42 U.S.C. § 2000e-2(k). For a thorough discussion of the doctrine of unconscious discrimination in the United States, see Ann C. McGinley, !Viva La Evolucion!: *Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415 (2000). In the European Union the concept of "indirect" discrimination is used to govern some of these issues. See, e.g., Council Directive 2000/78/EC, art. 2(b), 2000 O.J. (L 303) at 18: "[I]ndirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless [certain exceptions are met]"

For an Australian discussion of these issues see MARGARET THORNTON, *THE LIBERAL PROMISE: ANTI-DISCRIMINATION LEGISLATION IN AUSTRALIA* 180-93 (1990) (contrasting concepts of direct and indirect discrimination, and comparing Australian and American perspectives).

4. I am distinguishing here between those claims brought by individuals regarding a specific incident, and those claims raised collectively by labor unions.

5. Administrative tribunals and arbitral procedures are grouped together because, in each, the neutral or neutrals ultimately render a binding determination. Such specialized tribunals or arbitral bodies are intended to be faster, cheaper, less formal, more open to nonlegal considerations, and more expert than a court of general jurisdiction. Depending on the jurisdiction the processes vary according to whether decisions are made by a single neutral or a panel of three, whether any or all of the neutrals have legal training or have particular background expertise, whether the neutrals are governmentally appointed or privately selected, the degree of formality of the proceeding, the type of decision that is provided, the nature of any appeal that is permitted, and how disputants become involved in the particular process.

6. To date, privately imposed binding arbitration is only being used extensively in the United States, where it has been subject to a great deal of criticism. See *infra* notes 113-130 and accompanying text. A sharp distinction must be drawn between the private arbitration now being imposed by many U.S. employers prior to the time a dispute arises, and the voluntary government-sponsored arbitration used by the British to resolve unfair dismissal claims.

arbitral processes, and variations on mediation or conciliation.⁷ In fact, a consensus does not even exist between countries as to how various procedural mechanisms should be identified. The same procedure may be labeled differently in different countries,⁸ and the same name may have different meanings in various jurisdictions.⁹

7. Unfortunately, the terms “mediation” and “conciliation” often have different meanings as one crosses jurisdictional lines. However, both are used to describe a process whereby a third-party neutral attempts to help the parties reach a mutually acceptable settlement of the claim. Beyond that, the processes vary with regard to how directive the neutral is in attempting to push a settlement, regarding whether the process focuses on legal or nonlegal issues, and regarding whether the neutral provides the disputants with information or opinions as to the strength of their legal claims. In the United States, the term “conciliation” is now rarely used, although it is included in Title VII of the Civil Rights Act of 1964. *See, e.g.*, 42 U.S.C. § 2000e-5(b). Instead, we speak primarily of “mediation,” and often divide this into two types: facilitative and evaluative. *See* Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 17 (1996). In other jurisdictions, the terms are used differently. In an article about Great Britain and New Zealand, Susan Corby explains that “mediation” is essentially a more evaluative form of conciliation. She states:

Mediation is essentially a ‘facilitative function.’ The mediator, like the conciliator, conveys information and clarifies issues but, in addition, gives a view on the strengths and weaknesses of a case and recommends a settlement. Thus, a mediation can be differentiated from conciliation by the degree of initiative taken by the third party

SUSAN CORBY, *RESOLVING EMPLOYMENT RIGHTS DISPUTES THROUGH MEDIATION: THE NEW ZEALAND EXPERIENCE* 3 (1999). However, writing about Australia, Margaret Thornton differentiates the two terms in an exactly opposite fashion:

Strictly speaking, mediation is the least intrusive form of dispute resolution “The mediator does not take control of the situation, define the rules of the interaction or bring in outsiders to influence the attitudes and behaviours of the principals.”

While the conciliator is supposed to exercise a neutral role in the process of conciliation, he or she may be expected to shape the direction of the process to a greater degree than is the case with mediation.

Margaret Thornton, *Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia*, 52 MOD. L. REV. 733, 734 (1989) (footnote omitted). Thornton also explains that “the parties need not necessarily confront each other during the process of conciliation,” though most in the United States would see such a meeting as crucial to mediation. *Id.* Commentators Hilary Astor and Christine Chinkin agree that mediation and conciliation are different from one another in Australia, but offer multiple alternative definitions of conciliation. HILARY ASTOR & CHRISTINE M. CHINKIN, *DISPUTE RESOLUTION IN AUSTRALIA* 61-64 (1992).

8. One country’s mediation may be another country’s conciliation. *See supra* note 7 and accompanying text.

9. *See supra* note 7 and accompanying text. Similarly, the term “arbitration” is used very differently in various jurisdictions. In the United States, arbitration is usually a private process in which parties contractually agree, predispute, that their future conflicts will be decided on a binding private basis by a mutually acceptable private neutral. *See infra* notes 103-112 and accompanying text. In contrast, when the British and Irish discuss the use of arbitration in the context of employment claims, they mean a process in which the arbitrator

The question of how individual discrimination claims are processed is critical. A seemingly good substantive law is meaningless unless it can be adequately enforced.¹⁰ But, many countries have found that it is very difficult to devise a generally accepted procedure for resolving such disputes. Instead, the issue of procedure has been contentious in many jurisdictions, spawning complaints of delay, inadequate relief, lack of representation, overly formalistic procedures, and fundamental lack of justice.¹¹ Unfortunately, as countries have wrestled to create a good procedure for resolving employment discrimination claims, they have tended to look primarily inward rather than outward.¹² Typically focusing on what has and has not worked in that particular country, lawmakers attempt to make adjustments that will lead to more beneficial results than the previous system. Often, this approach leads to a predictable cycling between formal and informal approaches. As well, policymakers fail to pay as much attention as they should to lessons that may be learned from other countries' attempts to deal with similar problems.¹³ Even when they do

is a government employee or independent consultant, and where arbitration is agreed to by the parties voluntarily, postdispute. *See infra* note 326.

10. "I'll let you write the substance . . . and you let me write the procedure, and I'll screw you every time." *Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm. on Admin. Law and Governmental Regulations of the House Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. John Dingell); *see also* K.N. LLEWELLYN, *THE BRAMBLE BUSH* 17-18 (1960) ("Procedural regulations enter into and condition all substantive law's becoming actual when there is a dispute. . . . [W]hat substantive law says should be means nothing except in terms of what procedure says that you can make real.").

11. *See infra* notes 113-130 and accompanying text.

12. This phenomenon of ignoring other countries' approaches is most notable in the United States, where most attorneys and even law professors have no knowledge regarding approaches used elsewhere. In contrast, policymakers and academics in Britain and Australia have at least some knowledge regarding the way things are done elsewhere, such as the United States and New Zealand. *See* SECRETARY OF STATE FOR EMPLOYMENT, *RESOLVING EMPLOYMENT RIGHTS DISPUTES: OPTIONS FOR REFORM*, 1994, Cm. 2707, at 27 [hereinafter *GREEN PAPER*] (taking note, in British publication, that in the United States "compulsory arbitration is widely used for adjudicating employees' rights under their employment contracts"); Susan Corby, *Unfair Dismissal Disputes: A Comparative Study of Great Britain and New Zealand*, 10 HUM. RESOURCE MGMT. J. 79 (2000), available at 2000 WL 16264576 (comparing the approaches of Great Britain and New Zealand); Rosemary Hunter & Alice Leonard, *Sex Discrimination and Alternative Dispute Resolution: British Proposals in the Light of International Experience*, 1997 PUB. L. 298, 298-300 (suggesting that Britain may want to adopt a form of mediation, rather than arbitration, and that the British should learn from Australian experiences with conciliation).

13. There are a few notable exceptions. *See supra* note 12 and accompanying text. *See generally* ANTI-DISCRIMINATION LAW ENFORCEMENT: A COMPARATIVE PERSPECTIVE (Martin MacEwen ed., 1997) (collecting essays regarding the role of enforcement agencies in antidiscrimination law, and offering a comparative view of the laws of several countries).

take note of other countries' attempts, commentators fail to analyze their successes and failures in a useful fashion. While cultural and legal differences between countries caution against wholesale importation of techniques from other jurisdictions,¹⁴ we can still learn a great deal from how similar issues have been treated elsewhere.

This Article, in Part II, takes a unique look at these issues by examining the approaches taken in three specific countries: the United States, Great Britain, and Australia.¹⁵ It shows that while each country has attempted to provide a speedy, inexpensive, and just forum for resolving individual employment discrimination claims, each has met with considerable frustration and has tended to vacillate among a series of formal and informal approaches. None of the three countries has yet come up with an approach that satisfies all of the multiple concerns in resolving employment discrimination claims.

Part III then draws on the preceding examples to examine ten of the factors that make individual employment discrimination disputes so difficult to resolve. It explains that regardless of their country of origin, such disputes tend to have certain features that inevitably pose significant procedural difficulties. Specifically, it shows that the tension between the public and private purposes of antidiscrimination laws is responsible for many of the difficulties countries have had in

14. See O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 1-27 (1974).

15. The United States, Great Britain, and Australia were selected because, although the countries' legal systems are similar and derive from a common British history, they offer a fairly wide range of approaches to the resolution of employment discrimination disputes. Although I commenced this study in Ireland and Northern Ireland, I decided not to focus primarily on those jurisdictions because far less has been written about them than about Britain and Australia. In the future it would be interesting to expand this study to other English-speaking jurisdictions including New Zealand, Canada, Hong Kong, and South Africa. Some literature is available on each of those jurisdictions. See generally John-Paul Alexandrowicz, *A Comparative Analysis of the Law Regulating Employment Arbitration Agreements in the United States and Canada*, 23 COMP. LAB. L. & POL'Y J. 1007, 1054 (2002) (urging Canadian legislators not to take steps "that could be interpreted as an endorsement of non-union employment arbitration"); Philip Bryden & William Black, *Mediation as a Tool for Resolving Human Rights Disputes: An Evaluation of the B.C. Human Rights Commission's Early Mediation Project*, 37 U.B.C. L. REV. 73 (2004) (assessing use of mediation to resolve human rights claims in British Columbia, Canada); CORBY, *supra* note 7; Corby, *supra* note 12, at *8-*13 (comparing British and New Zealand experiences); Ellen J. Dannin, *Contracting Mediation: The Impact of Different Statutory Regimes*, 17 HOFSTRA LAB. & EMP. L.J. 65 (1999) (comparing New Zealand and U.S. approaches to resolving labor and employment claims); Carole J. Petersen, *Equality As a Human Right: The Development of Anti-Discrimination Law in Hong Kong*, 34 COLUM. J. TRANSNAT'L L. 335 (1996) (discussing the impact of human rights legislation on the women's movement in Hong Kong); Chester S. Spell, *The Evolution of Rights Disputes and Grievance Procedures: A Comparison of New Zealand and the U.S.*, 28 CAL. W. INT'L L.J. 199 (1997).

selecting an ideal method for resolving discrimination claims. Indeed, this tension has caused all three jurisdictions to oscillate between formal and informal approaches to the resolution of discrimination claims.

Finally, Part IV analyzes how the insights gained from this side-by-side comparison of three countries' approaches to resolving individual employment discrimination claims can inform policy making in this area. It concludes, first, that given the tension between the public and private purposes that undergird antidiscrimination laws, no single process is likely to work. Second, it asserts that in devising these multiple processes each jurisdiction should strive to construct procedures that will effectively serve both the public and private interests. The mere provision of multiple processes will not be effective unless each process is well designed to serve particular needs. Third, Part IV argues that because each jurisdiction will need to have at least two procedural mechanisms, or tracks, for resolving individual employment discrimination claims, each jurisdiction will also need to design an appropriate switching mechanism to determine which track is appropriate for a particular dispute. It then begins to explore what considerations should be used in designing such a switching mechanism.

Although this Article does not advocate entirely new procedures for resolving employment discrimination claims, it offers a new and more systematic blueprint for how to piece together familiar raw materials. Some countries have, seemingly instinctively, begun to develop multiple procedures for resolving employment discrimination disputes. We can, however, improve upon these programs by more consciously focusing on the multiple goals served by antidiscrimination legislation. The model offered in this Article will help us to reexamine which types of procedures can most effectively be used to combat the wrong of employment discrimination.

II. EXAMINING APPROACHES TAKEN ON A JURISDICTION BY JURISDICTION BASIS

A. *United States*

1. Pre-1964: Little Law, No Special Procedures

Prior to the passage of Title VII of the Civil Rights Act of 1964¹⁶ (Title VII), victims of discrimination received little legal protection in the United States.¹⁷ However, to the limited extent that discrimination was illegal, its victims could typically seek enforcement of their rights in court, as with other ordinary types of legal claims. No special federal agency or tribunal existed to hear claims of discrimination.¹⁸ It can be assumed that, as is generally true, the plaintiffs who were most likely to find lawyers to handle their cases would have been those who had claims that were both good on the merits as well as financially viable.¹⁹

2. Title VII's Provision for Conciliation and Litigation

Title VII is a product of many political deals and compromises.²⁰ This significant piece of legislation prohibits discrimination with

16. Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66 (codified at 42 U.S.C. § 2000e (2000)).

17. The federal Civil Rights Act of 1866, also known as the Ku Klux Klan Act, 42 U.S.C. § 1981 (2000), did bar some types of race discrimination, Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 1017 (2002), but the United States Supreme Court did not hold that it applied to private as well as public actions until 1976, *Runyon v. McCrary*, 427 U.S. 160, 173-75 (1976). For a discussion of some federal executive orders as well as state legislation that preceded the 1964 legislation, see HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972*, at 3-152 (1990). See also Arthur Earl Bonfield, *The Origin and Development of American Fair Employment Legislation*, 52 IOWA L. REV. 1043, 1043-92 (1967) (discussing the evolution of state and federal employment discrimination law). One common approach among northern states was a fair employment and practices commission that, while possessing cease and desist power, exercised considerable constraint and promoted education and conciliation. See GRAHAM, *supra*, at 21.

18. However, see GRAHAM, *supra* note 17, at 10, for a discussion of the five-man Committee on Fair Employment Practice, created by executive order in 1941, which was authorized to investigate charges of discrimination in certain limited contexts.

19. Cases are financially viable either where they can be expected to generate large judgments or where the plaintiff can afford hourly billing.

20. See BLUMROSEN, *supra* note 3, at 40-52. Some of the many histories of the passage of the Act include CARL M. BRAUER, *JOHN F. KENNEDY AND THE SECOND RECONSTRUCTION* (1977); GRAHAM, *supra* note 17; JAMES C. HARVEY, *CIVIL RIGHTS DURING THE KENNEDY ADMINISTRATION* (1971); *STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS* (pts. I & II) (Bernard Schwartz ed., 1970); CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* (1985); and Herbert Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical*

respect to race, color, religion, sex, or national origin.²¹ The U.S. Congress subsequently adopted legislation that also prohibits employment discrimination as to age²² and disability.²³ For the sake of simplicity, this Article will focus only on Title VII.

The procedural aspects of Title VII, like its substance, reflect significant compromise. The 1964 Act created a new federal agency, the Equal Employment Opportunity Commission (EEOC), to aid in enforcement of the new civil rights act.²⁴ Whereas some legislators sought to create a powerful enforcement agency,²⁵ those legislators who were nervous about the new law sought to limit the agency's powers and instead use the agency as a hurdle to surmount in the bringing of new claims.²⁶ In the end, compromises yielded a new agency designed to supplement rather than substitute for traditional litigation. Complainants would be required to file their claims of discrimination with the EEOC and would have to comply with an unusually short statute of limitations.²⁷ The EEOC would then investigate the claim of

Analysis of the Legislative History and Administration of the Law, 2 INDUS. REL. L.J. 1 (1977).

21. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.

22. Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2000).

23. Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213.

24. For a comprehensive history of the creation of this new agency, see generally BLUMROSEN, *supra* note 3, at 45. See also Richard K. Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOK. L. REV. 62, 62-97 (1965) (discussing the passage of Title VII of the Civil Rights Act of 1964 and the creation of the EEOC).

25. See BLUMROSEN, *supra* note 3, at 47-48.

26. See Hill, *supra* note 20, at 7 (stating that “[a]mong the provisions of the law that most clearly reflect tortuous congressional compromises are the severe limitations imposed on the administrative agency established by Title VII, the . . . (EEOC),” and observing that the EEOC was not initially empowered either to issue cease-and-desist orders or to initiate legal action directly). Today Professor Michael Selmi questions why employment discrimination suits should be subject to an agency procedure at all, concluding that it makes sense to maintain the EEOC only to the extent that the agency serves needs, such as those of small claimants, that would not adequately be served by the private bar. Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1 (1996).

27. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 706, 78 Stat. 241, 259-69 (codified at 42 U.S.C. § 2000e-5(e)). As an alternative, charging parties are also permitted to file with their state or local fair employment practices agency. *Id.* In the interest of simplicity, and because these state agencies function in a manner comparable to the EEOC, they will not be discussed separately in this Article. However, it is interesting to note that at least in the disability area, it seems there are significant differences in how the two sets of agencies process claims. See Kathryn Moss et al., *Different Paths to Justice: The ADA, Employment, and Administrative Enforcement by the EEOC and FEPAs*, 17 BEHAV. SCI. & L. 29, 44 (1999) (“While a much higher percentage of individuals whose [disability] charges are investigated by FEPAs receive benefits, a much lower percentage of such people receive monetary benefits.”); see also Scott Burris, Kathryn Moss, Michael Ullman & Matthew C. Johnsen, *Disputing Under the Americans with Disabilities Act: Empirical Answers, and*

discrimination.²⁸ In those cases in which the EEOC investigation revealed that discrimination had in fact occurred, the EEOC would attempt to “conciliate” a resolution, meaning that it was to encourage the perpetrator and the victim to enter into a mutually satisfactory settlement.²⁹ In the event that the attempt at conciliation failed, the complainant would primarily be left on her own to pursue relief in court.³⁰ In those cases in which the EEOC found no probable cause to believe discrimination occurred, the EEOC was to dismiss the charge and notify the claimant, who could then choose to file a private lawsuit.³¹ This same basic process is still in place today and has been applied to the newer age and disability statutes also placed under the EEOC’s auspices.³²

Many argue that the EEOC primarily serves as a screening device for suits that might be brought by private parties if an early settlement can not be achieved.³³ In particular, charging parties may not file private lawsuits until they have filed a charge of discrimination with

Some Questions, 9 TEMP. POL. & CIV. RTS. L. REV. 237, 246-47 (2000) (showing that far fewer claimants received monetary benefits from state agencies, and that average payments were also much lower).

28. § 706(a), 78 Stat. at 259.

29. *Id.* From the outset, many liberals and advocacy organizations forecasted that the EEOC would be largely “toothless” and “reactive.” See BLUMROSEN, *supra* note 3, at 63; GRAHAM, *supra* note 17, at 189.

30. A congressional memorandum noted:

[T]he Equal Employment Opportunity Commission cannot bring suit against employers, nor for that matter can charges be filed by other groups, “on behalf of” aggrieved persons. . . . Its function now is limited to an attempt at voluntary conciliation of alleged unlawful practices and the conciliation efforts must be conducted in confidence and not even the charge against the employer may be made public.

110 CONG. REC. 14,331, 14,331 (1964) (memorandum prepared by a staff member of the Senate Judiciary Committee). While the original legislation empowered the Attorney General to file suits where he could document a “pattern and practice” of discrimination, it was recognized from the outset that few such suits would be filed. GRAHAM, *supra* note 17, at 146.

31. 42 U.S.C. § 2000e-5(f)(1).

32. The EEOC enforces the following federal laws: Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e-2 to 2000e-17; Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (2000); Equal Pay Act (EPA), *id.* §§ 206-262; and Titles I and IV of Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12212. See U.S. Equal Emp. Opportunity Comm’n, *U.S. Equal Employment Opportunity Commission: An Overview*, at <http://www.eeoc.gov/abouteeoc/overview.html> (last modified July 25, 2001).

33. See Selmi, *supra* note 26, at 3; David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 BERKELEY J. EMP. & LAB. L. 1, 6-7 (2003) (describing EEOC procedures as “an administrative hoop through which plaintiffs with legitimate claims must unfortunately jump”).

EEOC or the state equivalent and given that agency an opportunity to attempt to resolve the claim.³⁴ Initially, the EEOC was not provided with the power to engage in litigation on behalf of those persons whom it found had been subjected to discrimination.³⁵ Although the statute was amended in 1971 to provide EEOC with the power to bring litigation on behalf of persons it found to have suffered discrimination,³⁶ the EEOC has never had the resources to handle more than a small proportion of the charges it has received.³⁷ Nor has

34. If the agency has not completed its investigation within 180 days, the charging party may request a "notice of right to sue" and file directly in court. 42 U.S.C. § 2000e-5(f)(1). Professor Selmi has criticized this model as primarily creating a hurdle to prospective litigants. Selmi, *supra* note 26, at 9-10.

35. See Selmi, *supra* note 26, at 5. As Professor Selmi notes:

The compromising nature of the EEOC's formation has substantially restricted its enforcement mission insofar as it has never been clear what the goal of the EEOC ought to be—whether, for example, it was to remedy discrimination, to alleviate the potential burden on the federal courts from employment claims, or to protect employers from undue interference.

Id. While the EEOC did, from the outset, have the power to refer cases to the U.S. Attorney General for litigation, few such referrals were made and even fewer were actually litigated. See Hill, *supra* note 20, at 28-29. Commentator Herbert Hill reports that of 115 cases referred to the Justice Department by the EEOC from July 1968 to May 1970, only eight were filed. *Id.*

36. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4, 86 Stat. 103, 103-04 (1972) (codified at 42 U.S.C. § 2000e-5(f)(1)); H.R. REP. NO. 92-238, at 3 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2139 ("It is essential that seven years after the passage of the Civil Rights Act of 1964, effective enforcement procedures be provided the [EEOC] to strengthen its efforts to reduce discrimination in employment."). The grant of direct litigation authority to the EEOC was opposed by business interests who asserted such authority was unnecessary, and indeed would undercut the nonadversarial goals of the agency. James W. Hunt, labor relations manager of the U.S. Chamber of Commerce, asserted:

Instead of a friendly climate where the parties sit down to reason together, [the addition of litigation authority] would substitute a formal adversary proceeding in which public charges and countercharges are disputed by the parties. . . . It would create resistance where none presently exists, and reverse the trend toward successful accomplishment of Title VII goals through mediation.

Equal Employment Opportunity: Hearings on S. 1308 Before the Subcomm. on Employment, Manpower, and Poverty of the Senate Comm. on Labor and Public Welfare, 90th Cong. 152 (1967) (statement of James W. Hunt, Labor Relations Manager, Chamber of Commerce of the United States). Meanwhile, civil rights groups felt it was crucial to also maintain the private right to sue. See *Equal Employment Opportunities Enforcement Act: Hearings on S. 2453 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong. 71 (1969) (statement of Jack Greenberg, Director-Counsel, NAACP Legal Defense and Educational Fund, Inc.).

37. The United States Supreme Court noted in its decision in *EEOC v. Waffle House, Inc.* that just 291 suits were filed by EEOC in 2000. 534 U.S. 279, 290 n.7 (2002). Paul Igasaki, Vice Chair of the EEOC, reports that "[w]hile EEOC receives approximately 80,000 charges per year, and state and local Fair Employment Practice Agencies receive another 60,000 charges, the EEOC files only several hundred lawsuits a year." Paul Igasaki, *The EEOC During the Clinton-Gore Years and Beyond*, EMPLOYEE ADVOC., Spring 2001, at 40,

the EEOC ever had judicial powers to order cessation of the discriminatory activities.³⁸

3. Dealing with Backlog at the EEOC³⁹

By the early 1970s, the EEOC was already becoming better known for delay and backlog than for its prowess in investigating discrimination, representing worthy claimants, or securing settlements. As of June 1972 it faced a backlog of 53,000 charges, and that number had risen to 130,000 by 1977,⁴⁰ when Eleanor Holmes Norton took over as Chair of the Commission.⁴¹ This backlog precluded effective action by the EEOC.⁴²

63. He observed that over the past five years the number of suits brought by EEOC has ranged from a low of 167 in 1996, to a high of 439 in 1999, with that number falling again in 2000. *Id.*

38. See GRAHAM, *supra* note 17, at 129-31. For a discussion of the general hostility of some to an administrative model that would have empowered the EEOC to perform a judging function, see *id.*

39. As noted earlier, persons claiming discrimination also have the option of filing with their state fair employment practices agency. See *supra* note 27 and accompanying text.

40. E. PATRICK McDERMOTT, RUTH OBAR, ANITA JOSE & MOLLIE BOWERS, AN EVALUATION OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION MEDIATION PROGRAM, at IV.B (2000), available at <http://www.eeoc.gov/mediate/report/index.html>.

41. She reports what she found:

At the EEOC . . . I found a crisis that ran so deep and had become so public that restructuring seemed to me to be the only viable solution. The Commission's burgeoning caseload and sophisticated statutory framework had outgrown the old-fashioned complaint process patterned on systems used by state and civil rights agencies The Commission's 125,000 case backlog and two-year time frame to resolve a simple complaint made a mockery of the formal administrative process, adopted by the Congress as an alternative to courts in order to speed resolutions and encourage conciliation. The original purpose to provide a way to resolve cases that was faster, less costly, more efficient and less adversarial than litigation had long since been defeated. Backlogged cases and slow processing time were so entrenched that some rights organizations openly advised complainants against filing at the EEOC.

Eleanor Holmes Norton, *Justice and Efficiency in Dispute Systems*, 5 OHIO ST. J. ON DISP. RESOL. 207, 213 (1990) (footnote omitted). She further explains that a 1976 report by the Government Accounting Office found that on average it took two years to process small individual complaints, and that some complaints took seven years. *Id.* (citing GEN. ACCOUNTING OFFICE, THE EQUAL EMPLOYMENT COMMISSION HAS MADE LIMITED PROGRESS IN ELIMINATING EMPLOYMENT DISCRIMINATION 7 (1976)).

42. See *id.* Holmes Norton reports that "[m]ost charges were closed administratively, usually because the long wait had foreclosed any enforcement action or because the complainant could not be found or no longer desired to pursue a case that was so old." *Id.* at 213-14. She further explained that "[d]espite a statutory requirement to conciliate cases, only eleven percent were settled, and a complainant had a probability of only one in thirty-three of obtaining a settlement in the year in which the case was filed." *Id.* at 214 (footnote omitted).

Unfortunately, the EEOC today continues to face many of the same problems it faced in the 1970s. Eighty-four thousand four hundred forty-two charges of discrimination were filed with the agency in fiscal year 2002.⁴³ Perhaps due in part to the fact that the relevant antidiscrimination statutes give the EEOC a fairly short period of time to investigate and attempt to conciliate charges of discrimination,⁴⁴ the agency found “reasonable cause” to believe discrimination had occurred in just 7.2% of the cases that were resolved.⁴⁵ This figure was significantly higher than it had been in some previous years.⁴⁶

Once the EEOC reaches the rare conclusion that discrimination has occurred, it attempts to “conciliate” the claim through a formal process.⁴⁷ The conciliator, an EEOC employee, attempts to secure “substantial relief” for the “charging party.”⁴⁸ Conciliation is an informal voluntary process in which offers and counteroffers are made.⁴⁹ In fiscal year 2002, just twenty-eight percent of the cases sent to conciliation were successfully resolved.⁵⁰

43. U.S. Equal Emp. Opportunity Comm’n, *All Statutes FY 1992–FY 2002*, at <http://www.eeoc.gov/stats/all.html> (last modified Apr. 28, 2003).

44. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b) (2000); Americans with Disabilities Act, 42 U.S.C. § 12117. In fiscal year 2001, the average charge processing time was 182 days. U.S. Equal Emp. Opportunity Comm’n, *Enforcement Activities*, at <http://www.eeoc.gov/enforce.html> (last visited Feb. 9, 2003).

45. U.S. Equal Emp. Opportunity Comm’n, *supra* note 43. Some may argue that this low figure reflects the weakness of the claims filed by most charging parties. See, e.g., Charles B. Craver, *The Use of Non-Judicial Procedures to Resolve Employment Discrimination Claims*, 11 KAN. J.L. & PUB. POL’Y. 141, 143 (2001) (“These data suggest that thousands of discrimination charges are filed by suspicious employees who were most likely not the victims of unlawful discrimination.”). However, my personal experience having represented plaintiffs in employment discrimination claims leads me to conclude that the low rate of success at the EEOC is attributable, in large part, to the fact that neither the charging party nor the agency has the resources necessary to do a sufficient investigation to prove that discrimination occurred. Smoking gun evidence of discrimination is rare these days, and circumstantial cases cannot be proved without an investment of time and also some good fortune.

46. U.S. Equal Emp. Opportunity Comm’n, *supra* note 43. The average percentage of “cause” findings from 1992-2001 was 4.59%, but it is also interesting that this figure ranged between 2.3% and 2.7% from fiscal year 1992 to fiscal year 1996, and then jumped significantly from fiscal year 1997-2001. *Id.*

47. U.S. Equal Emp. Opportunity Comm’n, *Definition of Terms*, at <http://www.eeoc.gov/epa/define.html> (last modified May 11, 2000).

48. *Id.*

49. U.S. Equal Emp. Opportunity Comm’n, *EEOC Investigations—What an Employer Should Know*, at <http://www.eeoc.gov/employers/investigations.html> (last modified Mar. 3, 2003).

50. U.S. Equal Emp. Opportunity Comm’n, *supra* note 43. This figure has been fairly constant over the last nine years. *Id.* It may be low, in part, because the EEOC staff may take the position that once a “cause” finding has been issued, the case should only be

In addition to the few charges that are resolved through conciliation, a number of other charges are also settled at the EEOC. In fiscal year 2002, of all charges filed with the agency, two percent of charges were successfully conciliated, 8.8% were settled, and four percent were withdrawn but with the payment of some benefits to the charging party.⁵¹ In all, \$257,700,000 were paid out to claimants who resolved their claims short of litigation,⁵² which comes to \$18,225 per settling claimant.⁵³

While the EEOC has tried over the years to use administrative streamlining to put its house in order, to date its success has been limited. Chair Eleanor Holmes Norton and her successors attempted to institute reforms in order to permit more efficient processing of EEOC charges⁵⁴ and to place greater focus on major class actions.⁵⁵ Although some of these programs have proved successful at least for a time in reducing the horrendous EEOC backlog,⁵⁶ few if any would

settled for full relief. Selmi, *supra* note 26, at 14. Needless to say, many defendants may be reluctant to pay out in a settlement the full amount that they would stand to lose in litigation.

51. U.S. Equal Emp. Opportunity Comm'n, *supra* note 43.

52. *Id.*

53. *Id.* This does not count the 4938 charges as to which EEOC found reasonable cause but for which it was not able to secure any benefits. *Id.*

54. Holmes Norton, *supra* note 41, at 214-18. Holmes Norton's reform was optimistically called "Rapid Charge Processing." *Id.* at 215. This was a three-step procedure, inserted at the beginning of the traditional process, consisting of a more extensive and professional intake interview, an informal fact-finding conference that would require the employer to appear in person with its records, and if appropriate a settlement attempt. *Id.* The goal was to sidestep in most cases the need for more extended inquiry and formal findings. See *id.*; see also McDERMOTT, OBAR, JOSE & BOWERS, *supra* note 40, at IVC.1 (describing Holmes Norton's implementation of Rapid Charge Processing). In the 1990s, again facing an enormous backlog, the EEOC implemented a new method known as Priority Charge Handling Procedures (PCHP) for streamlining its handling of complaints. See generally Igasaki, *supra* note 37, at 53 (describing the continued and overwhelming backlog problem faced by EEOC during the Clinton era). PCHP called upon intake officers to place charges into one of three categories, A, B, or C: those highly likely to result in a finding of probable cause; those with possible merit but contingent on further investigation; and those that lacked merit on their face, for example due to falling outside the jurisdiction of the EEOC or due to timeliness problems. U.S. Equal Emp. Opportunity Comm'n, *supra* note 32. This early categorization would determine the extent to which the agency would devote further resources to the claim. *Id.* For a detailed description of PCHP, see David Sherwyn, J. Bruce Tracey & Zev J. Eigen, *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 83-86 (1999).

55. Holmes Norton, *supra* note 41, at 225-26.

56. *Id.* at 225. Holmes Norton reports:

Between 1976 (when the old system was in place) and 1980, the settlement rate, the effective remedy rate, tripled from fourteen percent to forty-three percent, the average dollar benefit to complainants more than doubled from \$1400 to \$3400 and the case processing time decreased from 24 months to 140 days. Further, by

assert that the EEOC investigation and conciliation process offers a speedy, cost-effective means for resolving employment discrimination complaints.⁵⁷ Facing severe resource constraints, EEOC Directors have had to choose between systems that funnel resources to the most worthy/important cases,⁵⁸ and those that spread resources more broadly among all the charges filed at the agency.⁵⁹ Each course of action can be criticized for what it fails to accomplish.

In 1991 the EEOC began to consider whether mediation might afford a viable means, not only for streamlining EEOC processes, but also for amicably resolving those many disputes that reflected “poor management-employee communication and/or relations.”⁶⁰ The EEOC

the fall of 1981, the Backlog Charge Processing System had reduced the backlog by more than 100,000 cases.

Id. (footnote omitted); see also MCDERMOTT, OBAR, JOSE & BOWERS, *supra* note 40, at IV.C.1 (noting that the EEOC substantially reduced its case backlog during the tenure of Holmes Norton, even though EEOC’s jurisdiction was significantly expanded during this period).

57. For one recent recounting of the ongoing “backlog” problem at the EEOC, see MCDERMOTT, OBAR, JOSE & BOWERS, *supra* note 40, at IV.B, IV.C (observing that “[b]y the 1970s, it was clear that the EEOC was overwhelmed with charges,” and explaining specifically that a backlog of 53,000 charges existed in June 1972, rose to 130,000 in April 1977, fluctuated at levels including 96,945 at the end of Fiscal Year 1994, and has now gradually been reduced). As of fiscal year 2000 the backlog stood at a seventeen year low of “just” 34,297. U.S. Equal Emp. Opportunity Comm’n, *supra* note 32.

58. The Holmes Norton “Rapid Charge Processing” system and the Clinton Administration’s Priority Charge Handling Procedures are examples of such programs. See *supra* note 54 and accompanying text.

59. See MCDERMOTT, OBAR, JOSE & BOWERS, *supra* note 40, at IV.C. Stating that it was improper for the EEOC to slight small cases in favor of large, EEOC Chairman Clarence Thomas instituted a “full investigation policy.” *Id.* at IV.C.2. Inevitably, particularly combined with an expansion of EEOC jurisdiction due to passage of the Americans with Disabilities Act, the Thomas policy resulted in more backlog and in the bringing of fewer large class actions. *Id.* at IV.C.2-IV.C.3. By 1990 the backlog was 41,987. *Id.* By 1994 the average time for resolving a charge had risen to 328 days, and the backlog had risen to 96,945. *Id.* at IV.C.2-IV.C.4. For a discussion of the problem of EEOC backlog during this period, see Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1452-54 (1996) (“The vast majority of claims brought before the EEOC are not resolved by the agency, and the vast majority of potential plaintiffs cannot afford to bring suit in federal court.” (footnote omitted)). See also COMM’N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEP’T OF LABOR, REPORT AND RECOMMENDATIONS 25 (1994) [hereinafter DUNLOP COMMISSION REPORT AND RECOMMENDATIONS] (estimating that for each dollar transferred to a deserving claimant in litigation, an equal amount is spent on attorney fees and costs, and further estimating that employers spend in excess of those direct costs in an attempt to avoid litigation); COMM’N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEP’T OF LABOR, FACT FINDING REPORT 111-13 (1994).

60. CRAIG A. McEWEN, AN EVALUATION OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION’S PILOT MEDIATION PROGRAM 1 (1994) (on file with author) (citing U.S. EQUAL EMP. OPPORTUNITY COMM’N, RFP 92-14, at 4); see also MCDERMOTT, OBAR, JOSE & BOWERS, *supra* note 40, at V.C (analyzing a survey done regarding participants’ satisfaction with

suggested that because mediation, unlike the traditional investigative process, could focus not only on the legal aspects of discrimination, but also on more personal problems and management issues, it might prove more successful in bringing about early and amicable resolutions.⁶¹ When a study of four mediation pilot projects showed high satisfaction among participants,⁶² a settlement rate exceeding fifty percent,⁶³ and an average time to complete a mediation of just sixty-seven days,⁶⁴ in 1994, the EEOC decided to implement mediation programs in all of its offices.⁶⁵ While the nature of the program varied somewhat from office to office, it typically relied on a combination of EEOC employees, paid outside consultants, and volunteers to serve as mediators.⁶⁶

In describing the purpose of the mediation program to the public and to Congress, the EEOC focused particularly on the purported speed and efficiency of the process.⁶⁷ Thus, EEOC Chair Ida Castro explained in a press release: "Voluntary mediation not only furthers EEOC's noble mission of eradicating employment discrimination, but also benefits employers and charging parties by resolving disputes

mediation program); Matt A. Mayer, *The Use of Mediation in Employment Discrimination Cases*, 1999 J. DISP. RESOL. 153; Matthew A. Swendiman, Note, *The EEOC Mediation Program: Panacea or Panicked Reaction?*, 16 OHIO ST. J. ON DISP. RESOL. 391, 407 (2001) (arguing that funding for the new mediation program should be increased); U.S. Equal Emp. Opportunity Comm'n, *History of the EEOC Mediation Program*, at <http://www.eeoc.gov/mediate/history.html> (last modified Nov. 19, 2003) (noting implementation of pilot mediation programs in 1991).

61. MCEWEN, *supra* note 60, at 1-2 (citing U.S. EQUAL EMP. OPPORTUNITY COMM'N, RFP 92-14).

62. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 60; *see also* MCEWEN, *supra* note 60, at 66 tbl. 8.1 (noting that sixty-six percent of charging parties and seventy-two percent of responding parties stated they were satisfied with the mediation outcomes; eighty-four percent of charging parties and eighty-three percent of responding parties stated they would try mediation again if they had a similar problem).

63. MCEWEN, *supra* note 60, at 41, 52 (noting that fifty-two percent of mediated cases resulted in settlements, of which over half resulted in financial payments ranging from \$25 to \$22,000).

64. *Id.* at 73 (noting that the average time to investigate EEOC charges as of Fiscal Year 1993 was roughly 300 days).

65. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 60. The report found that the "cost effectiveness" of mediation will depend on how a mediation program is ultimately designed and integrated into the EEOC process." MCEWEN, *supra* note 60, at 78. It concluded that the pilot "generally appears to have achieved its objective of providing expeditious opportunities for parties to discrimination charges to talk and to examine settlement possibilities." *Id.* at 84.

66. McDERMOTT, OBAR, JOSE & BOWERS, *supra* note 40, at IV.D.4.

67. *See* Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Launches Major Expansion of Its Mediation Program (Feb. 11, 1999), at <http://www.eeoc.gov/press/2-11-99.html> [hereinafter EEOC Press Release].

quickly and to the satisfaction of both parties . . . It's fair, less costly and everybody wins!"⁶⁸ Vice President Gore, in videotaped remarks that were also included in the press release, similarly stated: "Mediation can make a critical difference for everyone involved. . . . By resolving disputes faster and easier, we can focus on the truly bad actors—and fight the worst cases of workplace discrimination with all the resources at our disposal."⁶⁹ Others have also touted the new program for allowing employers and employees to resolve their disputes more creatively.⁷⁰

The EEOC reports that the mediation program has been highly successful and popular.⁷¹ With respect to settlement rates, roughly sixty-five percent of mediated cases have been resolved through mediation.⁷² The average amount of time needed to reach a settlement also compares quite favorably to the EEOC administrative process.⁷³ As to satisfaction rates, one study found that over ninety percent of both complainants and employers would be willing to participate in such mediation again.⁷⁴ Many lawyers for employees and employers

68. *Id.* (internal citations omitted); see also Nancy Montwieler, *EEOC's New Nationwide Mediation Plan Offers Option of Informal Settlements*, Daily Lab. Rep. (BNA) No. 29, at C-1 (Feb. 12, 1999) (quoting EEOC Chair Ida Castro as stating: "Mediation is a fair and efficient voluntary mechanism to resolve employee/employer discrimination issues to the satisfaction of both parties," and explaining that "[d]isputes can be resolved 'quickly, fairly, and indeed quite simply'").

69. EEOC Press Release, *supra* note 68 (internal quotations omitted).

70. See, e.g., Julie Harders, *Too Good to Last?: Budget Cuts Force the EEOC to Terminate Contract Mediators from Its New, Highly Touted Program*, A.B.A. J., Apr. 2000, at 30, 30 (quoting multiple employee lawyers as explaining that mediation can help both parties resolve disputes creatively by ways, such as apologies and reinstatement, that go beyond money and potentially help reduce psychological damage); Montwieler, *supra* note 68, at C-1 (paraphrasing management lawyer as stating that "[t]he mediation process frequently can obtain results that could not be reached through the courts . . . [giving the example that] an employer could agree to change an employment record or to help a former worker find another job").

71. Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Mediation Program Scores High Marks in Major Survey of Participants (Sept. 26, 2000), at <http://www.eeoc.gov/press/9-26-00.html>.

72. See U.S. Equal Emp. Opportunity Comm'n, *EEOC Accomplishments Report for Fiscal Year 1999*, at <http://www.eeoc.gov/accomplishments-99.html> (last visited June 10, 2002); U.S. Equal Emp. Opportunity Comm'n, *EEOC Accomplishments Report for Fiscal Year 2000*, at <http://www.eeoc.gov/accomplishments-00.html> (last visited June 10, 2002).

73. See, e.g., Igasaki, *supra* note 37, at 66. In Fiscal Year 2000 the average time it took to mediate a case was ninety-six days. *Id.*; see also U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 32 (indicating that the average time for mediation in 2000 was ninety-six days, while the average charge processing time was 216 days).

74. MCDERMOTT, OBAR, JOSE & BOWERS, *supra* note 40, at VI.D (noting that specifically, ninety-one of the charging parties, and ninety-six percent of the respondents expressed this view). This overall satisfaction reflected a great deal of satisfaction with the procedural fairness of the process. Eighty-nine percent of charging parties and ninety-two

have endorsed the mediation program enthusiastically, explaining that mediation can bring benefits not available in litigation.⁷⁵

On the other hand, other data collected by the EEOC showed that while more than eighty percent of invited claimants had agreed to participate in mediation,⁷⁶ only thirty-six percent of employers had accepted the invitation to mediate.⁷⁷ This is particularly noteworthy in that the EEOC was covering the cost of the mediator.⁷⁸ Some employers complained that they “didn’t understand the benefits of EEOC mediation.”⁷⁹

In addition, some civil rights advocates also expressed concerns about the mediation program, worrying for example that it might result in inadequate protection of civil rights.⁸⁰ More than fifty percent of cases resolved through mediation settled without any monetary award

percent of respondents stated that the procedures used by the mediator were fair. *Id.* at VI.B.1.b. Participants exhibited somewhat less satisfaction with the substantive results. Fifty-five percent of employees and sixty-three percent of employers stated that they were satisfied with the results of the mediation. *Id.* at VI.B.2. It should be noted that these statistics are based on the self-selected sample of those charging parties and respondents who were willing to participate in mediation voluntarily, in the first place. *Id.*

75. See Harders, *supra* note 70, at 30 (discussing enthusiastic reactions from employee attorneys); Nancy Montwieler, *EEOC: EEOC’s Voluntary Mediation Program Is Now Integral Tool in Enforcement Arsenal*, 188 Daily Lab. Rep. (BNA) No. 188, at A-1 (Sept. 29, 1999) (discussing enthusiastic reactions from employer attorneys).

76. See, e.g., Susan J. McGolrick, *EEOC: Agency Needs More Employers in Mediation, Full Funding of Program, Chairwoman Says*, Daily Lab. Rep. (BNA) No. 99, at A-8 (May 22, 2000); Nancy Montwieler, *EEOC: More User-Friendly Commission Faces Tighter Budget Constraints*, Daily Lab. Rep. (BNA) No. 246, at C-1 (Dec. 23, 1999); Montwieler, *supra* note 75, at A-1 (charging that parties accepted mediation at a rate of eighty-one percent as of October 1999).

77. See, e.g., McGolrick, *supra* note 76; Montwieler, *supra* note 76, at C-1.

78. As of September 1999, the EEOC reported that just thirty-six percent of employers agreed to engage in the voluntary mediation, though this figure was up from twenty-five percent just a few months before. Montwieler, *supra* note 75, at A-1. This number is similar to the forty-three percent found by Professor McEwen, in his evaluation of the pilot study. McEWEN, *supra* note 60, at 28.

79. Darryl Van Duch, *EEOC Looks to More Mediation*, NAT’L L.J., Mar. 15, 1999, at B5 (internal quotations omitted).

80. See, e.g., Fawn H. Johnson, *Civil Rights Advocates Express Concerns About EEOC’s New Mediation Program*, U.S.L.W., at 2456, 2456 (Feb. 9, 1999) (stating that while advocates noted the significant potential benefits of mediation, they also cautioned the EEOC to ensure that power imbalances did not permit employers to take advantage of employees); Montwieler, *supra* note 68, at C-1 (noting that “civil rights groups have voiced concern that the rights of individuals might be compromised or inadequately protected”); see also Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U. ILL. L. REV. 583, 606 (noting the argument that women, minorities, and the economically disadvantaged may suffer from power imbalances in mediation) (citing Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1387-99 (1985)).

to the claimant.⁸¹ Given that 7438 charges received were resolved through mediation in fiscal year 2000, an average of \$14,574 was paid in each mediated case.⁸² However, another \$137.3 million was divided among just 6292 charging parties who settled their cases without mediation, for an average of \$21,820 per charging party, meaning that mediating complainants recovered less monetarily than complainants who chose to settle without mediation.⁸³

Although the EEOC has praised its mediation program, its economic viability remains unclear. Do the additional benefits that the program brings justify the costs of paying for the mediators? When faced with a budget shortfall, EEOC Chair Castro determined that the external mediator budget had to be cut.⁸⁴ Clearly the mediation program succeeded in settling cases and bringing in money for charging parties.⁸⁵ However, Congress has not yet demonstrated its willingness to support the program.⁸⁶

81. McGolrick, *supra* note 76.

82. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 32 (noting that \$108.4 million in monetary benefits were obtained through mediation).

83. *See id.* In fiscal year 2000, \$245.7 million were obtained for charging parties through prelitigation administrative procedures. Of that, \$108.4 million was awarded to charging parties who underwent mediation, leaving \$137.3 million for parties settling without mediation. *Id.*

84. Noting that the budget increase was not sufficient to cover cost-of-living increases for EEOC employees, Castro stated that she had little choice but to cut the external mediation program. *See* Montwieler, *supra* note 76, at C-1 (calling contract mediators "one of the few areas of flexibility"); Swendiman, *supra* note 60, at 405; Lisa I. Fried, *EEOC Mediation: A Budget Crunch May Cripple a New Program*, N.Y.L.J., Feb. 3, 2000, at 5 (discussing the prospect that EEOC might cut paid mediation contractors to make up for serious the budget shortfall). L.M. Sixel, *High Costs Force EEOC to Cut Back Mediation Project*, HOUS. CHRON., Feb. 15, 2000, at 1C (discussing the cancellation of the EEOC's external mediation program due to budget constraints). One report stated that this cut was causing serious delays in the provision of mediation, at least in some offices. Harders, *supra* note 70, at 30 (stating that cuts of eighty-four contract mediators in the New York office had caused significant problems for the program).

85. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 32. As of fiscal year 2000, the EEOC mediation program was responsible for a substantial portion of the benefits obtained by the agency on behalf of claimants. *See id.* Of the \$254.7 million obtained by the agency for victims of discrimination through prelitigation administrative enforcement, almost half, \$108.4 million, was attributable to mediation. *Id.*

86. Instead, according to a March 24, 2003, press release, the EEOC has recently established a new mediation pilot program whereby charges are "referred back" to the respondent company's own internal dispute resolution program. *See* Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Launches New Mediation Pilot Program (Mar. 24, 2003), at <http://www.eeoc.gov/press/3-24-03.html>. Under this program charging parties elect to have their charges held in suspense for sixty days while their charges are handled through the company program. *Id.*

4. Litigation of Employment Discrimination Claims

The litigation portion of the American enforcement scheme for employment discrimination has proved highly successful on occasion for some kinds of claims. Individual plaintiffs, classes of plaintiffs, and the EEOC have sometimes secured large victories that have not only provided benefits for individual plaintiffs, but also set new precedents and educated the public as to the nature of antidiscrimination law.⁸⁷

At the same time, it is generally agreed that the litigation portion of the American procedures for handling employment discrimination claims generally does not work well for many prospective plaintiffs or defendants.⁸⁸ From the plaintiffs' perspective, there are multiple problems. First, because the law of employment discrimination is complex, a plaintiff cannot hope to succeed without a good attorney.⁸⁹ Yet, attorneys are expensive. While the passage of the Civil Rights Act of 1991, making available punitive and compensatory damages likely made it easier for plaintiffs to secure a competent attorney on a contingent fee basis, it remains true that plaintiffs who did not earn a lot or cannot show clear monetary losses may not be able to secure legal representation.⁹⁰ Second, the formal legal system is quite slow. For those plaintiffs who need quick relief, litigation is a frustrating process.⁹¹ Third, the litigation system does not offer good solutions for

87. For a more cynical view of the success of such claims, see Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249 (2003) (arguing that as settlements of major discrimination class actions cannot be shown to have had a major impact on companies' profits nor to have caused significant internal reforms, we ought to increase awards of damages and increase monitoring of such settlements to improve the success of such litigation).

88. See Sherwyn, Tracey & Eigen, *supra* note 54, at 98. Commentators David Sherwyn, J. Bruce Tracey, and Zev J. Eigen take a highly critical position, arguing that the existing system is bad for good actors (employees who have been discriminated against and employers who have not discriminated) but good for bad actors (employees with frivolous claims and employers who have actually discriminated). *Id.*

89. *Id.* at 89.

90. See McGinley, *supra* note 59, at 1454 ("The financial barriers are insurmountable for all but the wealthiest of litigants."); see also DUNLOP COMMISSION REPORT AND RECOMMENDATIONS, *supra* note 59, at 25-26; Sherwyn, Tracey & Eigen, *supra* note 54, at 97 ("[L]ow wage-earning plaintiffs with potentially viable, but not egregious, claims may remain without a remedy.").

91. See McGinley, *supra* note 59, at 1454 ("Many cases take three or four years, or more, to come to trial."); Sherwyn, Tracey & Eigen, *supra* note 54, at 97-98 ("Federal litigation is a heart-wrenching marathon that no one enjoys and many people simply cannot tolerate. Litigation, which on the average takes two-and-a-half years to resolve, can last for more than ten years." (footnote omitted)).

plaintiffs' nonlegal needs and may be detrimental to those interests. Specifically, litigation usually will not offer plaintiffs a good means to ease the emotional wounds they suffered at work, nor an opportunity to obtain or make apologies. Moreover, the public aspect of litigation may also be detrimental to plaintiffs' emotional wellbeing and future job prospects.⁹² Thus, the financial and emotional costs of the litigation may make the suit not viable. Fourth, even when represented, plaintiffs do not tend to do very well when they litigate employment discrimination claims.⁹³ Absent "smoking gun" evidence, which is rare, the cases are very difficult to prove.⁹⁴ U.S. courts have become increasingly willing to throw out plaintiffs' cases on summary judgment, thereby denying them the opportunity to make a presentation in court.⁹⁵

From the employer's perspective, the litigation system is also quite problematic. First, it is very time consuming and expensive, so that even those employers who believe they have valid defenses to claims of discrimination find they are paying a great deal in legal fees.⁹⁶ Employers are frustrated at having to fight the charge of discrimination once at the EEOC, and then possibly again in litigation.⁹⁷ Second, employers see the litigation system as a negative lottery. Although they usually defeat employment discrimination claims, when they lose, they can lose big.⁹⁸ Third, the litigation system

92. Sherwyn, Tracey & Eigen, *supra* note 54, at 98.

93. See McGinley, *supra* note 59, at 1450-52.

94. See *id.* at 1451; see also Burris, Moss, Ullman & Johnsen, *supra* note 27, at 249-51 (stating that of the 760 disability discrimination claims in which courts made "final merits" decisions between 1992 and 1997, the employer prevailed in ninety-two percent, but also recognizing that numerous other cases are settled, presumably providing some benefits to plaintiffs). If one looks at 1992-98 Bureau of Justice Statistics data describing all employment discrimination complaints, plaintiffs prevailed in thirty-five percent of the cases taken to trial in 1998. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, CIVIL RIGHTS COMPLAINTS IN U.S. DISTRICT COURTS, 1990-98, at 9 tbl. 9 (2000).

95. See 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, 205-06 (1993); see also Sherwyn, Tracey & Eigen, *supra* note 54, at 94 ("The right to a trial in federal court is, in reality, limited to high wage earners and those who have strong evidence of clear violations of the law.").

96. Sherwyn, Tracey & Eigen, *supra* note 54, at 81 ("If the case is not resolved at the agency level and, instead, is adjudicated in court, the employer's attorneys' fees will almost always be in excess of \$50,000 and could exceed \$500,000, regardless of the merits of the case." (emphasis omitted)).

97. See *id.* (detailing costs); see also Sherwyn, *supra* note 33, at 18-19 (observing that employers fear juries and believe that they may impose large awards on weak cases).

98. See Sherwyn, Tracey & Eigen, *supra* note 54, at 80 (observing that plaintiffs and their attorneys may turn down reasonable settlement offers "in the hopes of *winning the employment discrimination lottery*—an exorbitant jury award").

may well hurt rather than help employers' efforts to maintain good relationships with their employees and maintain good company morale.⁹⁹ Fourth, even meritless accusations may tarnish an employer's reputation with its own employees and the public.¹⁰⁰

Finally, from a societal perspective, the litigation system has a mixed record. While it has secured some key victories that have helped make precedent and educate the public as to discrimination, these victories have come at a high cost. Although employment discrimination cases now make up almost ten percent of federal courts' dockets,¹⁰¹ thereby imposing high costs on the courts, plaintiffs' rate of success in these cases is not high in either percentage or dollar terms.¹⁰²

5. Employers' Substitution of Binding Arbitration for Litigation

U.S. employers, long frustrated by the high cost of defending workplace discrimination claims, have begun to use contracts of adhesion to require employees to resolve employment discrimination disputes through private binding arbitration rather than in court.¹⁰³ While employers have long offered their employees the option to report and perhaps resolve their complaints through internal complaint mechanisms,¹⁰⁴ in the 1990s employers increasingly began to take the further step of prohibiting their employees from filing employment discrimination lawsuits against them in court.¹⁰⁵ Employers accomplished this by requiring their employees to agree to contracts

99. See *id.* at 81 (explaining that employer costs of defending employment discrimination claims include the loss of productivity of other employees and adverse publicity).

100. *Id.* at 98.

101. STATISTICS DIV., ADMIN. OFF. OF THE U.S. CTS., STATISTICAL TABLES FOR THE FEDERAL JUDICIARY 28-29 tbl. C-2 (2001) (noting that from July 1, 2000, to June 30, 2001, there were 21,121 civil rights employment cases out of the total of 253,354 cases filed in federal courts); see also Craver, *supra* note 45, at 141 (detailing the number of cases filed in 2000).

102. Craver, *supra* note 45, at 141 (citing *Employment Bias Cases in Federal Courts Almost Tripled in Previous Decade, DOJ Says*, Daily Lab. Rep. (BNA) No. 13, at E-5 (Jan. 20, 2000)). Professor Craver reports that "[p]laintiffs prevail in less than one-third of the employment discrimination cases culminating in verdicts, generating median awards of \$137,000 in 1998." *Id.*

103. Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1036 (1996).

104. See, e.g., Craver, *supra* note 45, at 144-45.

105. See *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 296 n.11 (2002). In 1997 the American Arbitration Association estimated that "more than 3.5 million employees are covered" by arbitration agreements designating [AAA] to administer arbitration proceedings." *Id.* (quoting *Voluntary Arbitration in Worker Disputes Endorsed by 2 Groups*, WALL ST. J., June 20, 1997, at B2).

providing that the employees would resolve any complaints of employment discrimination through binding arbitration.¹⁰⁶

The binding arbitration imposed by U.S. employers requires employees to bring their complaints of discrimination to a private arbitrator, or sometimes a panel of three private arbitrators.¹⁰⁷ These arbitrators are not judges or government employees, and need not be attorneys.¹⁰⁸ The arbitration rules or the arbitrators determine how

106. For a description of mandatory arbitration plans imposed by some employers, see JOHN T. DUNLOP & ARNOLD M. ZACK, *MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES* 73-91 (1997). See also Craver, *supra* note 45, at 157 (“Following the *Gilmer* decision, many nonunion companies unilaterally created arbitration programs designed to prevent employees from litigating employment discrimination claims in federal courts.”); David E. Feller, *Putting Gilmer Where It Belongs: The FAA’s Labor Exemption*, 18 HOFSTRA LAB. & EMP. L.J. 253, 253 (2000) (noting estimates that eighty-five percent of the mandatory arbitration agreements in employment contracts have been introduced since the *Gilmer* decision); Sherwyn, *supra* note 33, at 21 (defending the imposition of mandatory arbitration); Stone, *supra* note 103, at 1037 (stating “these [now prevalent] *Gilmer* pre-hire arbitration agreements discourage workers from asserting statutory rights. They operate like the early nineteenth century ‘yellow dog contracts’—contracts in which employees had to promise not to join a union in order to get a job.”). Note that when many employers impose mandatory arbitration they may also offer other measures, such as mediation, as a first step. However, the last step in the process is arbitration, and not litigation.

107. The specific nature of the arbitration depends entirely on the terms of the contractual clause drafted by the employer, and is not restricted by statute. The primary limit on employers’ potentially drafting the clause to gain an extreme advantage over employees is that the United States Supreme Court has stated that arbitration should merely be a change of forum, and not cause an elimination of substantive rights. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (stating that the Court will compel arbitration of federal statutory claims only “[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, [such that] the statute will continue to serve both its remedial and deterrent function” (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985))).

108. Often the arbitration clause requires the employee to file the claim with a particular arbitral organization, such as the American Arbitration Association. This organization then assigns the arbitrator or arbitrators, usually with the opportunity for input from both employer and employee. Many commentators have pointed out that the employer, as a “repeat player” with an ongoing relationship with the arbitration provider, is likely to be in a much better position than the employee to select arbitrators who are predisposed to rule on behalf of the company. See, e.g., Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 346 (1997) (citing the repeat player phenomenon as a reason that “there is inherent in the institutions of private dispute resolution an endemic disinclination to enforce legal rights rigorously”); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 106-07 (rejecting the Supreme Court’s “presumption and its corollary—that arbitration is simply a procedurally fair (i.e., outcome-neutral) substitute for litigation—in every challenge to arbitration of statutory claims” because substantive protections under statutes are determined in arbitration and private arbitration favors corporate defendants (footnote omitted)); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 684-85 (1996); Cliff Palefsky, *Only a Start: ADR Provider Ethics Principles Don’t Go Far Enough*, DISP. RESOL. MAG., Spring 2001, at 18, 20-23 (observing the inability of the parties

formal or informal the arbitration proceeding will be, but typically the employee will have access to much less discovery than she would have in court.¹⁰⁹ Although the arbitrator may sometimes be instructed to make a ruling that complies with the law, the parties have quite limited recourse if the arbitrator strays from the law, as it is extremely difficult to vacate arbitral awards.¹¹⁰ Arbitral awards issued in cases involving individual claims of discrimination, like commercial arbitration awards generally, typically contain little or no reasoning and are not published.¹¹¹ Instead, the system is designed to provide a private ruling to guide the conduct of the parties in the particular case.¹¹²

The legitimacy of this approach has created significant controversy. Attackers of the process, including this author, have contended that it is unfair and unjust for employers to require their

and the free market system to regulate arbitrators' neutrality and ethics because of satisfied employers' ability to deliver large volume of business to the arbitrators).

109. While arbitral rules often permit arbitrators to allow interrogatories, document requests, or depositions in particular instances, it is generally recognized that far less discovery is available through arbitration than through litigation in the United States. Many commentators say that this is one of the advantages of arbitration, in that it makes the process more economical. *See, e.g.,* Craver, *supra* note 45, at 158-60 (arguing that because arbitration has less of the discovery and protracted delays associated with civil dockets, it may be fairer for employees as well as employers, but also suggesting that "minimal discovery rules" should be included in arbitration rules in order to be fair); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 570 (2001) (noting that "leading ADR service providers such as the American Arbitration Association and JAMS" provide rules requiring a "reasonable opportunity for discovery"). But, discovery limits may make it harder for plaintiffs to recover. *See* Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 40-41 (1998) (suggesting a protocol for arbitration with no limitations on discovery in order to provide employees access to the evidence required under the applicable burden of proof which is otherwise difficult, if not impossible, for the employee to obtain).

110. U.S. courts have frequently stated that arbitral awards are not reversible for mere errors of law. *See* *Gingiss Int'l, Inc. v. Bormet*, 58 F.3d 328, 333 (7th Cir. 1995) ("Factual or legal errors by arbitrators—even clear or gross errors—do not authorize courts to annul arbitral awards." (quoting *Windell v. Wolf*, 43 F.3d 1150, 1151 (7th Cir. 1994))). In the employment discrimination context, employees have been frustrated to find that it may well not be possible to vacate arbitral awards, even though the arbitrator had no adequate understanding of discrimination law, or of the law governing the award of attorney fees to prevailing plaintiffs. *See, e.g.,* *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 822-24 (2d Cir. 1997) (declining to reverse arbitrators' refusal to grant attorneys' fees to prevailing plaintiff in age discrimination claim, even though such fees are mandated by federal statute).

111. *See* 1 IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 3:13 (1999). By contrast, arbitrators who hear disputes brought in the collective bargaining context do typically issue reasoned awards. ALAN SCOTT RAU, EDWARD F. SHERMAN & SCOTT R. PEPPET, *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* 611-13 (3d ed. 2002). These awards are also often published. *Id.*

112. 1 MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 111, § 3:13-14.

employees or job applicants to be bound by signed or even unsigned small print contracts that eliminate their right to sue.¹¹³ Such critics urge that mandatory arbitration also denies complainants rights that they would otherwise have to obtain significant discovery, to proceed by class action, to obtain public rulings that would have precedential value for others, or to appeal unfavorable rulings.¹¹⁴ In addition such mandatory arbitration may impose high costs on complainants, require them to travel to distant locales, deny them remedies that would have been available in court, or shorten statutes of limitation.¹¹⁵ On the other hand, defenders of the process assert that it allows employers and employees to agree to a form of dispute resolution that is likely to be quicker, cheaper, more private, and more expert than public court or administrative alternatives.¹¹⁶

Although the United States Supreme Court initially refused to allow employers to deny unionized employees the opportunity to

113. See, e.g., Carrington & Haagen, *supra* note 108, at 334-39; Feller, *supra* note 106, at 253-55; Maltby, *supra* note 109, at 37 (asserting that requiring mandatory arbitration agreements as a condition of employment violates one of Americans' most fundamental rights, the right to a jury trial); Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 396 (1999) (arguing that permitting employers to mandate that employees resolve employment discrimination claims through binding arbitration rather than through litigation is inconsistent with the public policies served by those laws); Sternlight, *supra* note 108, at 676-77; Stone, *supra* note 103, at 1033 ("Plainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts." (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 42 (1991) (Stevens, J., dissenting))).

114. See, e.g., Carrington & Haagen, *supra* note 108, at 401 (worrying that Supreme Court's support for mandatory binding arbitration will allow "birds of prey" to "sup on workers, consumers, shippers, passengers, and franchisees"); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 5-6 (2000) (expressing concern that companies may use arbitration clauses as a tool to eliminate class actions).

115. Sternlight, *supra* note 108, at 685-86.

116. Craver, *supra* note 45, at 158 ("Fair arbitral procedures can provide a more expeditious and less expensive alternative that may benefit workers more than judicial proceedings."); Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1349 (1997) (stating that arbitration of employment disputes "offers the promise of a less expensive, more expeditious, less draining and divisive process, and yet still effective remedy"); Sherwyn, Tracey & Eigen, *supra* note 54, at 100 ("[D]espite ... concerns, arbitration offers a marked improvement over the existing adjudication process."); see also McGinley, *supra* note 59, at 1509-24 (urging adoption of a new comprehensive federal employment law that would prohibit unjust dismissal but would require employees to vindicate their rights through binding arbitration rather than through litigation).

pursue employment discrimination claims in court,¹¹⁷ in recent years the Court has repeatedly ruled that the practice of so-called “mandatory” arbitration can be permissible in the individual employment context. First, in 1991, in *Gilmer v. Interstate/Johnson Lane Corp.*, the Court held that an employee could be required to arbitrate a claim for violation of the Age Discrimination in Employment Act.¹¹⁸ Then, ten years later, in *Circuit City Stores, Inc. v. Adams*, the Supreme Court cemented this ruling, holding that most employment arbitration is covered by the Federal Arbitration Act.¹¹⁹ The applicability of this federal act means that courts are required to enforce arbitration agreements and that states cannot broadly invalidate such agreements.¹²⁰ It is expected that this decision will inspire more employers to require their employees to resolve their claims through private binding arbitration, rather than through public litigation.

At the same time, individual clauses that are particularly egregious are sometimes struck down by the courts. The Supreme Court has made clear that when an arbitration clause is drafted to prevent claimants from vindicating their rights under federal law, it will not be enforceable.¹²¹ Thus, courts may strike clauses that impose

117. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974) (stating that “the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices”).

118. 500 U.S. 20, 23 (1991). Although *Gilmer* did involve a claim brought by an employee, the Court was careful to explain that arbitration was not imposed in an employment contract, but rather in a side agreement that the employee had signed in order to participate as a broker in a particular stock exchange. *Id.* This distinction was important, as some commentators argue that the Federal Arbitration Act, the statute requiring courts to enforce binding arbitration agreements, does not apply to employment contracts. See Matthew W. Finkin, *Employment Contracts Under the FAA—Reconsidered*, 48 LAB. L.J. 329, 330 (1997); Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary’s Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259, 262.

119. 532 U.S. 105, 109 (2001). The Court’s closely split decision turned on statutory interpretation of section 1 of the Federal Arbitration Act. See *id.* (discussing the circuit court split regarding whether the section 1 exclusion applies to all employees, or merely to those such as truckers involved in the transportation of goods across state lines).

120. There are situations in which courts will not compel arbitration, such as where there is no actual agreement, or where the agreement is unconscionable or denies remedies provided for under relevant federal laws. See *infra* note 124 and accompanying text.

121. *Gilmer*, 500 U.S. at 28. The Supreme Court has frequently stated that it will compel arbitration of federal statutory claims only “[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, [such that] the statute will continue to serve both its remedial and deterrent function.” *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)); see also *id.* at 26 (recognizing that in agreeing to arbitration “a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum” (quoting *Mitsubishi*, 473 U.S. at 628)).

excessive fees¹²² or prevent plaintiffs from recovering the relief to which they would ordinarily be entitled.¹²³ Courts also use contractual doctrines such as unconscionability to strike abusive clauses.¹²⁴

Although private employers can prevent their employees from directly litigating employment discrimination claims, they cannot prevent the EEOC from bringing public litigation on those employees' behalf.¹²⁵ In *EEOC v. Waffle House, Inc.*, the Supreme Court determined that an arbitration agreement entered between an employee and employer cannot be used to preclude the EEOC from seeking damages as well as injunctive relief on that employee's behalf.¹²⁶ The Court emphasized that when the agency chooses, in a very small number of cases,¹²⁷ to bring an enforcement action in court, it is acting

122. See, e.g., *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1234-35 (10th Cir. 1999) (denying an employer's motion to compel arbitration of claims under Title VII, ADA, and the ADEA where the employee was required to pay half of arbitrator's fee, because such a requirement denies employee an effective and accessible alternative forum to litigation).

123. See, e.g., *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1060 (11th Cir. 1998) (refusing to compel arbitration of Title VII claims when the clause did not clearly cover non-contractual claims and the arbitrator was only permitted to award contract damages).

124. See, e.g., *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 894 (9th Cir. 2002), cert. denied, 535 U.S. 112 (2002) (finding an arbitration agreement in an employment contract unconscionable, in part, due to the limitation of remedies of back pay to one year, front pay to two years, and punitive damages to greater of the amount of back pay and front pay awarded or \$5000); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 674 (Cal. 2000) (holding unconscionable a non-mutual arbitration clause that prohibited employees from gaining full recovery of damages on their statutory or common law claims); see also *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 935 (4th Cir. 1999) (ordering rescission of arbitration agreement on ground that employer had breached agreement by drafting unfair arbitration rules).

125. See *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295 (2002).

126. *Id.* The United States Court of Appeals for the Fourth Circuit had previously held that in light of the strong pro-arbitration policy of the FAA, the EEOC should only be permitted to seek injunctive relief and not damages in a case in which the employee had agreed to arbitration. *EEOC v. Waffle House, Inc.*, 193 F.3d 805, 812 (4th Cir. 1999), rev'd, 534 U.S. at 295. Rejecting this approach the Supreme Court explained that employees do not have the authority to waive the procedural rights of the EEOC. *Waffle House*, 534 U.S. at 294. As the Court explained:

No one asserts that the EEOC is a party to the contract, or that it agreed to arbitrate its claims. It goes without saying that a contract cannot bind a nonparty. Accordingly, the proarbitration policy goals of the FAA do not require the agency to relinquish its statutory authority if it has not agreed to do so.

Id.

127. The Court emphasized that "[a]lthough the EEOC found reasonable cause in 8,248 charges, it only filed 291 lawsuits." *Id.* at 290 n.7. More than 80,000 charges of discrimination are filed in a typical year. See U.S. Equal Emp. Opportunity Comm'n, *Enforcement Statistics and Litigation*, at <http://www.eeoc.gov/stats/enforcement.html> (last modified Mar. 8, 2004).

not merely to provide relief for the employee but “to vindicate a public interest.”¹²⁸ Thus, “while punitive damages benefit the individual employee, they also serve an obvious public function in deterring future violations.”¹²⁹ Therefore, recognizing that limiting the EEOC’s ability to seek full relief would interfere with the public interest, the Court held that a private agreement could not limit the EEOC’s powers.¹³⁰

In short, the United States retains a multitiered procedural system. Some employees file charges of discrimination with the EEOC; a much smaller number file their own private discrimination cases in court; an increasing number of employees can file claims of discrimination only in private arbitration proceedings; some discrimination claims are resolved through mediation; and a very small number of employees are protected in public suits brought on their behalf by the EEOC. The current U.S. system has few if any advocates. Instead, it is subject to harsh criticism from all sides for its inability to provide just solutions, its high cost, slow speed, failure to adequately reward worthy complainants, and its subjection of innocent defendants to expensive and lengthy processes.

B. Great Britain

1. A System of Tribunals

Under Great Britain’s first antidiscrimination law, the Race Relations Act of 1968, complainants had no right to file claims on their own behalf. Instead, that Act required complainants to file their claims with a government agency, the Race Relations Board.¹³¹ The Race Relations Board would try to conciliate the claim and, only if that effort failed, could initiate civil legal proceedings on behalf of the

128. *Waffle House*, 534 U.S. at 296 (stating that this is true even when the EEOC “pursues entirely victim-specific relief”).

129. *Id.* at 294-95.

130. *See id.* at 295. The Court noted that “[i]f injunctive relief were the only remedy available, an employee who signed an arbitration agreement would have little incentive to file a charge with the EEOC.” *Id.* at 296 n.11. The Court further emphasized that as the number of employees covered by mandatory arbitration agreements continue to grow, “the pool of charges from which the EEOC can choose cases that best vindicate the public interest would likely get smaller and become distorted.” *Id.* It stated: “We have generally been reluctant to approve rules that may jeopardize the EEOC’s ability to investigate and select cases from a broad sample of claims.” *Id.*

131. ALICE M. LEONARD, JUDGING INEQUALITY: THE EFFECTIVENESS OF THE TRIBUNAL SYSTEM IN SEX DISCRIMINATION AND EQUAL PAY CASES 1 (1987).

complainant.¹³² The fact that complainants had no power to bring claims on their own behalf led to dissatisfaction.¹³³

As a result, when the Sex Discrimination Act¹³⁴ and the Equal Pay Act¹³⁵ came into effect in 1975, the British created a new scheme whereby discrimination complainants of all types could file claims on their own behalf, directly, with administrative tribunals.¹³⁶ These bodies were initially referred to as industrial tribunals, and now are called employment tribunals. The bulk of British discrimination claims are handled through these tribunals.¹³⁷ The industrial tribunals were already in existence, having previously been used for nondiscrimination disputes between employers and employees.¹³⁸ In general such tribunals had been seen as preferable to courts in many situations.¹³⁹ The idea of resolving discrimination claims through

132. *Id.*

133. *Id.*; see also ALICE M. LEONARD, PYRRHIC VICTORIES: WINNING SEX DISCRIMINATION AND EQUAL PAY CASES IN THE INDUSTRIAL TRIBUNALS, 1980-84, at 1 n.1 (1987). The initial scheme was also problematic because it prevented the government agency assigned to deal with discrimination from spending much significant time on systemic problems by overwhelming that agency with individual complaints. LEONARD, *supra* note 131, at 1-2.

134. Sex Discrimination Act, 1975, c. 65 (Eng.).

135. Equal Pay Act, 1970, c. 41 (Eng.). Although the Equal Pay Act was passed in 1970, it did not come into effect until 1975. LEONARD, *supra* note 133, at 1 n.1.

136. See *supra* notes 134-135.

137. As will be discussed, some gender discrimination claims can be taken directly to court. See *infra* notes 174-175 and accompanying text.

138. Tribunals were first used for disputes arising between employers and employees with respect to claims brought under the 1965 Redundancy Payments Act. Tribunals were then used for unfair dismissal disputes brought under the Industrial Relations Act 1971. LINDA DICKENS, MICHAEL JONES, BRIAN WEEKES & MOIRA HART, DISMISSED: A STUDY OF UNFAIR DISMISSAL AND THE INDUSTRIAL TRIBUNAL SYSTEM 3-4 (1985). The use of administrative tribunals is quite common in the United Kingdom for many types of disputes. One author observes that "[i]n the UK there are about 50 different types of tribunals and some 2000 tribunals altogether." Hazel Genn, *Tribunals and Informal Justice*, 56 MOD. L. REV. 393, 394 (1993) (noting also that such tribunals "have been largely overlooked by scholars concerned with developments in informal justice, who have tended to focus on small claims procedures, conciliation, mediation and arbitration"). See generally R.E. WRAITH & P.G. HUTCHESSON, ADMINISTRATIVE TRIBUNALS (1973) (providing a detailed history of the development of tribunals). Tribunals are also used to deal with disputes involving welfare benefits, immigration, and mental health detention, to give just a few examples. Genn, *supra*, at 393.

139. REPORT OF THE COMMITTEE ON ADMINISTRATIVE TRIBUNALS AND ENQUIRIES, 1957, Cmnd. 218, at 9. In 1957 the Franks Committee stated: "[T]ribunals have certain characteristics which often give them advantages over the courts. These are cheapness, accessibility, freedom from technicality, expedition and expert knowledge of their particular subject." *Id.* Many commentators have also noted, however, that empirical studies of tribunals do not always support these optimistic and oft-repeated assertions. See generally Genn, *supra* note 138, at 396 (citing as examples K. Bell, P. Collision, S. Turner and S.

tribunals can be traced to the Royal Commission on Trade Unions and Employers Associations, better known as the Donovan Commission. This group suggested in 1968 that labor tribunals' jurisdiction "should be defined so as to comprise all disputes arising between employers and employees from their contracts of employment or from any statutory claims they may have against each other in their capacity as employer and employee."¹⁴⁰ It urged that such procedures should be "easily accessible, informal, speedy and inexpensive," and that it should give employers and employees "the best possible opportunity of arriving at an amicable settlement of their differences."¹⁴¹

When discrimination claims were directed to the preexisting industrial tribunals, the structure of those tribunals was retained.¹⁴² The only difference was that a very small portion of their caseload now consisted of discrimination cases.¹⁴³ The industrial tribunals were and still are comprised of a group of three-person panels, specifically one experienced attorney, who serves as the Chair,¹⁴⁴ together with one lay member from management, and one from an employee background.¹⁴⁵ In general the lawyer member of the panel need not have special

Webber, *National Insurance Local Tribunals*, 3 J. SOC. POL'Y 289 (1974); R. Lawrence, *Solicitors and Tribunals*, 1980 J. SOC. WELFARE L. 13).

140. ROYAL COMMISSION ON TRADE UNIONS AND EMPLOYERS' ASSOCIATIONS 1965-1968, REPORT, 1968, Cmnd. 3623, at 156.

141. *Id.* at 155-56. In 1971 a former president of the industrial tribunals stated similarly:

[T]he tribunals are meant to provide simple informal justice in an atmosphere in which the ordinary man feels he is at home . . . an atmosphere which does not shut out the ordinary man so that he is prepared to conduct his own case before them with a reasonable prospect of success.

DICKENS, JONES, WEEKES & HART, *supra* note 138, at 73-74 (alteration in original).

142. See ROY LEWIS & JOHN CLARK, EMPLOYMENT RIGHTS, INDUSTRIAL TRIBUNALS AND ARBITRATION: THE CASE FOR ALTERNATIVE DISPUTE RESOLUTION 4 (1993) ("In composition and procedure the industrial tribunals have always differed from the ordinary courts.").

143. From the period 1985 through 1994 race and gender discrimination claims made up between seven and nine percent of the total claims filed with the tribunals. GREEN PAPER, *supra* note 12, at 17.

144. LEWIS & CLARK, *supra* note 142, at 4 (noting that the Chair must be legally qualified, meaning "a lawyer of at least seven years' standing, who is a member of the judiciary appointed by the Lord Chancellor in England and Wales and the Lord President of the Court of Session in Scotland"); see also DICKENS, JONES, WEEKES & HART, *supra* note 138, at 52-53 (describing the composition of the tribunal).

145. GREEN PAPER, *supra* note 12, at 8; see also DICKENS, JONES, WEEKES & HART, *supra* note 138, at 52 (providing an excellent description of the tribunal process, beginning with the filing of a complaint, and continuing through the entire process). Despite this difference in backgrounds it has been reported that ninety-five percent of the tribunal votes are unanimous. DICKENS, JONES, WEEKES & HART, *supra* note 138, at 70.

expertise in employment law.¹⁴⁶ However, when the tribunals hear gender claims they try to ensure that at least one panel member is a woman, and when they hear race claims they endeavor to ensure that at least one member has expertise with race relations.¹⁴⁷

The proceeding before the panel is adjudicative in nature, though it is intended to be less formal than a court proceeding.¹⁴⁸ One study done in the 1980s helps paint the picture:

Part of helping 'the ordinary man feel he is at home' has been the eschewing of various trappings associated with court hearings, such as imposing architecture and wigs and gowns. Other features, however, remain: evidence is given under oath, a seat apart is used by those giving evidence and in some tribunals we observed those attending were asked to stand when the members of the tribunal entered or left the room. The general picture of the tribunal's form which emerged from our observation of tribunals operating in four different regions was of the three tribunal members sitting behind a bench on a raised platform. The parties and their representatives sat facing the tribunal behind tables, and behind them sat any witnesses, members of the public and press. The 'witness box' (usually a small table) was to one side of the tribunal bench, to the other generally sat the clerk.¹⁴⁹

To initiate the tribunal process, the complainant completes a short form, with no filing fee, at one of the offices conveniently distributed across the country.¹⁵⁰ Litigants and witnesses can recover their travel costs, living expenses, and loss of earnings.¹⁵¹ Costs for frivolous litigation are rarely awarded against claimants.¹⁵² The tribunal tries to avoid undue formality, and employs a simplified version of standard

146. DICKENS, JONES, WEEKES & HART, *supra* note 138, at 54.

147. *Id.* at 63 n.3.

148. See LEWIS & CLARK, *supra* note 142, at 5 ("The tribunals' method of working, organisation and procedures are in principle designed to achieve ... cheapness, speed, accessibility and informality").

149. DICKENS, JONES, WEEKES & HART, *supra* note 138, at 74.

150. LEWIS & CLARK, *supra* note 142, at 5; see also DICKENS, JONES, WEEKES & HART, *supra* note 138, at 11-13 (detailing the method of filing a complaint); Corby, *supra* note 12, at *6 (noting no fees or charges are due for use of either employment tribunals or the EAT appellate body).

151. LEWIS & CLARK, *supra* note 142, at 5.

152. Corby, *supra* note 12, at *7 (stating that costs were awarded in just 0.4 percent of cases in 1995-96.)

adversarial court procedures.¹⁵³ The hearing itself in discrimination cases generally takes two to three days.¹⁵⁴

Appeals can be taken on points of law from the industrial tribunal to the Employment Appeals Tribunal (EAT), which consists of one high court judge and two lay persons, one representing employees and one representing employers.¹⁵⁵ In turn, further appeals can be taken to the Court of Appeals and then to the House Lords.¹⁵⁶ In contrast to litigation, the filing of an appeal requires little paperwork.¹⁵⁷ And, there is again no charge for filing an appeal with the EAT.¹⁵⁸

2. Simultaneous Conciliation Process

In determining to have employment discrimination claims routed to the employment tribunals, the British also retained the conciliation aspect of the original system.¹⁵⁹ Conciliation is handled by a special government agency, the Advisory Conciliation and Arbitration Service (ACAS).¹⁶⁰ When an employment discrimination claim is filed with the employment tribunal, a copy of the complaint document is also routed to ACAS, where it is assigned to a conciliation officer.¹⁶¹ This officer is instructed to explain the tribunal's adjudication procedures and relevant law to the parties and to help parties establish the facts and clarify their thoughts, but is not supposed to "impose" a settlement on them.¹⁶² The conciliation process itself "can be declined by either

153. LEWIS & CLARK, *supra* note 142, at 5 (observing that most tribunals require the party with the burden of proof to present the case by calling witnesses). These witnesses, under oath, are examined and cross-examined. *Id.*

154. GREEN PAPER, *supra* note 12, at 17 (observing that, in contrast, Wages Act cases take on average two to three hours and unfair dismissal cases approximately one day).

155. *Id.* at 9; see also Joseph M. Kelly & Adele Sinclair, *Sexual Harassment of Employees by Customers and Other Third Parties: American and British Views*, 31 TEX. TECH. L. REV. 807, 838 (2000).

156. LEWIS & CLARK, *supra* note 142, at 17; see also Kelly & Sinclair, *supra* note 155, at 838.

157. Corby, *supra* note 12, at *8 (stating that "EAT rarely has the tribunal chairperson's notes of evidence and does not require briefs of evidence or exhibits").

158. *Id.* at *6.

159. LEWIS & CLARK, *supra* note 142, at 12-15.

160. *Id.* at 5. This same agency helps to resolve collective bargaining disputes. *Id.* at 13.

161. GREEN PAPER, *supra* note 12, at 10; see also LEWIS & CLARK, *supra* note 142, at 5-6.

162. ACAS, *Individuals at Work—Employer*, at http://www.acas.org.uk/services/dispute_individuals_employer.html (last visited May 17, 2004) ("We don't impose or suggest solutions but we help you settle your differences on your own terms."); see also Corby, *supra* note 12, at *3-*4 (quoting undated ACAS materials). The British government's 1994 *Green Paper* states that conciliation officers "describe the relevant law and the procedure for dealing with tribunal complaints and, particularly where parties are unrepresented, can inform them in

party.”¹⁶³ Although one might assume that a conciliator would bring disputants together for a face-to-face meeting, and although the Donovan Commission in 1968 proposed such meetings, in fact conciliators normally deal with the parties separately, and often by phone.¹⁶⁴ A very significant portion of employment discrimination cases are resolved at this conciliation stage. According to the 2001-2002 ACAS Annual Report, 77.5% of completed discrimination claims were either settled or withdrawn, as compared to just 22.5% that were resolved at the tribunal stage.¹⁶⁵ The cost to the state of resolving claims through conciliation is relatively low.¹⁶⁶ Thus, some praise ACAS conciliation as an effective filter.¹⁶⁷

3. Role of British Antidiscrimination Commissions

In Britain, the Equal Opportunities Commission (EOC) serves somewhat different purposes than does the agency of similar name, the Equal Employment Opportunity Commission, in the United States. The EOC assists persons complaining of gender discrimination by conducting research, educating the public, providing advice to individuals and companies, and representing a limited number of complainants in the industrial tribunals.¹⁶⁸ The Commission for Racial Equality (CRE) and the Disability Rights Commission (DRC) do similar work on behalf of racial and ethnic minorities and the

general terms of sources of advice from which they can seek guidance or representation.” GREEN PAPER, *supra* note 12, at 28.

163. GREEN PAPER, *supra* note 12, at 28.

164. Corby, *supra* note 12, at *10.

165. ADVISORY, CONCILIATION AND ARBITRATION SERV. (ACAS), ANNUAL REPORT 2001-2002: WORKING TOGETHER 27 (2002), available at http://www.acas.org.uk/az_index.html. Note that this figure is similar to that for non-discrimination claims, and has remained quite constant over a number of years. A report from the mid 1990s showed that thirty percent of tribunal cases settle through ACAS conciliation, and thirty-six percent are withdrawn, leaving just thirty-four percent to proceed to tribunal hearing. Emp. Tribunals Serv., *Industrial and Employment Appeal Tribunal Statistics, 1994-95 and 1995-96*, LAB. MARKET TRENDS, Apr. 1997, at 151, 152; see also GREEN PAPER, *supra* note 12, at 10 (stating that thirty-six percent of ACAS cases settle, and thirty-two percent are withdrawn, mainly after discussions with ACAS personnel).

166. LEWIS & CLARK, *supra* note 142, at 6 (stating that the average cost to ACAS of clearing an individual conciliation case was just £164).

167. See, e.g., PAT LOWRY, EMPLOYMENT DISPUTES AND THE THIRD PARTY 115 (1990).

168. Kelly & Sinclair, *supra* note 155, at 839 (“Unlike the EEOC in the United States, the EOC does not ordinarily initiate litigation, but it may take a case on behalf of a litigant if there is to be an issue of general importance.”); Equal Opportunities Comm’n, *About the EOC*, at <http://www.eoc.org.uk/cseng/abouteoc/abouteoc.asp> (last visited Feb. 9, 2004).

disabled.¹⁶⁹ Like the EOC, these organizations neither investigate nor process complaints of discrimination. They are not factfinders but rather advocates on behalf of their respective constituency groups.

British employment discrimination claimants are frequently unrepresented at both the conciliation and tribunal stages.¹⁷⁰ They often cannot afford private representation and are not entitled to legal aid.¹⁷¹ While the Commissions for Racial Equality and for Equal Opportunities can provide financial assistance, these agencies only have funds to offer legal representation for a small minority of cases.¹⁷² Similarly, while some employees receive representation from their trade unions, many do not.¹⁷³

169. Comm'n for Racial Equality, *About the CRE*, at <http://www.cre.gov.uk/about/about.html> (last updated Feb. 4, 2004); Disability Rights Comm'n, *Who We Are and What We Do*, at <http://www.drc-gb.org/whatwedo/aboutus.asp> (last visited Feb. 9, 2004).

170. Corby, *supra* note 12, at *8 (citing TREMLETT & BANERJI (1994)). A British study from 1994 stated that just twenty-four percent of the applicants in British employment tribunals (all types of claims) were legally represented, whereas thirty percent were exclusively self-represented. *Id.* As well, statistics gathered on legal representation in the industrial tribunals generally, as opposed to regarding discrimination claims in particular, showed that the rate of legal representation was dropping, at least as of 1994. Whereas thirty-three percent of applicants were legally represented in 1987/88, just 19% were legally represented in 1992/93. GREEN PAPER, *supra* note 12, at 35. Similarly, whereas forty-five percent of respondents were legally represented in 1987/88, just thirty-one percent were represented in 1992/93. *Id.* In the mid-1980s, a study showed that "nearly half" of the complainants in sex discrimination and equal pay cases were completely unrepresented. LEONARD, *supra* note 131, at 11. Those persons who were represented were often not represented by attorneys. *Id.* at 10. Instead many appeared with the help of union shop stewards or officials, friends or relatives, or persons from citizen advisory groups. *Id.* Another study around the same period showed that depending on the region, between twenty-one percent and five percent of applicants were represented in employment tribunal hearings by attorneys. HAZEL GENN & YVETTE GENN, *THE EFFECTIVENESS OF REPRESENTATION AT TRIBUNALS: REPORT TO THE LORD CHANCELLOR* 43-46 (1989). For a study showing that specialist representation, particularly by attorneys, increases claimants' likelihood of success in several different kinds of tribunals, see *id.* See also LEONARD, *supra* note 133, at 12-13 (reporting that in study of *successful* claimants in sex discrimination claims, fifty percent had legal representation, and an additional thirty-one percent had representation from a trade union official or other non-lawyer).

171. Corby, *supra* note 12, at *8 (noting unavailability of legal aid to claimants in British employment tribunals); see also LEONARD, *supra* note 131, at 11 (observing that while comprehensive legal aid is not available claimants may receive "£50 worth of legal advice" if they qualify for legal aid).

172. Corby, *supra* note 12, at *8 (stating that commissions for racial and gender equality "only have funds to provide legal representation for a minority of the cases that come before them").

173. See *supra* note 170.

4. Direct Access to Court for Certain Gender Discrimination Claims

Pursuant to a 1976 European Union Directive, persons bringing claims for gender discrimination must be permitted to bring those claims in a court of general jurisdiction, and not merely to a special tribunal.¹⁷⁴ Thus, the EOC advises gender discrimination claimants that they can take their claims directly to county court, rather than to a tribunal.¹⁷⁵ Nonetheless, it appears that the vast majority of gender discrimination claimants choose to proceed through the tribunals, rather than through court. No policy rationale has been offered that would explain why direct court access is more important for persons alleging gender discrimination than for those alleging other types of discrimination.

5. Critiques of Existing System

The British system has been criticized over the years on a variety of grounds.¹⁷⁶ While a few of the critiques have been leveled with respect to the handling of discrimination claims in particular, most have focused more generally on all employment claims.¹⁷⁷

One of the most frequent refrains has been that, notwithstanding the initial goals of informality, the tribunals are in fact quite legal and adversarial in nature.¹⁷⁸ According to Roy Lewis and John Clark:

174. See Council Directive 76/207/EEC, art. 6, 1976 O.J. (L 39) 40, 41. Article 6 of the Directive provides that "Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged [by gender discrimination] . . . to pursue their claims by judicial process after possible recourse to other competent authorities." *Id.* This same provision has been interpreted to prevent states from putting limits on the recoveries of gender discrimination claimants that are lower than limits for other kinds of personal injury cases. *Marshall v. Southampton & South West Hampshire Area Health Auth.*, 1993 E.C.R. I-4367, I-4403.

175. Equal Opportunities Comm'n, *Tribunal and Court Procedures*, at <http://www.eoc.org.uk/EOCeng/dynpages/Tribunal.asp> (last visited Feb. 9, 2004).

176. For a broad-ranging critique of the failure of British laws and procedures to eliminate gender discrimination, see Linda Dickens, *Anti-discrimination Legislation: Exploring and Explaining the Impact on Women's Employment*, in *LEGAL INTERVENTION IN INDUSTRIAL RELATIONS: GAINS AND LOSSES* 103, 116-23 (William McCarthy ed., 1992) (pointing particularly to the problems of lack of access to the legal system, low rates of success, limited remedies, and the failure of the EOC to bring many high-publicity cases).

177. See, e.g., *id.* at 103. Although this grouping is understandable, given that only a small portion of the industrial tribunals' business is discrimination claims, we must constantly ask ourselves whether a particular critique is valid as applied to discrimination claims, even if it is generally valid.

178. See, e.g., LEWIS & CLARK, *supra* note 142, at i. As Lewis and Clark explain:

When they were set up in the 1960s, industrial tribunals were meant to be easily accessible, informal, speedy and inexpensive. They were also intended to give employers and employees involved in individual employment disputes the best

Procedurally, tribunals have come to operate increasingly like ordinary courts, with legal oaths, adversarial proceedings (including cross-examination), and the continual possibility of appeals on points of law to higher courts. Institutionally, tribunals are chaired by lawyers, who naturally play the dominant role in interpreting the law, and there is an increasingly frequent use of lawyers as representatives.¹⁷⁹

This excessive legalism is seen negatively by some because it is believed to slow the process, thereby both harming the parties and clogging the tribunal system;¹⁸⁰ make the process more costly;¹⁸¹ make the process "offputting" for claimants;¹⁸² lead to the overemphasis of

possible opportunity of arriving at an amicable settlement of their differences. There is substantial evidence to suggest that they are failing to meet these original objectives.

Id.; see also GREEN PAPER, *supra* note 12, at 4 (discussing "inexorable growth of 'legalism'" in employment tribunal proceedings).

179. LEWIS & CLARK, *supra* note 142, at 7.

180. See *id.* at 2 (noting the "irreversible trend toward legalism" and stating that "in practice [tribunals] have become increasingly inaccessible, formal, slow and expensive in time and money, to the parties as well as to the state"). The annotations accompanying the Employment Rights (Dispute Resolution) Act 1998, which among other things adopted a version of the voluntary arbitration urged by Lewis and Clark, recognizes that one of the major purposes of the reforms is to reduce stresses on the tribunal system:

These reforms have in general been supported as a worthwhile attempt to relieve the pressures on a tribunal system which is increasingly straining at the seams. The number of applications to industrial tribunals has risen dramatically in recent years. In 1996-97 there were a total of 88,910 tribunal applications, as compared with only 34,697 in 1989-90, with a forecast of 109,000 applications by the year 2000. A significant contributory factor in this increase has been the increase in discrimination cases (from 8 per cent of applications in 1993-94 to 30 per cent in 1995-96) In the annotator's view, it remains to be seen whether the present reforms will make any significant and lasting impact on the pressures in the employment tribunal system, or whether in time they will come to be seen as the juridical equivalent of rearranging the deck-chairs on the Titanic.

Employment Rights (Dispute Resolution) Act, 1998, c. 8, cmt. at 8-3 (Eng.). The British government's 1994 *Green Paper* notes a goal of having eighty percent of tribunal cases come to first hearing within twenty-six weeks of the filing of the initial application, and for promulgation of a decision within five weeks of the hearing, but recognizes that these goals are far from being met. GREEN PAPER, *supra* note 12, at 14-15.

181. See, e.g., GREEN PAPER, *supra* note 12, at 4 (stating that the increasing formality and legalism of tribunals has led to a concern that they have "departed from their original objectives—to provide a readily accessible and cost effective means of redress with a minimum of formality and delay").

182. See, e.g., LEONARD, *supra* note 133, at 20 (finding that "[f]ully three-quarters of all applicants found the experience . . . 'very' or 'quite' stressful"); Hunter & Leonard, *supra* note 12, at 303 ("There is evidence from British research on sex discrimination complaints that I.T. applicants found the panel or the process itself formal, offputting, intimidating and/or extremely stressful."); see also Jill Earnshaw & Marilyn J. Davidson, *Remedying Sexual Harassment via Industrial Tribunal Claims: An Investigation of the Legal and Psychosocial Process*, PERSONNEL REV. No. 7 1994, at 3, 9 (reporting that although three quarters of tribunal claimants they interviewed would go through the process again if necessary that

legal issues and the underemphasis of common sense and other background issues;¹⁸³ lead to a deterioration in relationships between claimants and employers and increased stress for claimants;¹⁸⁴ and require claimants to obtain legal representation in order to have a chance of obtaining satisfactory relief.¹⁸⁵ With respect to speed, critics Lewis and Clark emphasized that the problem of delay

was highlighted dramatically in May 1992 when, on a complaint concerning delays in the tribunals and the EAT, the European Commission of Human Rights held that the UK was in breach of Article 6 of the European Convention on Human Rights, which provides that the determination of civil rights or obligations should be heard within a reasonable time.¹⁸⁶

“[a]ll suffered detrimental physical and psychosocial effects ranging from sickness, anger, anxiety, tiredness, fear, sleep problems, weight loss, relationship problems, depression and loss of confidence, to nervous breakdown”).

183. Hunter & Leonard, *supra* note 12, at 305 (explaining that adjudication remedies available in a tribunal typically do not include a broad range of practical solutions such as apologies, the provision of references, help with job searches, promotion, transfer to an alternative position, provision of additional training, clarification of duties, review of management duties or responsibilities, or institution of EEO programs); *see also* LEWIS & CLARK, *supra* note 142, at 17-18 (discussing advantages, with respect to unfair dismissal cases, of using standards relating to fairness and reasonableness, and not just statutory requirements). *See generally* Corby, *supra* note 12, at *5 (noting that tribunals, like courts, resolve disputes in bipolar fashion on winner-take-all basis).

184. *See* LEONARD, *supra* note 133, at 25 (discussing negative impacts and noting, at 25, that “[n]ot one applicant in this group stated that her employment situation had improved because of taking her case” (emphasis omitted)). Leonard also presents numerous compelling narrative accounts from claimants who were ostensibly successful and yet suffered greatly in the process. *Id.*

185. Genn, *supra* note 138, at 400 (concluding that the presence or absence of a representative at a tribunal hearing often significantly affects the outcome of the hearing). Genn explains that the belief that representation is not needed in informal tribunals is based on certain unfounded assumptions. *Id.* at 400-09. Specifically, she observes that small dollar value cases are not necessarily legally or factually simple, that apparent informality may mislead disputants into failing to present a legally sufficient case, that advocacy is necessary even in the informal tribunals, and that tribunal judges cannot possibly be expected to take the place of representatives for the disputants. *Id.*; *see also* GENN & GENN, *supra* note 170, at 247-48 (concluding, based on empirical study, that representation, and particularly legal representation, increases the likelihood of success in industrial tribunals, and further concluding that while simplicity and informality may be valuable, they should not be used to deny disputants the value of legal representation); LEONARD, *supra* note 131, at 140 (stating that a study has identified the “urgent need . . . for knowledgeable advice and representation for individuals who believe they have a sex discrimination or equal pay claim”).

186. LEWIS & CLARK, *supra* note 142, at 7; *see also* Darnell v. United Kingdom, 18 EUR. H.R. REP. 205, 210-11 (Eur. Ct. H.R. 1993) (holding that the nine year period required to bring an appeal of an unfair dismissal claim to the EAT was so extensive that it violated Article 6 of the European Convention on Human Rights).

Some critics have also suggested that the adversarial tribunal processes are too public, at least in some situations.¹⁸⁷

While some are troubled by what they see as the ever-present trend toward formality in the system,¹⁸⁸ others are bothered that the mix of a procedurally informal system with disputes involving complex legal matters prevents justice from being achieved.¹⁸⁹ Hazel Genn explains the problem as follows:

Analysis of the procedures and outcomes of informal tribunal and court hearings suggest that, despite procedural informality, the matters to be decided at hearings often involve highly complex rules and case law; that procedures remain inherently 'adversarial' and often legalistic; that the adjudicative function has not always adapted well to new forums; that those who appear unrepresented before informal courts and tribunals are unable sufficiently to understand the proceedings to participate effectively; and that decision-making processes for many types of problem[s] remain traditional. The result of these shortcomings is that, in the absence of the conventional 'protections' of formality, such as representation, and the rules of evidence, the cases of those appearing before informal tribunals and courts may not be properly ventilated, the law may not be accurately applied, and ultimately justice may not be done.¹⁹⁰

Alice Leonard similarly worries that the system is not well suited to ensure the exploration and development of complex legal and factual issues.¹⁹¹ One problem she emphasizes is that the panels lack sufficient expertise to deal with often complex discrimination claims.¹⁹² Other

187. LEWIS & CLARK, *supra* note 142, at 19-20 (stating that while publicity may be desirable to set a precedent or make a point in some cases, in others parties may "wish to settle a sensitive matter away from the gaze of publicity").

188. *See, e.g.*, GREEN PAPER, *supra* note 12, at 5:

[A]gainst the background of rising caseloads and increasing legislation of growing complexity, the delays to hearings and criticisms that the nature of tribunal proceedings had departed from the model of relative informality and ready access which remains the objective of public policy in this area, the Government decided . . . that a fundamental review [of the system] should be undertaken.

189. Genn, *supra* note 138, at 397-98.

190. *Id.* (footnote omitted).

191. LEONARD, *supra* note 133, at 1 (stating that "solicitors, academic commentators and tribunal chairmen themselves have stated that the tribunal system as it currently operates is not conducive to the adequate development and presentation of the legal and factual issues in discrimination and equal pay cases, which are often complex and/or novel").

192. *Id.* at 2 (citing a prior study for the point that "lack of specialisation in the tribunals had resulted in a failure to develop a level of expertise in the equal rights legislation equivalent to their expertise in unfair dismissal claims, in part because sex discrimination and equal pay cases constitute only a very tiny proportion of the tribunals' caseload"); *see also* B.A. Hepple, *Judging Equal Rights*, in *CURRENT LEGAL PROBLEMS* 1983, at 71, 73-74 (1983).

critics have emphasized insufficient access to discovery within the tribunal system.¹⁹³

A third criticism, in addition to those that the process is both too legal and not sufficiently legal, is that the remedies provided by the tribunals are inadequate, particularly in light of the costs. In general industrial tribunals find for the employee only approximately 39% of the time.¹⁹⁴ The figures for discrimination claims may be more dismal. One study showed that in the first eight years during which tribunals heard equal pay and sex discrimination claims, they found for the claimant only 10% and 11% of the time respectively.¹⁹⁵ Somewhat more recently, statistics collected for 1998-1999 showed that of 4025 complaints of sex discrimination, just 797 proceeded to a tribunal, and of these just 33.9% prevailed.¹⁹⁶ Moreover, even when claimants prevail, they secure little by way of remedies. Reinstatement, although thought of by some as the most appropriate award, is quite rare.¹⁹⁷ As for monetary awards, they are also very low. Although this can in some cases be explained, in part, by the fact that compensatory damages are capped by statute, it seems that the awards are far lower even than the caps.¹⁹⁸ A 1983 study showed that "50% of all known tribunal awards and 65% of all known conciliated settlements under the Sex Discrimination Act were for less than £300."¹⁹⁹ Much more

(discussing tribunals' inadequate remedial powers as well as their lack of experience in discrimination and equal pay claims owing to the low percentage of tribunal cases dealing with these issues).

193. See, e.g., Geoffrey Bindman, *Proving Discrimination: The Importance of Discovery*, 17 LAW SOC'Y GAZETTE 316, 316 (1980) (advocating the expanded use of discovery in the tribunals and noting that "the relevance and importance of discovery becomes plain; without it the complainant may not be able to get a case on its feet at all, let alone prove it"); Lawrence Lustgarten, *Problems of Proof in Employment Discrimination Cases*, 6 INDUS. L.J. 212 (1977) (advocating the expanded American-style use of statistical evidence in discrimination cases); David Pannick, *The Burden of Proof in Discrimination Cases*, 131 NEW L.J. 895, 895 (1981) (stating that issues of proof inherently favor employers and that the EAT has failed to develop an equitable system of burden shifting).

194. Emp. Tribunals Serv., *Employment Tribunal and Employment Appeal Tribunal Statistics 1997-98 and 1998-99*, 107 LAB. MARKET TRENDS 493, 494 (1999).

195. LEONARD, *supra* note 133, at 2.

196. Emp. Tribunal Serv., *supra* note 194, at 494.

197. LEWIS & CLARK, *supra* note 142, at 9 (stating reinstatement is provided to fewer than three percent of persons found to have been wrongly dismissed and that it is just as rare in conciliation); see also DICKENS, JONES, WEEKES & HART, *supra* note 138, at 107 (finding that tribunals rarely order reinstatement); Corby, *supra* note 12, at *12 (noting that even where applicant wins at tribunal, reinstatement is rarely ordered).

198. LEWIS & CLARK, *supra* note 142, at 9.

199. LEONARD, *supra* note 133, at 2 (citing ALICE M. LEONARD, *THE FIRST EIGHT YEARS: A PROFILE OF APPLICANTS TO THE INDUSTRIAL TRIBUNALS UNDER THE SEX DISCRIMINATION ACT 1975 AND THE EQUAL PAY ACT 1970*, at 49, 54 (1986)). Awards are also

recently, and even after a ruling from the EU led to the removal of statutory caps with respect to compensation for sex discrimination claims,²⁰⁰ a 1998 study showed that “[t]he average award in sex discrimination cases was £6873, and the median award only £3000.”²⁰¹

Claimants face other problems besides the low level of awards. Even when they prevail, complainants often face significant enforcement problems.²⁰² At the same time, another study by Alice Leonard also shows that even when complainants succeed before a tribunal and obtain at least some relief, they face very significant personal and financial costs.²⁰³ Given these costs, only one quarter of the women who prevailed on their discrimination claims felt that they had been fully compensated for the discrimination they experienced.²⁰⁴

Finally, some critics have also argued that the conciliation portion of the British process is problematic.²⁰⁵ They question whether a process of conciliation is appropriate for discrimination claims.²⁰⁶ In particular, some suggest that there is an inherent tension between ACAS’s purported impartiality, its goal of settling cases, and the role it should play in helping victims of discrimination protect their rights.²⁰⁷ It is quite clear that ACAS continues to see settlements as its goal. The *2001-2002 Annual Report* repeatedly proclaims the success of ACAS

low for unfair dismissal claims. One study showed that the median award for unfair dismissals was £2388. Emp. Tribunals Serv., *supra* note 194, at 495.

200. See *Marshall v. Southampton & South West Hampshire Area Health Auth.*, 1993 E.C.R. I-4367, I-4403 (holding that damages cap on compensation violated Article 6 of the EU Equal Treatment Directive, and mandating that member states provide adequate remedies for successful claimants in sex discrimination cases). The Sex Discrimination and Equal Pay Act was amended to remove the preexisting statutory cap following the European Court of Justice’s decision. Sex Discrimination and Equal Pay (Miscellaneous Amendments) Regulations 1996, (1996) SI 1996/438, at http://www.legislation.hmsso.gov.uk/si/si1996/Uski_19960438_en_1.htm (last visited Feb. 9, 2004).

201. Kelly & Sinclair, *supra* note 155, at 862 (citing *Compensation Awards '98—A Record Year*, EOR, July-Aug. 1999 at 14).

202. LEONARD, *supra* note 133, at 49 (stating that nearly half of the successful complainants in gender discrimination cases studied reported experiencing difficulty or delay in getting the employer to provide the relief that had been ordered or agreed to).

203. *Id.* Out-of-pocket costs included not only occasional legal representation, but also costs of travel, copying, mailing, and phone calls. *Id.* The more personal costs included substantial stress, harassment, and subsequent retaliation. *Id.*

204. *Id.*

205. This section does not purport to summarize all views of ACAS, but rather some of the criticisms that have been levied against the agency.

206. LEONARD, *supra* note 133, at 1.

207. See, e.g., Jeanne Gregory, *Conciliating Individual Employment Disputes: A Shabby Compromise?*, 8 EMPLOYEE REL. 27, 27-28 (1986).

in achieving settlements without the need of a hearing.²⁰⁸ The critics' claim is that, particularly when claimants are unrepresented, conciliation officers may well pressure them to drop or settle their claims.²⁰⁹ As noted earlier, roughly one-third of claims sent to ACAS are simply withdrawn or dropped.²¹⁰ The one-third of claimants that settle receive little compensation.²¹¹ An additional criticism is that the process of filing and conciliating complaints may actually have a detrimental impact on complainants. Commentators Graham and Lewis found that sex discrimination and equal pay cases that were conciliated "brought about a deterioration of relationships in the workplace, and victimisation."²¹² In addition, a study done by Alice Leonard of women who had brought claims of gender discrimination, reported that "[m]ost comments which were made about ACAS were negative."²¹³ Examples of the comments reflected that the

208. ACAS, *supra* note 165, at 8, 11 (boasting that "almost four out of five discrimination cases are resolved without the need for a tribunal hearing").

209. Gregory, *supra* note 207, at 29. Gregory bases her conclusions on her own interviews of claimants as well as her interpretation of a study done by Cosmo Graham & Norman Lewis, *THE ROLE OF ACAS CONCILIATION IN EQUAL PAY AND SEX DISCRIMINATION CASES* (1985). *Id.* Gregory emphasizes that given ACAS' institutional responsibility to settle cases she is not surprised to find that conciliation officers were quite discouraging to claimants, often urging them to drop their claims or simply accept whatever first offer was provided by the employer. *Id.* at 28-30. Even assuming that conciliation officers are acting in good faith, and simply conveying to claimants the "unpalatable facts of life," Gregory asserts that this puts governmental officials in the inappropriate position of reinforcing existing power inequalities. *Id.* at 29-30. One study reported that in thirteen percent of *successful* cases, conciliation officers had encouraged applicants to withdraw because they had "little or no chance of winning." Paul Lewis, *The Role of ACAS Conciliators in Unfair Dismissal Cases*, 13 INDUS. REL. J. 50, 54 (1982); *see also* LEWIS & CLARK, *supra* note 142, at 8-9 (observing also that given the complexities of these cases, unrepresented applicants will often be at a disadvantage that cannot be corrected by ACAS given its required neutrality). However, not all commentators are so negative. *See, e.g.*, DICKENS, JONES, WEEKES & HART, *supra* note 138, at 165 ("There is no doubt that the general view of both applicants and respondents is that ACAS conciliation officers are impartial and helpful.").

210. ACAS, *supra* note 165, at 27 (showing that thirty-three percent of all claims are withdrawn, and also showing that 34.8% of discrimination claims are withdrawn); *see also* GREEN PAPER, *supra* note 12, at 10.

211. *See* LEONARD, *supra* note 133, at 2 (stating, based on a study in the mid-1980s, that "50% of all known tribunal awards and 65% of all known conciliated settlements under the Sex Discrimination Act were for less than £300").

212. *Id.* at 50 (citing GRAHAM & LEWIS, *supra* note 209, at 46-48). "Victimisation" is the term used in Britain for what we in the United States call "retaliation." It is not clear that these problems are due to conciliation, as opposed to the mere filing of a complaint. Leonard's own study showed "[m]any applicants reported that workplace relationships deteriorated as soon as they filed their case, particularly with employers and managers." *Id.* It is nonetheless significant that the conciliation process did not seem to alleviate these strains.

213. *Id.* at 47.

complainants tended to see the ACAS representatives as very negative and discouraging and thought that ACAS did little if anything to help them.²¹⁴

6. Calls for Reform

a. Two-Track Litigation System

In 1987 the Justice Committee issued a report, entitled *Industrial Tribunals*, urging reform of the then-current employment tribunal system.²¹⁵ The proposed solution involved two tracks, both forms of litigation. Pursuant to the proposal most disputes would be resolved by tribunals, but using an investigative rather than an adversarial approach. In this way, the tribunal would bear a greater responsibility for initiating inquiries, framing the questions, and eliciting evidence.²¹⁶ The second track would be used for a minority of cases, those in which a significant point of law arose, the evidence was complex, or public interests were involved. In such cases, an adversarial system would be used, but additional legal representation would be provided to claimants to enable them to present their claims more effectively.²¹⁷ This proposal was not adopted, but rather was sharply criticized, not only on the ground that it would not mesh well with the existing system, but also on the ground that it would fail to take account of a broad range of non-legal interests and considerations.²¹⁸

b. Potential Addition of Arbitration

Disappointed with the increasing legalism and formality of the industrial tribunal system discussed above, Roy Lewis and John Clark led a call for the introduction of a less formal system, voluntary binding arbitration, in 1993.²¹⁹ Unlike U.S. arbitration, which is

214. *Id.*

215. INDUSTRIAL TRIBUNALS, A REPORT BY THE JUSTICE COMMITTEE 1 (1987).

216. *Id.* at 1, 18-21. The Committee also recommended that full time officers be hired and specially trained to elicit background information for use by the tribunals. The goal of this would be to speed the hearings themselves as well as reduce the disparity between those with counsel and those without. *Id.* at 19.

217. *Id.* at 1, 15-18. The proposal also suggested establishment of a new industrial court that would take the place of the EAT. *Id.* at 54-56.

218. Linda Dickens, *Justice in the Industrial Tribunal System*, 17 INDUS. L.J. 58, 60-61 (1988).

219. LEWIS & CLARK, *supra* note 142, at 2. Professor Dickens and her colleagues had earlier explored the idea of an arbitral alternative for unfair dismissal claims in 1985. DICKENS, JONES, WEEKES & HART, *supra* note 138, at 272-300 (arguing that an arbitral system may be superior to the labor tribunals in many respects, particularly in that it would be

private, Lewis and Clark called for government-sponsored arbitration.²²⁰ While their proposal was focused on unfair dismissal claims, they stated that “the debate could be opened up to address the potential advantages and disadvantages of applying ACAS arbitration to other areas such as equal pay claims and discrimination rights more generally.”²²¹

In their proposal Lewis and Clark were careful to distinguish what they called “compulsory” or “regulated” arbitration, in which parties are required to submit to arbitration and to abide by the decision of the arbitrator, from the “voluntary” or “equitable” arbitration they proposed.²²² The arbitration proposed by Lewis and Clark would come into play only if accepted voluntarily by both employee and employer, and the awards would be enforceable only per moral suasion and not legal sanction.²²³ They envisioned that determinations would be based on equitable rather than legal factors, and that while arbitrators would be appointed by ACAS, and while they would have expertise in industrial relations, only a few would be attorneys.²²⁴ Lewis and Clark urged that over time parties would come to realize that they would not need lawyers in arbitration, although parties would not be precluded from bringing legal representation.²²⁵ They reasoned, in sum, that “[a]rbitration is cheaper, speedier, more informal and more accessible, it avoids the legalism and publicity associated with the tribunals, and offers the possibility of a more flexible range of remedies.”²²⁶

In 1994, in the *Green Paper*, the British government picked up the Lewis and Clark call for voluntary binding arbitration as a potentially

more inquisitorial than adversarial, and more directed to problem solving than merely legal issues).

220. LEWIS & CLARK, *supra* note 142, at 2.

221. *Id.* at i.

222. *Id.* at 12-13.

223. *Id.* at 16-17, 22. Lewis and Clark note that while there would be no appeal, actions taken by ACAS, like actions taken by any government agency, would always be subject to a limited judicial review for irrationality, illegality, and procedural impropriety. *Id.* at 28. They saw the likelihood of such review as slim. *Id.* at 29-30.

224. *Id.* at 13-18 (explaining that arbitrators would focus on a broad range of considerations aimed at problem solving, rather than achieving the legally correct result). Indeed, the terms of reference suggested by Lewis and Clark would not invite the arbitrator to make a legal decision, but only to decide whether the employer’s action was fair and reasonable. *Id.* at 17-18. Lewis and Clark state that parties who seek a legal decision on the “issue of whether the claimant was or was not unfairly dismissed” should go to the court-like tribunals. *Id.* at 25.

225. *Id.* at 27.

226. *Id.* at 33.

cheap, quick, informal alternative to the tribunals, and requested public comments on the desirability of adopting such a system.²²⁷ Failing to distinguish between discrimination and nondiscrimination claims, the *Green Paper* implied that so long as the disputants agreed, discrimination claims could be resolved through arbitration.²²⁸ Citing to the earlier Lewis and Clark proposal, the *Green Paper* suggested that ACAS conciliation officers might explain to the parties that if they were not able to conciliate their dispute, they might choose to resolve that dispute less formally, through binding arbitration, rather than by proceeding to a tribunal hearing.²²⁹ The case would only proceed to arbitration if both parties agreed, but once the parties agreed to the arbitration they would be precluded from bringing the claim to an industrial tribunal and would also be barred from filing an appeal, except in exceptional circumstances.²³⁰ In the event the parties agreed to arbitration, ACAS would appoint a single arbitrator from a panel of persons deemed suitable by ACAS.²³¹ The process would then proceed as follows:

A private hearing would . . . be quickly arranged, for example at the employer's premises or at the local office of ACAS or any private arbitrator. The case would be presented informally with no requirement for oaths or affirmations, but the parties would be free to be represented if they so wished. After each side had presented their case, the arbitrator would ask questions of either party to establish the facts. There would be no cross-examination of witnesses, although witnesses would be allowed and questions could be raised through the arbitrator. In determining the issue, the arbitrator would have regard to the ACAS Code of Practice on Disciplinary Practice and Procedures in Employment and to the ACAS advisory handbook *Discipline at Work*.

227. GREEN PAPER, *supra* note 12, at 33. As discussed below, the *Green Paper* also recommended other reforms in addition to arbitration. It suggested fostering the settlement of disputes between employers and employees through voluntary settlement, prior to the making of a tribunal complaint; encouraging the resolution of complaints without a tribunal hearing, whether through ACAS conciliation or some other means; and streamlining the tribunal procedures themselves. *Id.* at 6. It also suggested improving education so that employers would less frequently infringe on employees' rights, and increasing usage of employers' internal dispute resolution procedures. *Id.* at 20.

228. *Id.* at 31-34.

229. *Id.* at 31.

230. *Id.* The arbitral award could only be appealed on the ground that it was "perverse on the facts" or that the interpretation of law was "perverse", with the term "perverse" defined to mean no reasonable arbitrator could have reached that conclusion. *Id.* at 32. These grounds for appeal do seem somewhat broader than those proposed by Lewis and Clark.

231. *Id.* at 31. It should be noted that the *Green Paper* does not set forth what the criteria would be for appointment to the ACAS panel except to say that they would be "persons with suitable industrial, academic and/or legal experience." *Id.*

(S)he would be bound by statutory provisions relating to both jurisdiction and substance but not by any case law in respect of the provisions.²³²

This proposal for voluntary arbitration coincided with a generally more welcoming attitude in Britain toward alternative dispute resolution (ADR) in the early 1990s.

In 1998, having received public comment on the proposed arbitration, the British Parliament passed the Employment Rights (Dispute Resolution) Act of 1998, which authorized ACAS to adopt a scheme of arbitration for unfair dismissal claims.²³³ The scheme, at least for now, does not cover discrimination claims.²³⁴ This determination not to cover discrimination claims, at least initially, followed extensive discussion. At the time the Employment Rights (Dispute Resolution) Act 1998 was being considered, several members of the House of Lords expressed concerns that discrimination claims might not be well suited to arbitration. Lord McCarthy explained his concerns as follows:

The great advantage of arbitration—its abiding glory—is that it is essentially hugger-mugger. No one knows what you did or why you did it for the most part and you do not even have to give your reasons. It is quiet, confidential and private. If we are successful in moving from legal regulation to arbitration, do we want virtually all unfair dismissal cases to be dealt with hugger-mugger? That would mean that there would never be any principles and that we would never find out why the arbitrators did what they did. That is what happens in arbitration. Even more dangerously, do we want that to happen with race, sex or disability cases? . . . If so, that would mean that we would never know about them. In the past we have had a whole series of cases where the

232. *Id.* at 32. The *Green Paper* seems to envision a somewhat more legally-oriented standard than did Lewis and Clark; whereas Lewis and Clark urged a decision based only on fairness the *Green Paper* contemplated some reliance on statutes. Compare LEWIS & CLARK, *supra* note 142, at 17-18, with GREEN PAPER, *supra* note 12, at 32.

233. Employment Rights (Dispute Resolution) Act, 1998, c. 8, § 7 (Eng.).

234. Although the legislation authorized ACAS to expand arbitration into other areas, upon the approval of the Secretary of State, such expansion would also have to be approved by both Houses of Parliament. See *id.* § 7(11). The detailed regulations of the new unfair dismissal arbitration scheme explicitly state: "This Scheme only applies to cases of alleged unfair dismissal. . . . The Scheme does not extend to other kinds of claim which are often related to, or raised at the same time as, a claim of unfair dismissal. For example, sex discrimination cases . . . are not covered by the Scheme." ACAS Arbitration Scheme (England and Wales) Order, 2001, SI 2001/1185 at pt. V, §§ 13-14. The award issued by the arbitrator is enforceable in the court. *Id.* pt. XXVI. The grounds for appeal are very limited and appeals based on points of law are not allowed except where EC law or the Human Rights Act of 1998 are relevant. *Id.* pt. XXIV.

decisions of tribunals, of the EAT or occasionally even the ECJ, have been given maximum publicity—and that has been a very good thing. . . . There have been enormous and significant advances in workers' rights relating to, for example, sex discrimination in the Marshall cases. I would not want such decisions in future to be hugging-mugger. I want them to be proclaimed because we are creating new standards.²³⁵

Other Lords, albeit using less colorful language, also expressed a concern that it might be unwise to permit the use of arbitration for discrimination claims, given the legal complexity of those matters²³⁶ and concerns expressed by trade unions and some employers.²³⁷ Expansion of ACAS arbitration to cover discrimination claims does not seem imminent, particularly given that only thirteen unfair dismissal claims were taken to arbitration in 2001-2002.²³⁸ The 1998 Act also makes clear that employees and employers may not enter into private agreements to arbitrate discrimination claims, outside the ACAS scheme, that would deprive the employment tribunals of jurisdiction over those claims.²³⁹

235. EMPLOYMENT BILL DEBATES cols. 1594-95 (statement of Lord McCarthy).

236. *Id.* col. 1588 (statement of Baroness Turner of Camden) (noting that race, sex, and disability claims can be very complicated); *see also id.* col. 1590 (statement of Lord Gladwin of Clee) (questioning "whether at this stage or ever racial, sexual and disability discrimination cases are suitable for ACAS arbitration"). In response to these concerns, the Bill's sponsor, Lord Archer, proposed to amend the Bill to permit such expansion only upon express approval of Parliament. *Id.* col. 1582 (statement of Lord Archer of Sandwell). In addition, Lord Haskel assured the assembled Lords that before the government proposed the expansion of arbitration to cover discrimination claims it would consult with the EOC, CRE, and other bodies. *Id.* col. 1604, 1606 (Statement of Lord Haskel).

237. *Id.* col. 1585 (statement of Lord Wedderburn of Charlton).

238. ACAS, *supra* note 165, at 11.

239. *See* Employment Rights (Dispute Resolution) Act, 1998, c. 8, § 8 (Eng.) (providing that an agreement to submit a dispute to arbitration shall be regarded as a "contract settling a complaint," and thus exempt from the normal prohibition on contracting out of statutory provisions, only if the arbitration is done "in accordance with the [ACAS] scheme"); *see also id.* (making amendments to section 77 of the Sex Discrimination Act of 1975, section 72 of the Race Relations Act 1976, section 288 of the Trade Union and Labour Relations (Consolidation) Act 1992, section 9 of the Disability Discrimination Act 1995, and section 203 of the Employment Rights Act 1996). Lord Archer explains this as follows:

I should also stress that the parties are not precluded, if they wish to do so, from submitting their dispute to a private arbitration not within the ACAS scheme as they may now; but, if they do so, the jurisdiction of the tribunal will not be excluded. This represents an important change from the proposals in the consultation paper. It was then proposed to enable parties to exclude the jurisdiction of the tribunal by referring the dispute to any form of arbitration. That proposal is now confined to arbitration within the ACAS scheme.

EMPLOYMENT BILL DEBATES, *supra* note 235, col. 1582 (statement of Lord Archer of Sandwell).

c. Proposal to Add Mediation or More Settlement

Some British commentators have suggested that more negotiated solutions offer the best way to deal with discrimination claims. In 1994 the British government *Green Paper* observed that from the government's perspective, as well as the parties', it is much cheaper to resolve cases through settlement than through a tribunal.²⁴⁰ The report also observed that conciliation "offers the potential for the dispute to be settled relatively quickly, informally and without publicity."²⁴¹ Thus, the *Green Paper* discussed changes that might make it easier for employees to receive the advice necessary to make a settlement of claims binding, and also suggested research into how to make conciliation techniques even more successful.²⁴² For example, the *Paper* raised the question of whether it might be effective to have more face-to-face conciliations.²⁴³

More recently, Rosemary Hunter and Alice Leonard have proposed that mediation offers many desirable features for resolving gender discrimination claims.²⁴⁴ Drawing on insights from the Australian system, they urge that in comparison to the employment tribunals, mediation can offer possible savings in time and cost, high satisfaction, a less stressful and less formal process, as well as the possible benefit of privacy.²⁴⁵ They also suggest that mediation may allow parties to work out mutually beneficial solutions, broader than those available through adjudication, such as apologies, training, and clarification of duties.²⁴⁶ At the same time, Hunter and Leonard

240. GREEN PAPER, *supra* note 12, at 16 (stating that the cost of an average industrial tribunal hearing averages £966, and the cost of an ACAS "cleared" case is £267). This differential is much greater for discrimination claims than other type of claims heard by industrial tribunals, because discrimination claims require much longer hearings. *Id.* at 17 (stating that cost of discrimination cases is £2000-£3000); *see also id.* at 27 ("Voluntary settlement or withdrawal of actual and potential tribunal claims has benefits in terms of speed and reduced costs, both to the parties concerned and to the public purse.").

241. *Id.* at 28.

242. *Id.* at 25-29. Pursuant to section 140 of the 1978 Act, "compromise agreements," whereby an employee waives the right of access to a tribunal in return for a settlement, are valid only if the employee has received independent legal advice about his rights from a person protected by proper indemnity insurance. *Id.* at 25-26. The *Green Paper* discussed new legislation that might make it clearer that most attorneys have such insurance, and also inquired as to whether persons other than attorneys should be empowered to provide such advice. *Id.*

243. *Id.* at 29.

244. Hunter & Leonard, *supra* note 12, at 298. Commentator Susan Corby similarly urges that strong consideration be given in Britain to using mediation to resolve unfair dismissal claims. Corby, *supra* note 12.

245. Hunter & Leonard, *supra* note 12, at 302-05.

246. *Id.* at 305.

recognize that mediation is not an ideal method for resolving all gender discrimination disputes, in that the use of private mediation rather than adjudication will inhibit both the publication of results and also the expansion of sex discrimination legislation.²⁴⁷ To address potential problems of power imbalances and of failure to ensure enforcement of law, Hunter and Leonard urge reliance on a rights-based/evaluative form of mediation, in which the mediator would help parties to evaluate strengths and weaknesses of their positions, with an eye toward reaching an agreement broadly in line with their respective rights.²⁴⁸ If this form of mediation were to be adopted, the mediators would need to possess sufficient expertise such that they could properly inform parties of their legal rights.²⁴⁹ Hunter and Leonard also urge adoption of a presumption that mediated agreements are public rather than private.²⁵⁰ In short, the proposal calls for adoption of a form of mediation that is somewhat closer to adjudication than other forms of mediation.

To date, the British are not using either binding arbitration or face-to-face mediation as an alternative to the combined tribunal/conciliation/litigation system that they have used for many years. However, the debates that have surrounded the existing system and proposed new systems show that the current system is likely not written in stone.

247. *Id.* at 306. Yet, they say that this may not be as much of a problem in Britain as it has been in Australia, where conciliation was established as the primary dispute resolution method from the inception of anti-discrimination legislation. *Id.* at 306-07. The authors explain that unlike in Australia, where only five percent of discrimination complaints proceeded to a public hearing, in Britain, ACAS conciliation and private settlement have still left thirty to forty percent of cases proceeding to industrial tribunals each year. *Id.* at 299, 307. Thus, Hunter and Leonard assert that introducing mediation into the British system at this point “would not be at the expense of test case litigation.” *Id.*

248. *Id.* at 311. They explain that “we would place primary responsibility on the mediators to ensure that the parties are adequately informed of their rights and that the objectives of the [Sex Discrimination Act] are met through mediation.” *Id.*; see also Corby, *supra* note 12, at *10 (urging the use of a proactive rights-based form of mediation). Note that some U.S. commentators and mediators would not consider this technique to be properly denominated mediation. See Kimberlee K. Kovach & Lela P. Love, “Evaluative” Mediation Is an Oxymoron, *ALTERNATIVES TO THE HIGH COST OF LITIG.*, Mar. 1996, at 31, 31 (arguing that it is inappropriate to use the term “mediation” to describe a process in which mediators offer opinions on the law or other matters). See generally Symposium, 2000 J. DISP. RESOL. 245, 248-394 (collecting articles discussing the current U.S. debate over the proper meaning of the term “mediation”).

249. Hunter & Leonard, *supra* note 12, at 311.

250. *Id.* at 313-14 (“[W]e would suggest that there be a presumption that mediated settlements are a matter of public record.”).

C. Australia

Australia began to pass significant civil rights legislation in the 1960s and 1970s.²⁵¹ While its initial legislation called for the criminalization of discriminatory conduct,²⁵² Australia quickly moved to adopt a purportedly informal, nonadversarial process for resolving individual employment discrimination claims.²⁵³ Specifically, Australia chose to emphasize conciliation rather than litigation as the main method for resolving discrimination disputes.²⁵⁴

In Australia, the primary body charged with administering antidiscrimination legislation is the federal Human Rights and Equal Opportunity Commission.²⁵⁵

The Commission seeks to promote an understanding and acceptance of human rights in Australia; undertakes research to promote human

251. Australia's federal statutes dealing with employment discrimination include the following: Racial Discrimination Act, 1975 (Austl.); Sex Discrimination Act, 1984 (Austl.); Human Rights and Equal Opportunity Commission Act, 1986 (Austl.); Disability Discrimination Act, 1992 (Austl.); Equal Opportunity for Women in the Workplace, 1999 (Austl.). Australia's state and territory statutes covering discrimination include the following: Equal Opportunity Act, 1984 (S. Austl.); Anti-Discrimination Act, 1977 (N.S.W.); Administrative Decisions Tribunal Act, 1997 (N.S.W.); Equal Opportunity Act, 1984 (W. Austl.); Discrimination Act, 1991 (Austl. Cap. Terr.); Anti-Discrimination Act, 1991 (Queensl.); Anti-Discrimination Act, 1992 (N. Terr.); Sex Discrimination Act, 1994 (Tas.); Anti-Discrimination Act, 1998 (Tas.); Equal Opportunity Act, 1995 (Vict.) (originally enacted as Equal Opportunity Act, 1984 (Vict.)).

252. See Prohibition of Discrimination Act, 1966 (S. Austl.), *repealed by* Racial Discrimination Act, 1976, § 2 (S. Austl.), *repealed by* Equal Opportunity Act, 1984, pt. I § 3(3) (S. Austl.); see also Margaret Thornton, *The Public/Private Dichotomy: Gendered and Discriminatory*, 18 J. L. & SOC'Y 448, 451 (1991); Annemarie Devereux, *Human Rights by Agreement? A Case Study of the Human Rights and Equal Opportunity Commission's Use of Conciliation*, 7 AUSTL. DISP. RESOL. J. 280, 282 (1996) (discussing "fierce opposition" to reliance on criminal sanctions).

253. See ASTOR & CHINKIN, *supra* note 7, at 261 ("The aim . . . is to challenge discrimination by an informal and consensual process involving negotiation and agreement wherever it is possible to do so.").

254. Relevant antidiscrimination statutes call for "conciliation." See Racial Discrimination Act, 1975, § 23(2); Sex Discrimination Act, 1984, § 73; Human Rights and Equal Opportunity Commission Act, 1986, § 46PF, *amended by* Human Rights Legislation Amendment Act (No. 1), 1999. See generally *Alternative Resolution of Employment Discrimination Claims: American and Australian Experiences: Proceedings of the 2001 Annual Meeting, Association of American Law Schools Section on Employment of Discrimination Law*, 5 EMPLOYEE RTS. & EMP. POL'Y J. 603, 612-13 (2001) [hereinafter *Australian Experiences*] (statement of Rosemary C. Hunter) (noting that there was great "precedent in the industrial relations system for the use of industrial conciliation").

255. Parliament created this commission through the enactment of the Human Rights and Equal Opportunity Commission Act, 1986 (Austl.), *amended by* Human Rights Legislation Amendment Act (No. 1), 1999 (Austl.). For a general description of this agency see Human Rights and Equal Opportunity Comm'n, *About the Commission*, at http://www.hreoc.gov.au/about_the_commission/index.html (last updated Oct. 9, 2003).

rights; investigates and attempts to conciliate complaints about breaches of human rights or of equal opportunity laws; intervenes or acts as *amicus curiae* in important legal cases that may affect the human rights of people in Australia; examines laws related to human rights; and provides advice to government on laws and actions that are required to comply with international human rights obligations.²⁵⁶

The Commission's scope includes claims based on race, gender, and disability.²⁵⁷ Like the British EOC, and unlike the U.S. EEOC, the Australian HREOC is not a decisionmaking body. Rather, if it is unable to conciliate a solution it may terminate the complaint. If this happens in a race, gender, or disability claim the complainant has the opportunity to have the complaint heard in the Federal Court of Australia or the Federal Magistrates Court.²⁵⁸ In addition to the HREOC, which is a federal body, the various Australian States all have their own antidiscrimination agencies which function in a similar manner.²⁵⁹

1. Focus on Conciliation

The Australian process for dealing with discrimination complaints is founded on the idea that an informal process, specifically conciliation, is usually the best method for resolving discrimination claims.²⁶⁰ Policy makers in Australia emphasized

256. HUMAN RIGHTS AND EQUAL OPPORTUNITY COMM'N, ANNUAL REPORT 2001-2002, at 7 (2002), available at http://www.humanrights.gov.au/annrep01_02/sta_president.htm (last visited May 17, 2004).

257. See Human Rights and Equal Opportunity Comm'n, *supra* note 255. The Commission also handles claims under Australia's 1986 Human Rights Act. *Id.*

258. Such a complaint must be filed within twenty-eight days of the termination decision. Human Rights and Equal Opportunity Act, 1986, § 46PO. Initially, the HREOC was charged with holding public hearings in those cases that were not withdrawn or resolved through conciliation. However, after a court decision found the hearings by an administrative agency violated the Australian Constitution, the statutes were rewritten to eliminate the public hearing and send complainants directly to federal court. See *infra* note 293. Note that claimants under the Human Rights and Equal Opportunity Commission Act do not have the option of filing in federal court. Human Rights and Equal Opportunity Act, 1986, § 46PO. Instead, they may request that the HREOC make a report to the Attorney General for presentation to the Parliament. *Id.*; see also HUMAN RIGHTS AND EQUAL OPPORTUNITY COMM'N, *supra* note 256, at 39-79 (explaining the complaint process).

259. See HUMAN RIGHTS AND EQUAL OPPORTUNITY COMM'N, *supra* note 256, at 43. The HREOC has cooperative agreements with most states that authorize the state agencies to handle discrimination claims on behalf of the HREOC. *Id.* (discussing cooperative arrangements with various states); see also HR STANDING COMM. ON LEGAL & CONST. AFFAIRS, PARLIAMENT OF AUSTL., HALF WAY TO EQUAL: REPORT OF THE INQUIRY INTO EQUAL OPPORTUNITY AND EQUAL STATUS FOR WOMEN IN AUSTRALIA 214-15 (1992).

260. Commentators have explained that conciliation was adopted after studying the procedural approaches taken by various other countries. See, e.g., Devereux, *supra* note 252,

conciliation because they thought it would provide relatively easy, speedy, low-cost access, achieve positive durable creative solutions that would repair relationships, empower the disputants, and provide a dignified process.²⁶¹ At the same time, they sought to avoid a primarily litigation-oriented system that they thought would be too formal, slow and costly, and would also heighten rather than lessen conflicts.²⁶² Several commentators have also observed that a private conciliation emphasis was deemed more acceptable by those who saw themselves as potential defendants under the new antidiscrimination laws.²⁶³ Thus, Australia's federal and state antidiscrimination laws require that discrimination charges be filed initially with a special government agency, and that the agency would "investigate" and attempt to "conciliate" the claims of discrimination.²⁶⁴ While the statutes do generally afford complainants a public option if the conciliation fails, only a small number of all complaints make it to either litigation or a public hearing.²⁶⁵ Thus, in practice agency process and conciliation is the primary dispute resolution system for employment discrimination disputes in Australia.

Although the Australian statutes all call for "conciliation,"²⁶⁶ they do not define the term.²⁶⁷ Studies have shown that while significant

at 282. One commentator also suggests that reliance on conciliation and arbitration has been part of the Australian culture for nearly 100 years, and that other jurisdictions may have looked to Australia in setting up their own models. Sev Ozdowski, *The Australian Experience with Tribunals, Commissions and Ombudsmen*, Presentation at the Sino-Australian Seminar on Alternative Dispute Resolution and the Modern Rule of Law (Nov. 20-22 2002), available at http://www.hreoc.gov.au/speeches/human_rights/sino_aus.html.

261. See, e.g., Anna Chapman, *Discrimination Complaint-Handling in NSW: The Paradox of Informal Dispute Resolution*, 22 SYDNEY L. REV. 321, 321-22 (2000); Devereux, *supra* note 252, at 283 (stating "conciliation was lauded as a process which produced 'positive and lasting solutions' which 'deal[t] more effectively with future relationships'"); Rosemary Hunter, *Evidentiary Harassment: The Use of the Rules of Evidence in an Informal Tribunal*, in FEMINIST PERSPECTIVES ON EVIDENCE 105, 107 (Mary Childs & Louise Ellison eds., 2000) ("The original intention of specialist anti-discrimination tribunals was to provide informal, low-cost [opportunities] for the adjudication of rights, with the ability to hear directly from parties without the need for legal representation.").

262. See, e.g., THORTON, *supra* note 3, at 145.

263. See *id.* at 144-45 (contrasting public treatment of crimes to confidential non-threatening treatment of discrimination, as mere "private peccadilloes"); *Australian Experiences*, *supra* note 254, at 613; Devereux, *supra* note 252, at 283.

264. Hunter & Leonard, *supra* note 12, at 299.

265. See *id.*

266. Racial Discrimination Act, 1975, § 23(2) (Austl.); Sex Discrimination Act, 1984, § 73 (Austl.); Human Rights and Equal Opportunity Commission Act, 1986, § 46PF (Austl.), amended by Human Rights Legislation Amendment Act No. 1, 1999 (Austl.).

267. See ASTOR & CHINKIN, *supra* note 7, at 61-64; THORNTON, *supra* note 3, at 143-44; Chapman, *supra* note 261, at 328 (noting, also, that "there is no clear line between investigation and conciliation" and that at least in New South Wales, "the same officer may

differences seem to exist among various government agencies' approaches to conciliation,²⁶⁸ some generalizations are possible. First, conciliation is a settlement technique. Conciliators do not decide cases or issue orders but instead attempt to help the complainant and respondent resolve their differences.²⁶⁹ Conciliators are typically instructed that they are not supposed to act as representatives for either side, nor to provide legal opinions.²⁷⁰ Instead, one study notes, "the commission's role could be described more accurately as facilitating parties' communication, lobbying and occasionally bringing the parties

conduct both" functions); Devereux, *supra* note 252, at 282; Hunter & Leonard, *supra* note 12, at 299. A definition of statutory conciliation has however been offered by the National Alternative Dispute Resolution Advisory Council:

Statutory conciliation is a process in which the parties to a dispute which has resulted in a complaint under a statute, with the assistance of a neutral third party (the conciliator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator has no determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement which accords with the requirements of that statute.

NATIONAL ALTERNATIVE DISPUTE RESOLUTION ADVISORY COUNCIL, ISSUES OF FAIRNESS AND JUSTICE IN ALTERNATIVE DISPUTE RESOLUTION 200 (1997).

268. ROSEMARY HUNTER & ALICE LEONARD, THE OUTCOMES OF CONCILIATION IN SEX DISCRIMINATION CASES 1 (Univ. of Melbourne Ctr. for Employment & Labour Relations Law, Working Paper No. 8, 1995) ("[A]gencies [handling conciliation] have been left to develop their own policies, practices and procedures."); *see also id.* at 11-16 (describing wide variation among one federal and two state agencies with respect to how they received complaints and informed parties about their investigation and conciliation process); ASTOR & CHINKIN, *supra* note 7, at 61-64 (explaining how each government agency handles complaints).

269. Hunter & Leonard, *supra* note 12, at 300 (observing that in some ways "the Australian practice of conciliation in discrimination cases is close to the commonly understood meaning of mediation: that is, a process by which an independent third party assists the parties to a dispute to reach their own agreement"); *see also* Human Rights and Equal Opportunity Comm'n, *Complaints Information*, at http://www.hreoc.gov.au/complaints_information/parties/index.html#Conciliation (last updated Dec. 18, 2003) (stating that "[t]he conciliator's role is a neutral one, conducting the conference in a fair and impartial manner, giving each party an opportunity to present their point of view and assist them in resolving the complaint").

270. HUNTER & LEONARD, *supra* note 268, at 12, 16, 24; Chapman, *supra* note 261, at 338-39; Human Rights and Equal Opportunity Comm'n, *supra* note 269 ("The conciliator is not an advocate for either party."). However, it is likely that variation exists. *See* Chapman, *supra* note 261, at 338 n.100 (stating that the South Australian Commissioner for Equal Opportunity regularly provided parties with written advice discussing the lawfulness of respondent's actions); Devereux, *supra* note 252, at 293 (reporting that in studied cases Commission officers provided disputants with advice but at the same time emphasized that they could not serve as either disputant's advisor).

together.²⁷¹ One study reports that whereas some conciliations use an interest-based approach, others are adversarial in nature.²⁷² Second, the one statutory requirement is that conciliating agencies must afford complete confidentiality to the process.²⁷³ Third, although one might assume that the purpose of conciliation is to bring complainants and respondents together physically, apparently face-to-face meetings are not the rule.²⁷⁴ Instead, conciliation attempts often involve independent communications between the conciliator and each side.²⁷⁵ Fourth, although the conciliators are empowered to conduct investigations, studies have shown that the typical investigation is quite minimal.²⁷⁶ In most cases, no witnesses are contacted from either side, and just two or three documents are obtained from each complainant and respondent.²⁷⁷ Fifth, it is fairly rare for either side to be represented at

271. Devereux, *supra* note 252, at 287.

272. Ozdowski, *supra* note 260 (citing Paula Gonzalez & Karen McCable, Giving Them What They Want—Challenges in Using the Adversarial and Interest Based Models of Statutory Conciliation, Paper Presented to the 6th National Mediation Conference (Sept. 18-20, 2002)).

273. HUNTER & LEONARD, *supra* note 268, at 1; *see infra* note 291.

274. HUNTER & LEONARD, *supra* note 268, at 14 (conciliation conferences held in less than half of sex discrimination claims examined); Louise Thornthwaite, *The Operation of Anti-discrimination Legislation in New South Wales in Relation to Employment Complaints*, 6 AUSTL. J. LAB. L. 31, 33 (1993) (stating that conferences were held in approximately half the cases over a ten year period); Devereux, *supra* note 252, at 287 (noting that although “HREOC guidelines advoca[te] . . . holding conferences ‘wherever practicable,’ conferences were held in only six of the 17 ‘conciliated’ cases [examined]” (footnote omitted)); Thornton, *supra* note 7, at 734 n.6 (“Out of 111 complaints settled by the New South Wales Anti-Discrimination Board (ADB) between July 1, 1986 and June 30, 1987, conferences were held in 46.8 percent of cases . . .”).

275. Chapman, *supra* note 261, at 337 (stating that “convening of a conference is probably not the norm,” and that instead “conciliation was largely about the exchange of correspondence, documents and telephone calls”); Devereux, *supra* note 252, at 287 (stating that conciliators often simply served as a liaison between the parties, clarified viewpoints, or lobbied respondents through telephone calls and letters).

276. Hunter & Leonard, *supra* note 12, at 300 (contrasting the Australian approach to that taken by the American EEOC); *see also* Chapman, *supra* note 261, at 335-36 (noting that in New South Wales, while the Board “investigates” each complaint in the sense of ensuring that the allegations are jurisdictional, and while the Board also sends out standard written inquiries, it does not compel that the questions be answered, nor carry out further inquiries, nor visit the respondent’s premises).

277. HUNTER & LEONARD, *supra* note 268, at 14 (concluding, in a five year study of three jurisdictions, that in 79.5% of the cases no witnesses other than complainant and respondent were contacted, that in half the cases no documents were gathered or tendered, and that on average 3.5 documents were obtained from complainants and 2.3 from respondents).

the initial stages of the filing of the complaint, or even at a conciliation hearing, when those are held.²⁷⁸

What have been the results of the conciliation process? First, it appears that very few employment discrimination disputes make it beyond the conciliation process. In the period when the HREOC had the responsibility for filing public hearings, several studies reported that just five or ten percent of such claims were taken to public hearings or litigation that would follow unsuccessful conciliation.²⁷⁹ Now that complainants are authorized to take their terminated claims to court, it appears that this percentage may increase significantly, but it is too soon to tell what the full impact of this change will be. Although it appears that more claims may be filed in court than had been taken to public hearing,²⁸⁰ it is not yet clear whether these lawsuits will result in substantive determinations or perhaps be dismissed or withdrawn short of a ruling on the merits. Second, at the same time, far fewer disputes than one might expect are actually settled as a result of the conciliation. While sixty-two percent of cases in which conciliation was attempted were settled,²⁸¹ just thirty percent of claims

278. *Id.* at 4, 8. This report showed that at the time a complaint was filed only four percent of complainants were represented by a solicitor and only 5.8% were represented by a union or other organization. *Id.* at 4. By the time of the conciliation conference, if one was held, 15.5% of complainants were represented by a solicitor and 5.7% by a union or other organization. *Id.* However, of those complainants who proceeded beyond the conciliation conference, 42.3% were represented by a solicitor, and 4.1% by a union. *Id.* Respondents were somewhat more likely to be represented at the early stages, with 18.5% being represented by an attorney, and 2.1% by an association prior to the conciliation conference. *Id.* at 8. At the conference, 24.8% of respondents were represented by an attorney, and 3.2% by an association. *Id.* When the complaint proceeded beyond the conference, twenty-six percent of respondents were represented by an attorney, and 5.2% by an association. *Id.* But see Devereux, *supra* note 252, at 291 (reporting, based on a study of forty claims filed against government respondents in 1989-90, that more than forty-seven percent of complainants had some time of representation, whether by a union or community group representative, but that just twenty-five percent of government respondents were represented).

279. In 2001-2002, complainants had the power to file their own complaints in federal court in all except human rights claims. Human Rights and Equal Opportunity Commission Act, 1986, § 46FO (Austl.), *amended by* Human Rights Legislation Amendment Act (No. 1), 1999 (Austl.). With respect to human rights, the HREOC took just one percent of claims to a public hearing. See HUMAN RIGHTS AND EQUAL OPPORTUNITY COMM'N, *supra* note 258, at 67 tbl. 8; see also Chapman, *supra* note 261, at 322; Hunter & Leonard, *supra* note 12, at 299 (stating fifty percent of sex discrimination complaints proceeded to public hearing in practice); HR STANDING COMM. ON LEGAL & CONST. AFFAIRS, *supra* note 259, at 217 (stating that in 1990-91 "[o]nly 5 per cent of complaints handled by HREOC were referred for a formal hearing, the most expensive and traumatic way of reaching settlement").

280. See *infra* note 305 (detailing an e-mail from Rosemary Hunter stating that twice as many cases were taken to court, in the first year, as had been taken to public hearing).

281. HUMAN RIGHTS AND EQUAL OPPORTUNITY COMM'N, *supra* note 258, at 61.

were taken to conciliation,²⁸² meaning that under nineteen percent of claims filed with the HREOC are actually resolved through conciliation. In a sizable number of claims no settlement is reached either because the agency deemed the claim to be nonmeritorious, or because the complainant decided to withdraw the charge.²⁸³ This is apparently deemed appropriate by the government, as the HREOC sets its goal as conciliating thirty percent of complaints.²⁸⁴ Third, the conciliation process is relatively speedy as compared to processes used elsewhere.²⁸⁵ Fourth, when complaints are resolved in conciliation they do not typically result in large financial settlements. Monetary agreements are reached in approximately thirty percent of cases,²⁸⁶ but the average amount of such settlements tends to be quite small, in the area of \$3000.²⁸⁷ Settlements also frequently include nonmonetary

282. *Id.*

283. The HREOC 2001-2002 *Annual Report* shows that of complaints received in all categories, thirty percent were conciliated, fourteen percent withdrawn, fifty-five percent were terminated or declined, and one percent (human rights) were reported to the Attorney General. *Id.* at 67 tbl. 8. Examining the reasons for termination or withdrawal, which are broken down by category of discrimination, one sees that most terminations are due to a determination that the claim was trivial or frivolous, and most withdrawals are due to a claimant's determination not to proceed, rather than to a settlement received outside the HREOC. *Id.* at 70 tbl. 17 (examining race); *id.* at 73-74 tbl. 24 (examining sex); *id.* at 75-76, tbl. 28 (examining disability); *id.* at 79 tbl. 34 (examining human rights); *see also* HUNTER & LEONARD, *supra* note 268, at 17 (reporting, based on a five year study of three jurisdictions, that an average of 13.8% of complaints were dismissed due to lack of contact with the complainant, and 25.1% were withdrawn prior to the conciliation conference). However, just under one quarter of the 25.1% claims withdrawn prior to the conference were settled privately. HUNTER & LEONARD, *supra* note 268, at 17; *see also* Devereux, *supra* note 252, at 285 (of forty cases "successfully resolved" during conciliation, seventeen were conciliated and twenty-three were withdrawn). Having studied the high withdrawal rate, however, Devereux concludes that it is not as problematic as one might think at first glance. Devereux, *supra* note 252, at 288, 293-95.

284. HUMAN RIGHTS AND EQUAL OPPORTUNITY COMM'N, *supra* note 256, at 41.

285. *Id.* (reporting eighty-eight percent of complaints were within twelve months of lodging, and that the average time of disposition was seven months); *see also* HUNTER & LEONARD, *supra* note 268, at 12 (finding, in a five year study of three jurisdictions, a median time of just over six months between agency receipt and closure of a complaint). However, note that some of the complaints that were "closed" were presumably taken to litigation or sent on for further hearing, and thus not actually ended from the perspective of the disputants. As well, a significant number of the complaints were dismissed or withdrawn. *See supra* notes 279-283.

286. HUNTER & LEONARD, *supra* note 268, at 18.

287. *Id.* at 24. Hunter and Leonard found that, during the period studied, financial awards conciliated in Victoria and South Australia were less than \$500 in one third of the cases. *Id.* Conciliated awards rarely exceeded \$10,000. *Id.* In contrast, Hunter and Leonard report that the average award in sex discrimination cases taken to hearings was \$18,200. *Id.* Hunter and Leonard also found that in conciliation "respondents achieved the outcome they first proposed almost twice as often as complainants." *Id.* at 26. Those researchers interpret this as reflecting a power imbalance between complainants and respondents. *Id.* Hunter and

terms.²⁸⁸ One study found apologies were issued in approximately thirty percent of cases,²⁸⁹ and that changes in policies or practices were also common.²⁹⁰ Fifth, and quite significantly, all actions taken at the conciliation stage are confidential.²⁹¹

As noted earlier, for those claims that are not resolved in the conciliation process or withdrawn, the specific process through which they are handled has recently changed. At the federal level, whereas public hearings used to be held by a specialized administrative tribunal, they are now heard by a regular federal court or by federal magistrates.²⁹² This change is attributable, in significant part, to a court decision, *Brandy v. Human Rights & Equal Opportunity Commission*, casting doubt on the authority of the specialized tribunal to issue

Leonard show that because parties did not have legal representation, nor receive advice from conciliators as to previously awarded/requested amounts, complainants asked for much smaller amounts than might have been appropriate. *Id.* “One conciliator commented that complainants did not generally have a concept of future loss, but would only ask for lost wages up to the date of the agreement.” *Id.* at 24.

288. HUMAN RIGHTS AND EQUAL OPPORTUNITY COMM’N, *supra* note 256, at 45-60 (providing a vast array of examples of conciliated agreements).

289. HUNTER & LEONARD, *supra* note 268, at 18 (finding that 30.5% of settlements included an apology); *see also* Devereux, *supra* note 252, at 294 (noting that Commission staff generally discouraged punitive damages and instead “encouraged settlements focused upon the possibility of future amicable relations” and included such terms as apologies, permitting complainants to apply for future positions, or instituting new training programs).

290. HUNTER & LEONARD, *supra* note 268, at 18 (reporting policy changes in 29.8% of cases and practice changes in 14.5% of cases). However, offices’ attitudes toward such relief varied substantially, with one office expressing the view that because conciliation is primarily geared to individuals, the agency should not generally seek to address broader issues. *Id.* at 25.

291. *See, e.g.*, Human Rights and Equal Opportunity Commission Act, 1986, § 46PS(2) (Austl.), *amended by* Human Rights Legislation Act (No. 1), 1999 (Austl.); Racial Discrimination Act, 1975, § 22(5) (Austl.); Equal Opportunity Act, 1984, § 27(2) (S. Austl.). The confidentiality requirement may affect private settlements, as well as public perceptions of how discrimination laws are enforced. Hunter and Leonard report that some conciliators would cite confidentiality concerns in refusing to provide complainants with data on outcomes in previously conciliated agreements. HUNTER & LEONARD, *supra* note 268, at 24. They also found that while conciliation officers expressed the view that too much emphasis was placed on confidentiality, to the detriment of public awareness of discrimination issues, a number of complainants noted that they personally had no preference for confidentiality. *Id.* at 25.

292. *See* Human Rights and Equal Opportunity Commission Act, 1986 § 46PO (stating that complainants have twenty-eight days after receiving decision of non-conciliation to file in Federal Court of Australia); *see also* Human Rights and Equal Opportunity Comm’n, *Frequently Asked Questions*, at <http://www.hreoc.gov.au/faqs/complaints/html> (last visited Jan. 30, 2004); Hunter, *supra* note 261, at 106 n.6 (“[T]he specialist tribunal has been abolished and its functions transferred to a generalist court.”); Chapman, *supra* note 261, at 334 n.77 (noting that “the role of HREOC in the determination of unconciliated complaints ... has been transferred to the Federal Court under the *Human Rights Legislation Amendment Act (No.1) 1999*”).

binding decisions.²⁹³ At the state level, some states are now moving to a system where public hearings are held by an administrative tribunal that hears a variety of matters, rather than by one that specializes in employment discrimination.²⁹⁴ It is too soon to tell precisely how these new federal and state procedures will work. However, a preliminary analysis from the HREOC based on the first two years of operation of the new system found that in general the legal interpretations by the federal court and magistrate service were consistent with principles developed by the HREOC.²⁹⁵ Procedurally we can assume that the courts will be at least as formal as were the administrative tribunals. Thus, we can gain some insights into both past and present practice by looking at the operation of the specialized administrative tribunals.

2. Evaluation of Australian Process

It is generally agreed that the specialized tribunals were designed to operate informally, as compared to a traditional court; opinions differ as to whether this informality was been achieved, and also as to whether it was desirable. Several commentators observed a phenomenon of creeping adversarialness or formality, noting that the existence of a possible appeal from the specialized tribunal to a regular court encouraged panelists to behave in a fairly legalistic manner.²⁹⁶

293. *Brandy v. Human Rights & Equal Opportunity Comm'n* (1995) 183 C.L.R. 245. *Brandy* held that the purported delegation to the Commission of judicial power violated Chapter III of the Australian Constitution. *Id.* at 267; *see also* Human Rights and Equal Opportunity Comm'n, *Change and Continuity: Review of the Federal Unlawful Discrimination Jurisdiction September 2000-September 2002*, at <http://www.humanrights.gov.au/legal/review/index.html> (last updated July 25, 2003) (discussing reform to procedures for bringing discrimination claims required by *Brandy*).

294. For example, in New South Wales, prior to October 1998, claims were heard by the Equal Opportunity Tribunal. Now, however, that tribunal's functions are performed by the Administrative Decisions Tribunal. *See* Jill Anderson, *Something Old, Something New, Something Borrowed . . . The New South Wales Administrative Decisions Tribunal*, 5 AUSTL. J. ADMIN. L. 97, 106 n.6 (1998) (noting initially six tribunals merged into one general Administrative Decisions Tribunal under the Administrative Tribunal Act, 1997 (N.S.W.)); Chapman, *supra* note 261, at 328 n.41. Similarly, in Victoria, the Equal Opportunity Tribunal was replaced by the more general Victorian Civil and Administrative Tribunal under the Victorian Civil and Administrative Tribunal Act, 1998 (Vic.). Chapman, *supra* note 261, at 334 n.78; *see also* Hunter, *supra* note 261, at 106 (observing that specialist antidiscrimination tribunals in Victoria and New South Wales have now been amalgamated with tribunals hearing other types of claims including guardianship, town planning, et cetera).

295. Human Rights and Equal Opportunity Comm'n, *supra* note 293, at 2.

296. Chapman, *supra* note 261, at 323. Chapman notes:

[C]ontrary to much of the rhetoric of ADR, 'investigation' and 'conciliation' in NSW contain traces of a Western adjudicative tradition. . . . [A]dversarial ideologies, and in particular the centrality accorded to procedural fairness, and the construction of the parties as formally equal individuals who 'drive' the dispute

On the other hand, some commentators contended that the adoption of informal evidentiary practices has largely been successful.²⁹⁷ Yet, to the extent that informality was achieved, it was not always seen as desirable. One commentator concluded that respondent companies were able to take advantage of the informal, and thus undefined, rules of evidence to present negative evidence about complainants that would not have been admissible in court, to delay proceedings substantially, and to put relatively inexperienced complainants' counsel on the defensive.²⁹⁸

Reactions to the Australian procedural system have been mixed. Some commentators are quite pleased with the heavy emphasis on conciliation. A case study based on 1989-1990 data found that the conciliation system was "proving successful in producing outcomes directed at future relationships rather than punishment," and stated that "[w]ith the predicted move towards Federal Court proceedings for all unresolved discrimination cases, the role for conciliation will become

resolution processes to a conclusion, appear to be present, in a shadow form, in the handling of complaints by the Anti-Discrimination Board (NSW)

Id. Chapman further notes that "the ever present possibility of a tribunal or court proceeding presents a constraining influence over all discrimination jurisdictions." *Id.* at 333; Hunter, *supra* note 261, at 107 ("Despite legislative encouragement to adopt more relaxed procedures, anti-discrimination tribunals have experienced a persistent pull towards formality, arising from their structural position in the legal hierarchy and the pervasive influence of adversarialism."); *see also* THORTON, *supra* note 3, at 162-63 (referring to conciliation and stating that "[i]n practice . . . informalism is being subtly transformed by creeping legalism").

297. Peter Bailey & Annemarie Devereux, *The Operation of Anti-Discrimination Laws in Australia*, in HUMAN RIGHTS IN AUSTRALIAN LAW: PRINCIPLE, PRACTICE AND POTENTIAL 292, 315 (David Kinley ed., 1998) (explaining that while antidiscrimination tribunals continue to apply the main rules of evidence, they avoid treatment of finer points, thereby generally affording disputants quicker hearings and a greater ability to represent themselves).

298. Hunter, *supra* note 261, at 105. Hunter found:

In sexual harassment cases, complainants attempt to tell stories of unwelcome and invasive behaviour that is often unwitnessed, frequently prolonged, and always embarrassing and humiliating to recount. Relative informality and the absence of traditional evidentiary restrictions might be thought to enhance the ability of women who have been targets of sexual harassment to tell their stories and to have them believed. Tribunal observations in a number of sexual harassment cases, however, demonstrated that respondents' counsel used the rules of evidence (or their absence) tactically to obstruct the hearing process.

Id. She found, as a result, that the supposedly informal sexual harassment cases tended to last much longer than other proceedings, either criminal or civil. *Id.* at 115; *see also* Margaret Thornton, *Board's First Decision*, 4 LEGAL SERVICE BULL., Oct. 1979, at 180, 181 (commenting on the New South Wales Anti-Discrimination Board's first decision by saying, "[n]ot only would a court hearing have been more expeditious and cheaper, the Complainant would have had the added protection of procedural rules").

even more vital.”²⁹⁹ Similarly, a 1992 review of sex discrimination legislation and procedures concluded as follows: “Although criticisms have been made of the conciliation model, both as a concept and in its practical operation, most submissions and evidence accepted that its benefits outweighed its deficiencies. Attention, therefore is on the means of minimising or overcoming those deficiencies, rather than on abandoning conciliation.”³⁰⁰ The HREOC’s *2001-2002 Annual Report* stated that “83 percent of parties were satisfied with the service they received,” and that “of this 83 percent, 47 percent rated the service they received as ‘very good’ or ‘excellent.’”³⁰¹

On the other hand, some commentators have criticized the Australian system for resolving employment discrimination complaints primarily on grounds that are insufficiently legal and do not ensure adequate interpretation or enforcement of the laws. Because only a very small percentage of discrimination claims historically were resolved through public hearings or in court, critics contended that the discrimination laws received insufficient public attention and that the laws have not evolved as thoroughly as they have in other countries.³⁰² Rosemary Hunter contends, for example, that “[i]ndirect discrimination provisions in particular remain misunderstood and underutilised in Australia as a result of the lack of

299. Devereux, *supra* note 252, at 298; see also PATRICK PENTONY, HUMAN RIGHTS COMM’N, CONCILIATION UNDER THE RACIAL DISCRIMINATION ACT 1975: A STUDY IN THEORY AND PRACTICE 106 (Occasional Paper No. 15, 1986) (giving an example of an Aboriginal woman who, because of the conciliation process, gained self-confidence in herself and acquired the ability to “confront, in a quiet but firm way, any estate agent or other person she thought was discriminating against her because of her colour”).

300. HR STANDING COMM. ON LEGAL & CONST. AFFAIRS, *supra* note 259, at 259.

301. HUMAN RIGHTS AND EQUAL OPPORTUNITY COMM’N, *supra* note 256, at 41.

302. Hunter & Leonard, *supra* note 12, at 306. While praising some aspects of the use of ADR, for employment discrimination disputes, the authors state “there is also a danger that a privatised dispute resolution will inhibit both the publicisation and the elaboration of sex discrimination legislation.” *Id.* They further elaborate on this point:

Public hearings (and media reports of them) can be an important source of information about the legislation. People are reminded of its existence and are able to see it working. Publicity encourages potential complainants to invoke the legislation, and acts as a deterrent to employers. By contrast, a private dispute resolution process has no empowering or educative effect. This problem has emerged clearly in Australia, where as noted above, only a very small number of cases proceed to a public hearing.

Id. (footnote omitted); see also Andrea Durbach, *Test Case Mediation—Privatising the Public Interest*, 6 AUSTL. DISP. RESOL. J. 233, 235 (1995) (mediation of employment discrimination disputes “poses the risk of invisibility and important community interests and tenuous rights hard won ‘could fade from the public agenda’”); Margaret Thornton, *Towards Embodied Justice: Wrestling with Legal Ethics in the Age of ‘New Corporatism’*, 23 MELBOURNE U. L. REV. 749, 758-60 (1999) (criticizing the conciliation process).

publicity given to this form of discrimination.”³⁰³ Even when disputes did reach the public hearing stage, it was alleged by some that the administrative tribunals lacked sufficient knowledge to adequately interpret or develop the discrimination laws.³⁰⁴

It remains to be seen whether providing complainants with direct access to court, after their claim has been dismissed by the HREOC, will solve this problem. Preliminary information does show that more claims are being filed in the federal court and with the federal magistrate service than had previously been brought to public hearing by the HREOC.³⁰⁵ Thus, it seems likely that more precedents will be reported and more law developed. At the same time, there is now a concern that the law being developed by the Federal Magistrates Service and the Federal Courts may be unduly formalistic and hostile to discrimination claimants.³⁰⁶

Commentators have raised several other issues as well. First, some point out that the emphasis on conciliation results in a system that is too private. Neither complainants, respondents, their representatives, nor even conciliators have a firm idea of how comparable claims of discrimination have been resolved.³⁰⁷ Second,

303. Hunter & Leonard, *supra* note 12, at 306; *see also* ROSEMARY HUNTER, INDIRECT DISCRIMINATION IN THE WORKPLACE xxiii (1992) (provisions for indirect discrimination are rarely publicized and even more rarely analyzed as an element of a claim); HUNTER & LEONARD, *supra* note 268, at 9. Hunter and Leonard also assert that “the paucity of authoritative decisions has become self-perpetuating in Australia, as few lawyers have developed expertise in the discrimination area, thereby limiting the availability of skilled representation and the capacity for creative arguments to be put before the courts, which might extend the scope of the legislation.” Hunter & Leonard, *supra* note 12, at 306.

304. Hunter & Leonard, *supra* note 12, at 306-07. Hunter and Leonard have recognized that the need for development of the law and setting of legal precedent may vary, depending on the maturity of the laws in question. *Id.*

305. E-mail from Rosemary Hunter to Jean R. Sternlight (Mar. 24, 2003) (on file with author) (showing that whereas 169 complaints were taken to public hearing in 1997-98, and 182 in 1998-99, 315 complaints were filed either with the federal courts or the federal magistrates service in 2000-01).

306. *But see* Human Rights and Equal Opportunity Comm’n, *supra* note 293, at 1-5 (summarizing critiques of the new legislation but concluding, based on extensive legal analysis, that race and sex discrimination decisions handed down by the federal courts were “largely consistent with the principles that had been developed by HREOC,” and that the narrowing that had occurred in interpretation of the disability statute likely would have occurred under the HREOC as well).

307. In providing comments on the functioning of the sex discrimination act in the early 1990s, the National Women’s Consultative Council put its concerns as follows:

Whilst conciliation provides a less ‘threatening’ model for complaints, NWCC is concerned that this model pushes the Sex Discrimination Act out of public view. Sex discrimination is thus viewed as a private matter. A balance between private and public settlement of disputes would ensure that information about the SDA would be more prominent in our society through media reports, etc. NWCC is also

some contend that the substantive results achieved through the conciliation process are not sufficient to compensate victims or deter future illegal conduct.³⁰⁸ Such critics focus in part on the high withdrawal rate, suggesting that it reflects at least in part a sacrificing of rights.³⁰⁹ Some also emphasize that the conciliator's or agency's interest in achieving a settlement is not always in the best interest of the complainant or even the public at large.³¹⁰ Third, some critics focus on what they see as the insufficiency of the investigations of discrimination, noting that while the complainants typically lack adequate resources to put together a compelling claim of discrimination, the agencies also often fail to do much more than consider the information gathered by the two sides.³¹¹ That is, reliance on conciliation, at least absent representation, "fails to even out, and therefore reproduces, financial, informational, skill, status and personal power imbalances between the parties."³¹² In other words, critics assert the conciliation process cannot adequately compensate for the serious power imbalances that often exist among the

concerned that the conciliation model cannot, as it stands, adequately address systemic discrimination in the workplace.

HR STANDING COMM. ON LEGAL & CONST. AFFAIRS, *supra* note 259, at 221. *See generally* Thornton, *supra* note 252.

308. *See* Devereux, *supra* note 252, at 283 (citing concerns by Kressel and Pruitt that "'private' methods of dispute resolution may simply operate to entrench existing power dynamics," and also citing concerns by Thornton that compromise often means that the complainant is accepting a lesser remedy than she might have obtained in court).

309. *See* HR STANDING COMM. ON LEGAL & CONST. AFFAIRS, *supra* note 259, at 220 (quoting Ms. Moira Rayner, Equal Opportunity Commissioner for Victoria):

All I can say to you is that while they may not proceed to a determination, that does not necessarily mean that they are settled in the conciliation process. My experience in the last five months has been that people just pull out and say they have had enough. We are not, in fact, providing a very prompt or effective process.

310. June Williams, Commissioner for Equal Opportunity in Western Australia, put it as follows: "Statistics indicating high levels of success in conciliation . . . are misleading. Such data indicate the effectiveness of the model in keeping matters from proceeding to formal hearings, not the success of the conciliation model." *Id.*; *see also id.* at 222 (contrasting the complainant's attorney's role of producing the best possible outcome for the client with the "conciliator's agenda . . . to get the complaint resolved").

311. *See infra* notes 392-393.

312. Hunter & Leonard, *supra* note 12, at 307 (noting that while neither complainants nor respondents tended to be represented by attorneys during the conciliation process, complainants often found themselves outnumbered by managers, and further noting that "the outcome of the conciliation process reflected the respondent's first offer almost twice as often as it did the complainant's first demand"); *see also* ASTOR & CHINKIN, *supra* note 7, at 105 (noting that mediation has a better chance of resulting in equitable agreements among parties of relatively equal power); HUNTER & LEONARD, *supra* note 268, at 26 ("The relative success of respondents is undoubtedly a reflection of the relative power and bargaining strength of respondents—factors which the conciliation process fails to equalize.").

disputants.³¹³ A fourth set of criticisms emphasize that conciliation, at least if not properly handled, can be insensitive to the cultural values of the claimants.³¹⁴ Fifth, and to some extent in tension with aspects of the preceding, some criticize the conciliation system on the ground that a system that was designed to be informal has become too formal and adversarial, diminishing its effectiveness.³¹⁵

While criticisms have been offered regarding the current emphasis on conciliation, there is no evidence that Australia is currently contemplating major changes to its system, apart from the switch from tribunals to courts that was just adopted. Unlike in the United States and Britain, there seems to be little discussion of using arbitration as a means of resolving employment discrimination matters. There is no talk of adopting the informal government tribunal system that is known by the name of "arbitration" in Great Britain. Nor is there evidence this author could find that companies are currently using or contemplating using the sort of "mandatory" private binding arbitration that has become increasingly popular in the United States. In light of the *Brandy* antidelegation decision,³¹⁶ it seems doubtful that the Australian high court would accept a system in which a nonjudicial body made a final determination in a discrimination matter.

D. Emergence of Some Common Themes

Having reviewed how three jurisdictions have attempted to resolve individual claims of employment discrimination, we begin to

313. See HR STANDING COMM. ON LEGAL & CONST. AFFAIRS, *supra* note 259, at 222 (noting that the "complainant is invariably in a position of less power than the respondent"); Devereux, *supra* note 252, at 283 (discussing power imbalance critique).

314. See, e.g., Devereux, *supra* note 252, at 283 (summarizing critique that conciliation "often uses methods inconsistent with Aboriginal values"); Durbach, *supra* note 302, at 241-42 (recounting the story of mediation used to resolve damages issues following a liability determination in a large test case, and arguing that the mediation used marginalised the complainants, causing them to lose faith in the justice system).

315. See, e.g., Chapman, *supra* note 261, at 350 (noting adversarial aspects are coming into informal dispute resolution and "can only be seen as a regressive development"); Thornton, *supra* note 7, at 756. Thornton reasons that:

[T]he intrusion of lawyers inevitably means a package of values antipathetic to informalism, namely, costs, procedural rules, rejection of the emotional and therapeutic dimension, and a psychological preparedness for the advent of a greater degree of formalism by way of a hearing or inquiry and, subsequently, the exercise of an appeal.

Id.

316. See *supra* note 293 and accompanying text.

see some common themes.³¹⁷ By identifying and examining these themes we can give more thoughtful consideration to how such claims can best be resolved.

First, all three countries have offered a mix of dispute resolution processes, rather than attempting to resolve all employment discrimination claims using a single process. The United States currently offers the broadest range of processes: private and public mediation, conciliation by the EEOC, binding arbitration by privately selected arbitrators, and adjudication through the ordinary court system.³¹⁸ In Britain, discrimination disputes are currently resolved primarily through either conciliation or administrative tribunals,³¹⁹ although mediation and public arbitration options are being considered. Australia relies significantly on conciliation, but also uses court processes for those disputes that are not withdrawn or conciliated.³²⁰

Second, in each jurisdiction we have seen some cycling among the different processes. As one Australian commentator put it, there is a tendency toward “oscillation” between the formal and informal processes.³²¹ Thus, in Australia, a jurisdiction which has emphasized a relatively informal nonadjudicatory mode of dispute resolution, some have urged that more attention needs to be paid to formal adjudicatory processes in which precedent might be developed.³²² Similarly, in Britain some have expressed concern that perhaps too many claims are being resolved or withdrawn at the conciliation stage.³²³ At the same time, to the extent that jurisdictions have emphasized adjudication, critics are urging them to become more mediation or conciliation oriented. In the United States, although the EEOC has always been required by law to “conciliate” claims of discrimination, the agency traditionally emphasized more adjudicative methods both within and outside of the agency. Now, however, mediation is being

317. I have also seen these themes play out in Ireland and Northern Ireland, both countries in which I conducted extensive interviews on this subject.

318. *See supra* notes 27-31 and accompanying text. However, as will be discussed, the use of binding arbitration clauses on a wide-scale basis threatens the use of some of these other processes.

319. *See* Sex Discrimination Act, 1975, c. 65, §§ 63-64 (Eng.); Equal Pay Act, 1970, c. 41, § 2 (Eng.). Gender discrimination claims may alternatively be filed in court.

320. *See supra* notes 258, 266 and accompanying text.

321. *See* THORNTON, *supra* note 3, at 169-70.

322. *See supra* notes 304-310 and accompanying text. The transfer of jurisdiction for hearings from the HREOC to the federal courts may help accomplish this end.

323. *See* Emp. Tribunal Serv., *supra* note 194, at 494.

emphasized.³²⁴ In Britain, while the tribunals were intended to operate in a relatively informal fashion, they have been criticized as overly legal. Attempts are now being made to introduce arbitration or mediation in order to make the process less formal and less legal.³²⁵

Third, there appears to be an inevitable tendency toward legalization and formalization that causes processes originally intended to be quick, cheap, and informal to morph into processes that resemble normal litigation. As these processes come to resemble litigation more closely, they also become slower and more costly. In Britain, because the employment tribunals have ceased to be quick, cheap, and informal, policy makers have looked to conciliation and government-sponsored arbitration as alternatives to the tribunals.³²⁶ In the United States, although the initial statutes called for "conciliation" and apparently envisioned that discrimination claims would be resolved quickly, cheaply, and amicably, instead legalistic wrangling has spurred backlog both at the EEOC and in the courts.³²⁷ Although Australia has emphasized conciliation, some conciliations are handled in an adversarial fashion.³²⁸ Moreover, when tribunals were used in Australia they also "experienced a persistent pull towards formality,"³²⁹ and the transfer of jurisdiction to the courts will likely increase this pull.

Fourth, all three jurisdictions are wrestling with issues of access: how to provide adequate remedies to a sufficiently large group of

324. See U.S. Equal Emp. Opportunity Comm'n, *supra* note 32; U.S. Equal Emp. Opportunity Comm'n, *supra* note 43.

325. See generally LEWIS & CLARK, *supra* note 142; see also DICKENS, JONES, WEEKES & HART, *supra* note 138, at 272-300.

326. See GREEN PAPER, *supra* note 12, at 33. This same phenomenon has occurred in Ireland, which also uses a system of administrative tribunals known as labour courts. Persons I interviewed stated that although the tribunals were intended to be cheap and informal they have become complex and judicialized. Many parties have and require representation. Interview with Mary Quinn, University of Galway (May 2001). For these reasons, and in an attempt to accommodate complainants' desires for nonmonetary compensation, Ireland has introduced a mediation program within the office of Equality Investigations. Interview with Ruari Gogan, Office of the Director of Equality Investigations (May 2001). In Northern Ireland, similarly, which relies on a system of industrial courts, the existing system is seen as too slow, too expensive, and overly legalistic. Thus, thought is being given to whether equality cases as well as unfair dismissals should be handled through arbitration, rather than the tribunals. The idea is that such arbitrators would not have to be lawyers, that they might provide an inquisitorial hearing rather than an adversarial one including cross examination, and that decisions would be less legally based. Interview with Bill Patterson, Chief Executive, Northern Ireland Labor Relations Agency (May 2001).

327. See *supra* notes 41-42.

328. See Ozdowski, *supra* note 260, at 7.

329. Hunter, *supra* note 261, at 107 (explaining that this tendency derived from the tribunals' "structural position in the legal hierarchy and the pervasive influence of adversarialism").

complainants at a reasonable cost. In the United States, it is argued that while a few victims of discrimination can secure large compensatory awards, many other victims cannot even obtain realistic access to the system in order to seek relief.³³⁰ In both Britain and Australia the awards provided to victims have been criticized as absurdly low, and reinstatement rarely occurs.³³¹ To the extent complainants are now given access to court, in Australia, the concern has been raised that courts will deter claims by awarding costs to prevailing defendants.³³² Thus, while basic access to the system seems to be less of a problem in Britain and Australia as compared to the United States, the question one must ask is: "access to what?" One aspect of this problem is the question of whether complainants can or should be able to secure relief without the assistance of legal representation.³³³ All of the jurisdictions are looking for ways to provide adequate relief in a timely low-cost fashion. Backlog has been a concern in each country.³³⁴

III. WHAT MAKES INDIVIDUAL EMPLOYMENT DISCRIMINATION CLAIMS SO TOUGH TO RESOLVE?

Why would it be that these three legal systems, spread across the globe and relying on quite different procedures, face such similar issues in trying to devise a system for resolving claims of employment discrimination? In order to come to terms with these concerns, and how they can best be addressed, it is helpful to step back and think

330. See Estreicher, *supra* note 109, at 563; McGinley, *supra* note 59, at 1454 ("The financial barriers are insurmountable for all but the wealthiest of litigants."). While any complainant can file a charge of discrimination with the EEOC or a state agency at no cost, these critics urge that significant relief is only available from the courts.

331. See LEWIS & CLARK, *supra* note 142, at 9 (Britain); HUNTER & LEONARD, *supra* note 268, at 23 (Australia) LEONARD, *supra* note 133, at 2 (Britain); Emp. Tribunal Serv., *supra* note 194, at 494 (Britain).

332. See Human Rights Employment Opportunity Comm'n, *supra* note 293, at 2, 113-14 (concluding that while the federal courts and magistrates were awarding costs against losing claimants, they were not doing so as frequently as some might have expected).

333. Although the British have attempted to design a system in which legal representation would be unnecessary, studies have shown that represented claimants do much better than those who are unrepresented. See Genn, *supra* note 138, at 400.

334. The backlog issues in the United States at the EEOC have been the most severe. See Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 310-14 (2001) (discussing the backlog problems throughout the history of the EEOC). However, British and Australia commentators have voiced concerns about their backlogs as well. See *supra* notes 180, 186, 319.

about the individual and societal goals that underlie claims of employment discrimination.

Some legal disputes are harder to resolve than others, and lawyers in any country who practice in the discrimination area will likely tell you that those disputes are among the toughest.³³⁵ Government policymakers who have sought to design fair, just, and appropriate mechanisms to resolve such disputes have also found it very difficult to come up with an ideal procedural device. I posit that the difficulty in resolving such disputes is due to a series of factors that tend to span across international borders, despite cultural and legal differences among various societies. I have identified ten of the most significant.³³⁶

A. Ten Factors that Make Individual Employment Discrimination Claims Particularly Difficult to Resolve

1. Laws Prohibiting Discrimination Tend to Be Quite Complex

In their initial conception, laws prohibiting employment discrimination may seem simple.³³⁷ The United States' Title VII of the Civil Rights Act of 1964 straightforwardly states that

[i]t shall be an unlawful employment practice for an employer—

(1) 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 origin³³⁸

Similarly, the British Sex Discrimination Act states “[a] person discriminates against a woman . . . if . . . on the ground of her sex he treats her less favourably than he treats or would treat a man.”³³⁹ The seeming simplicity of these laws hearkens back thousands of years to

335. As a former plaintiff-side employment attorney for eight years, I speak from personal experience.

336. Certainly this list is incomplete. But ten is a nice number for list-making purposes.

337. Note that this Article takes, as a given, that laws focused on eliminating discriminatory practices are themselves worthwhile. However, critics in various countries have questioned this assumption. *See, e.g.*, BLACK, *supra* note 15, at 1 (arguing that because discrimination is a systemic problem, it must be attacked through systemic remedies, and not merely as an individualized problem); Dickens, *supra* note 176, at 124-33 (examining the relative failure of legislation prohibiting gender discrimination to eliminate the phenomenon in Great Britain).

338. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2000).

339. Sex Discrimination Act, 1975, c. 65, § 1(1)(a) (Eng.). Note that section 2(1) of the Act provides that the anti-discrimination language also protects men who are discriminated against on the basis of their gender. *Id.* § 2.

when Aristotle stated: “[I]n democracies . . . justice is considered to mean equality . . . but equality for those who are equal, and not for all.”³⁴⁰

Yet, the apparently simple prohibitions disguise far more complex issues, as the quote from Aristotle nicely demonstrates. Who are the “equals” who must be treated equally? As societies have struggled to determine which differential treatment is permissible they have wrestled with whether it is discriminatory to treat people differently when there really are demonstrable differences between certain groups.³⁴¹ In the United States, concepts such as “otherwise qualified” for the position,³⁴² “bona fide occupational qualification,”³⁴³ and affirmative action³⁴⁴ have been used to make these sorts of distinctions. Where such complexities have not been written into the statutes, courts have evolved complex case law to deal with these issues.³⁴⁵ Elsewhere, similar concepts are employed. Aspects of the British Sex Discrimination Act do not apply to any job where “being a man is a genuine occupational qualification for the job.”³⁴⁶ In Australia, with

340. THE POLITICS OF ARISTOTLE 117 (Ernest Barker trans., 1946).

341. Is it discriminatory to prevent blind people from obtaining drivers' licenses? Is it improper to prohibit persons above a certain age from serving as judges or from being drafted into the military? Can male drivers be paid less than women because the company will be charged higher insurance rates? May a male prison hire only male guards? Can a religious institution choose to hire only members of that religion? Can all employees be prohibited from wearing braided hair even though this prohibition will likely bother persons of African descent more than members of other ethnic groups? Can homosexuals be barred from participating in the military? Can persons who are members of groups that historically were subjected to discrimination be given a leg up in education or employment? All countries that have prohibited employment discrimination have had to deal with these sorts of issues.

342. Americans with Disabilities Act, 42 U.S.C. § 12112(b)(5)(A) (2000).

343. 42 U.S.C. § 2000e-3(b).

344. See CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION (1997) (arguing that affirmative action programs should be expanded); RICHARD F. TOMASSON, FAYE J. CROSBY & SHARON D. HERZBERGER, AFFIRMATIVE ACTION: THE PROS & CONS OF POLICY AND PRACTICE 175-87 (rev. ed. 2001) (2001); Michelle Adams, *Causation and Responsibility in Tort and Affirmative Action*, 79 TEX. L. REV. 643, 644-48 (2001); Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1163-77 (2002).

345. In the United States the law regarding affirmative action has been developed by courts, rather than Congress.

346. Sex Discrimination Act, 1975, c. 65 § 7(1) (Eng.). The Act goes on to define circumstances in which being a man might be a genuine occupational qualification, but clearly these circumstances will be open to argument and interpretation: “The job needs to be held by a man to preserve decency or privacy because . . . it is likely to involve physical contact with men in circumstances where they might reasonably object to its being carried out by a woman . . .” *Id.* § 7(2)(b). The Irish Employment Equality Act, 1998, allows decisions to be made on the basis of gender “where, on grounds of physiology (excluding physical strength or stamina) or on grounds of authenticity for the purpose of entertainment,

respect to disability discrimination, courts struggle over the question of which of the disabled persons' traits should be attributed to the hypothetical nondisabled person to whom a comparison will be made.³⁴⁷ One rather extreme example of this phenomenon of complex legal analysis is the Irish Employment Equality Act, 1998. Weighing in at seventy-five pages, this law goes into tremendous detail in attempting to explain what acts should and should not be construed to be discriminatory.

Discrimination laws also typically deal with many other complex issues including issues pertaining to the state of mind of the alleged discriminator,³⁴⁸ potential liability for discrimination against persons who are not direct victims but either report discrimination or befriend victims,³⁴⁹ liability in situations involving multiple causation,³⁵⁰ and companies' liability for acts taken by their supervisors or employees.³⁵¹

In short, although the prohibition on discrimination with respect to employment may initially have been envisioned as simple and straightforward, and although jurisdictions may strive for such simplicity, the laws governing this subject have become increasingly

the nature of the post . . . requires a person of [the particular sex]." Employment Equality Act, 1998, §§ (1)-(2)(a) (Ir.), *available at* <http://www.irlgov.ie/ag> (last visited Feb. 17, 2004).

347. *See Purvis v. New South Wales* (2002), 117 F.C.R. 237, 244-45 (holding that the comparison should be made between the treatment of the complainant with the particular brain damage in question and a person without that brain damage but who engaged in identical conduct).

348. For example, must the claimant show that the defendant acted deliberately with an intent to harm the victim? Or, must the claimant at least show that the defendant acted with knowledge that she was discriminating? Is it sufficient to show that the perpetrator did in fact systematically treat members of different groups differently, even though she was not consciously aware of such stereotyping? Is it enough to show that the rule or act in question has or would have a disproportionately negative impact on members of a certain group? In the United States, this would be a claim of "disparate impact." *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(k) (2000). In the United Kingdom, Australia, and Ireland the concept of "indirect discrimination" is used to prohibit acts that have a disparate impact on a protected group. *See* Sex Discrimination Act, 1984, § 7(b)-(c) (Austl.); Employment Equality Act, 1998, §§ 22, 31 (Ir.); *see also* Dickens, *supra* note 176, at 119-20 (discussing the British prohibition on indirect discrimination and noting that the concept, as well as the potential defense of justification, are both vague and subject to interpretations).

349. *See, e.g.,* Sex Discrimination Act, 1984, § 94 (Austl.) (authorizing penalties of fines and imprisonment for "any act subjecting, or threatening to subject, a person to any detriment on the ground" that this person is affiliated in any manner, such as being a witness, with a proceeding under the Sex Discrimination Act and/or Human Rights and Equal Opportunity Commission Act, 1986 (Austl.)).

350. *See, e.g.,* *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993) (enunciating standard for sorting out multiple causation); Sex Discrimination Act, 1984, § 8 (Austl.).

351. Employment Discrimination Act, 1998, § 15 (Ir.); Sex Discrimination Act, 1984, § 106 (Austl.).

complex.³⁵² Nor is this trend likely to reverse. To the contrary, the most blatant and obvious cases of discrimination are the most simple to prohibit. But as societies succeed in eradicating the most obvious forms of discrimination, attention will increasingly focus on the more difficult and controversial forms of discrimination.³⁵³

2. Facts Pertinent to Claims of Discrimination Are Often Highly Contested and Confusing

Most claims of discrimination are highly individualized, arising out of the particular personalities, work rules, job qualifications, and reporting structures of a given workplace. Often, even where discrimination is present, it is mixed together with other bad managerial practices that may not necessarily be illegal.³⁵⁴ Thus factual disputes over what actually happened often lie at the heart of discrimination claims.³⁵⁵

To understand even one person's notion of what actually occurred often requires an interviewer to immerse herself in hours of history, details, and nuance. With the exception of the most egregious cases of discrimination, claims typically require an interviewer or factfinder to pour over details such as prior qualifications, salaries, performance reviews, job descriptions, and so on. If a claimant alleges she was denied a position based on her membership in a particular group, one must examine what the position was for which she applied, what her qualifications were, how the selection worked, who else applied for the position, what their qualifications were, and so on. Similarly, if a claimant alleges he was harassed on the job due to his membership in a particular group one must ask him to explain what his job was, how he was treated by various persons, how other persons at the workplace

352. See INDUSTRIAL TRIBUNALS, *supra* note 215, at 11 (“[E]mployment legislation is complex and often obscure”); GREEN PAPER, *supra* note 12, at 4 (observing that the developing case law in domestic and European courts has “added to the complexity of the deliberations of the tribunals”).

353. See generally Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (arguing that structural regulatory solutions rather than simple rules may be necessary to deal with complex “second generation” issues).

354. See *id.* at 472 (observing that “[g]ender-based abuses of power may overlap with, or be complicated by, patterns of bad management, general worker abuse, or other unprofessional conduct”); see also Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 21-25 (1988).

355. See Hunter & Leonard, *supra* note 12, at 309; see also Earnshaw & Davidson, *supra* note 182, at 9 (noting that most successful claimants attributed their success to their own credibility as witnesses).

were treated, what if any complaints he filed, and what if any remedial actions were taken. The mistreatment about which the person complains will often be subtle or potentially attributable to a variety of factors.³⁵⁶ Paula Jones, in her harassment claim against President Bill Clinton, complained “that her superiors exhibited hostility toward her by moving her work location, refusing to give her meaningful work, watching her constantly, and failing to give her flowers on Secretary’s Day in 1992, even though all the other women in the office received flowers.”³⁵⁷ Each of these complaints may be seen by some as trivial, and indeed were so treated by the judge.³⁵⁸ However, most persons who have either been victimized by discrimination or represented persons who will realize that events such as these can in fact be part of a campaign of harassment.

The complexity of the facts surrounding claims of employment discrimination is greatly amplified because the story told by complainant and defendant is almost inevitably quite different. “He said/she said” does not do justice to the factual contestations that are typical in such cases. *Rashomon*, the famous Japanese story and movie about multiple memories of a murder, may begin to describe the phenomenon.³⁵⁹ It is a natural psychological tendency to defend oneself and to see the world as one wants to see it.³⁶⁰ Thus, the claimant will tend to see herself as better qualified than she is and will tend to exaggerate slights committed against her. At the same time, the

356. See Holmes Norton, *supra* note 41, at 221 (noting that complainants often have difficulty prevailing “because the evidence is usually circumstantial and elusive”); see also Hunter, *supra* note 261, at 114-15 (citation omitted) (discussing the “dripping tap” nature of many sexual harassment claims and noting that confronting these “‘small, mundane and accumulating’ incidents of sexual harassment . . . can be a lengthy and painful process”).

357. See *Jones v. Clinton*, 990 F. Supp. 657, 665 (E.D. Ark. 1998).

358. *Id.* at 662 (granting defendant Clinton’s motion for summary judgment).

359. See RYUNOSUKE AKUTAGAWA, *RASHOMON AND OTHER STORIES* 34 (Takashi Kojima trans., Liverlight Publ’g Co., 1952); *RASHOMON* (RKO Radio Pictures, Inc. 1950) (depicting the *Rashomon* story of four people involved in the murder of a gentleman in feudal Japan and the seduction of his wife, all of whom report differing views of what actually happened).

360. See, e.g., Linda Babcock, George Loewenstein, Samuel Isaaccharoff & Colin Camerer, *Biased Judgments of Fairness in Bargaining*, 85 AM. ECON. REV. 1337, 1337 (1995) (finding people in roles of the plaintiff and the defendant made different predictions of judge’s ruling even when they had the same information); David M. Messick & Keith Sentis, *Fairness, Preference, and Fairness Biases*, in *EQUITY THEORY: PSYCHOLOGICAL AND SOCIOLOGICAL PERSPECTIVES* 61, 71 (David M. Messick & Karen S. Cook eds., 1983) (stating that when people work different amounts of time at a joint task, those who work more generally believe that they should earn more, while those who work less generally believe that both parties should be paid equally); Michael Ross & Fiore Sicoly, *Egocentric Biases in Availability and Attribution*, 37 J. PERSONALITY & SOC. PSYCHOL. 322, 325-27 (1979) (noting that adding up each spouse’s estimated contribution to housework comes to more than 100%).

defendant will tend to rationalize actions taken against the victim, often coming to believe that the victim was truly unqualified, incompetent, or a willing participant in the alleged harassment.

In many kinds of disputes such factual discrepancies can be resolved by turning to “impartial” or bystander witnesses,³⁶¹ yet these rarely exist in the employment context. Those persons who continue to work for or with the defendant have a strong incentive, both personal and financial, to see the world in a way helpful to the defendant.³⁶² Similarly, those persons who no longer work for the defendant company often left for a reason. Typically they were either dismissed, or they were treated sufficiently poorly that they chose to take another position.³⁶³ Thus, those persons no longer with the company who are willing to get involved in a claim now brought against the company may well be persons who are likely to see the world as the claimant saw it, and not as the company saw it.

These contrasting stories are not necessarily the result of conscious or deliberate lies, though of course they may be. More likely, unconscious psychological phenomena color persons’ memories of events.³⁶⁴ Of course, it is well established that memories are far from accurate even in the least traumatic of circumstances.³⁶⁵

In sum, it will almost never be easy to sort out “what really happened” in a case involving a claim of discrimination.³⁶⁶ The search for a single truth in such cases is more likely to lead to madness, than to certainty. Instead, the interviewer, investigator or fact finder can at

361. For example, when two drivers tell discordant stories of a motor vehicle accident, one can often turn to a bystander or police officer for an unbiased explanation. When a supplier and contractor disagree over who bears the fault for the collapse of a building, experts may examine the wreckage, designs, and parts and testify as to who is right.

362. Also, the company, fearing litigation, may not collect information that might have proved helpful in ascertaining what happened. *See generally* Susan Bisom-Rapp, *Discerning Form from Substance: Understanding Employer Litigation Prevention Strategies*, 3 EMPLOYEE RTS. & EMP. POL’Y J. 1 (1999) (examining how employers’ litigation prevention tactics limit the efficacy of employment discrimination law).

363. Retirees make up another category of former employees, but like current employees they are often afraid to speak out for fear of jeopardizing their pension, medical benefits, or simply the good will of their friends who remain at the company.

364. For discussions of the concept of unconscious discrimination, see Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); McGinley, *supra* note 3.

365. *See* MICHAEL W. EYSENCK, A HANDBOOK OF COGNITIVE PSYCHOLOGY 137-72 (1984) (discussing several different factors that play a part in why we forget things).

366. *See* INDUSTRIAL TRIBUNALS, *supra* note 215, at 16 (noting that some discrimination cases require the evaluation of highly complex or specialized evidence).

best hope to sort through the numerous stories and documents to find a few clear facts that may lead the way to a tentative conclusion on some relevant key points.

3. Disputes Regarding Employment Discrimination Tend to Involve Significant Nonlegal as Well as Legal Interests

Although lawyers typically treat claims of employment discrimination as purely legal matters, complainants, defendants, and good lawyers recognize that the law is often just a small part of what is really at issue.³⁶⁷ From the victim's standpoint, it has been shown that losing one's job is one of the most traumatic things that a person can undergo.³⁶⁸ Jobs in modern societies are closely tied to our sense of self and self-esteem.³⁶⁹ Thus, not only losing one's job but also being mistreated or harassed on the job or being denied a job in the first place can be very traumatic events.

Of course, the reason for which one suffered an employment harm is also very significant. Whereas a person may be able to accept being laid off due to a reduction in force (known elsewhere as being declared "redundant"), that same person may be very upset if they think the layoff was discriminatory. Studies have shown that perceptions of discrimination cause victims to suffer a number of

367. See generally Deborah R. Hensler, *The Real World of Tort Litigation*, in EVERYDAY PRACTICES AND TROUBLE CASES 155 (Austin Sarat et al. eds., 1998) (contrasting the desires of tort plaintiffs for vindication with the attorneys' focus on monetary relief); David B. Wilkins, *Everyday Practice Is the Troubling Case: Confronting Context in Legal Ethics*, in EVERYDAY PRACTICES AND TROUBLE CASES, *supra* at 68, 86. David Wilkins notes that:

Individual clients . . . often come to lawyers . . . because the system forces them to resolve their problems through legal channels. In these circumstances, what the client is often really seeking from her lawyer is help with, or at least understanding of and compassion about, the real circumstances of her life. By forcing the client to define the problem in legal terms, and then to maximize every available legal advantage, lawyers often neglect the issues that are most important to their clients.

Wilkins, *supra*, at 86 (citations omitted).

368. See NICK KATES, BARRIE S. GREIFF & DUANE Q. HAGEN, *THE PSYCHOSOCIAL IMPACT OF JOB LOSS* 80 (1990) ("While the impact [of a job loss] may not be as severe as a bereavement, the initial process of adaptation and the stages of adjustment may be similar to a grieving process."); Shirley Middlebrook & Edward Clarke, *The Emotional Trauma of Job Loss: How to Interact and Cope with Laid-Off Employees in Distress*, EMPLOYEE ASSISTANCE Q., No. 2 1991, at 63, 63 ("The process a person goes through with the loss of a job is much like the stages of grief when a loved one dies.").

369. See Middlebrook & Clarke, *supra* note 368, at 63 ("In the American culture much of our sense of self is connected with our career and work role. It is truly a loss of part of our identity and self-worth when our job has been terminated. When this happens, we are likely to experience a number of emotional reactions.").

psychological effects.³⁷⁰ Feelings of severe anger, betrayal, abandonment, and depression are common.³⁷¹ Often these traumas may themselves spark further problems, such as breakups in personal relationships.³⁷²

Beyond these direct psychological impacts, victims of discrimination often face serious economic problems that may also enhance the psychological problems. Having lost or been denied a source of income, many victims find themselves afloat in bills, debt, and recrimination from loved ones. Medical and education benefits may be in jeopardy, and government benefits may be insufficient to help the victim survive until obtaining another position.

Of course, it is also highly emotional to be accused of committing a discriminatory act. To be charged with deliberately discriminating against a person is to be vilified, often in the public eye. Such a charge, even if ultimately defeated, may harm the alleged perpetrator's

370. See Edward Dunbar, *Counseling Practices to Ameliorate the Effects of Discrimination and Hate Events: Toward a Systematic Approach to Assessment and Intervention*, 29 COUNSELING PSYCHOLOGIST 279, 281 (2001) ("Contemporary researchers have noted that victims of chronic discrimination may experience a constellation of psychological symptoms including feelings of helplessness, numbing, paranoid-like guardedness, medical problems, dysphoria, poorly mediated affects, and denigration of one's sociocultural in-groups." (citations omitted)); Edith Greene & Jane Goodman-Delahunty, *Diagnosis of Psychological Impairment in Employment Discrimination Claims*, 13 BEHAV. SCI. & L. 459, 464 (1995) ("[F]our disorders commonly occur in the context of employment litigation. These include Anxiety Disorders, Somatoform Disorders, various forms of Depression and Posttraumatic Stress Disorders. They may range in intensity from mild to severe." (citation omitted)); Barbara A. Gutek, Aaron Groff Cohen & Anne Tsui, *Reactions to Perceived Sex Discrimination*, 49 HUM. REL. 791, 792 (1996) (discussing research used to assess "the relationship of perceived discrimination to an individual's reactions to the job and to the organization"); Beth Bonniwell Haslett & Susan Lipman, *Micro Inequities: Up Close and Personal*, in SUBTLE SEXISM: CURRENT PRACTICE AND PROSPECTS FOR CHANGE 34, 34-53 (Nijole V. Benokraitis ed., 1997) (explaining how micro inequities in an environment affect the victim's psychological state); see also WILLIAM H. GRIER & PRICE M. COBBS, BLACK RAGE (1968) (examining the attitudes of African-Americans from the standpoint of psychiatry). See generally JAMES L. McDONALD, JR. & FRANCINE B. KULICK, MENTAL AND EMOTIONAL INJURIES IN EMPLOYMENT LITIGATION (2d ed. 2001).

371. See Haslett & Lipman, *supra* note 370, at 45 ("The most common response to a micro inequity was frustration, followed by stress and then anger. . . . [These feelings] increase the difficulty of maintaining effective workplace relationships and a productive workplace climate."); Maria P.P. Root, *Reconstructing the Impact of Trauma on Personality*, in PERSONALITY AND PSYCHOPATHOLOGY: FEMINIST REAPPRAISALS 229, 229 (Laura S. Brown & Mary Ballou eds., 1992) ("[A]fter trauma is inflicted by another human being, people may begin to appear less benevolent, events less random, and living more encumbered. The attempts to prevent subsequent trauma may result in a labored and sometimes tortuous existence.").

372. See KATES, GREIFF & HAGEN, *supra* note 368, at 57 ("Unemployment has been linked with family breakdown. . . . This finding . . . suggest[s] that employment may be a contributing factor [in the deterioration of a relationship].").

career prospects or damage the company's sales or stock prices.³⁷³ Thus those persons or companies who believe they have been wrongly accused may well feel righteous anger, betrayal, sorrow, fear, or depression.³⁷⁴ They may well feel that they did their best to make a fair decision, or even to befriend the claimant, only now to be accused of an evil act.³⁷⁵

Some persons who are accused of discrimination may actually begin to question their own unconscious motivations or to rethink what they could or should have done differently. This too can be a highly emotional experience.³⁷⁶

Finally, even those persons who recognize that they did make a job-related decision based on the victim's membership in a certain group may respond quite emotionally to the charge. Some may feel strongly that the law is wrong, and that in a truly just society they should have been permitted to refuse to hire a person who will prove

373. A recent article questions how significant an impact even big verdicts have on major companies. See Selmi, *supra* note 87, at 1331 (concluding that shareholder value is not typically affected by the filing or settlement of major employment discrimination class actions). Clearly, however, such claims at least affect the companies' public image. For examples of some highly publicized claims of discrimination, see *Wal-Mart Hit with Suit Claiming Widespread Sex Discrimination*, 15 EMP. LITIG. REP. 3 (2001) (describing a class action gender discrimination suit filed against Wal-Mart alleging that "Wal-Mart systematically denies female employees opportunities for promotion because of their sex, allows hostile environment discrimination to go unchecked, and retaliates against women who complain about the adverse treatment"); *A Race Case Ends, but Big Picture Stays Blurred*, U.S.A. TODAY, Dec. 26, 1997, at 9A (reporting Avis's agreement to pay "\$3.28 million to settle a lawsuit charging that it tolerated racist practices by a franchisee who refused to rent to black customers in the Carolinas"); Anne Fisher, *Texaco: A Series of Racial Horror Stories*, FORTUNE, May 11, 1998, at 186, 186 (detailing continual racial discrimination at Texaco including "tape recordings of high-level Texaco meetings . . . where black employees were called 'black jelly beans'" and the subsequent suit resulting in an award for the plaintiffs of \$176 million, the largest race-discrimination award in history); Stephen Labaton, *Denny's Gets a Bill for the Side Orders of Bigotry*, N.Y. TIMES, May 29, 1994, at E4 (discussing Denny's agreement to pay \$54 million in settlements for its alleged refusal to serve blacks and other discriminatory treatment); and Barbara Presley Noble, *Gay Group Asks Accord in Job Dispute*, N.Y. TIMES, Nov. 25, 1992, at D4 (discussing the twenty-month boycott and publicity campaign against Cracker Barrel protesting its anti-gay employment policies).

374. See Hunter, *supra* note 261, at 115 ("Both employers and individual respondents are keen to establish their personal or organisational innocence . . .").

375. See Hunter & Leonard, *supra* note 12, at 309 ("Respondents most often deny the facts alleged by the complainant and/or dispute the complainant's interpretation of the facts and/or claim that the issue has already been adequately dealt with.")

376. See generally JOHN RAWLS, A THEORY OF JUSTICE 67, 72 (1971) (asserting that guilt flows from the sense that one has caused wrongful harm to another, has defaulted in some duty to another, or has reaped gains at others' expense or despite their greater need).

problematic to the company.³⁷⁷ Others may feel angry that they have been caught and accused of a wrong which so many others commit on a regular basis.³⁷⁸

So, as the legal claims are being analyzed and examined from all sides, the parties themselves may be thinking about much more personal and emotional matters. They care about the legal outcome of the matter, but they are immediately focused on other related interests and implications. The legal claims are often not congruent with the emotional issues that are at stake.³⁷⁹ Claimants may, at least initially, be more eager to secure an apology or another job than a monetary remedy.³⁸⁰ Often these kinds of personal and emotional concerns lead respondents, and sometimes also complainants, to prefer a private process.³⁸¹ They may also lead to a very hard fought legal battle.³⁸²

4. Society Has a Need for Correct Determinations

Amidst the above *mélange* of complex law, facts, and swirling emotion, society has a strong need to make the “right” decision when discrimination claims are filed. It is important that victims be rewarded when they have been discriminated against, but not when they have not. It is equally important that alleged perpetrators be found liable, but only when they have truly committed an act of discrimination. Correct decisions are important to do justice to the rights of the claimants and the accused and also to ensure that the laws

377. See GABRIELE TAYLOR, PRIDE, SHAME, AND GUILT: EMOTIONS OF SELF-ASSESSMENT 85 (1985) (“[An individual] may . . . be guilty and not *feel* guilty, for he may think the law in question bad and oppressive . . .”).

378. *Id.* at 85-107; see Anthony O’Hear, *Guilt and Shame as Moral Concepts*, 77 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 73, 77 (1977); Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL’Y & L. 645, 648 (1997).

379. See THORNTON, *supra* note 3, at 146 (explaining that under the Australian law of the time, a female mail center employee whose manager called her a “bitch” and a “slut” “and suggested that she was going to masturbate when she went to the toilet” would have a very difficult time prevailing on a discrimination claim).

380. Thornton, *supra* note 7, at 742.

381. THORNTON, *supra* note 3, at 169 (stating that some complainants would prefer a private forum in which to air their claims); LEWIS & CLARK, *supra* note 142, at 21-22; Earnshaw & Davidson, *supra* note 182, at 9 (noting that many complainants in sexual harassment cases found the appearance before an industrial tribunal to be extremely difficult and unpleasant).

382. Hunter, *supra* note 261, at 115:

[S]exual harassment cases that proceed to hearing tend to be extremely hard fought. Both employers and individual respondents are keen to establish their personal or organisational innocence, while complainants seek vindication of their grievances in a context in which the tribunal is their last opportunity to have their story believed.

are properly interpreted in the future. Of course, achieving the correct decision can be very difficult given the complexity of the law, the confusion of the facts, and the added problems created by emotional turmoil. A decision maker will have to be expert and experienced in many ways to be able to accurately sort through all these factors.

5. Society Has a Need for Clear and Public Precedents to Deter Future Wrongdoers and Let Persons Know What Conduct Is Permissible

Having set out new and complex laws prohibiting employment discrimination, societies must also attempt to educate the public on the meaning of those laws. While it may be obvious how to apply the law to certain egregious cases, as discussed earlier the proper interpretation of antidiscrimination laws is often far from clear.³⁸³ Thus, it is important to publish rulings in order that both potential perpetrators and potential victims can better learn what is required and permitted by the law. Further, even as to those interpretations of the law that are clear, public precedents are important to show that and how the law will be enforced. If companies were to believe that discriminatory behavior, while theoretically illegal, would nonetheless be tolerated without significant sanction, they might choose to continue to engage in discrimination. So, once again society must ensure that determinations made under the law receive public attention.

6. Victims of Discrimination Must Be Adequately Compensated

Those persons who have been victimized by discrimination have been wronged. Many have suffered direct financial loss, for example because of nonhiring, nonpromotion, demotion, or termination. Even those persons who have not suffered such a direct financial loss have typically suffered other injuries, including serious psychological harm or harm to their sense of dignity.³⁸⁴ Sometimes these harms give rise to tangible medical injuries as well, resulting particularly from stress or depression.³⁸⁵

383. See *supra* notes 337-353.

384. See *supra* note 370.

385. See, e.g., *Delgado v. Lehman*, 665 F. Supp. 460 (E.D. Va. 1987) (terminated plaintiff could not afford health care or to eat properly, resulting in serious health problems); *Arnold v. City of Seminole*, 614 F. Supp. 853, 866-67 (E.D. Okla. 1985) (plaintiff suffered from "massive anxiety and depression" and "stroke-level" high blood pressure as a result of harassment).

Most societies that have adopted antidiscrimination laws apparently believe that one of the primary purposes of such laws is to compensate the victims, once those victims are identified. Such compensation may include receipt of a job or promotion, revocation of a termination, or monetary payment in lieu of lost pay or benefits or in the place of psychological or other nonmonetary harms.³⁸⁶ Adequate compensation of the victims will also serve to deter future violations by the perpetrator, or by other potential perpetrators.

7. Many Societies Have a Further Interest in Punishing Wrongdoers

In addition to the interest, explained above, in compensating victims, some societies have enunciated a separate interest in punishing the wrongdoers. Fines,³⁸⁷ punitive damages,³⁸⁸ or even criminal sentences³⁸⁹ can be used to ensure that the perpetrator pays a substantial price for its bad act, even when the discrimination did not cause the victim substantial harm. It is possible that an egregious act of discrimination may not lead to actual harm if, for example, the victim was immediately able to secure another better position. Even outrageous harassment will not necessarily cause significant harm when, for example the intended victim has a very thick skin. Yet, it may well be appropriate to ensure that the discriminator pays a high price for its misbehavior.

8. Alleged Victims of Discrimination Must Have Adequate Access to a Procedural Mechanism That Allows Them to Assert Their Claims

Antidiscrimination laws can only be effective to the extent that victims have an adequate opportunity to enforce their rights. If, for

386. See, e.g., Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-5(g) (2000); 42 U.S.C.A. § 1981a (2002) (giving statutory authorization for damages for claims under Title VII); Human Rights and Equal Opportunity Commission Act, 1986, § 46PO (Austl.), *amended by* Human Rights Legislation Amendment Act (No. 1), 1999 (Austl.) (providing courts with the ability to order a respondent to employ or re-employ an applicant, pay damages to the complainant for any loss or damage suffered because of the conduct of the respondent, as well as ordering a reworking of a termination contract in order to address damages or losses suffered by the complainant).

387. E.g., Sex Discrimination Act, 1984, § 86 (Austl.) (permitting the court to fine respondents \$1000-\$5000, depending on their status as individual or corporation, for advertising an intention to carry out a sex discrimination act).

388. In the United States, Title VII was amended in 1991 to allow the award of punitive damages. 42 U.S.C.A. § 1981a (giving statutory authorization for damages for claims under Title VII).

389. See *supra* note 252.

example, the enforcement process is very time-consuming and costly, many unassisted victims will not be able to even initiate a claim of discrimination. After all, victims of discrimination will often be unemployed and lacking in financial resources. The overall issue of accessibility involves a series of factors. It turns not only on the cost and complexity of bringing a claim, but also on the types of resources that will be made available to claimants. A system that would be too costly and complex for a victim to handle unassisted may work well so long as victims are provided with government-funded advocates³⁹⁰ or so long as the system creates adequate incentives for the victims to obtain attorneys who can help them pursue their claims.³⁹¹

9. Employment Discrimination Claims Must Be Resolved Quickly in Order to Permit All Persons Involved to Get On with Their Lives and Business

While there is often a societal interest in resolving legal claims quickly, the interest in speedy resolution is particularly strong in the case of employment discrimination claims. From the victim's standpoint, delay is often an amplification of the problems that have already been alleged. For example, a person who brings a claim of employment discrimination for denial of promotion or benefits while still retaining her job at the company is in a very awkward position. Often she will feel she is being spurned by management and coworkers, and sometimes management will be making special efforts to build a record showing her incompetence. This plaintiff needs to have her claim resolved as speedily as quickly, so that she can normalize her situation at that company or elsewhere. Equally, the claimant who has been fired or denied a job often has a rather desperate need for salary or benefits. She too needs to have her claim resolved quickly, so that she can either win and obtain benefits from

390. Critics of existing systems have on occasion urged that more legal assistance be provided to victims of discrimination. *See, e.g.*, BRITISH JUSTICE COMMITTEE REPORT (1987), discussed *supra* notes 215-218. However, none of the three systems studied has ever provided substantial legal representation to victims.

391. In the United States, passage of Civil Rights Act of 1991, amending Title VII to provide punitive and compensatory damages, made it easier for victims of discrimination to find attorneys. *See generally* H.R. REP. NO. 102-40 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549. Attorneys' fees and costs are also provided to prevailing parties in the United States, helping victims to secure representation. 42 U.S.C. § 2000e-5(k). Nonetheless, many U.S. victims of discrimination are unable to secure legal representation. *See sources cited supra* note 90.

the defendant or lose and know that she must earn a living in another way.

Time is also a critical factor from the perspective of the alleged perpetrator. The individual who has been accused of discrimination often feels that she has been vilified or slandered. She wants the claim to be resolved quickly, and in her favor, so that she can earn back the respect of her employer, friends, and family. Equally, the company, whether or not it has been directly named as a defendant, would typically prefer to end the claim of discrimination as quickly as possible. When a claim of discrimination is pending it inevitably harms a company in a variety of ways. It may sap workers' productivity and morale, in part simply by distracting them from the task at hand. Those claims that become public outside the company may also affect the popularity of the company's product, services, or stock. As well, the process of resolving a claim of discrimination may consume substantial company resources. Employees may have to spend time testifying, meeting with lawyers, or looking for documents instead of focusing on their regular work.

Finally, from a societal standpoint as well, it is better to resolve discrimination claims quickly, so that members of the public will gain an understanding of what conduct is and is not permitted under the law. Thus, from all sides, speed is a desirable attribute of a dispute resolution process.

10. Alleged Victims of Discrimination Tend to Have Fewer Resources Than Do Alleged Perpetrators of Discrimination

It is typically but by no means uniformly true that persons claiming to be the victims of employment discrimination have fewer resources than the alleged perpetrators. First, to the extent that the victim is suing a company, as opposed to an individual, the company will generally possess greater wealth and also access to legal representation than the claimant.³⁹² Big companies will have the greatest advantage, in that they will likely have in-house counsel and a human resources department. Only a quite wealthy claimant can hope to match such resources, and wealthy employment discrimination claimants are fairly rare.³⁹³ To the extent the alleged victim has just lost her job, the resource disparities will be heightened.

392. See Holmes Norton, *supra* note 41, at 221 (noting that complainant "almost always has fewer resources and less power" than the respondent).

393. Those claimants who are likely to have the greatest financial resources are those who hold high level managerial positions and were denied a promotion or other benefit but

Even when the claimant makes a claim against an individual, rather than a company, the claimant generally faces a resource disparity. The accused individual will often be a supervisor of the claimant, and thus hold a better-paying position. Moreover, the company may well choose to support the defense of its supervisors who are accused of discrimination.³⁹⁴

B. An Analysis of the Factors That Make Individual Employment Discrimination Disputes Particularly Difficult to Resolve

The various factors outlined above certainly help explain why so many jurisdictions have found it difficult to devise an ideal set of procedures for resolving discrimination claims.³⁹⁵ These difficulties become even more clear once one analyzes the factors and realizes that many of the expressed concerns are actually in tension with one another.

Most fundamentally, one can identify two sets of substantive concerns that sometimes point in opposite directions. On the one hand, having recently passed laws seeking to eliminate well-established and discriminatory modes of behavior, societies need procedural enforcement mechanisms that will interpret new and complex legislation, educate the public, deter potential perpetrators, and fully compensate those persons who have been victimized by discrimination. That is, society needs to establish procedures adequate to meet its substantive concerns of eliminating discrimination. On the other hand, victims of discrimination have their own more personal and emotional concerns, relating in particular to their need to get their life back together as quickly as possible. These two sets of interests, while coexisting and overlapping, may also sometimes be at odds with one another.³⁹⁶

not terminated from their employment. Thus, persons claiming age discrimination may often have more resources, as a group, than persons for example claiming discrimination on the basis of race, ethnicity, or gender. Very often the latter never held a high paying position that would have allowed them to accumulate significant resources.

394. Of course, there are cases in which a claimant has more resources than a defendant. This can occur when the claim is brought against a coworker, or when the claimant's efforts are supported by an outside organization.

395. Individual disputants may also find it difficult to choose an appropriate dispute resolution technique, particularly if they attempt to do so contractually, prior to the arising of the dispute. For an article advising employers and highly skilled employees how to make this choice, see Edward Brunet, *Seeking Optimal Dispute Resolution Clauses in High Stakes Employment Contracts*, 23 BERKELEY J. EMP. & LAB. L. 107 (2002).

396. For an attempt to examine and balance the individual and societal interests in settlement and adjudication, see generally Carrie Menkel-Meadow, *Whose Dispute Is It*

In addition to these two sets of substantive concerns, both individuals and also society as a whole may have direct procedural concerns with how a system of justice is set up. As will be discussed, the “procedural justice” literature suggests that people care not only about whether a given process will deliver substantive results, but also about whether the procedure itself feels fair.³⁹⁷

1. Three Sets of Interests

a. Societal Interests in Eliminating Discrimination

As societies work to eliminate employment discrimination, they are attempting to reshape core values and behavior. Because the issues surrounding discrimination can be quite complex, from a policy perspective, society has an interest in making sure that the governing laws are sufficiently detailed and nuanced to account for a variety of situations. The laws will inevitably be fairly complicated, as we have seen in our examination of the United States, the United Kingdom, and Australia.

However, the mere existence of these complex and nuanced laws will not serve societal interests in eliminating discrimination. The laws are effective only to the extent they are fairly and accurately applied, and those results publicized. To ensure that the complicated law and facts are interpreted fairly, society has an interest in making sure that the decision maker can understand and interpret complex law and facts. Because there is a societal need to publicize employment discrimination determinations, in order to shape future behavior, the decision makers must be capable of writing clear, well-reasoned decisions that can be published. Substantial sanctions may also be needed to achieve appropriate deterrence.

All of the above factors lead naturally to some form of litigation.³⁹⁸ Such litigation, whether before a regular or specialized

Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases), 83 GEO. L.J. 2663, 2694-95 (1995) (stating that while it is impossible to decide, ex ante, what disputes should be assigned to what kind of procedural process, it is clear that certain issues are so important that they must be publicly decided). While I have attempted to divide these two sets of concerns to assist in analysis, I certainly do not believe that they are always conflicting. See *infra* notes 401-408 and accompanying text. Still, I believe the dichotomy has some value.

397. For an examination, outside the employment context, of how these various theories of justice relate to one another, see Jean R. Sternlight, *ADR Is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 NEV. L.J. 289, 289-304 (2003).

398. While I agree with Carrie Menkel-Meadow that settlements can sometimes serve the public interest in legal compliance as well or better than could an adjudicated solution,

judge, can thoroughly explore the complicated facts and law. Whether the litigation process is adversarial or investigative in nature, it is structured to delve into the details of both fact and law. Investigative processes rely on the judge in efforts to perform these inquiries. Adversarial processes instead depend on the disputants and their representatives to inform the judge of the facts and the law. Techniques including discovery, cross-examination, and the opportunity for argument are designed to support a thorough airing of law and facts. Both investigative and adversarial litigation approaches are geared towards ensuring that the victim receives a fair and just hearing of her claims, and that the defendant is sanctioned substantially, but only if sanctioning is appropriate. Factual details and legal exceptions must all be fully explored. To ensure that these societal goals are achieved the decision maker should be a lawyer, or at least very familiar with the law surrounding employment discrimination claims.

While such a formal litigation process may be thorough and just, it will have some inevitable downsides. It will not be fast, and it will not be cheap.³⁹⁹ There is no way to explore all of the factual and legal nuances of a discrimination claim in an expeditious manner. The calling of witnesses, the examination of documents, the reading of statutes and existing precedents, and the making of arguments based on these facts and laws are difficult, time-consuming activities. As new issues are raised, new disputes may arise. For example, procedural rules inevitably generate jurisdictional and other challenges. Once discovery is permitted, issues of confidentiality and privilege become important. A variety of motions may be filed to shortcut the trial process. In a trial, there are always issues concerning the admissibility of evidence. Once liability is established, issues relating to damages and successor liability must be resolved. Decisions that have been made can constitute appealed. In short, lawyers who are experts in the field spend hours and hours preparing their factual and legal arguments, and that is not because they are being inefficient or wasting their time. It is because, as a legal matter,

Menkel-Meadow, *supra* note 396, at 2674, 2678-79, I nonetheless contend that on balance litigation is better equipped to serve these public interests. On the other hand, society may have additional interests, beyond enforcing or developing the law, that support the use of nonlitigation processes. *See infra* note 405.

399. *See, e.g.*, EMPLOYMENT BILL DEBATES, *supra* note 235, col. 1578 (statement of Lord Archer) ("A further concern is that, owing to the increasing complexity of some of the legislation which industrial tribunals have to administer, their claim to informality, which is sometimes equated with an absence of legalism, is under some pressure.").

these claims are very difficult. Needless to say, most disputants are not capable of fully exploring these legal and factual claims without the assistance of a legally trained representative.

Of course, as explained above, the inevitable slowness and expense of the legal process can be serious problems for complainants, and to a lesser degree also for defendants. If not dealt with, the formality and expense of such a system may preclude many victims from seeking, much less obtaining, any relief. Thus, it should not be surprising that to the extent the United States, the United Kingdom, and Australia have relied on formal litigation to resolve discrimination claims, each jurisdiction has faced issues relating to the cost and slow speed of the process and has contended with disputants' lack of access to a slow, expensive system. Even if complainants are able to achieve access to the system, certain types of relief, such as reinstatement, may no longer be appropriate.⁴⁰⁰ In addition, such a litigation system will not likely be able to deal very adequately with the substantial emotional and nonlegal concerns typically raised in these sorts of cases. Parties to lawsuits do not get to tell their story the way they want to tell it, but rather they are typically instructed to answer only those questions posed by their attorneys. Nor is the formal legal system set up to provide apologies or reconciliation. Instead, in some ways the formal litigation process may exacerbate the emotional problems.

b. Individual Interests in Personal Well-being

Victims of discrimination may place greater emphasis on personal interests than on enforcement or development of the law. The victim typically wants to obtain a job, promotion, or cessation of harassment as quickly and easily as possible. Thus, he may often prefer a law that is simple and straightforward and a process that is quick and informal. For many victims of discrimination a lengthy, expensive dispute resolution process is of no use whatsoever. If the victim cannot afford to bring a claim in that system, and cannot afford to retain an attorney to help him pursue that claim, he won't be able to take advantage of what might seemingly be the best antidiscrimination laws in the world.

400. *Id.* col. 1590 (statement by Lord Gladwin of Clee) ("Reinstatement . . . is an effective remedy only if it is awarded four to six weeks after the employee has been unfairly dismissed. It has to be done when the employment relationship is still warm. If it has gone cold and time has elapsed, it is no longer an effective remedy.").

An alleged victim of employment discrimination may also prefer a process that can deal adequately with the emotional issues typically surrounding such claims. Sometimes victims will be satisfied with an apology, or an explanation, or a positive letter of reference, rather than requiring a monetary solution. Many victims would rather have a quicker decision, even if the monetary payment, if any, is smaller. Some victims would prefer a private process to the public courtroom.

Defendants may have similar personal interests. They too would often prefer a dispute resolution mechanism that is simple, cheap, and can handle emotional and personal issues. For defendants, a complicated formalistic process can be anathema, in that even when they ultimately defeat a claim of discrimination, they still lose substantial time and money that was invested in the defense. Even in systems that require the losers of legal fights to pay the costs of winners, a defendant will at minimum have been deprived of the use of its funds for a significant period of time. Nor can a losing plaintiff likely afford all the defendant's legal expenses. Apart from legal fees, defendants involved in employment discrimination litigation must effectively pay for the time of their employees involved in that claim, as well as suffer morale losses associated with the claim. Moreover, most defendants would prefer to resolve discrimination claims privately, rather than in a public process, thereby avoiding negative publicity.

c. Interests in Procedural Justice

In addition to their desire for certain substantive results, claimants and respondents in discrimination cases, as well as society at large, may also have preferences regarding the type of procedure that is used to resolve their dispute. In a recent article, Professor Nancy Welsh has explored the U.S. "procedural justice" literature in detail, arguing that for many disputants the perceived fairness of the process is just as important, or even more important, than the fairness of the outcome.⁴⁰¹ Citing the works of Allen Lind, Tom Tyler, and others, she suggests that disputants are looking for an opportunity to voice their perspective, want to feel that a third party contemplated their views, and seek to be treated in a dignified and respectful manner.⁴⁰² This set

401. Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASH. U. L.Q. 787, 817-20 (2001).

402. *Id.* at 820-26. Welsh goes on to conclude that certain aspects of the way court-connected mediation has come to be practiced in the United States can be problematic, from a procedural justice format. *Id.* She worries particularly about processes that exclude

of concerns does not necessarily dictate a choice between formal and informal methods of dispute resolution,⁴⁰³ but should affect the design of both types of processes.

2. Tension Between Public and Private Goals

Based on the brief analysis above, it is clear that traditional litigation is often not designed to serve all of the individual interests of either claimant or defendant. Instead, both sides may well prefer a process that is quicker, cheaper, and less formal. As long as they can obtain “fair” results, in a procedurally “fair” manner, both sides might well be happy with a system that did not include lawyers as either decision makers or advocates. It is these sorts of interests that have led many countries, including the United States, United Kingdom, and Australia, to explore informal adjudication, arbitration, and mediation.

At the same time, it must be recognized that such informal resolution of employment discrimination disputes is not likely to meet the sort of societal interests set out earlier. The informal processes may meet individual needs in particular disputes but fail to clarify and publicize the antidiscrimination laws the society has adopted. Thus, when it comes to selecting a remedial scheme there seems to be a significant tension, if not outright conflict, between the public and private purposes served by antidiscrimination laws.

Admittedly the above paradigm, while potentially useful, exaggerates the disparity between individual and societal interests. Clearly “society” is interested in individual well-being in addition to making and publicizing law. Thus, many of the factors most important to individuals, such as speed and low cost, may be important to societal policymakers as well. As well, and as I have argued elsewhere, society may have an interest in using its system of justice to do more than resolve disputes in a fair and just manner by applying the society’s laws. Instead, from a societal standpoint it may be appropriate to also ask a system of justice “to help create balance, harmony, or reconciliation among the members of society.”⁴⁰⁴ Equally, many individuals are interested in setting legal precedents and in

disputants from mediation, that abandon or marginalize the joint session, and that rely on an early or aggressive use of evaluative mediation practices. *Id.* at 793.

403. *But see* Deborah R. Hensler, *Suppose It’s Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 94 (drawing on procedural justice literature to argue that disputants prefer to have their disputes resolved on the basis of fact and law by third-party neutrals, rather than through non-adversarial methods).

404. Jean R. Sternlight, *ADR Is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 NEV. L. J. 289, 301 (2003).

detering future discrimination, as well as improving their own personal situation. Thus, individual complainants will frequently refuse to settle their claims quickly, instead holding out for the greater legal victory. In short, individual and societal interests may substantially overlap, at times.

3. Impact of the Societal/Individual Tension

While recognizing this caveat, the tension between individual and societal interests still provides insights that are useful in explaining each of the four phenomena common to all of the countries that have been examined. First, this tension helps explain why each country has instinctively offered an array of procedural devices. The advantage of either mediation or conciliation is that each mechanism can potentially allow disputants to resolve their disputes on mutually acceptable terms that will serve their personal interests well. On the other hand, conciliation and mediation cannot effectively serve the society-wide concerns identified earlier. Formal adjudication, whether through the courts or through specialized tribunals, is better designed to serve the public interests of legal development, precedent, and punishment than is mediation or conciliation. Thus, each procedure serves an aspect of the multiple goals.

Second, this tension between the public and private interests helps explain the cycling or oscillation phenomenon. When a jurisdiction becomes too focused on those processes that best serve disputants' personal interests, pressures are brought to bear to change that process to better serve the public interest. For example, as we make the adjudicative process less formal we hinder development and enforcement of inevitably complex laws. If we try to speed up the process, in order to help complainants and respondents get on with their lives, we may hinder the ability of some complainants to develop their case, thereby increasing the odds that they will recover nothing at all.

Third, the trend toward legalization or formalization of the more informal tribunal or conciliation processes also makes some sense. To the extent that parties or government agencies are trying to use the informal processes to serve the public interest goals, those processes will tend to become more formal. The advocacy of some Australian critics for an evaluative rights-based form of mediation can be explained in this way.

Fourth, as has been discussed, the access issues each jurisdiction has faced are inherent to the expense and slow speed of a formal,

publicly oriented process. For example, as we increase the sanctions that are issued against violators of the law we encourage those alleged perpetrators to mount a vigorous defense. This will inevitably increase the cost of the process and decrease access for some complainants.

As jurisdictions set up their procedures for dealing with employment discrimination claims they may or may not have always been conscious of the need to serve multiple purposes. However, at least instinctively, they have responded to this problem by oscillating between and combining processes. Some Australian commentators, going beyond instinct, have been quite explicit in identifying the tensions between the public and private goals underlying antidiscrimination provisions. Many of these commentators suggest that while conciliation may do a good job of serving disputants' private interests, it does not adequately fulfill the public interests of education and systemic reform.⁴⁰⁵ At the same time, the public litigation system, with its inevitable problems of high cost, limited access, narrow focus, and slow speed, may be better suited to the public goals but poorly serve the private interests.⁴⁰⁶ Where does recognition of this tension lead? One commentator, Margaret Thornton, having recognized benefits and disadvantages to both the formal and informal systems, concludes oscillation between the two is natural.⁴⁰⁷ In contrast, Rosemary Hunter and Alice Leonard seem to be looking for ways to adjust the conciliation process to help it better serve public interests.⁴⁰⁸

405. See, e.g., HR STANDING COMM. ON LEGAL & CONST. AFFAIRS, *supra* note 259, at 222 (quoting comments of Dr. Rosemary Hunter and stating that "[t]here would thus appear to be a need for more balance between public decisions and conciliated settlements. . . . The enshrinement of conciliation as a compulsory step in discrimination cases suggests . . . that discrimination is seen as essentially a private matter between the parties, involving nothing more serious than a difference of opinion."). Clarke and Davies go further, arguing that mediation is simply not the correct resolution process for discrimination complaints because "[p]ublic display and recognition is required here before any social or legislative reform will occur." See Gary R. Clarke & Iyla T. Davies, *Mediation: When Is It Not an Appropriate Dispute Resolution Process?*, 3 AUSTL. DISP. RESOL. J. 70, 76-77 (1992).

406. See THORNTON, *supra* note 3, at 167-70 (explaining that while conciliation can be criticized in theoretical terms, it has many positive practical attributes such as being more accessible and often more personally satisfying for the disputants). As Andrea Durbach points out, the interest in access may also be characterized as a public interest. Durbach, *supra* note 302, at 233 (exploring the tension between "ventilation of a substantive public interest" and the "use of a mechanism which appeared to serve procedural access to justice").

407. THORNTON, *supra* note 3, at 169-70 ("This oscillation between formalism and informalism highlights the resilience of the dominant ideological forces, although it should not be forgotten that bureaucracies, as well as tribunals and courts, are organs of the same state.").

408. HUNTER & LEONARD, *supra* note 268, at 30. As Hunter and Leonard note:

IV. LESSONS TO BE LEARNED FROM THE COMPARATIVE PROJECT

What then? Do we throw up our hands in despair, reasoning that there is no good way to chart our course between the Scylla and Charybdis of formal and informal approaches to employment discrimination? Must each country simply reconcile itself to bouncing between a multiplicity of processes which fail to fully satisfy any interests? I offer a few more positive insights that can help countries to plan their procedures more rationally. By recognizing, explicitly, the tensions that are at play, a jurisdiction can better try to serve the many competing interests.

A. No Single Process Is Likely to Work

Given both the analysis above and countries' actual experience with attempting to design a system for resolution of employment discrimination claims, it does seem clear that no single system, whether adjudicative or nonadjudicative, will ever be able to meet all the individual and societal interests outlined above. A system which serves the public interests well will disserve many of the private interests, and vice versa. But, this is not cause for despair. Instead, it means that those jurisdictions that have tried to devise a multipart system for resolving these disputes are on the right track. The attempt to provide both litigation and conciliation options is not schizophrenic or incompetent but rather necessary, in order to serve an array of interests.

Moreover, the corollary proposition is also true: it will almost certainly be a mistake for any jurisdiction to attempt to impose a single system for resolution of individual discrimination claims, because doing so will inevitably leave some set of interests ill-served. While policy makers may be tempted to try to "have it all," by combining multiple types of processes and seeking to serve both public and

In order to maximise the impact of sex discrimination legislation there needs to be a specific concern to achieve institutional change through conciliation. Policy change should be a goal of the conciliation process, and agencies should pursue broader issues raised by a complaint, even if the complainant is only interested in an individual remedy.

Id.; see also Hunter & Leonard, *supra* note 12, at 310-11 (suggesting that if the British are to adopt mediation that they ought to use a more evaluative or rights-oriented version of mediation than is typically used in Australia, and urging that mediators who are experts in discrimination law would have "primary responsibility . . . to ensure that the parties are adequately informed of their rights and that the objectives of the . . . [law] are met through mediation"). They also suggest that the assumption that all settlements must be confidential be reconsidered. Hunter & Leonard, *supra* note 12, at 311.

private interests, I fear that the result of such attempted compromises are likely to fail. Like the “hybrid” bike, which is not fast or light enough to compete with the real road bike, nor sturdy enough to compete with the real mountain bike, a compromise system of procedural justice may be quite disappointing.

This advice has some important practical implications. First, we in the United States are currently at risk that one particular system, binding arbitration, will come to displace other options. If more and more companies continue to compel their employees to resolve their discrimination claims through arbitration, rather than other means, binding arbitration will increasingly become the primary procedure for resolving discrimination claims in the United States. This would be undesirable, because binding arbitration does not serve all of the interests outlined above. On the public side, the privacy and lack of precedent that attach to private arbitration severely limit the extent to which discrimination decisions can be used to educate the public or potential defendants. The lack of reasoning in arbitration decisions also limits development of the law of employment discrimination. Further, to the extent that arbitrators issue lower awards than courts, they will limit the deterrent effect of the laws. Additionally, if binding arbitration is imposed without also providing access to mediation or conciliation, employees and employers will miss out on many opportunities to resolve their disputes based on nonlegal factors.

Second, Australia needs to be careful that it does not permit its extensive reliance on conciliation to preclude employees from access to a more formal adjudicative system that might serve various public interests. Perhaps the recent move to permit complainants to sue in court, rather than in the tribunals, will be an appropriate balance to the predominant conciliation system.

Third, the British need to realize that none of their processes—court, tribunal, arbitration, or conciliation—will be best for all disputes. Rather, they need to set up a system that allows for some choice, depending on the nature of the disputes.

B. In Designing Multiple Processes Countries Must Consciously Seek to Serve the Variety of Public and Private Interests

It is necessary but not sufficient for a jurisdiction to establish a mixed process that permits disputants to resolve employment discrimination disputes in multiple ways. Instead, each jurisdiction must be careful to design each of the multiple parts of its system to ensure that there is a way to serve each of the public and private

interests. That is, the jurisdiction must carefully tailor both what the alternatives are and how they relate to each other. For example, there should be a way to get clear, binding precedent in cases where that is required, but there should also be a way to shortcut that litigious process when precedent is not needed and all the disputants would be better served by an informal approach such as mediation. A multiplicity of approaches is not sufficient if it still leaves disputants without ways to protect their interests, or if it still leaves societal interests unprotected. As well, each jurisdiction must focus on how to ensure that the various components of the system are consistent with our conceptions of procedural justice.

Here, again, this insight has practical implications. None of the three countries are currently offering a very good procedure for serving disputants' personal interests. Although Britain and Australia each offer multiple tracks for resolution of employment discrimination disputes, at present neither regularly offers an opportunity for disputes to be resolved face-to-face. In both countries, although many disputes are resolved through "conciliation," the conciliation is typically achieved without a meeting between disputants. Instead, the conciliation often consists of a government official urging both sides to settle or urging the complainant to drop her claim. These communications may take place by phone.⁴⁰⁹ At least in this author's view, such a process does not likely foster an exploration of complex facts, nor of nonlegal interests. Nor does such a process provide disputants with an opportunity to explain their perspective or vent their emotions.⁴¹⁰ While British and Australian conciliation may be speedy and inexpensive, these benefits are likely achieved at a high cost to the complainant and perhaps also the respondent. Nor does the United States currently do a good job of serving those personal interests in reconciliation nor in speed and low cost. The EEOC process is still backlogged, and the EEOC mediation program is underfunded. To the extent mediation occurs, it may or may not serve those personal

409. See CORBY, *supra* note 7, at 13.

410. See *id.* (contrasting British impersonal conciliation to the face-to-face meetings provided in New Zealand, and concluding that the latter is more valuable because it "enables the applicant to have his/her half day in a quasi-court, explain to the employer how he/she felt"). She explains:

As anyone who has ever represented an applicant will report, applicants are often more motivated by the desire to clear their name, get things 'off their chest' and have their say, than to receive monetary compensation. Accordingly, in a face to face meeting applicants are often emotional, but this can prove cathartic.

Id.

interests, depending on the approach of the mediator and the parties' attorneys, if they are represented.

Similarly, it is not clear whether any of the three countries offers an adequate device for serving the public interest in enforcing antidiscrimination laws. Although Britain offers both conciliation and litigation before the industrial tribunals, it does not currently provide a very good way for precedent to be developed or publicized. The tribunal decisions are often fairly short, and are not made easily available for study. Although a few British gender discrimination cases may be brought in court, this is the exception rather than the rule. In Australia, as discussed, public hearings were such a rarity that commentators feared the law had not been adequately developed. It remains to be seen whether the introduction of a litigation option will be sufficient, or whether the costs of that system will prove too much of a barrier for most prospective litigants.

In the United States, although the courthouse doors are theoretically open to all, thereby providing the possibility of thoroughly reasoned precedents, the practical reality is that few disputants can afford to bring litigation. The disputants who can afford to litigate are not necessarily those who have the best cases nor those who would best serve the public interest. They may instead merely be the wealthiest claimants. To the extent a jurisdiction relies on private disputants to bring actions serving the public interest, it may also be necessary to provide substantial legal assistance. Moreover, as will be discussed in the next Part, while the EEOC has the power to bring actions in furtherance of the public interest, it is not clear that it is adequately funded for this purpose.

In establishing multiple processes, it is critical to ensure that both the public and private interests are served. Commentators Alice Leonard and Rosemary Hunter have urged Britain to consider using mediation, as well as test case litigation in appropriate cases, to resolve discrimination cases.⁴¹¹ They assert that mediation would, in many ways, be superior to the arbitration that has recently been proposed in Britain.⁴¹² However, the form of mediation they advocate, "rights-based mediation," would require mediators to ensure parties are accurately informed of their rights, to provide expertise in the law, and to balance power between the parties.⁴¹³ I worry that the proposed

411. Hunter & Leonard, *supra* note 12, at 307.

412. *Id.* at 302.

413. *Id.* at 311.

form of mediation, designed to serve both the public and private interests, may serve neither well.

Another model proposed in Britain by a Justice Committee in the mid-1980s, and discussed earlier, is also problematic.⁴¹⁴ Two tracks were suggested, but both tracks had a heavily law-based focus. Most claims were to be resolved before tribunals, employing an investigative rather than adversarial approach.⁴¹⁵ A smaller number of claims, those involving tricky legal questions or affecting the public interest, were to be resolved in an adversarial setting.⁴¹⁶ The report authors implied that a higher percentage of discrimination cases than unfair dismissal claims would be resolved using the adversarial approach.⁴¹⁷ Yet, while the use of a dual-track system allows multiple private and public needs to be served, neither of the two tracks do as good a job as they might of providing disputants with a forum in which to vent some of their more personal or emotional concerns. As envisioned by the committee, the tribunal procedure seems primarily focused on providing the correct legal outcome quickly at a relatively low cost.⁴¹⁸ The model offered in this Article instead suggests that if such a two-track procedure were adopted, the less adversarial track should also be structured to help disputants air some of their more personal and emotional concerns.

In the United States, although mediation is available in some cases and arbitration or litigation in others, we have not made sure that both are available or properly designed in all disputes. For example, we have not focused on whether the mediation that we have is designed to serve the private interests for which mediation is best suited. A narrow and highly evaluative form of mediation will not give parties the opportunity to explore nonlegal interests. Similarly, even in those cases in which litigation is theoretically available, it is often too costly to be afforded by many disputants. We need to make sure that important precedent-setting cases can feasibly be litigated in a public manner. For example, we should ensure that government agencies established to fight discrimination receive enough funding such that they can pursue worthy cases. Alternatively, we should provide sufficient attorney fees and relief such that individual claimants can

414. See *supra* notes 215-218 and accompanying text.

415. See *supra* note 216 and accompanying text.

416. See *supra* note 217 and accompanying text.

417. INDUSTRIAL TRIBUNALS, *supra* note 215, at 15-16.

418. *Id.* at 11-27. Even to the extent conciliation is discussed, the focus is on the provision of legal information rather than on responding to emotional or other personal concerns. *Id.* at 21-22.

afford to litigate those cases that society would deem worthy of that public process.

C. In Providing Multiple Dispute Resolution Processes Jurisdictions Must Provide an Adequate Selection Mechanism

Assuming jurisdictions are able to devise two or more dispute resolution processes to serve the multiple public and private interests relating to employment discrimination, they must also provide an appropriate mechanism to steer the dispute to the proper process. As Professor Frank Sander and others have noted, in discussing what has come to be known as the “multi-door courthouse,”⁴¹⁹ there must be a “gatekeeper” who will decide which mechanism is best for a particular dispute. Conceptually this selection could either be made by the disputants themselves or by a third party.

More thought needs to be given to how the choice of dispute resolution process is made for particular disputes, and by whom. Should it be the disputants themselves or a governmental entity that makes the choice? This is something which different jurisdictions handle in various ways, but which has not received a great deal of attention. As Professor Carrie Menkel-Meadow has explained, to the extent that disputants own their own disputes, they should be the ones who have the power to decide on a dispute resolution mechanism.⁴²⁰ But, to the extent that society as a whole has an interest in the disputes, it should be society that chooses the dispute resolution mechanism.⁴²¹ Adding further to the complexity, who should decide whether a particular dispute has a public aspect or is instead purely private?

It seems clear to this author that a public agency will be better situated than the individual disputants to decide whether or not a particular dispute has public as well as private implications. Whereas the individual will almost inevitably put his or her interests ahead of the public interest, a public agency will be in a better position to make a choice that best serves the public. Theoretically, at least, the public entity can also consider the private interests that are at stake. In

419. See Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297 (1996) (discussing the concept of multi-door courthouse); see also Frank E.A. Sander, *Varieties of Dispute Processing*, Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7-9, 1976), in 70 F.R.D. 79, 111 (discussing the concept of the multi-door courthouse without using that phrase).

420. Menkel-Meadow, *supra* note 396, at 2696.

421. *Id.*

practice, however, one worries that the public interest in legal development may give short shrift to the private interests in speed and reconciliation.

Of the jurisdictions studied, the United States has seemingly gone the furthest in trying to protect both public and private interests in dispute resolution. As the Supreme Court has explained, the EEOC is empowered to bring enforcement actions that serve the interests of the public.⁴²² The Court has recognized that there are key differences between the public enforcement role played by the EEOC and the individual employee's own role in protecting her statutory rights.⁴²³ Thus, even once an individual complainant has settled her claim, the EEOC is authorized to pursue the claim on behalf of other similarly situated individuals.⁴²⁴ *Waffle House* went on to apply this distinction to arbitration clauses, holding that even where disputants have agreed to resolve their dispute through arbitration, the EEOC may continue to pursue the claim seeking victim-specific as well as injunctive relief.⁴²⁵

Still, while the empowerment of the EEOC to protect the public interest may provide a good start, it does not provide a panacea. First, it is not at all clear that the EEOC is adequately funded to actually protect the public interest. As the Supreme Court observed, it brings less than 300 cases per year.⁴²⁶ In a country in which approximately 80,000 charges of discrimination are filed per year,⁴²⁷ it is at least questionable whether the public interest is being adequately served.⁴²⁸ Second, it is not clear that the U.S. system gives the individual

422. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 286 (2002) (observing that the EEOC was intended "to bear the primary burden of litigation"); *Gen. Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 326 (1980).

423. In *Waffle House* the Court explained that in two prior cases, *Occidental Life Insurance Co. of California v. EEOC*, 432 U.S. 355 (1977), and *General Telephone Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318 (1980), "we recognized the difference between the EEOC's enforcement role and an individual employee's private cause of action . . ." *Waffle House*, 534 U.S. at 287. In doing so the Court emphasized "the agency's independent statutory responsibility to investigate and conciliate claims," *id.* at 288, and stated that "the EEOC is not merely a proxy for the victims of discrimination." *Id.* (quoting *Gen. Tel.*, 446 U.S. at 326).

424. *Waffle House*, 534 U.S. at 291-97 (accepting the EEOC's position that the EEOC can litigate a claim that an individual has chosen to settle, but also stating that an individual who had accepted settlement could not get double recovery by virtue of the EEOC action).

425. *Id.* at 295. The Court did, however, recognize that to the extent a complainant has already been compensated for a particular wrong, any recovery by the EEOC should be limited to prevent her from getting a double recovery. *See id.* at 296.

426. *Id.* at 290 n.7.

427. *Id.*

428. For one of many critiques of the EEOC's "toothlessness," see Green, *supra* note 334, at 329.

disputants adequate opportunity to protect their own private interests. To some extent this problem may be inevitable. By empowering the EEOC to pursue the public interest, regardless of the individual's desire to put the claim to rest, the United States potentially impinges on the individual complainant's ability to put the claim behind her.⁴²⁹

But, the United States may also be failing to protect individuals' interests in ways that are not inevitable. Specifically, it may not be affording sufficient opportunities for mediation. Theoretically, of course, disputants can choose mediation at any time. However, the reality is that unless mediation is mandated, it may not occur. Disputants on either side may be reluctant to suggest mediation, for fear of appearing "weak," and disputants or their representatives may not be cognizant of the benefits of mediation.⁴³⁰ Currently the EEOC is suggesting mediation primarily in those cases in which liability or lack of liability is not clear.⁴³¹ In addition, the mediation at the EEOC will not proceed unless it is accepted by both claimant and respondent.⁴³² However, it is not evident that this basis for EEOC choice is an appropriate selection mechanism. In some cases mediation may be desirable, to serve nonlegal interests, even though liability clearly does or does not exist. Moreover, mediation may be *undesirable* in some cases where liability is questionable, because development of precedent may be important in precisely some such cases.

The United States also hosts a more worrisome selection mechanism. When companies use handbooks or fine print clauses to require employees to resolve future disputes through binding arbitration, rather than in court, they are ensuring that many of the public interests identified will not be served. The arbitration will typically be kept private, may well not contain reasoned analysis, and thus will not have educative or precedential value. Allowing employers to make this choice, by themselves, jeopardizes some of the

429. That is, a complainant who decided that speed and reconciliation were more important than legal vindication cannot necessarily put the claim to rest. She can potentially settle her own individual claim, but the respondent may have little interest in settling with an individual while an EEOC action is looming overhead. And, even if she settles, the ongoing EEOC claim would likely limit her ability to forget about the past and get on with her life. Defendants, of course, also are prevented from resolving the claim unless the EEOC is willing to drop its enforcement action.

430. See generally Green, *supra* note 334, at 334-46 (urging the use of mandatory mediation by the EEOC, and also citing other literature).

431. See *supra* notes 60-61 and accompanying text.

432. See U.S. Equal Emp. Opportunity Comm'n, *Questions and Answers About Mediation*, at http://www.eeoc.gov/mediate/mediation_9a.html (last modified Nov. 20, 2003).

interests most jurisdictions seek to serve. While the Supreme Court's *Waffle House* decision preserves the EEOC's right to bring enforcement actions, even where individual employees have agreed to arbitrate,⁴³³ this protection of the public interest is sufficient only to the extent the EEOC is adequately funded. Moreover, a recent decision by the United States Court of Appeals for the Third Circuit provides that employers may require employees to waive their right to file an EEOC claim, which means that the agency would not have the opportunity to file a claim on behalf of an affected employee.⁴³⁴ Mandatory binding arbitration may also effectively foreclose the use of mediation, which might better serve some private interests.

Other jurisdictions' methods for choosing among dispute resolution processes are at least equally troublesome. In both Britain and Australia attempts are made to resolve all disputes at the administrative stage and through conciliation. The Australian process is so "successful" that it disposes of seventy percent of the claims for discrimination before they even get to conciliation.⁴³⁵ In Britain, similarly, most claims are "weeded out" at the conciliation stage.⁴³⁶ More thought needs to be given as to whether these processes are causing too many claims or the wrong claims to be shunted away from a public hearing that would serve important public interests. While individuals' interests may often be well served by processes that resolve disputes quickly, cheaply, and informally, such systems may not adequately protect the public. Perhaps both Britain and Australia should give serious thought to establishing a public agency, akin to the American EEOC, that would have the authority to bring discrimination actions that might vindicate public interests.

V. CONCLUSION

The comparison of multiple jurisdictions' approaches to employment discrimination claims does not provide us with a single "best" way to resolve such disputes, but the comparison does yield three key insights as to existing processes. First, the comparison shows numerous similarities in the types of issues that arise as jurisdictions attempt to devise a process for resolving such disputes. Second, the comparison shows a tendency, in all three jurisdictions, to

433. See *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291-97 (2002).

434. *Parilla v. IAP Worldwide Servs. VI Inc.*, No. 03-2009, 2004 WL 1067931, at *10 (3d Cir. May 13, 2004).

435. See HUMAN RIGHTS AND EQUAL OPPORTUNITY COMM'N, *supra* note 258, at 21.

436. See *Emp. Tribunal Serv.*, *supra* note 194, at 494.

oscillate among a series of formal and informal dispute resolution mechanisms. Third, upon analysis we have seen that the variety of processes and the vacillation among these processes can be attributed to societies' and disputants' multiple and sometimes conflicting goals.

The comparative analysis also yields three key prescriptive insights. First, because it is highly unlikely that any single dispute resolution process will be able to serve all of our public and private interests, it is instead desirable that a jurisdiction offer multiple processes. Second, in designing each of these processes, policy makers should focus explicitly on the interests that have been identified and try to design each process to serve certain of the interests. Third, policy makers need to focus on how the selection is made among processes, and by whom, to ensure that as many of the identified interests can be protected as is possible.

While this Article has deliberately focused on one particular type of dispute, employment discrimination, many of the insights would also be applicable to other kinds of disputes. In general we must remember that just as disputes have both public and private aspects, so too should the procedures used to resolve disputes. Only through the use of multiple procedures can we truly provide procedural justice.
